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# THE PACIFIC REPORTER

WITH KEY-NUMBER ANNOTATIONS

VOLUME 119  
PERMANENT EDITION

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, WASHINGTON  
COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING  
UTAH, NEW MEXICO, OKLAHOMA, COURTS OF APPEAL  
OF CALIFORNIA, AND CRIMINAL COURT OF  
APPEALS OF OKLAHOMA

WITH TABLE OF STATUTES CONSTRUED

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Second District.

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VICTOR E. SHAW.	W. P. JAMES.
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JESSE J. DUNN.****SUPREME COURT COMMISSIONERS.<sup>1</sup>***Division No. 1.***CHAS. B. AMES.****J. B. A. ROBERTSON.****J. F. SHARP.***Division No. 2.***M. E. ROSSER.****PHIL. D. BREWER.****JNO. B. HARRISON.****Criminal Court of Appeals.****HENRY M. FURMAN, PRESIDING JUDGE.****ASSOCIATE JUDGES.****THOMAS H. DOYLE.****JAS. R. ARMSTRONG.****OREGON—Supreme Court.****ROBERT EAKIN, CHIEF JUSTICE.****ASSOCIATE JUSTICES.****THOMAS A. McBRIDE.  
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<sup>2</sup> Commencing October 10, 1912.



# COURT RULES

## SUPREME COURT AND DISTRICT COURTS OF APPEAL OF CALIFORNIA

### RULE I.

#### ADMISSION OF ATTORNEYS.

1. Applicants for license to practice as attorneys and counsellors will be examined in open court, by the court authorized by law to act in that behalf, and at such regular times as such court shall fix. Until further order the examination will be based upon the following books: Blackstone's "Commentaries," Kent's "Commentaries," Greenleaf's "Evidence" (first volume), Story's "Equity Jurisprudence," Gould's "Pleading," Lube's "Equity Pleading," Parsons on "Contracts," Pomeroy's "Introduction to Municipal Law," Code of Civil Procedure, Civil Code, Constitutions of the United States and of the state of California. Persons applying for admission, whether upon examination or motion, must personally appear in court at the time the application for admission is made. No applicant will be examined unless there shall have been filed with the clerk of the court, before the day on which the application is made, a certificate signed by at least two attorneys of the court, each of whom shall have been regularly engaged in practice as such attorney for at least four years next theretofore, stating, in substance, that they have, and that each of them has, carefully and diligently examined the applicant touching the qualifications of such applicant in point of learning in the law; that it satisfactorily appeared to them, and to each of them, upon such examination, that the applicant had been engaged in the study of the law for a period of time to be named in the certificate, naming the place at which, and the person under whom, if any, such study had been prosecuted; that the applicant had, during that time, read certain books of law, which books shall be enumerated in the certificate; and stating any other fact tending to show the character of the attainments of the applicant, and also stating that, in their opinion, the applicant possesses the requisite qualifications in point of learning in the law to be entitled to be admitted to practice.

#### FEE.

2. The fee for license must in all cases be deposited with the clerk of such court before the application is made, to be returned to the applicant in case of rejection.

#### REJECTION.

3. Applicants must apply for examination to the District Court of Appeal of the appellate district in which they reside. Provided,

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that a person may make application and be examined and admitted in another appellate district upon filing with his application a written statement showing good cause therefor, satisfactory to the court to which he applies, accompanied by the written consent of the Presiding Justice of the appellate district in which he resides. No person rejected shall be at liberty to renew his application in any court earlier than six months after such rejection.

### RULE II.

#### TRANSCRIPT.

1. The appellant in a civil action shall within forty days after an appeal is perfected, except as hereinafter stated, serve and file the transcript of the record, duly certified to be correct by the attorneys of the respective parties, or by the clerk of the court from which the appeal is taken. If a proceeding is pending for the settlement of a bill of exceptions or statement which may be used in support of such appeal, the time aforesaid shall not begin to run until the settled and authenticated statement or a bill of exceptions has been filed. When a party appealing from a judgment has given notice of motion for a new trial before perfecting said appeal, the time aforesaid shall not begin to run until the motion for a new trial has been decided, or the proceeding therefor dismissed. If the transcript for use on appeal is prepared under the provisions of section 953a of the Code of Civil Procedure and a notice is filed by the appellant requesting a transcript of the phonographic report, the time for filing the transcript of the record on appeal shall not begin to run until such phonographic report is approved and certified by the judge or until the proceeding to obtain the same has been terminated in the court below by dismissal or otherwise. An appeal from a judgment and from any order denying a new trial of the issue may in all cases be presented in the same transcript.

#### EVIDENCE OF SERVICE.

2. Written evidence of the service upon the adverse party of the transcript shall be filed therewith.

#### EXTENSION OF TIME.

3. The time above limited may be extended by order, based on stipulation or affidavit, showing good cause therefor.

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**BRIEFS.**

4. Thirty days after the filing of the transcript, the appellant shall file with the clerk his printed points and authorities, with proof of the service of one copy thereof upon the attorney or attorneys of each respondent who shall have appeared separately in the superior court. Within thirty days after the service of appellant's points and authorities, the respondent shall serve and file his printed points and authorities; and within ten days after service of respondent's points the appellant may serve and file a reply.

In criminal cases the appellant shall file his points and authorities (with proof of service of a copy thereof on the Attorney General) within ten days after the filing of the transcript. The Attorney General shall serve and file his points and authorities within ten days after service upon him of the appellant's points, and within five days thereafter the appellant may serve and file a reply. Such points and authorities may be either printed or typewritten.

**EXTENSION OF TIME ON BRIEFS.**

5. The time above limited for filing points and authorities shall not be extended except by order of the court upon stipulation of the parties, or an affidavit showing good cause therefor. No brief shall be filed after oral argument except by special order.

**TWENTY-ONE COPIES OF TRANSCRIPT AND POINTS TO BE FILED.**

6. The party wishing to file any printed paper shall prepare the original and twenty copies thereof. If such paper is to be filed in the District Court of Appeal, the original and three copies shall be filed therein, and the remaining seventeen copies shall be simultaneously delivered to the clerk of the Supreme Court. If it is to be filed in the Supreme Court, the original must be accompanied by the twenty copies, unless it is an application to the Supreme Court for the hearing of a cause decided by the District Court of Appeal, in which case the party shall deliver to the clerk of said District Court one copy for each Justice of said court and file the original and seventeen copies in the Supreme Court. Papers not required to be printed are subject to these provisions if they are, in fact, printed. If not printed, they must be in typewriting, and (except as provided in the next succeeding paragraph) three copies must be filed with the original. A carbon copy must not be used for the original.

In civil cases appealed under the provisions of sections 953a, 953b and 953c of the Code of Civil Procedure, and in criminal cases appealed under the provisions of sections 1246, 1247, 1247a and 1247b of the Penal Code, the record upon appeal shall be prepared and transmitted to the court to which the appeal is taken, in accordance

with said sections; and no further copies of such record shall be required.

When such appeal is taken to the Supreme Court, or has been transferred thereto from a District Court of Appeal, the record shall be kept in the San Francisco office of the clerk of the Supreme Court.

**DISPOSITION OF PAPERS.**

7. Copies of all printed papers, points and briefs filed in any matter appealed, must be deposited with the clerk of the court from which the appeal is taken; and the copies so deposited shall, by said clerk, be delivered to the judge who presided at the trial of the cause in the lower court.

**ORDERS EXTENDING TIME.**

8. The Chief Justice is authorized in the name of the Supreme Court to make orders in conformity to the stipulation of the parties, extending time for filing records and briefs; and in other matters of mere routine pending in the Supreme Court. An order endorsed on the stipulation in the following form is sufficient:

"So ordered by the Court. . . ., C. J."

It is desirable that all stipulations should be expressed in terms as brief as may be consistent with clarity.

The Chief Justice is also authorized in the name of the court to make orders in state causes extending time to file briefs on application of the Attorney General.

The presiding justices of the three District Courts of Appeal shall have similar authority as to causes pending in their respective courts.

**RULE III.**

There must be endorsed upon the cover of the printed transcript the name of the county from which the appeal is taken, and also the name of the judge of the superior court whose decision is presented for review and the names and addresses of the attorneys representing the parties to the appeal.

**RULE IV.****CALENDAR FOR ORAL ARGUMENT.**

Thirty days before the commencement of a regular session the clerk shall, unless otherwise ordered by the court, place on the calendar for oral argument all cases which have been continued for such argument, and also, in the order in which the transcripts were filed, all cases in which points and authorities are on file, and also all motions and original proceedings pending and not under submission. Cases in certiorari shall, after the record is brought up by the return, be subject to the same rules with respect to argument and submission as cases on appeal.

**RULE V.****DISMISSAL OF APPEAL.**

1. If the transcript of the record or appellant's points and authorities be not filed

within the time prescribed, the appeal may be dismissed on motion, upon notice given. If the transcript, or the points and authorities, though not filed within the time prescribed, be on file at the time such notice is given, that fact shall be sufficient answer to the motion. If the respondent shall not file his points and authorities within the time allowed therefor, the cause may be submitted for decision upon the motion of the appellant, or notice thereof to the respondent.

2. If an appeal is attempted to be taken after the time limited by law, and papers are filed, either in the trial court or in an appellate court, in pursuance of such attempt, such purported appeal may be dismissed on motion of respondent, supported by certificate or affidavits, or both, as provided in rule VI.

#### RULE VI.

##### CERTIFICATE OF CLERK ON MOTION TO DISMISS.

1. On motion to dismiss an appeal for a failure to file the transcript within the prescribed time, there shall be presented the certificate of the clerk below, under the seal of the court, certifying the amount or character of the judgment or order appealed from, the date of its rendition, the fact and date of the filing of the notice of appeal, together with the fact and date of service thereof on the adverse party, and the character of the evidence by which said service appears; the fact and date of filing an undertaking on appeal and that the same is in due form; the fact and time of the settlement of the bill of exceptions, or statement on appeal or reporter's transcript prepared under section 953a of the Code of Civil Procedure, if there be any the names of the attorneys of the respective parties; and also that the appellant has received a duly certified transcript, or that he has not requested the clerk to certify to a correct transcript of the record, or, if he has made such a request, that he has not paid the fees therefor, if the same have been demanded.

##### AFFIDAVITS.

2. On motion to dismiss the appeal on any other ground than the failure to file transcript within the prescribed time, the moving papers shall consist of the certificate of the clerk of the court below, as to any of the matters above mentioned, or of affidavits, or both such certificate and affidavits.

##### SERVICE OF MOVING PAPERS.

3. Copies of the moving papers, except the transcript, shall be served with notice of the motion.

#### RULE VII.

##### FORM OF TRANSCRIPT.

1. All transcripts of record, except in criminal cases and civil cases coming under the provisions of section 953a of the Code of

Civil Procedure shall be printed on unruled white writing paper, ten inches long by seven inches wide, with a margin on the outer edge not less than two inches wide. The printed pages, exclusive of any marginal note or reference, shall be seven inches long and three and one-half inches wide. The folios, embracing ten lines each, shall be numbered from the commencement to the end, and the numbering of the folio shall be printed on the left margin of the page. Small pica, solid, is the smallest letter and most compact mode of composition allowed.

2. Transcripts on appeal in civil cases, prepared under section 953a of the Code of Civil Procedure, and the papers and transcript of the proceedings required to be sent to the appellate court in criminal cases, must be typewritten and the paper and the backs for binding the same must not exceed ten inches in length and eight inches in width. The leaves must be bound together on the left hand side in volumes of convenient size. The papers required to be sent by the clerk under section 1246 of the Penal Code, and, in civil cases under section 953a, the papers constituting the ordinary judgment roll, are here designated as the "clerk's transcript," and the certified transcriptions of the phonographic reporter's notes required by section 1247a of the Penal Code, and by section 953a in civil cases are here designated as the "reporter's transcript." The respective papers in the clerk's transcript must be placed in chronological order, and if it is bound with the reporter's transcript, it must come first in order. The pages of the clerk's transcript and those of the reporter's transcript must be numbered separately by consecutive numbers. The lines of each page must be numbered separately and consecutively. An index of each transcript must be inserted at the beginning thereof, referring to each document and to the page beginning the examination, cross-examination, re-direct, and recall of each witness.

#### RULE VIII.

##### INDEX AND ARRANGEMENT OF TRANSCRIPT.

The pleadings, proceedings, and statement shall be chronologically arranged in the transcript, and each transcript shall be prefaced with an alphabetical index, specifying the page of each separate paper, order, or proceeding, and of the testimony of each witness; and the transcript shall have at least one blank flysheet cover. The chronological arrangement of the several parts of the transcript, and a strict compliance with the other requirements of this rule will be exacted of the appellant or party filing the record in all cases, whether objection by the opposite party be made or not; and for any failure or neglect in these respects, which is found to obstruct the examination of the record, the appeal may be dismissed.

**RULE IX.****MAPS.**

Whenever a map or survey or photograph forms a part of the transcript, it shall not be necessary to furnish more than one copy thereof, which shall be annexed to the transcript filed with and certified by the clerk, and reference thereto shall be made in the other copies.

**RULE X.****PENALTY.**

No transcript, or other paper or document, which fails to conform to the requirements of these rules shall be filed by the clerk.

**RULE XI.****TRANSCRIPT, SERVICE AND CERTIFICATE.**

Before the printed transcript is filed, a copy thereof shall be served upon the adverse party, and if there be more than one adverse party appearing by different attorneys, upon the attorney of each party so appearing. If a party shall present to the attorney of the adverse party a transcript on appeal, in a civil cause, and request his certificate that the same is correct, and said attorney, upon such request, shall, for a period of five days, neglect or refuse to join in such certificate, or, if deemed incorrect, shall neglect or refuse, for the same time, to serve upon the party making the request a written statement of the particulars in which the transcript is incorrect, or, upon the presentation of the transcript corrected in the particulars thus specified, shall still neglect or refuse for a period of two days to join in such certificate, the costs of procuring the certificate to such transcript from the clerk of the proper court shall be taxed against the party whose attorney so neglects or refuses.

**RULE XII.****CLERK MAY PRINT TRANSCRIPTS AND CERTIFY TO SAME.**

1. The written transcript, in civil causes, authenticated in the mode prescribed by rule XI, together with sufficient funds to pay the expenses of printing the same, may be transmitted to the clerk of the court to which the appeal is taken. The clerk, upon the receipt thereof, shall file the same and cause the transcript to be printed, and to a printed copy shall annex his certificate that the said printed transcript is a full and correct copy of the transcript furnished to him by the party; and said certificate shall be prima facie evidence that the same is correct. The said printed copy so certified shall also be filed, and constitute the record of the cause in said court, subject to be corrected by reference to the written transcript on file. Printed copies thereof shall be furnished, as provided in rule II; and the clerk shall also immediately transmit, by mail or ex-

press, copies to the attorneys of the adverse parties, and note such service on the original.

**POINTS WHERE CLERK PRINTS RECORD.**

2. The time for filing points and authorities, in cases where the record is printed by the clerk, shall commence to run from the filing of the printed copy of the transcript.

**RULE XIII.****COST OF PRINTING.**

The expense of printing transcripts on appeal in civil causes and pleadings, affidavits, or other papers constituting the record in original proceedings upon which the case is heard, required by these rules to be printed, shall be allowed as costs, and taxed in bills of costs in the usual mode.

**RULE XIV.****SUGGESTION OF DIMINUTION OF RECORD.**

For the purpose of correcting any error or defect in the transcript, either party may suggest the same in writing, and upon good cause shown, obtain an order that the proper clerk certify to the court in which the case is then pending, the whole or part of the record, as may be required, or may produce the same duly certified without such order. If the attorney or counsel of the adverse party be absent, or the fact of the alleged error or defect be disputed, the suggestion, except when a certified copy of the omitted record is produced at the time, must be accompanied by an affidavit showing the existence of the error or defect alleged.

**RULE XV.****EXCEPTIONS TO TRANSCRIPT.**

Exceptions or objections to the transcript, statement, the bond or undertaking on appeal, the notice of appeal, or to its service, or any technical exception or objection to the record in civil cases, affecting the right of the appellant to be heard on the points of error assigned, which might be cured on suggestion of diminution of the record, must be taken and notified to the appellant, in writing, at least five days before the hearing, or they will not be regarded; and when so noted, it shall be the duty of the appellant to present and file at the hearing of the cause such additional record, certificate, or other matter, if such there be, to remove or answer the objection or exception so taken; otherwise such objection or exception, if well taken, shall prevail.

**RULE XVI.****SUGGESTION OF DEATH OF PARTY.**

Upon the death, on other disability, of a party, pending an appeal, his representative shall be substituted in the suit, by proper proceedings for that purpose in the trial

court. Upon suggestion thereof and the presentation of a certified copy of the order of substitution made by the trial court, a like order of substitution will be made in the court in which the case is pending on appeal, and the cause shall proceed as in other cases.

#### RULE XVII.

##### CALENDAR.

Criminal causes shall be placed at the head of the calendar, and shall be followed by such other causes as are preferred by law. Other causes shall be arranged on the calendar of the respective courts, as the Chief Justice of the Supreme Court, or the Presiding Justice of the District Court of Appeal, respectively, may direct.

#### RULE XVIII.

##### PRINTING OF POINTS, ETC.

In all cases where a paper or document is required by these rules to be printed, it shall be printed upon similar paper and in the same style and form (except the numbering of the folios in the margin), as is prescribed for the printing of transcripts.

#### RULE XIX.

##### ORAL ARGUMENT.

No more than one counsel upon a side will be heard upon the oral argument, except when otherwise ordered; but each defendant, or intervener, who appeared separately in the court below may be heard through his own counsel, unless the court otherwise order. The counsel for each party shall be allowed only one hour, unless an extension of time is ordered before the argument begins.

#### RULE XX.

##### REGULAR SESSIONS—MOTIONS—TIME OF NOTICE.

1. For the purpose of hearing motions of which notice is required to be given, the Supreme Court will be in session at San Francisco on the first Monday of each month at ten o'clock a. m., except when the regular sessions at Sacramento and Los Angeles are held during the week beginning on that day. Motions may also be presented and submitted on the first day of each regular session of said court at Sacramento and Los Angeles.

2. Each District Court of Appeal shall be in session for the hearing of causes at such times and for such periods as such court may, by order, direct. Each of said courts shall, by general order, provide for a regular session for said purpose to be held at least once in each quarter. For the purpose of hearing motions, each District Court of Appeal shall be in session on the fourth Monday in each month at ten o'clock a. m.

3. In all cases where notice of a motion is necessary, unless for good cause shown the time is shortened by the court, or by the Chief Justice or Presiding Justice thereof, the notice shall be ten days.

#### RULE XXI.

##### OPINION TRANSMITTED WITH REMITTITUR.

When a case on appeal or certiorari is finally decided, a certified copy of the opinion in the case shall be transmitted with the remittitur, to the court below, or to the tribunal whose record is reviewed.

#### RULE XXII.

##### COPY FOR SERVICE IN HABEAS CORPUS.

Any person applying for a writ of habeas corpus shall furnish with the petition a copy thereof for service upon the party to whom the writ shall be addressed. Such copy shall be delivered to the officer with the writ for service, and shall be by him delivered to the party on whom service is made, with the writ.

#### RULE XXIII.

##### COSTS.

In civil cases the clerk shall not be required to remit the final papers until the costs are paid. In all cases in which the judgment or order appealed from is reversed or modified, and the order of reversal or modification contains no directions as to the costs of appeal, the clerk will enter upon the record, and insert in the remittitur, a judgment that the appellant recover the costs of appeal.

#### RULE XXIV.

##### DISMISSAL OF APPEAL ON STIPULATION.

An appeal or writ of error may be dismissed at any time, upon and in accordance with the written stipulation of the attorneys of record of the respective parties. Such stipulation shall be accompanied by a certificate of the clerk of the court below, showing the names of attorneys of the respective parties and the date and character of the judgment or order appealed from. Upon and in accordance with such stipulation, and upon order of the court, the clerk shall enter such dismissal, and the remittitur shall issue thereon in accordance with the terms of such stipulation.

#### RULE XXV.

##### INSPECTION OF ORIGINAL PAPERS.

When the inspection of an original paper, which was offered in evidence in the court below, is shown to be necessary to a correct decision of the appeal, the court may order the clerk of the court below to transmit such original paper, if in his possession, to the clerk of the court; and if such paper be in the possession of a party to the action, he may produce the same on the hearing of the cause, or he may, upon motion and notice of the adverse party, be required to produce such paper on the hearing of the cause; and in default thereof, the court will intend the paper to be, in all respects, as alleged by the opposite party.

**RULE XXVI.****REASONS FOR ORIGINAL APPLICATION TO THE COURT TO BE STATED.**

1. When any application is made to the Supreme Court, or to a District Court of Appeal, for a writ of mandamus, certiorari, prohibition, procedendo, or for any prerogative writ to be issued in the exercise of its original jurisdiction, and such application might have been lawfully made to a lower court in the first instance, the affidavit or petition, in addition to the necessary matter requisite by the rules of law to support the application, shall also set forth the circumstances which, in the opinion of the applicant, render it proper that the writ should issue originally from the appellate court to which such application is made, and not from such lower court. The sufficiency or insufficiency of such circumstances, so set forth in that behalf will be determined by the court in awarding or refusing the application. In case any court, judge, or other officer, or any board, or other tribunal in the discharge of duties of a public character, be named in the application as respondent, the affidavit or petition shall also disclose the names or names of the real party or parties, if any, in interest, or whose interest would be directly affected by the proceedings.

**MEMORANDUM OF AUTHORITIES.**

2. All ex parte applications for the issuance of writs in the exercise of original jurisdiction shall be typewritten or printed, and filed with the clerk of the court to which such application is made, and the same shall be accompanied by a memorandum of points and authorities in support of the application.

**RETURN AND ISSUANCE OF WRIT.**

3. Upon the return day of the alternative writ, the respondent may make return, either by demurrer or by answer, or by both. If the return be by demurrer alone and the demurrer is not sustained, the writ will be ordered to issue without leave to answer over.

**STAY OF PROCEEDINGS.**

4. When an application is made for an alternative writ, an order staying the proceedings of any court or officer, until the return of the writ, will not be made unless due notice of the application for the writ shall have been given to all the parties interested in the proceedings.

**RULE XXVII.****SETTLEMENT OF BILLS OF EXCEPTIONS ON DEATH OF JUDGE.**

When the judge before whom an action was tried is dead, or has been removed from office, or resigns, any unsettled bill of exceptions, or statement or motion for new trial therein, may be settled and certified by his successor in office; or, if he be disqualified, by a judge of the same or an adjoining

county. And when the judge before whom an action was tried becomes disqualified, or is absent from the state, such bill of exceptions or statement may be settled and certified before a judge of the same or an adjoining county.

**RULE XXVIII.****REHEARINGS AND OPINIONS.**

1. All orders of the Supreme Court granting rehearings, or for hearing in bank cases decided in departments, or for hearing in the Supreme Court after decision in a District Court of Appeal, shall be signed by the members of the court assenting thereto, and filed with the clerk.

**OPINIONS WITHIN NINETY DAYS AFTER SUBMISSION.**

2. Every opinion of the Supreme Court which shall have received the assent of a sufficient number of the members of the court to order the judgment therein directed, shall be filed within ninety days after the submission of the cause in which such opinion is written.

**FILING OF OPINIONS.**

3. Opinions of the Supreme Court will be kept in the office of the clerk in San Francisco. If the opinion is in a case submitted in another district, a certified copy thereof shall immediately be transmitted to the clerk's office of such district, and there kept on file.

**RULE XXIX.****AUTHENTICATION OF PAPERS.**

In all cases of appeal from the orders of the superior courts, the papers and evidence used or taken on the hearing of the motion must be authenticated by incorporating the same in a bill of exceptions, except where another mode of authentication is provided by law.

**RULE XXX.****APPLICATIONS FOR REHEARING.**

1. Applications for a rehearing of a cause by the court rendering the judgment therein must be filed and a copy served on the adverse party, within twenty days after the judgment is pronounced. The adverse party may file an answer thereto not less than two days before the expiration of the time within which the rehearing can be granted.

2. The submission of a cause to a department of the Supreme Court without oral argument shall be deemed to be a waiver of an oral argument of the same in bank, if for any reason the same is thereafter ordered to be heard in bank; and when the order that the cause be heard in bank is made the same shall be at once submitted for decision, unless otherwise ordered by the court.

3. Applications after a judgment of a District Court of Appeal has become final, for



an order that the cause be heard and determined by the Supreme Court, must be accompanied by a copy of the opinion of the District Court of Appeal, showing the date of the filing thereof, and must be filed and a copy served on the adverse party, within ten days after the judgment of the District Court of Appeal has become final therein. The adverse party may file an answer thereto not less than ten days before the time for making such order for hearing in the Supreme Court will expire.

4. The time herein prescribed shall not be extended, and the clerk must not file any such application or answer after the time therefor has expired. In civil cases such applications and answers must be printed.

#### RULE XXXI.

##### APPLICATIONS FOR THE TRANSFER OF CAUSES.

Applications, before judgment, to have a cause pending in a department of the Supreme Court heard in bank, or to transfer a cause from the Supreme Court to a District Court of Appeal, or from a District Court of Appeal to the Supreme Court, or to another District Court of Appeal, must set forth briefly the questions involved in the cause and the reasons why it should be heard by the court in bank, or transferred as requested, and must be made before the submission of the cause in the court in which it is pending.

#### RULE XXXII.

##### TRANSFER OF APPEALS NOT TAKEN TO THE PROPER COURT.

When a District Court of Appeal decides that the appeal should have been taken to another District Court of Appeal or to the Supreme Court, it shall make an order to that effect, and the clerk of such court shall immediately transmit to such other court all papers in the cause on file in his office, including the opinion of the court upon which such order was made, and thereupon such cause shall be deemed to be duly transferred to the proper court, according to such order, without further proceeding.

#### RULE XXXIII.

##### TRANSFER OF CAUSES, RECORDS AND PAPERS.

1. When the judges of a District Court of Appeal fail to agree on a judgment in any cause, and their opinions have been forwarded to the Supreme Court, thereupon, of its own motion, or upon suggestion of either party in open court or in chambers, the Supreme Court will order such cause transferred to the Supreme Court, or to another District Court of Appeal, to be there heard and determined. The order may be made by the Chief Justice, in the name of the court.

2. When a cause is transferred to the Supreme Court, or to a District Court of Appeal, for any cause except that it was ap-

pealed to the wrong court, the clerk of the Supreme Court must immediately send a certified copy of the order to the court in which the cause was pending, unless it was pending in the Supreme Court. If it is transferred from the Supreme Court, the clerk must immediately send to the court to which it is transferred all the written papers, all exhibits, and the original and three copies of all printed papers on file in such cause in his office, and must preserve the remaining printed copies for subsequent disposition. If it is transferred from one District Court of Appeal to another, or to the Supreme Court, the clerk of the court from which it is transferred must, on receipt of a copy of the order of transfer, send to the court to which it is transferred all papers and records on file in said cause in his office, if the order is made before judgment; if such order is made after judgment he must send all written papers and the original of all printed papers.

The clerk of the Supreme Court must also send to the court to which the cause is transferred, if it is a District Court of Appeal, a certified copy of the order of transfer, and if the order is made upon a failure to agree upon a judgment, the opinions of the judges, which have been forwarded to the Supreme Court.

#### RULE XXXIV.

##### REMITTITURS AND DISPOSITION OF COPIES.

1. When a judgment of a District Court of Appeal becomes final therein, the remittitur shall not be issued until after the lapse of thirty days thereafter, unless otherwise ordered.

2. At the expiration of said thirty days, if no order for hearing has been made by the Supreme Court, the clerk of the District Court of Appeal shall forthwith send to the secretary of the Supreme Court, a copy of the opinion of the District Court of Appeal upon which such final judgment was given.

3. Thereupon the seventeen copies of the printed papers in such cause which are, in accordance with these rules, in the custody of the Supreme Court, shall be distributed as required by law and as ordered by said court.

4. When a judgment of the Supreme Court, in a cause filed after these rules take effect, has become final, seventeen copies of the printed papers must be distributed as provided in subdivision 3 hereof.

5. When a cause, pending at the time these rules take effect, is, or has been, transferred to a District Court of Appeal for decision, there shall be sent to such District Court of Appeal all the written papers on file and the original and three copies only of the printed papers on file. If such cause is thereafter ordered to the Supreme Court or to another District Court of Appeal, all of said papers shall be transmitted to the court to which the cause is transferred.

**RULE XXXV.****SERVICE ON ATTORNEY GENERAL WHERE STATE OR COUNTY IS INTERESTED.**

In all criminal cases, and in all other cases where the state or any officer thereof in his official capacity is a party, and in all cases to which any county may be a party, unless the interest of the county is adverse to the state or to some officer thereof acting in his official capacity, no transcript on appeal or brief on behalf of the state or of such county or officer whom the Attorney General is empowered to represent, shall be received or filed without proof of the service of such transcript or brief upon the Attorney General. On such transcript or brief there shall not be printed the name of any person as attorney for the state or for such county or officer of the state, other than the name of the Attorney General, without an order of the court or the written consent of the Attorney General first obtained.

**RULE XXXVI.****BILLS OF EXCEPTIONS IN CRIMINAL CASES.**

1. When a party in a criminal case desires to have a ruling therein reviewed on appeal, and no statutory method is provided for making such ruling a part of the record, he may present to the judge who made the ruling, or his successor, a bill of exceptions, exhibiting such ruling and the necessary explanations, after serving a copy thereof on the adverse party. The adverse party may present to such judge amendments thereto, after serving the same on the other party. The bill may be presented within thirty days after the ruling and the amendments thereto within ten days after service of the proposed bill. The bill must thereupon be settled by the judge, upon three days' notice to the parties, within sixty days after the ruling complained of, and when so settled it shall become a part of the record on appeal in such

case. The judge may, for good cause, shorten the respective periods hereby fixed.

2. Upon appeal, copies of such bill of exceptions shall, if requested by the appellant, be forwarded to the proper appellate court, as in case of other papers constituting the record on appeal.

**RULE XXXVII.**

When a petition is filed in the Supreme Court for hearing of a cause decided by a District Court of Appeal, in which the transcript is prepared and filed as prescribed in sections 953a, 953b and 953c, of the Code of Civil Procedure, or in a criminal case, the clerk of the Supreme Court shall immediately send notice that such petition has been filed to the clerk of the District Court of Appeal in which the case was decided, who shall forthwith transmit to the clerk of the Supreme Court the transcript of the record filed in such case. If the petition is not granted the clerk of the Supreme Court shall return such transcript to the clerk of the proper District Court of Appeal. If it is granted, such transcript shall be filed by the clerk of the Supreme Court.

Ordered, that the foregoing rules be and the same are hereby adopted as the rules for the government of the Supreme Court and District Courts of Appeal of the state of California, and for the regulation of practice therein, and that they take effect on the eighteenth day of March, A. D. 1912, and that thereupon the rules heretofore made be abrogated.

January 16, 1912.

W. H. BEATTY, Chief Justice.

F. M. ANGELLOTTI, Justice.

LUCIEN SHAW, Justice.

W. G. LORIGAN, Justice.

HENRY A. MELVIN, Justice.

M. C. SLOSS, Justice.

F. W. HENSHAW, Justice.

Attest: B. Grant Taylor, Clerk.

**SUPREME COURT OF WASHINGTON \***

Adopted December 8, 1911

**RULE IX, Subd. 6.**

(6) In all criminal appeals where the defendant is in custody and is unable to give bail, the judge of the superior court from

which the appeal emanates shall file a certificate, and the cause will be advanced to the head of the docket and be heard on the first day of the succeeding term of the court, or as soon thereafter as counsel can be heard.

\* For subdivisions 1-5 of this rule, see 101Pac. xi.

# AMENDMENTS TO RULES

## SUPREME COURT OF MONTANA<sup>1</sup>

It is ordered that the second paragraph of section 2 of Rule XXII of this court (37 Mont. xl, 103 Pac. xiii), referring to the admission of attorneys from other jurisdictions, entitled "Application, How Made," be amended so as to read as follows:

"Application, How Made.—A candidate for admission may make application at any time by filing a petition with the clerk, accompanied by the certificate hereinafter specified, and evidence of his good moral character. The clerk shall forthwith deliver the petition and other papers to the attorney general. If upon examination by him he is satisfied that the applicant is prima facie entitled to admission, he shall thereupon notify the applicant when the court will hear the application. The applicant need not appear until the motion for admission is made. All applications must be made upon motion of the attorney general or one of his assistants. The petition shall be verified and, in addition to the facts recited in section 6385, Revised Codes, 1907, shall show," etc.

The above paragraph of Rule XXII, as amended, shall be in full force and effect from and after sixty days from this date.

Promulgated June 22, 1911.

It is ordered that paragraph 1 of Rule XXII, referring to the examination of candidates for admission to practice, be amended so as to read as follows:

"1. Examinations—When Held.—Petition for Examination—Contents.—Examinations of candidates for admission to practice law in the courts of this state will be held in open court in the courtroom, at 10 o'clock a. m., on the first Wednesday after the first Tuesday of June and December of each year. Any person desiring to enter for examination must, at least ten days prior to the date of such examination, file with the clerk his verified petition setting forth that he is a citizen of the United States and a resident of this state, of the age of twenty-one years. He shall also file with his petition a certificate of two reputable counselors at law of this state (or the affidavits of two nonresident attorneys) that he has been engaged in the study of law for two successive years prior to making his application. He shall also file with his petition testimonials of his good moral character, which must be satisfactory to the court. If such testimonials are furnished by others than attorneys of this state, they must be in the form of affidavits."

Promulgated November 28, 1911.

<sup>1</sup> For rules of the Supreme Court of the state of Montana, see 37 Mont. xxiii, 103 Pac. vii, 110 Pac. vi.



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**DEMPSEY v. UNITED WIRELESS TELE-  
GRAPH CO.**

(Supreme Court of Washington. Dec. 5, 1911.)

**BROKERS (§ 8\*)—RELATION—CREATION—EVI-  
DENCE.**

In an action for commissions for a sale of stock which plaintiff claimed to have made as a subagent of defendant, evidence held not to show that the officer appointing defendant as agent had either express or implied authority, or that the sale was beneficial to defendant.

[Ed. Note.—For other cases, see *Brokers*, Dec. Dig. § 8.\*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by James E. Dempsey against the United Wireless Telegraph Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with instructions to dismiss.

E. B. Palmer and Thos. M. Askren, for appellant. McClure & McClure, for respondent.

**MORRIS, J.** This is an action to recover commissions upon two sales of stock of the appellant. Recovery was permitted upon one sale and denied as to the other, and the company appeals.

In November, 1909, respondent was employed by George H. Parker as an agent to solicit the sale of stock in the appellant company. He saw one Fred Cavanaugh residing near Kent, and endeavored to induce him to purchase. He made several visits to Fred Cavanaugh, and was finally told by Fred Cavanaugh that he was favorably impressed, but that he was not in a position to buy stock, and would refer the matter to his father, then at San Jose, Cal. Fred Cavanaugh wrote to his father concerning the stock, sent him some literature issued by the company, and also a letter he had received from Parker, in which letter Parker strongly urged the purchase of this stock. Fred Cavanaugh seems to have been his father's financial agent in many respects, but in this matter he wished his father to act upon his own responsibility. After this communication to the father at San Jose, respondent took Fred Cavanaugh to the company's office at Seattle, and there had a talk with Par-

ker, in which Fred Cavanaugh repeated that he had told respondent that he would do nothing upon his own responsibility, but would wait until he had heard from his father. Just before Christmas respondent saw Fred Cavanaugh again, and was told that he had heard from his father, and that the father thought it a good proposition, but had not advised him about the taking of any stock. Nothing more is shown by the record until about June 1st M. L. Cavanaugh, the father of Fred Cavanaugh, returned to his home near Seattle, and, walking into the office of the appellant at Seattle, informed those in charge that he had purchased 110 shares of stock while in California, and wished to make some arrangements as to its transfer. When or from whom this stock was purchased does not appear. After M. L. Cavanaugh left the office, a Mr. Carr, another selling agent of appellant, was called in, and instructed to call on M. L. Cavanaugh, and endeavor to sell him additional stock. Carr had accompanied respondent on one or two of his visits to Fred Cavanaugh, and it had been arranged between them, if they succeeded in making a sale, they would divide the commission. At the time M. L. Cavanaugh returned to Seattle with this stock, Fred did not know that he had purchased any stock while in California, nor did he know of his return until some days afterwards. Carr called on M. L. Cavanaugh, and finally induced him to purchase 100 shares of stock at \$35 per share, providing he could trade in some notes and mortgages for the purchase price, which was consented to and the sale made. Thereafter respondent demanded a commission on both sales, and, being refused, brought this action, in which the court denied him any commission upon the purchase in California, but awarded him judgment for the amount of his commission upon the second sale. It might be added that he brought the action against both George H. Parker and the company. Parker was, however, dismissed in the court below.

The errors assigned are that it is not shown that Parker had any authority to bind the company; that respondent was not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

instrumental in procuring the last purchase, and that the stock sold was the stock of Parker. Unless the record shows authority on the part of Parker, the case must fail, as all the transactions upon which recovery is based are had with either Parker or his agents. We have read the record carefully, and it is absolutely silent as to any authority Parker had to bind the company, to appoint agents, or to pay commissions for the sale of its stock. There is neither any express nor any implied authority shown, nor does it appear just what is the relation between Parker and the company. The only testimony in the record upon that question is this: "Q. Now, this office of the company in Seattle was the main office on the Coast here, wasn't it? That is, the headquarters? A. Yes. Q. That is where all of the final business was transacted? A. I don't know what you mean by that. Q. Well, this was the head office for the Pacific Coast, headed by Mr. Parker? A. Yes, sir. Q. And he was the general agent of the Wireless Telegraph Company as well as one of the trustees of the company? A. He was the general fiscal agent of the company and one of the directors, I believe. Q. And he had the right and authority to sell stock? A. Why, I presume so. Q. And he had the right and authority to employ agents? A. Why, I believe so. I am not certain. I do not know anything about his authority." This testimony was given on cross-examination by Mr. Martin, who seems to have been in charge of the Seattle office under George H. Parker. All that we can gather from it is that Parker was the general fiscal agent of the company and one of its directors. Just what the duties of a general fiscal agent and a director are in this company does not appear, and we cannot assume that Parker's authority from the company was such that his actions in this matter would bind the company. It was an issue in the case, and it should have been proved, and not left to assumption nor presumption.

Appellant's contention here is that a general agent's authority to bind his principal through a subagent depends, in the absence of proof of express authority, upon the nature of the business he is transacting, and that it may be implied, and is implied, when the nature of the business requires the implication. There is nothing in this record as to the nature of the business of the appellant, nor as to the nature of Parker's duties as fiscal agent or director, and we cannot assume his authority from such a description. The appointment of respondent is signed, "United Wireless Tel. Co." Underneath appears the name, "Geo. H. Parker." This was the basis of respondent's claim that he was acting for both the company and Parker. He says it was given him by Parker. If so, it would prove authority from

Parker, but it could not prove authority from the company to Parker. If we could find any evidence to justify an assumption that the stock included in the last sale was the stock of the company and not the stock of Parker, or could find any evidence of a benefit to the company from the sale, or of its ratification, the case would be easier upon the theory of implied authority. But there is no such evidence. On the contrary, it would appear that the company had no part in the transaction, and that Parker was dealing in his own stock. On June 6th, when the notes and mortgages which were to be exchanges for the stock were delivered at the Seattle office, the following receipt was given: "M. L. Cavanaugh: Received of Mr. Cavanaugh note & mtg. for 1000 (Geo. D. Farwell) dollars. Note & mtg. for 1000 C. E. Rigby. Note & mtg. for 1200 Alex McLush, for examination. Also five abstracts covering above property. Geo. H. Parker, per J. M. Martin." On June 15th, when it had evidently been determined to accept the notes and mortgages in exchange for the stock, Parker gave the following receipt: "Received of M. L. Cavanaugh payment in full for 100 shares of the preferred stock of the United Wireless Telegraph Co., same to be delivered as soon as received from home office. Geo. H. Parker." These receipts would seem to indicate that they were dealing with Parker's stock, and not the stock of the company. They would at least be no proof that the stock was that of the company. We therefore hold that in the face of the issue raised the respondent has failed to prove that he had any contractual relation with the appellant, and for this reason his action must fail. *Shavaller v. Grand Rapids Bark & Lbr. Co.*, 128 Mich. 230, 87 N. W. 212; *Carroll v. Manganese Steel Co.*, 111 Md. 252, 73 Atl. 685; *Kalina v. Robert Gair Co.* (Sup.) 125 N. Y. Supp. 1040.

Having reached this conclusion upon the first and third assignments of error, it is not necessary to discuss the second.

The judgment is reversed, and the cause remanded with instructions to dismiss.

CROW, ELLIS, and CHADWICK, JJ., concur.

#### HENDERSHOTT et al. v. MODERN WOODMEN OF AMERICA et al.

(Supreme Court of Washington. Dec. 2, 1911.)

#### THEATERS AND SHOWS (§ 6\*)—LIABILITIES FOR INJURIES TO PERSONS ATTENDING—NEGLIGENCE.

Defendant providing a hall for an entertainment made a safe and well-lighted entrance. Plaintiff passed such entrance, and at the suggestion of a stranger proceeded up a dark slippery way. The darkness was so great that she could not see the character of the stairway. She was warned that her path was obstructed by vines, but she proceeded and slipped and fell,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

and was injured. *Held*, as a matter of law, that she was guilty of negligence and assumed the hazards, precluding a recovery.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 6; Dec. Dig. § 6.\*]

Department 1. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by Orville Hendershott and another against the Modern Woodmen of America and another. From a judgment of dismissal, plaintiffs appeal. Affirmed.

J. P. Ball, for appellants. S. A. Bostwick, for respondents.

GOSE, J. This is a suit to recover damages for personal injuries. At the close of the plaintiffs' case, in response to a challenge to the sufficiency of the evidence, a judgment of dismissal was entered. The plaintiffs have appealed.

The facts are these: The respondents, as fraternal organizations, are the owners of a hall in the town of Sultan known as "Woodmen's Hall," and used for lodge and entertainment purposes. On the night of September 5, 1910, a play was given at the hall by the children of the town. The auditorium is 30 by 70 feet in dimensions, with a raised stage at its rear 19 by 30 feet. The hall is on the lower floor of the building. It is elevated at the rear about eight feet above the surface of the street. The front elevation is somewhat less. On the night in question the main or front entrance to the hall was well lighted, as was also the hall. The auditorium has a seating capacity of approximately 500. On the evening stated the appellant wife took her little girl and a small boy, the child of her neighbors', to the hall to take part in the play. She did not know the location of the hall, but was directed to it by the children who had been there previously. She passed the front entrance, as she says, without observing it, and, upon reaching the rear of the hall, she inquired of a lady whom she did not know where she could find the lady who instructed the children for the entertainment. The lady answered that she was on the stage. She then asked her how she could get there, and the lady answered, "You can go that back way, but be very careful of the blackberry bushes." She then proceeded with the children to the stage along the way suggested. In undertaking to return the same way she slipped upon the second step from the top of the stairway and fell, sustaining the injury for which she seeks redress in this action. After falling, she walked to the street, met her friends, returned, entered the auditorium at its main entrance, and sat through the play. When upon the stage she had her ticket, and intended to go to the auditorium to witness the play. The stairway upon which she fell

is 30 inches in width, about 8 feet in height, and made of boards with an 8-inch tread and 10-inch risers, and is not covered. The night was so dark, she says, that in going up the stairway she could not see its condition. It was raining, and the stairs, being without covering, were necessarily wet. There was no light at the alley or the stairway. The approach to the stairs is through an alley, with the building upon one side and a high board fence upon the other. The blackberry vines to which the lady referred project through the fence and across the alley. She testified that she knew the entrance which she chose was not the main entrance to the hall. The rear stairway, when built, was intended to be used by the people upon the stage as a fire escape. The respondents did not intend that it should be used for any other purpose. The door leading from the stage to the stairway was usually kept locked upon the inside, but there is no evidence that it was locked upon the night in question. A low stairway leads from the auditorium to the stage.

Upon these facts, we think the learned trial court was not in error in withdrawing the case from the jury. The respondents had provided a safe and well-lighted stairway for all who desired to enter the hall. The size of the hall, the location and darkness of the rear stairway, and the presence of the blackberry vines all pointed unmistakably to the fact that there was no invitation to the public to enter the hall or the stage in the manner chosen by the appellant. When she passed by the safe, well-lighted entrance, and, at the suggestion of a stranger, proceeded up the dark, slippery way, when the darkness was so great she could not see the condition or character of the stairway, and with the warning that her path was obstructed by vines, she was guilty of negligence, and assumed the hazards which beset her. While her unfortunate injury is to be lamented, it cannot be said to have resulted from any negligence on the part of the respondents.

The judgment is affirmed.

DUNBAR, C. J., and MOUNT, FULLERTON, and PARKER, JJ., concur.

SNELLING et ux. v. BUTLER, Sheriff.  
(Supreme Court of Washington. Dec. 5, 1911.)  
HOMESTEAD (§ 55\*)—ACQUISITION—DECLARATION.

Where a judgment was obtained against a husband and wife on their note, and before execution they made a declaration of homestead upon their residence, such property was not subject to execution, under Rem. & Bal. Code, §§ 532, 533; the judgment having become a lien on the property subject to the right of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

owners to defeat an execution sale by a homestead declaration.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 77-80; Dec. Dig. § 55.\*]

Fullerton, J., dissenting.

Department 1. Appeal from Superior Court, Wahkiakum County; A. El. Rice, Judge.

Action by E. S. Snelling and wife against D. C. Butler, as Sheriff of Wahkiakum County. From a judgment for plaintiffs, defendant appeals. Affirmed.

Willett & Oleson, for appellant. N. H. Bloomfield and E. S. Snelling, for respondents.

GOSE, J. This is an appeal from a judgment granting a permanent injunction against the sale of real property upon execution. The facts are as follows: On August 12, 1909, one Bailey obtained a judgment against the respondents in the superior court of Wahkiakum county for \$350, with interest and costs. The respondents then owned, and with their two minor children resided upon, lots 6, 7, and 8, in block 6, of the town of Athens, in that county. On September 14, 1910, the respondents executed and filed their declaration of homestead upon the property conformably to the statute. Two days later the judgment creditor caused a writ of execution to issue for the enforcement of the judgment. The writ was placed in the hands of the sheriff of that county, who levied upon the property and advertised its sale. The answer admits that the property is of less value than \$2,000. The judgment was entered upon the respondents' unsecured promissory note. The debt is not secured by mechanic's, laborer's, materialman's, or vendor's lien upon the premises.

Upon these facts the appellant asks for a reversal of the judgment, under the authority of *Hookway v. Thompson*, 56 Wash. 57, 105 Pac. 153. We do not think that case has any application to the case at bar. In that case a married man executed a mortgage upon his separate real estate to secure the payment of a contemporaneous loan. Later the wife filed her declaration of homestead, under the provisions of Rem. & Bal. Code, § 530. In discussing the case we said, in substance, that under the statute the homestead is brought into being by the filing of a homestead declaration, and that it exists and speaks from that time only and has no retroactive force. We adhere to that view of the law. This case is controlled by other provisions of the statute. Rem. & Bal. Code, §§ 532, 533, provide:

"Sec. 532. The homestead is exempt from execution or forced sale, except as in this chapter provided.

"Sec. 533. The homestead is subject to execution or forced sale in satisfaction of judgments obtained: (1) On debts, secured

by mechanic's, laborer's, materialman's or vendor's liens upon the premises. (2) On debts secured by mortgages on the premises executed and acknowledged by the husband and wife or by any unmarried claimant."

The judgment became a lien upon the property, subject to the right of the owners to defeat an execution sale by the filing of a homestead declaration. They filed the declaration before the issuance of the execution. When the declaration was filed, the property became a homestead, and as such it was exempt from execution or forced sale. The *Hookway* Case was controlled by the provisions of Rem. & Bal. Code, § 533, and subsequent sections of the statute. Sections 532 and 533, when read together, so clearly protect the homestead in the case at bar that discussion and argument seem unnecessary. Article 19 of the Constitution provides that the "Legislature shall protect by law from forced sale a certain portion of the homestead, and other property of all heads of families." The first section of the statute quoted was enacted in obedience to that command.

The judgment is affirmed.

DUNBAR, C. J., and PARKER and MOUNT, JJ., concur. FULLERTON, J., dissents.

KELLER v. WHITE RIVER LUMBER CO. (Supreme Court of Washington. Dec. 2, 1911.)

MASTER AND SERVANT (§ 190\*)—INJURY TO SERVANT—VICE PRINCIPAL—NEGLIGENCE.

Where a servant who directed the work of a logging crew and who signaled the engineer when to start the engine, moving logs, left his station during the temporary absence of the engineer and negligently started the engine, injuring a member of the crew, the master was liable, the servant being a vice principal, and could not escape liability on the ground that the servant acted without the scope of his authority.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.\*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Max Keller against the White River Lumber Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, for appellant. John P. Hartman, for respondent.

GOSE, J. This is an appeal from a judgment of nonsuit. The facts are few and simple. The appellant was employed by the respondent as a snipper for its logging crew. His duties were to round the forward end of the logs, so that they could be drawn in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



by the yard engine. The hooktender had charge of the logging crew and directed its work. He was also the signalman. The appellant, while sniping a log to which the cable leading from the engine was attached, was injured by the starting of the engine without warning. The engine was started by the hooktender in the temporary absence of the regular engineer. It was no part of the duties of the hooktender to operate the engine. This duty was performed by the engineer upon receiving a go-ahead signal. Shortly before starting the engine the hooktender had directed the appellant to resume sniping. When he started the engine, he was within 50 feet of the appellant, who was in plain view and working upon the log with his back to the engine. The engine was started without a signal.

The case should not have been withdrawn from the jury. The hooktender was a vice principal. It was his duty to direct the work, and to signal the engineer when he desired him to start the engine. Had he given a wrong signal to the engineer, the master would have been clearly liable. When he left his station and started the engine, it was the act of the master. *Creamer v. Moran Bros. Co.*, 41 Wash. 636, 84 Pac. 592; *Tills v. Great Northern Ry. Co.*, 50 Wash. 536, 97 Pac. 737, 20 L. R. A. (N. S.) 434; *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765; *Campbell v. Jones*, 60 Wash. 265, 110 Pac. 1083. As was said in the *Tills* Case, whether the vice principal does the negligent act himself or directs another to do it, the master is liable. And, as was said in the *Westerlund* Case, the master is liable whether the injury proceeds from the giving of a wrong signal or from the failure to give any signal. In 2 *Labatt, Master & Servant*, § 546, it is said that there is no logical difference between the quality of an act done by the order of the vice principal and the quality of the same act when done by him. The learned trial court granted the nonsuit on the authority of *Conine v. Olympia Logging Company*, 38 Wash. 345, 73 Pac. 932, and same, 42 Wash. 50, 84 Pac. 407. This case holds that the engineer of a logging crew is the fellow servant of the loggers. We do not think it has any application to the case at bar. Here the vice principal started the engine. The trial court was influenced by the fact that the master had furnished a competent engineer, and that the injury was caused by the vice principal who was acting without the scope of his authority. This we are persuaded does not affect the question of the master's liability.

The judgment is reversed.

DUNBAR, C. J., and FULLERTON, MOUNT, and PARKER, JJ., concur.

# IN RE CITY OF SEATTLE.

(Supreme Court of Washington. Dec. 1, 1911.)

MUNICIPAL CORPORATIONS (§ 495\*)—STREET IMPROVEMENTS—ASSESSMENT DISTRICTS—CREATION—DECISION OF COMMISSIONERS—CONCLUSIVENESS.

A decision by a municipal board fixing the limits of a street improvement assessment district, or refusing to apportion part of the expense against the city's general fund, will not be disturbed by the courts, where there may be difference of honest opinion as to the fairness of the decision.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1166; Dec. Dig. § 495.\*]

Department 1. Appeal from Superior Court, King County; John F. Main, Judge.

Petition by the City of Seattle to condemn property to improve streets. On appeal from an order confirming a special assessment. Affirmed.

Willett & Oleson, for appellant. Scott Calhoun and William B. Allison, for respondent.

PARKER, J. This is an appeal from an order of the superior court for King county confirming a special assessment made by eminent domain commissioners to pay awards of damages and expenses incurred by the city of Seattle in acquiring and damaging private property for the purpose of improving Twelfth avenue and other streets in that city. Appellants are the owners of property against which the assessment is made, and it is contended in their behalf (1) that the boundaries of the assessment district are so clearly wrong in omitting certain property therefrom that the trial court should have annulled the assessment; and (2) that the general fund of the city should have been charged with a portion of the cost and expenses of acquiring and damaging the private property for the improvement.

The improvement contemplated is the widening and changing of the grades of Twelfth avenue from Denny Way south to Jackson street, a distance of 20 blocks, and the widening and changing of the grades of certain other streets near to or crossing Twelfth avenue, so that at no point does the improvement extend more than four blocks in an east and west direction. The limits of the assessment district fixed by the commissioners extend north and south and east and west in approximately this proportion. It is insisted by counsel for appellants that the assessment should have extended much farther to the east so as to include property it is claimed will be benefited by the improvement, and that in this respect the boundaries of the district were erroneously fixed by the commissioners. The theory of this contention is that the improvement in the grades of the east and west streets will furnish a more advantageous outlet than at present

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

to the business portion of the city from this property which is excluded from the assessment district upon the east. Alleged error in excluding certain other property from the assessment district is rested upon the same theory as to its benefit. No contention is made as to the amount of any assessment upon any particular lot or tract, it being conceded that, if the boundaries of the assessment district are correct, the assessments are properly apportioned upon the several lots and tracts.

There is eminent authority indicating that the fixing of the boundaries of a district for a special assessment purpose by the persons or body possessing that power by virtue of it being so delegated by the Legislature is an act so purely legislative in its character that the courts are excluded from interfering therewith. 1 Cooley on Taxation (3d Ed.) 234; Hamilton on Special Assessments, 19; 1 Page & Jones on Taxation by Assessment, 552, 553.

We are not, however, required to adopt this view without qualification, in order to sustain the acts of the eminent domain commissioners in this case. Applying the rule heretofore adopted by this court where the correctness of the amount of the assessment upon the various lots and tracts is involved, a review of the evidence in this case convinces us that there is here no such showing of arbitrary action, fraud, or mistake on the part of the commissioners in fixing the boundary of this district as calls for interference therewith by the courts, even conceding that that may become a judicial question. We see nothing here involved, except a difference of honest opinion as to where the boundaries of this assessment district should be. Clearly that is not sufficient to warrant an interference with the judgment of the commissioners in that respect. In re Seattle, 46 Wash. 63, 89 Pac. 156; In re Seattle, 50 Wash. 402, 97 Pac. 444. The contention that a portion of this expense should have been charged to the general fund of the city because of the general public benefit can be answered in the same way. In re West Lake Avenue, 40 Wash. 144, 82 Pac. 279.

Some contention is made that the total amount of the assessment was unduly enhanced by a charge for accumulated interest pending the making of the assessment roll. It is manifest that from time of the rendition of the verdict and judgment awarding damages to the owners of property taken or damaged, until the money can be realized upon the assessment for payment of such damages, interest will necessarily accumulate upon the damage awards. The complaint here is that there was undue delay in making up the assessment roll, resulting in accumulation of interest charged against the prop-

erty to be assessed, which could have been avoided by diligence on the part of the city and commissioners in making up the roll. The evidence convinces us that the commissioners and the city moved as promptly as circumstances would permit in preparing the assessment roll. Had there been undue delay in this respect, there would be some ground for this contention. We agree with the learned trial judge that no reason is shown for interference with this assessment by the courts.

The order confirming the assessment roll is therefore affirmed.

DUNBAR, C. J., and MOUNT, FULLERTON, and GOSE, JJ., concur.

#### ALBERG v. CAMPBELL LUMBER CO.

(Supreme Court of Washington. Nov. 28, 1911.)

##### 1. RAILROADS (§ 224\*)—STATUTES—OPERATION.

Laws 1899, c. 35, § 1, which provides that any person, railroad company, or corporation owning or operating a railroad in this state shall be and is required, on or before the 1st day of October, 1899, to so adjust, fill, block, and securely guard the frogs, switches, and guard rails on their roads as to prevent the feet of employes and other persons from being caught therein, is not limited by its terms only to corporations in existence at the time of its enactment, but applies to a corporation thereafter incorporated.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 224.\*]

##### 2. RAILROADS (§ 224\*)—SWITCHES AND FROGS—STATUTORY PROVISIONS.

Laws 1899, c. 35, § 1, which provides that any person, railroad company, or corporation owning or operating a railroad shall block and securely guard the frogs, switches, and guard rails of their roads, so as to prevent their employes and other persons from being caught therein, is not limited in its application to common carriers, but applies as well to railroads used in connection with mills and logging camps.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 224.\*]

##### 3. MASTER AND SERVANT (§ 250½\*)—ACTION FOR INJURIES—PARTIES—STATUTORY PROVISIONS.

Laws 1899, c. 35, § 1, requires that frogs, switches, and guard rails on railroads be guarded, and section 2 provides that a person, railroad company, or corporation owning a railroad shall be liable for any damages received from a failure to comply therewith, to be recovered by the parties entitled to recover, as provided in 2 Hill's Ann. St. & Codes, §§ 137-139 (Ballinger's Ann. Codes & St. §§ 4827-4829). *Held*, that it was not the intention of the Legislature by section 2 to give the benefit of the act only to the representatives of persons who had been killed, or who were suing for death of the persons mentioned in those sections, but only that, in case of death resulting from the negligence prohibited in the acts, the representatives of the parties suing should be the representatives provided for in the sections quoted in the act.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 250½.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**4. MASTER AND SERVANT (§ 289\*)—ACTION FOR INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.**

In an action for personal injuries received by plaintiff while in the employ of a logging company, alleged to have resulted from its failure to guard frogs and switches on a railroad operated by it, as prescribed by Laws 1899, c. 35, § 1, *held*, on the evidence, that the question of contributory negligence was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 289.\*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Julius Alberg against the Campbell Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 60 Wash. 533, 111 Pac. 775.

Hastings & Stedman, for appellant. Wm. Martin, for respondent.

DUNBAR, C. J. Julius Alberg, a logger employed by the Campbell Lumber Company as second faller—that is to say, assistant to the principal faller—received an injury on December 6, 1906. He was at that time 23 years of age. After the injury, he brought this action to recover \$27,430 on account of said injury. Negligence of the company was alleged in failing to fill, block, or guard a frog on the track, and in having incompetent engineers to conduct the train. Upon the trial of the cause to a jury, verdict was rendered in favor of the plaintiff for \$3,500. Motions for new trial were made by the defendant and plaintiff also. The motions were overruled, and appeal followed.

The proof shows that it was the custom for the men working in the woods to gather at the switch, at or near the place where respondent was injured, and board the engine, or a car, for the purpose of being carried to the camp, a distance of about two miles. On the day the respondent was injured, he, in company with his fellow workmen and the boss of the crew, came down to a road which crossed the track some 60 feet from the switch. The engine came down from the woods with two loaded cars of logs, and stopped at the switch. Some one on the engine hallooed at the men. The respondent, with the other men, including the superintendent, Mr. Matson, started to get on the engine. Mr. Matson had entire charge of the camp, and direction of the starting and stopping of the train. There were some 15 or 20 Japanese working for the company, looking after the railroad at that time. They usually rode home on a hand car, but on this day, for some reason not necessary to be mentioned, the Japanese, not having a hand car available, began to get upon the engine with the other men, for the purpose of riding to the camp. The engine was standing about four feet from the frog which was the cause of the respondent's mishap, waiting for the

men to come from about 60 feet up the track to get on. When the respondent was about four or five feet from the engine, and as he was looking for a place to get upon the engine, his foot slipped in the frog, which was not protected, and he was unable to get it out. About that time the engine, without any notice, started towards the respondent, who, seeing that he could not extricate himself from his perilous position, threw his body off the track, and the engine passed over his foot, and crushed his foot and leg, so that it had to be amputated just below the knee.

[1] This action is based upon chapter 35, p. 49, of the Laws of 1899, section 1 of which is as follows: "Any person or persons, railroad companies or corporations, owning or operating a railroad or railroads in this state, shall be and are hereby required on or before the first day of October, 1899, to so adjust, fill, block, and securely guard the frogs, switches, and guard rails on their roads as to prevent the feet of employees and other persons from being caught therein." It is the contention of the appellant that inasmuch as this defendant corporation was not incorporated until the 8th day of April, 1905, which was several years after the passage of the act, the act in terms does not apply to it, and applies only to corporations then in existence. There can be no merit in this contention, as it certainly is not the legislative policy to have the laws re-enacted for the benefit of corporations which are created after the passage of the act, or for the benefit of individuals who may be born after the passage of the act, or who may come into the country and be admitted to citizenship after the act. We know of no such construction that has ever been placed upon a general law.

[2] It is also the contention of the appellant that the act in terms does not apply to railroads used in connection with mills, and only applies to common carriers, and that, as it appears that this was exclusively a logging railroad, used by the Campbell Lumber Company in getting logs from the woods, and was not a railroad engaged in public service as a common carrier, the act does not apply to it. *Williams v. Northern Lumber Company*, (C. C.) 113 Fed. 382, among other cases, is cited to sustain this view. But an examination of that case convinces us that it is not in point. It is true that the court in that case decided that a certain statute of Minnesota did not apply to railroads, other than common carriers; but, while the statute is not set forth, it is evident from the language of the opinion that it was not such a statute as we have under construction. The court in the course of its opinion says: "It does not come within the language of the statute, because it is not a railroad corporation; and the proviso in the statute indi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cates that the statute is intended to apply only to corporations of the character to which I have referred, possessed of franchises, open to public travel or use, because the proviso is that they shall not be liable for damage during the construction of a new road, not open to public travel or use." Our statute not only fails to indicate that the law does not apply to other than railroad corporations which are common carriers, but it expressly provides that it shall apply to any person or persons, railroad companies, or corporations owning or operating a railroad. The scope of the act indicates that it was intended to protect workmen or employees of railroads, whether such railroads were common carriers or not, and whether they were corporations or individuals. The language is so plain and comprehensive that it is difficult to base an argument upon its construction. The other cases cited do not sustain appellant's contention.

[3] Again, it is contended by the appellant that, even though it be conceded that the act applies to railroad companies other than common carriers, the respondent is not granted the right to bring an action under this statute, by reason of the provisions of section 2, which is as follows: "Any person or persons, railroad companies or corporations, owning or operating a railroad or railroads in this state, shall be liable for any damage received from a failure to comply with the provisions of this act; such damages to be recovered by the parties entitled to recover as provided in sections 137, 138 and 139 of volume 2 of Hill's Annotated Statutes and Codes of Washington, being sections 4827, 4828 and 4829, Ballinger's Annotated Codes and Statutes of Washington." A reference to the sections quoted renders the meaning of section 2 of the statute a little doubtful; but it certainly never was the intention of the Legislature, in the passage of the act of 1899, to give the benefit of that act only to the representatives of persons who had been killed, or who were suing for the death of the persons mentioned in those sections. The evident intention was that, in case of death resulting from the negligence prohibited in the act, the representatives of the parties suing should be the representatives provided for in the sections quoted in the act. But, however that may be, it is not material to the determination of this case; for the law, in section 1, imposes a duty upon the appellant, and prescribes in effect that the omission of certain acts shall constitute negligence on its part. That would be sufficient, in any event, for the respondent to base an action on for negligence on the part of the appellant. If the act of negligence was proven, the case would stand just the same as though the act, or omission of the act, was negligence at the common law.

[4] The main contention in the case is that the respondent was guilty of contributory

negligence in attempting to get upon the engine under the circumstances proven. In discussing this phase of the case, it will be necessary for us to notice only the testimony of the respondent, and that in substance is as follows: "A. When we got to the road the engine was up at the switch, and somebody called for us to go up there and to get on. Q. About how far was it from where you were standing when they called for you to go and get on the engine? A. About 60 or 70 feet, I think; and, of course, we walked up that way, and as I came pretty close to the engine I stepped in that frog there; and I was looking to get on the engine, because there were lots of men on the engine, and I was looking to get on the foot-board, because there was a pretty good place to stand on, and lots of places were taken up by the other men on the engine. And when I was caught in the frog, about the same time the engine started up, and it was close by me, and I could not get out of the way, so I turned round, and my foot was in there, and the engine ran over my foot, and that is about the way it happened. Of course, after that they picked me up and took me down to the camp." The testimony shows, also, that no bell was rung, or any warning given to anybody that the engine was about to start; that the foreman, Matson, was with the respondent, and was trying to get upon the engine at the same time; that the engine was started by a young boy, a son of the superintendent of the road, who had no knowledge of the engine, and no discretion in regard to such matters. The respondent was called and recalled in cross-examination and redirect examination many times, but the proof was substantially as we have indicated.

It is claimed by the appellant, and the record shows, that the judge who tried the cause expressed grave doubts of the right of the respondent to recover, under the circumstances shown by the proof, but said that he would submit the case to the jury. The court being in grave doubt as to whether the respondent was guilty of contributory negligence was the best of reasons for submitting it to the jury.

The appellant strongly contends that the respondent was attempting to get upon the cowcatcher for the purpose of riding into camp, and that this was gross negligence. It appears from the testimony of the respondent that he was attempting to get upon a platform which, so far as we are able to ascertain from the testimony, may have been attached to the cowcatcher, which was attached to the engine; but he testifies that it was a place where he could stand, and where he could hang on, and that it was not a dangerous place. But, even conceding that riding on the cowcatcher was such an act of negligence as would preclude a recovery for injuries caused by dangers incident to

riding on the cowcatcher, that principle is not applicable to this case, for such dangers were not the cause of the accident, proximate or otherwise. The proximate cause of the accident unquestionably was the starting of the engine without notice, while the men gathered there were attempting to get upon the engine.

The case strongly relied upon by the appellant, viz., *Birrell v. Great Northern Lumber Company*, 61 Wash. 336, 112 Pac. 362, was where an accident occurred by reason of the perils of the place, which were the actual cause of the injury. A dining car conductor left a well-known-path, between tracks, 6 feet wide from tie to tie, and took a walk along the edge of a swamp near the outer ties, where the space was only 2½ feet, and was in consequence struck and killed by a switch engine. It will be seen that the principle governing that case was altogether different from the principle governing the case at bar, where the safety or nonsafety of the cowcatcher had no remote influence upon the accident.

It is also contended by the appellant that it was contributory negligence for the respondent to run or walk the distance that he did, which was 60 or 70 feet, on the track, or inside of the railroad tracks. But the result in this case would have been the same, if the appellant had approached the track at the point where his foot was caught in the frog, because no injury happened to him by traversing the road back of that point; and it seems from all the testimony that it was necessary for the men to go on the track at least that short distance from the engine.

Many cases are cited by both appellant and respondent in support of their respective contentions, but the law in relation to the duties of the master and the correlative duty of the servant in regard to contributory negligence is so well understood that the citing of cases is of very little aid to the court. The important question is, not what the law is, but whether the facts in the particular case bring it within the provisions of the law as understood. Under all the circumstances of this case, we are unable to say that the action of the respondent in attempting to board this engine, under the circumstances shown by the respondent's testimony, was contributory negligence as a matter of law. On the contrary, it was a case where it was the peculiar province of the jury to determine that question.

No error was committed by the court in the giving or refusing of instructions, and the judgment is therefore affirmed.

PARKER, MOUNT, GOSE, and FULLERTON, JJ., concur.

## KENDALL v. LONG.

(Supreme Court of Washington. Nov. 25, 1911.)

### 1. PUBLIC LANDS (§ 109\*)—DISPOSITION—PROCEEDINGS IN LAND OFFICE—JURISDICTION OF COURTS.

A party aggrieved by an erroneous decision of the federal Land Department must exhaust his remedies in that department before he can resort to the courts, and, where one instituting a contest in a local land office against a homestead entry did not appeal to the General Land Office or to the Secretary of the Interior from an order dismissing the contest because not sufficiently regular to constitute a valid contest, he was bound thereby, and he could not resort to the courts.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 307; Dec. Dig. § 109.\*]

### 2. PUBLIC LANDS (§ 106\*)—PROCEEDINGS IN LAND DEPARTMENT—CONCLUSIVENESS.

Where a contestant of a homestead entry did not appeal from an order of the local land office dismissing the contest because not sufficiently regular to constitute a valid contest, he could not revive the contest by mere suggestion on the hearing of his protest against a third person's entry under the timber and stone act on the relinquishment of the homestead entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 301, 302; Dec. Dig. § 106.\*]

### 3. PUBLIC LANDS (§ 109\*)—LAND OFFICE—JURISDICTION OF COURTS.

The right of the courts to interfere in proceedings for the disposition of public lands arises from the inherent power to correct wrongs done to individuals by an erroneous administration of the law, and, where the wrong involves the transfer of property from one person to another, the proceeding is equitable, and the party claiming the right must show superior equities.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 307; Dec. Dig. § 109.\*]

### 4. PUBLIC LANDS (§ 40\*)—HOMESTEAD ENTRY—RELINQUISHMENT—EFFECT.

Where a homestead entryman determined to relinquish long before he knew of the institution of a contest against him, and he went to the land office to relinquish without knowledge of the contest and learned of the contest after reaching the land office, the contest was not the procuring cause of the relinquishment, and the contestant had no preference right to enter the land, in the absence of any contrary showing.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 40.\*]

Department 1. Appeal from Superior Court, Pacific County; A. E. Rice, Judge.

Action by Gustavus S. Kendall against Minnie S. Long. From a judgment for defendant, plaintiff appeals. Affirmed.

W. H. Abel and Sleman & Lerch, for appellant. Hayden & Langhorne, for respondent.

FULLERTON, J. The appellant brought this action against the respondent seeking to charge her, as a trustee holding for his benefit, the legal title to the northeast quarter of section 24, in township 15 north of range 6 west of the Willamette meridian.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The respondent holds the land by patent from the government of the United States, having acquired the same by entry under the timber and stone act and the acts amendatory thereof. The appellant claims the same in virtue of an attempted entry made by him under the homestead acts. He conceives that the land was awarded to the respondent through a misconstruction of the law by the officers of the land department; whereas, a proper construction would have awarded the land to him.

The facts giving rise to the controversy are not seriously in dispute. It appears that the land first became subject to entry at 9 p. m. of July 2, 1903, at the land office situated at Olympia, in the state of Washington. At that time one Thomas J. Long, husband of the respondent, and Gustavus S. Kendall, the appellant, made simultaneous applications to homestead the land; each alleging a prior settlement thereon. It thereupon became necessary to determine who had the better right, and a hearing was had for that purpose before the local land office, which determined the right in favor of Kendall. An appeal was taken from this ruling to the Commissioner of the General Land Office, who reversed the holding of the local office, and, on his ruling being affirmed on appeal to the Secretary of the Interior, Long was allowed to make a homestead entry on the land. This entry was made on September 8, 1905. On September 12, 1905, four days later, one Andrew J. Jackson filed an affidavit of contest against Long's entry, alleging therein that Long was disqualified to enter the land at the time he offered his homestead application, because he then owned more than 160 acres of land within the state of Washington, and had never established nor maintained a residence on the land. Notice of these charges was served upon Long and a trial thereof had which resulted in a decision in favor of Long by the officers of the local land office. An appeal was also prosecuted from this decision to the Commissioner of the General Land Office, and afterwards to the Secretary of the Interior, who likewise determined the case in favor of Long; the contest being finally closed and dismissed in the land office on August 24, 1907, and notice thereof being communicated to Long on the next day. On May 29, 1907, while the last-mentioned contest proceedings were pending on appeal, the appellant sent an affidavit of contest to the local land office, averring that Long had never established a residence on the land in question; that he had done nothing more than erect a temporary shack thereon wholly unsuitable for a residence; and that subsequent to making his entry he had ceased to live on the premises and had wholly abandoned the same; praying that he be accorded a hearing in regard thereto according to the rules and practice of the land department.

On receipt of the affidavit the register of the local office notified the appellant of the pendency of the contest proceedings instituted by Jackson, and stated that the affidavit would be filed as a junior contest to be held pending the final disposition of the Jackson contest proceedings. The affidavit of contest was not corroborated as required by the rules of the land department, nor was any proceedings taken thereon at that time further than to file the same.

On August 26, 1907, the day after Long was informed that he had been successful in contest proceedings instituted against him by Jackson, he came to the local land office at Olympia and filed a relinquishment of his homestead right. Immediately prior to filing the relinquishment, he made an examination of the official records of the land office and learned for the first time of the filing of the appellant's contest affidavit; no official notice or notice of any kind having ever been sent him of its pendency. Immediately on the relinquishment being filed, his wife, the respondent in this action, made application to enter the land under the timber and stone act. Her application was allowed, and she was granted a certificate of entry. Three days later, on August 29, 1907, the register of the local land office rejected Kendall's affidavit of contest against Long's homestead entry on the grounds that his rights had already been adjudicated; that Long was absent from the land at the time the affidavit was filed on leave of absence granted him by the land department, and his right was not for that reason then contestable on the ground of abandonment; that the affidavit failed to set forth sufficient facts to constitute grounds for a contest; and that all the facts set forth in the affidavit had been adjudicated. Notice of this rejection was forthwith sent to the appellant, with the further notice that he had 30 days in which to appeal therefrom to the Commissioner of the General Land Office. No appeal was taken from the order of rejection, but on September 16th the appellant filed a protest against the entry of the respondent, alleging residence upon the land prior to and at the time the relinquishment filed by Long, the homestead claimant, and that he had by reason thereof "a prior right of entry to said tract under the laws of the United States"; alleging further that the timber entry of the respondent was fraudulent and a collusive entry between herself and her husband, and the result of a conspiracy to defraud the appellant; that the leave of absence granted Long by the land department was granted on false and fraudulent affidavits to the effect that Long was in ill health and unable to live on the land because thereof, whereas in truth and in fact he at all times was in good health; that the sole purpose and object of Long in relinquishing his homestead right to the premises and his wife in enter-

ing the same under the timber and stone act was to acquire fraudulently a precedence over the homestead application of the appellant, which he alleges was still pending before the land office. He also averred, in another paragraph, somewhat in contradiction of his former averments, that the sole purpose of the relinquishment and subsequent entry of Mrs. Long was to avoid the necessity of making a residence on the land and the consequent hardships of pioneer life, and that the Secretary of the Interior had held the land to be more valuable for agricultural purposes than for timber. On September 17, 1907, the register of the local land office dismissed the protest, giving as reasons therefor that the same was not corroborated; that service thereof had not been made upon the timber applicant; that he had no homestead application on file as alleged in the affidavit of protest; and that a certain allegation therein as to the ruling of the Secretary of the Interior was not in accord with the actual ruling of that official. Later on the respondent offered proof under the timber culture entry, whereupon the appellant appeared and sought to cross-examine the witness and otherwise contest the entry. The right to cross-examine or contest the proofs offered was refused him by the register and the proofs of entry allowed. The appellant thereupon appealed to the Commissioner of the General Land Office from the several rulings of the local office, and such proceedings were had as to result in the return of the cause to the local office with the following instruction: "You will therefore order a hearing, after due notice to the parties, to determine whether or not, prior to August 26, 1907, the date of the relinquishment of Thomas J. Long, said Kendall had settled and established residence upon the land involved herein, and was a settler thereon at the date thereof. If so, of what such settlement consisted, what improvements were made, and whether said residence has since been maintained thereon; how much of the land has been cultivated, by him, if any; and what, if any, crops have been raised by him on the land. And, upon such hearing having been had, you will transmit the evidence, together with your recommendation in the case, to this office for further consideration. In due time report your action hereunder."

Acting pursuant to this instruction, the local office ordered a hearing at which all of the parties appeared and introduced evidence to substantiate their several claims, after which the office determined that the appellant had not established a residence on the land in good faith, and that his homestead application should be rejected, and the proofs of the respondent allowed. From the decision the appellant again appealed to the General Land Office, assigning, among others, the following errors: "(3) It was error to fail to hold that Gustavus S. Kendall,

upon the filing of the relinquishment of the homestead of Thomas J. Long, had a preference right of entry inuring to him by reason of his contest against said homestead entry, which was pending at the time the relinquishment was filed. (4) It was error not to hold that Minnie S. Long had failed to overcome the prima facie presumption that the Thomas J. Long homestead entry was relinquished as a result of the contest then pending, of this appellant." The ruling of the local office was affirmed by the General Land Office by a decision rendered May 4, 1909. The opinion filed reviewed in detail the evidence introduced and held that it failed to show that the appellant was a bona fide settler upon the disputed land at the time he filed his affidavit of contest or at the time Thomas J. Long filed his relinquishment; holding further that without such bona fide settlement upon the land he had no standing to contest the entry of Minnie S. Long. From this decision the protestant appealed to the Secretary of the Interior, again urging the proposition that he was entitled to a preference right to enter the land because the relinquishment of Thomas J. Long had been made while his affidavit of contest was pending. The Secretary, however, overruled the contention and affirmed the decision of the local land office. Thereafter patent to the land was issued to Minnie S. Long under her timber entry as before stated.

The statutes of the United States relating to contest over the right to enter public lands provide that in all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry, he shall be notified by the register of the land office of the district in which the land is situated of such cancellation, and shall be allowed 30 days from the date of such notice to enter such land. Act May 14, 1880, c. 89, § 2, 21 Stat. 141 (U. S. Comp. St. 1901, p. 1393). It is on this provision of the statute that the appellant bases his right to recover. He contends that presumptively, at least, the filing of his affidavit of contest procured the relinquishment and cancellation of the homestead entry of Thomas J. Long, and that he was thereupon, in virtue of this statute, entitled to notice of such relinquishment and cancellation, and to 30 days thereafter to enter the land himself; and that the land department committed error of law when it failed to send him notice of such relinquishment and refused to allow him to enter the land, and in allowing the respondent to enter the land while his contest affidavit was pending. He also contends that the department erred in its subsequent proceedings, in that it failed to give effect to this presumption, or consider it when reviewing his protest against the allowance of the entry of the respondent.

It has been ruled by the land department

that a relinquishment filed in the face of a pending contest is prima facie presumed to be the result of the contest, and when no counter showing is made effect has been given to the presumption and the contestant given a preference right to enter the land. The presumption, however, has never been held conclusive. It is the practice to permit it to be shown that the fact is otherwise, in which case the contestant, if he is allowed to enter the land, must show a superior right to other claimants. See *Osborne v. Crow*, 11 Land Dec. Dept. Int. 210.

[1] In the case before us, it will be observed, the local land office refused to recognize the appellant's contest proceedings as being sufficiently regular to constitute a valid contest, and dismissed the same. It found that he had not paid the land office fees, and had not given notice to the entryman of his contest as required by statute; that his affidavit of contest was not corroborated as required by the rules of practice formulated by the department; and that he proposed contesting on grounds that had been the subject of an unsuccessful contest by another person. If the grounds upon which the local land office dismissed the proceedings were sound—that is, if they were sufficient upon which to base a dismissal—it is plain that no error was committed by the department in failing to give effect to the presumption that would arise were the contest proceedings sufficiently regular. The appellant contended in the court below, and contends in this court, that the contest proceedings were sufficiently regular to constitute a valid contest; but we think he is foreclosed from making this contention by his action concerning the dismissal of the proceedings by the local land office. He took no appeal to the General Land Office or to the Secretary of the Interior from that order, and the courts will not entertain a suit in equity to charge the legal title to land under a patent with a trust based on an erroneous decision of an inferior officer of the land department when a right of appeal to a superior office therein exists. In other words, a party aggrieved by an erroneous decision of the land department must exhaust his remedies in that department in an effort to obtain relief before he can resort to the courts for that purpose. So here, since the appellant did not appeal from the order of the local office dismissing his contest proceedings, he must be held bound by the order of dismissal in so far as the courts are concerned, since he did not avail himself of the relief the rules of the department itself afforded.

[2] Nor was it error, under these circumstances, for the department to fail to give effect in the subsequent proceedings to the presumption that arose from the act of relinquishment. That branch of the case was

closed by the dismissal of the proceedings, and the appellant was not at liberty to revive it by mere suggestion on the hearing of his protest against the respondent's entry. The department accorded him all of his rights when it entered upon an inquiry as to his relation to the land at the time the respondent's entry was made, disregarding any right claimed under the contest proceedings.

[3] But, if we were to conclude that the appellant was entitled to take advantage of the supposed error of the land department, we would still conclude that he could not recover in this action. The primary disposition of the public lands is vested by the Constitution of the United States in Congress. That body has passed general laws for their disposition and vested the administration of them in a special department of its own creation. In the scheme the courts were awarded no place. They have no direct supervisory control over the department decisions either by appeal or review. The right of the courts to interfere at all arises from their inherent power to right wrongs that are done to individuals by an erroneous administration of the laws. Where the conviction of the wrong involves the transfer of property from one person to another, the proceeding is equitable in its nature, and the party claiming the right must show that the superior equities are with him.

[4] In the case at bar, therefore, it was incumbent upon the appellant to show not only that Thomas J. Long released his homestead entry while his contest proceeding was pending, but also that the contest proceeding was the procuring cause of the relinquishment. To prove the latter fact, he relied wholly upon the presumption that arose from the fact that the relinquishment was filed while the contest proceedings were pending. But the respondent introduced evidence tending to show that the contest proceeding was not the cause of the relinquishment. It was shown that Thomas J. Long made up his mind to relinquish long before he knew that the contest affidavit was on file; that he went to the land office for that purpose without knowledge of the fact and learned of the affidavit only after he reached the land office; that the filing of the affidavit, so far from being the procuring cause of the relinquishment, had rather a deterrent effect on the action of Long. The appellant offered nothing to rebut this evidence, and we think he has shown no equity entitling the court to charge the respondent as a trustee holding for him the legal title of the lands patented to him.

On any view of the case, therefore, the respondent is entitled to an affirmance. It is so ordered.

DUNBAR, C. J., and GOSE, MOUNT, and PARKER, JJ., concur.



CASASSA et al. v. CITY OF SEATTLE et al.  
(Supreme Court of Washington. Dec. 2, 1911.)

1. EMINENT DOMAIN (§ 243\*)—JUDGMENT—  
CONCLUSIVENESS.

Parties and their privies are concluded by the judgment as to all matters which were or could be put in issue in condemnation proceedings.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 627-629; Dec. Dig. § 243;\* Judgment, Cent. Dig. § 1806.]

2. EMINENT DOMAIN (§ 243\*)—JUDGMENT—  
CONCLUSIVENESS.

Defendant city, desiring to regrade a street, adopted a plan and a cut, so as to make a slope at an angle of 45 degrees in front of plaintiffs' property, on the theory that such slope would protect the street, and provide lateral support for the remainder of the lot. Plaintiffs' buildings were moved back to the front of the slope, and damages assessed and paid in accordance with that plan. It thereafter developed that the slope was too steep to hold the soil, which slid into the cut, and carried with it the buildings, which were completely demolished. Held that, since the city's determination to take only sufficient land to make a slope of 45 degrees was conclusive on the owner, the damages fixed by the award were for the part so definitely taken, and no more, and for the injury to the remainder on account of the part so taken; and hence the judgment, awarding such damages, was not res judicata of plaintiffs' right to recover such additional damages as they sustained by reason of the further caving of their property and the destruction of their buildings.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 243.\*]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Peter Casassa and others against the City of Seattle and another. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Walter A. Keene and E. H. Guile, for appellants. Leander T. Turner, Sanford C. Rose, O. B. Thorgrimson, Scott Calhoun, and H. D. Hughes, for respondents.

MOUNT, J. Plaintiffs brought this action to recover damages caused by a regrade of Tenth avenue and Plummer street, in the city of Seattle. After the plaintiffs had introduced all of their evidence, the trial court was of the opinion that the defendants were not liable, and therefore discharged the jury and dismissed the action. The plaintiffs have appealed.

It appears that the plaintiffs are the owners of two city lots on the east side of Tenth avenue and immediately in front of the intersection of Plummer street with Tenth avenue, in the city of Seattle. This avenue extends north and south, while Plummer street extends west from Tenth avenue. The plaintiffs' property, prior to the regrade, had been improved, and two frame dwelling houses had been erected thereon. The lots were level with the streets. They were situated on the west slope of what is known

as Beacon Hill. Immediately to the east of these lots, and in the rear thereof, the hill rises abruptly to a considerable height, and to the westward of Tenth avenue the hill slopes down toward the waters of the sound. The elevation of the lots is about midway between the waters of the sound and the summit of the hill. In the year 1906, the city of Seattle, by ordinance, determined to regrade both Plummer street and Tenth avenue, thereby making a cut in front of the lots to a depth of from 55 to 58 feet. The plan was to make a one to one slope from the street upon the lots, which means to cut down the front part of the lots at an angle of 45 degrees. This ordinance provided for the ascertainment and payment of compensation for property taken or damaged in the change of grade. Thereupon the city, by an action in condemnation, proceeded against the owners of the lots, to acquire the right to make the grade and slope as above stated. That action resulted in an award of damages in the sum of \$1,000, which the city paid to the then owners. Thereafter the plaintiffs in this action acquired the title to the lots, and the city let a contract to the defendant Lewis & Wiley Company to make the grade. Before the work was commenced in front of plaintiffs' property, the plaintiffs caused the building to be removed to the rear of the lots, and beyond where the slope would reach. The defendant Lewis & Wiley Company proceeded, as required by the contract with the city, to make the cut and slope. This was done by blasting and sluicing. The formation of the hillside was a stratified blue clay, which was subject to slides. This fact appears to have been known to the city officers prior to the condemnation. While the excavation was in progress, the soil of plaintiffs' lots, by its own weight, slid beyond the slope as provided into the excavation in the streets, so that the houses were destroyed, and the lots themselves left in an irregular and uneven condition. The city ordinance, under which the condemnation proceedings were had, provided that: "All the lands, rights, privileges, and other property necessary to be taken, used or damaged in the grading or regrading of the streets in question and approaches thereto, in conformity with such established grades, and in the construction of the viaducts and slopes and retaining walls for cuts and fills upon the property abutting upon said streets and approaches thereto, are hereby condemned and appropriated for the public use, for the purpose of making such changes of grade and in the construction of the necessary viaducts and slopes and retaining walls in the grading and regrading of said streets." The condemnation petition also recites that the object for which the proceeding was brought was to ascertain the damages to the land

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

and property rights necessarily taken or damaged by reason of the proposed improvement, and by the construction of the necessary viaducts and slopes and retaining walls for cuts and fills on abutting property in the manner prescribed by said ordinance, and for a release from all liability to the owners of such property, or others having an interest therein, that may be damaged or injuriously affected by reason of the improvement provided for in said ordinance. The trial court upon these facts was of the opinion that the purpose of changing the slopes was to protect the street and travel thereon from slides which might occur, and that the whole damage to the property by reason of the cut was determined in the condemnation proceedings, and paid to and accepted by the owners of the property at that time; and because the character of the soil and its disposition to slide was known the damages which occurred on that account were or should have been tried and determined in the condemnation proceedings, and may not be tried in this action, even though the damages were actually greater than might have been anticipated at that time.

[1, 2] This court has many times held that parties and their privies are concluded as to all matters which were put in issue in the condemnation proceedings. *Compton v. Seattle*, 38 Wash. 514, 80 Pac. 757, and cases there cited. In *Parke v. Seattle*, 5 Wash. 1, 31 Pac. 310, 32 Pac. 82, 20 L. R. A. 68, 34 Am. St. Rep. 839, this court held the city liable for damages caused in grading the street, whereby the abutting land was deprived of lateral support; and in *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161, this court held that the city may not lower the surface of the street, without subjecting itself to damages for the injury thereby occasioned to the abutting owner. It is apparent from the rules laid down in these cases that the city was liable for damages caused by the removal of the lateral support to the land abutting upon this deep cut. It is also apparent that, if the city condemned the right to make a cut 58 feet deep in front of this property, the judgment in that condemnation proceeding was conclusive of all damages which were or could have been litigated therein; and if the city, without negligence, proceeded to make the cut no further liability would be incurred, although greater damages might result than were covered by the award. In this case it is conceded that the city, in addition to the cut, undertook to make a slope of one to one upon the abutting lots. The purpose of this slope is apparent. It was to so cut down the lots that the remaining soil thereon would provide for the lateral support. If the remaining soil would stand upon the slope, the street and travel thereon would thereby be protected, and the only injury, if any, to the lots by reason of the

regrade would be the removal of the wedge-shaped tract, and the difference between the level lots and the lots in the elevated position above the street. The purpose was therefore twofold: (1) To protect the street; and (2) to lessen the damage by obviating the question of lateral support. The street was already a public street and the city did not have to condemn any portion for a street. The city had a right to change the grades, provided it did not damage the adjoining lots. *Parke v. Seattle*, supra. The condemnation proceedings gave the city the right to enter upon the lots in question, and to construct the slope. As above stated, the theory of the city no doubt was that, when the designated slope was constructed, the soil would not slide of its own weight, and the city would thus reduce or entirely obviate the damages caused by the removal of the lateral support. The city assumed that the one to one slope would be sufficient for that purpose, and condemned and paid for the right to make that slope to a depth of 58 feet in front of the lots. The buildings located upon the lots were then moved back, so that no part thereof was upon the slope. When the contractors for the city proceeded with the work of excavation, the slope was not sufficient to hold the soil, which, on account of its character, slid into the cut, and carried with it the houses, which were completely demolished.

Respondents now maintain that, because the ordinance required all the lands, rights, and privileges and other property necessary to be taken, used, or damaged in the grading or regrading of the streets, and because the petition in condemnation recites that the object for which the proceeding was brought was to ascertain the land and property rights necessarily taken and damaged, and because it was the duty of the lot owners to litigate in the condemnation proceedings every ground of recovery which might have been presented therein, therefore the judgment in the condemnation was res adjudicata of the damages claimed in this action. We think there could be no doubt of the application of this rule, if the city had taken no more than the slope designated, or substantially no more, as was done in the *Compton Case*. It seems plain that the city had a right to take by condemnation such lands and privileges as were necessary to construct the street as proposed. It also seems plain that the city had the right to determine in advance what quantity of land was reasonably necessary to be taken, in order to protect the street, or to protect the lateral support of the abutting property. The property owner could not decide for the city what it was necessary for the city to take. *State ex rel. Burrows v. Superior Court*, 48 Wash. 277, 93 Pac. 423, 17 L. R. A. (N. S.) 1005, 125 Am. St. Rep. 927. When the city in this case determined that it would take only sufficient land to make a slope of 45

degrees, the city, as well as the property owner, was bound by that determination. The city in substance thereby said to the property owner: "This much of your property, and no more, is necessary to be taken. This will protect the street from earth which may fall by reason of the taking away of the lateral support. It is sufficient and all that is necessary." The damages fixed by the award in condemnation were for the part definitely taken, and no more, and for the injury to the remainder on account of the part actually taken. We think the question whether the city took sufficient property in the condemnation proceeding could not have been properly litigated there. It would certainly be unreasonable to hold that the city, having taken a parcel of land definitely located, might take as much more as subsequently proved necessary, even to the destruction of the buildings upon the land outside of the part taken, without being liable for additional damages. It appears that the defendant Lewis & Wiley Company was a contractor, who did the work as directed by the city. There may be some slight evidence of negligent work; but it is also shown that the damage would have resulted, had the work been carefully done. It is apparent, therefore, that, if there is any liability, the city, and not the contractor, is responsible.

As to the defendant Lewis & Wiley Company, the judgment is therefore affirmed, but as to the city the judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and PARKER and GOSE, JJ., concur.

#### STATE v. NICK.

(Supreme Court of Washington. Dec. 2, 1911.)

##### 1. BRIBERY (§ 6\*)—INDICTMENT—SUFFICIENCY.

Under Rem. & Bal. Code, § 2320, prescribing punishment for bribing public officers, an indictment, charging that accused gave a police officer \$10, with intent to influence such officer to disregard his power to prevent accused from conducting a house of prostitution, is not insufficient for failing to set forth the officer's powers and duties, where the charter of the city empowers such officer to make arrests to prevent commission of public offenses, etc.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 5-8; Dec. Dig. § 6.\*]

##### 2. CRIMINAL LAW (§ 304\*)—EVIDENCE—JUDICIAL NOTICE.

The courts of Washington take judicial notice of the contents of the charter of the city of Seattle.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 700-717; Dec. Dig. § 304.\*]

##### 3. BRIBERY (§ 1\*)—CONSTRUCTION—"PERSON."

Rem. & Bal. Code, § 2320, prescribes a penalty against every person who bribes an executive or administrative officer of the state, or any member of the Legislature, or any judicial officer, juror, referee, etc., or any "person executing any of the functions of a public

officer other than as hereinbefore specified." *Held*, that the word "person," in the quoted clause, is not limited to the officers enumerated in the preceding part of the section, and includes police officers.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5322-5335; vol. 8, p. 7752.]

Department 1. Appeal from Superior Court, King County.

A. B. Nick was convicted of bribery, and he appeals. Affirmed.

Gill, Hoyt & Frye and R. L. Blewett, for appellant. John F. Murphy and Hugh M. Caldwell, for the State.

FULLERTON, J. The appellant was indicted by the grand jury of King county for the crime of bribing a public officer; the charging part of the indictment reading as follows: "The said A. B. Nick, alias A. B. Nickerson, on the 9th day of March, 1911, in the county of King, state of Washington, did then and there willfully, unlawfully, feloniously, and corruptly offer and give a compensation and gratuity of ten dollars (\$10) in lawful money of the United States of America, and five dollars (\$5) in lawful money of the Dominion of Canada, to H. S. Thompson, then and there a person duly and regularly executing the functions of a public officer, to wit, the functions of a police officer of the city of Seattle, said county and state, with intent him, the said H. S. Thompson, to influence with respect to an act and decision in the exercise of his powers and functions as such officer, to wit, to influence the said H. S. Thompson to disregard and ignore his functions and power to prohibit and prevent the said A. B. Nick, alias A. B. Nickerson, from conducting a house of prostitution in the said Seattle, King county, Washington."

The indictment was framed under section 2320 of Rem. & Bal. Code, which provides: "Every person who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to any executive or administrative officer of the state, with intent to influence him with respect to any act, decision, vote, opinion or other proceeding, as such officer; or who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a member of the legislature, or attempt, directly or indirectly, by menace, deceit, suppression of truth or other corrupt means, to influence such member to give or withhold his vote, or to absent himself from the house of which he is a member or from any committee thereof; or who shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a judicial officer, juror, referee, arbitrator, appraiser, assessor or other person authorized by law to hear or determine any question, matter, cause, proceeding or controversy,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with intent to influence his action, vote, opinion or decision thereupon; or shall give, offer or promise, directly or indirectly, any compensation, gratuity or reward to a person executing any of the functions of a public officer other than as hereinbefore specified, with intent to influence him with respect to any act, decision, vote or other proceeding in the exercise of his powers or functions, shall be punished by imprisonment in the state penitentiary for not more than ten years, or by a fine of not more than five thousand dollars, or by both."

On being arraigned, the appellant demurred to the indictment, on the ground that it did not state facts sufficient to constitute a crime. The demurrer was overruled, whereupon he entered a plea of not guilty, and was tried, convicted, and sentenced for the crime charged in the information. From the judgment of conviction, he appeals.

[1, 2] The record suggests but one question, namely, the sufficiency of the allegation of the indictment to constitute a crime. The appellant first contends that a police officer as such is not a public officer, and does not ordinarily perform the functions of a public officer; that his powers and duties are not defined by statute, but are wholly the creation of municipal ordinances, which the court cannot know judicially; hence it is argued that this information is fatally defective, in that it does not set forth the powers and duties of the police officer alleged to have been bribed, so that the court may know that he was such a public officer as the statute made it a crime to bribe. The information, it will be observed, does set out the specific act which the officer was bribed to refrain from doing; and it is clear that this act was one that involved the powers and functions of a public officer. True it is not alleged in direct terms that the officer had the power and authority to do what he is charged to have refrained from doing, but it is inferentially so alleged, and this is sufficient against a general demurrer. But, while this would seem sufficient to meet the objection raised, we think the indictment sufficient for another reason. The courts can know judicially the contents of the charter of the city of Seattle; hence they can know that there is a police department in the city of Seattle, composed of police officers, who exercise the powers and functions of public officers; that is to say, they have power to make arrests for public offenses already committed, to make arrests to prevent the commission of public offenses, and to maintain the peace and quiet of the city. These are clearly the functions of public officers.

[3] A second contention is that, conceding the police officer to be a public officer, we must apply to the particular clause of the statute upon which this indictment is found-

ed the rule of *ejusdem generis*, and restrict the meaning of the word "person" to the class enumerated in the preceding part of the section. This is a rule of construction, undoubtedly, where general words follow an enumeration of particular things; but this statute contains words which render the rule inapplicable. It expressly makes it a crime to give a gratuity or reward "to a person executing any of the functions of a public officer other than as hereinbefore specified," showing, as we think, a clear manifestation of the purpose to include acts and things, other than those specifically enumerated in the preceding part of the section. It must therefore be given the effect of an independent clause, and so construed it must be held to include public officers, other than those specifically enumerated.

The judgment is affirmed.

DUNBAR, C. J., and GOSE and PARKER, JJ., concur.

#### STEENSTRUP v. TOLEDO FOUNDRY & MACHINE CO.

(Supreme Court of Washington. Dec. 1, 1911.)

##### 1. CONTINUANCE (§ 20\*)—GROUNDS—ABSENCE OF NONRESIDENT COUNSEL.

Though, under Rem. & Bal. Code, § 120, a nonresident attorney may be given the privilege of appearing for a party, the court is not required to delay the trial of the case to await the convenience of such attorney to be present and participate in the trial.

[Ed. Note.—For other cases, see Continuation, Cent. Dig. §§ 51, 53-57; Dec. Dig. § 20.\*]

##### 2. CONTINUANCE (§ 20\*)—GROUNDS—ABSENCE OF NONRESIDENT COUNSEL.

Denial of a continuance on the ground of the absence of a nonresident attorney of a foreign corporation represented in the case from the beginning by a resident attorney, as well as by the nonresident, is not an abuse of discretion, where the action had been pending for several months.

[Ed. Note.—For other cases, see Continuation, Cent. Dig. §§ 51, 53-57; Dec. Dig. § 20.\*]

##### 3. CONTINUANCE (§ 15\*)—FAILURE TO ANSWER INTERROGATORIES.

Where interrogatories were served on plaintiff six months after the action was begun and at a time the case had either been set for trial or was about to be set, and plaintiff moved to strike the interrogatories because of delay in serving them and because of their irrelevancy, the denial of a continuance on the ground of plaintiff's failure to answer the interrogatories was not an abuse of discretion; defendant not having sought a ruling on plaintiff's motion before applying for a continuance.

[Ed. Note.—For other cases, see Continuation, Cent. Dig. §§ 38, 37; Dec. Dig. § 15.\*]

##### 4. APPEARANCE (§ 9\*)—GENERAL APPEARANCE—WAIVER OF DEFECTS IN SERVICE OF SUMMONS.

A foreign corporation answering on the merits and filing with its answer a cross-complaint seeking a money judgment against plaintiff on a cause of action growing out of the same transaction on which plaintiff based his

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

claim thereby appeared generally, and waived defects in the service of the summons on it.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 42-52; Dec. Dig. § 9.\*]

**5. EVIDENCE (§ 455\*)—PAROL EVIDENCE—MODIFICATION OF CONTRACTS—"EXPENSE"—"F. O. B."**

A contract of sale of a machine which stipulates for its shipment f. o. b., and for the payment by the buyer of expenses of unloading, installing and operating the machine for demonstration to determine compliance with the seller's guaranty, and which provides that, on the failure of the seller to demonstrate fitness, it will remove the machine at its own expense, and refund any portion of payment received thereunder, and that the buyer waives any right for possible damages or expenses, is ambiguous on the question of liability for freight charges in case the sale fails because the machine does not comply with the guaranty, and parol evidence was proper that the seller agreed in that event to refund the freight paid by the buyer; the word "expense" waived by the buyer referring only to the expense of unloading, installing, and operating, and the words "f. o. b." contemplating payment of freight by the buyer in case of consummation of the sale.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2104; Dec. Dig. § 455.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2590-2593; vol. 8, p. 7657; vol. 3, p. 2636; vol. 8, p. 7659.]

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by Paul Steenstrup against the Toledo Foundry & Machine Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wesley J. Wuerfel and James T. Lawler, for appellant. Gill, Hoyt & Frye and R. L. Blewett, for respondent.

**PARKER, J.** This is an action to recover the sum of \$1,123.15 paid by the plaintiff for freight charges upon a steam shovel which was shipped from Toledo, Ohio, to Seattle, in pursuance of a contract for the sale thereof from the defendant to the plaintiff. A trial resulted in findings and judgment in favor of the plaintiff and against the defendant for that sum. The defendant has appealed.

It is first contended that the trial court erred in denying appellant's motion for a continuance of the trial. Appellant is a corporation of Toledo, Ohio. This action was commenced in May, 1910. The trial was set for December 16, 1910. Appellant has been at all times since June 10, 1910, represented in the case by James T. Lawler, a resident attorney of Seattle, and also by Wesley J. Wuerfel, an attorney of Ohio, residing at Toledo, in that state, who is not a member of the bar of this state, though it may be conceded that he may be granted the privilege of appearing and practicing in our courts under section 120, Rem. & Bal. Code. On December 16, 1910, Mr. Lawler as attorney for appellant moved the court for a continuance of the trial supported by his affidavit, stating, in substance, that Mr. Wuerfel as one of the attorneys for

appellant had the principal charge of the case, and was the only attorney in the case who was acquainted with the facts and prepared to act for appellant upon the trial; that he, Lawler, did not have such knowledge of the facts as to be in a position to intelligently conduct the defense; that it was understood between him and Mr. Wuerfel that Mr. Wuerfel would try the case on behalf of appellant; that technical matters were involved in reference to steam shovels with which he was not familiar, but with which Mr. Wuerfel was familiar; that Mr. Wuerfel was then sick at his home at Toledo, and unable to be present at the time the trial was then set for; and that certain interrogatories which had been propounded and served upon respondent had not been answered. So far as this motion rests upon the absence of Mr. Wuerfel from the state, we think there was no abuse of discretion on the part of the trial court in denying the motion.

[1, 2] While our law contemplates extending the courtesy of practicing in our courts to attorneys of other states, we do not think that our courts are thereby required to delay the trial of causes to await the convenience of such attorneys to be present and participate therein. There may be circumstances under which a trial court might be justified in delaying a trial for such a purpose, but for this court to say that the refusal of a trial court to do so would be an abuse of its discretion would require a showing of far greater necessity for the presence of such nonresident attorney than is made in this case. Indeed, it may well be doubted that a party to an action has any right to be represented by non-resident counsel except when such counsel is present in the state when the action is pending at such times as the presence of counsel is required in the action. To say that the enforced absence of nonresident counsel gives cause for continuance under similar circumstances as the enforced absence of resident counsel would render possible delays such as the law never contemplated. The disposition of the vast amount of litigation pressed upon the attention of our courts cannot be subjected to such contingencies except in the discretion of the trial court. We view a continuance under such circumstances as little else than a matter of grace. We may add that in this case the appellant's cause was apparently well conducted by Mr. Lawler, notwithstanding his opinion that he was unprepared.

[3] Nor do we think that the failure of respondent to answer the interrogatories was a cause for continuance under the circumstances. As we have seen, the case was commenced in May, 1910. The interrogatories were served upon respondent on November 28, 1910, six months after the commencement of the action, and at a time when the case had either been set for trial or was about to be set for trial. Respondent moved to strike the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

interrogatories on the ground of delay in serving them, and also on the ground of their irrelevancy to the issues involved. Appellant did not seek a ruling of the court upon this motion before making application for a continuance nor before the trial. Respondent was present at the trial and testified, and appellant's counsel had there every opportunity to examine him. We conclude there was no error in the denial of the motion for continuance.

[4] It is next contended that the court erred in denying appellant's motion to quash the service of the summons. The only answer that this contention requires is the fact that appellant thereafter answered upon the merits and also filed with its answer a cross-complaint seeking a money judgment against respondent upon an alleged cause of action growing out of the same transaction upon which appellant based its claim. This was clearly a general appearance by which appellant waived whatever defects there may have been in the service of the summons upon it. *Walters v. Field*, 29 Wash. 558, 70 Pac. 66; *Hodges v. Price*, 38 Wash. 1, 80 Pac. 202; *Calhoun v. Nelson*, 47 Wash. 617, 92 Pac. 448; *Springfield Shingle Co. v. Edgecomb Mill Co.*, 52 Wash. 620, 101 Pac. 233.

[5] It is next contended that the trial court erroneously admitted and considered certain evidence which it is insisted by counsel for appellant was in contradiction of the terms of the written contract of sale of the steam shovel, upon which contract alone they claimed the rights of the parties here involved depend. The terms of that contract so far as we need notice them here are as follows: "Toledo, Ohio, March 11th, 1910. This agreement, made in duplicate, witnesseth: The undertaking upon the terms and conditions as in this conditional sale contract set forth, of the delivery of one class 2 Victor steam shovel, No. 506, from the Toledo Foundry & Machine Company, of Toledo, Ohio, hereinafter styled the seller, into the possession of Paul Steenstrup of Seattle, Washington, doing business and known as Paul Steenstrup, Contractor, hereinafter called the buyer. This writing contains all and singular the agreements and conditions, and warranties, between the parties hereto. \* \* \* Said machine is to be shipped f. o. b. Toledo, Ohio, on or about the 12th day of March, 1910; and upon receipt of wire notice (which buyer hereby agrees to send to said seller immediately upon arrival of said shovel at destination), or as soon thereafter as possible, seller agrees to send a competent steam shovel engineer to superintend the unloading and installing, and to operate the engines of said steam shovel to demonstrate same to be in accordance herewith; said engineer to be entirely at the expense of seller for a period of not exceeding 15 days of 10 hours each; but should it be found necessary for him to remain longer, buyer hereby agrees to pay

seller \$6.00 per day for each day of such overtime. All other expenses of unloading, installing and operating of said steam shovel for demonstration, buyer hereby agrees to bear. The seller guarantees said machine to be as set forth on page six of catalogue No. 1, issued by seller, and as per specifications hereto attached, which are made part of this contract. If after said demonstration said steam shovel is in accordance herewith, buyer hereby agrees to at once accept same and relieve seller of further expenses by signing and delivering to seller's engineer a formal acceptance of the shovel in the following terms: 'Received from the Toledo Foundry & Machine Company, of Toledo, Ohio, the possession of steam shovel No. 506 in full satisfaction,' whereupon the liability of the seller shall cease and determine; and to sign and deliver to the seller the notes as herein provided, and the possession of said shovel will not be acquired by buyer until the delivery to the engineer of said acceptance and signed notes. If, during said demonstration any parts of said steam shovel prove defective or any changes be necessary, seller shall have a reasonable length of time to replace such parts or make such changes as may be found necessary. If seller then fails to demonstrate the guarantee, it agrees to remove said steam shovel at its expense and to refund whatever portion of payment it has received hereunder, and buyer hereby expressly waives any right or claim for possible damages or expense." This contract was signed by respondent on March 11, 1910, the date it bears, at Seattle, and was signed by appellant on March 16, 1910, at Toledo, Ohio. It was prepared by appellant at Toledo and sent to Hadley & Rinker of Seattle, who were acting as agents for appellant in the sale. Negotiations between respondent and Hadley & Rinker had been carried on for some time looking to this sale, when on March 7, 1910, appellant wrote to Hadley & Rinker a letter inclosing this form of contract, in which letter it is stated: "Your customers will run no risk whatever; if our shovels do not come up to the guarantee, they can be rejected and we will refund all payments made to us and the freight paid by them. Our Victor steam shovels are not an experiment and are not excelled, we believe, by any other make. We beg to confirm the telegram we sent you this P. M. as follows: 'Steenstrup option fifty-five ton shovel still good on terms your letter January seventeenth.' In this connection we may say that we are building these shovels constantly and are in shape to ship promptly on receipt of order. We are sure that your customers will be highly pleased with the Victor, as it is a shovel that will do the work on a minimum expense per yardage. We inclose herewith a blank form of the contract under which we deliver the shovels and which we will execute upon re-

ceiving an order from you, based on the terms and conditions therein set forth." This letter was received at Seattle by Hadley & Rinker with the form of contract inclosed as stated about March 10 or 11, 1910. The letter was then shown to respondent by Hadley & Rinker, and the statement therein as to refunding freight charges upon failure of the guaranty particularly called to respondent's attention with the assurance on the part of Hadley & Rinker that the freight charges would be refunded to respondent in the event the steam shovel should not come up to the guaranty. Thereupon the contract was signed by respondent and returned by Hadley & Rinker to appellant at Toledo, when it was signed by appellant on March 16, 1910. The shovel was shipped from Toledo, arriving at Seattle April 5, 1910, when respondent paid the \$1,123.15 freight charges thereon. The demonstration of the shovel was then proceeded with under the superintendence of a steam shovel engineer in pursuance of the contract. This demonstration failed to show that the shovel was as guaranteed, notwithstanding ample time was given therefor as well as for curing defects in the shovel. Thereupon respondent rejected the shovel, and commenced this action to recover the amount of the freight charges he had paid thereon. The letter of March 7th from appellant to its agents, Hadley & Rinker, the showing of that letter by it to respondent, and the conversation then occurring touching the refunding of freight charges as stated in the letter, constitute the evidence admitted and considered by the court which is insisted by counsel for appellant to be inadmissible, in view of the provisions of the written contract of sale. The contention is that the provisions of this written contract constitute the sole evidence by which to determine appellant's liability to refund the freight charges to respondent. If the written contract was clear and certain upon the question as to which of the parties should be responsible for the freight charges in the event of the failure of the sale because of the failure of the guaranty, there would be merit in this contention. It seems to us, however, that the written contract is not so certain in this particular, as to exclude contemporaneous acts and conversations of the parties putting their own construction upon the terms of the written contract or evidence of a separate contract concerning the freight such as we find in this letter and the contemporaneous conversation, which clearly indicates that respondent was to have the freight charges refunded to him by appellant in the event of the failure of the guaranty and his rejection of the shovel

on that account. It may well be argued that the "expense" waived by respondent refers only to the "expense of unloading, installing, and operating" mentioned in the contract as being assumed by respondent. It is true that the shovel was to be sold f. o. b. at Toledo, and this, of course, contemplated payment of freight by respondent in case of the sale being consummated. We think it does not necessarily follow that he was to lose the freight in case there was no consummation of the sale through the fault of appellant. Whether we regard the showing of this letter by Hadley & Rinker to respondent and the contemporaneous conversation as creating a separate contract from the written sale contract or as a contemporaneous construction of the sale contract which we regard as uncertain in this particular, we think this evidence was admissible and sufficient to base respondent's recovery upon, in the event he was under the terms of the sale contract justified in rejecting the shovel.

It is finally contended that the evidence is insufficient to sustain the findings and judgment. Our review of the evidence convinces us that it was ample to warrant the conclusion that the shovel was proven so defective as to wholly fail to meet the requirements of the guaranty, and that appellant did not remedy the defects in the shovel, though ample time was given for that purpose. We deem it unnecessary to review the evidence in detail here.

We conclude that the judgment should be affirmed. It is so ordered.

DUNBAR, C. J., and MOUNT, FULLERTON, and GOSE, JJ., concur.

### ELLIOTT v. TOLEDO FOUNDRY & MACHINE CO.

(Supreme Court of Washington. Dec. 1, 1911.)

Department 1. Appeal from Superior Court, King County; R. B. Albertson, Judge.

Action by George R. Elliott against the Toledo Foundry & Machine Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wesley J. Wuerfel and James T. Lawler, for appellant. Gill, Hoyt & Frye and R. L. Blewett, for respondent.

PER CURIAM. This appeal involves only the denial of a motion for a continuance of the trial of the case upon the same grounds as the motion for a continuance in the case of Paul Steenstrup v. Toledo Foundry & Machine Company, 119 Pac. 16, just decided by us. For the reasons there stated, we conclude that there was no error in the denial of the motion for a continuance in this case. The judgment is therefore affirmed.

## STATE v. ROSS.

(Supreme Court of Washington. Dec. 2, 1911.)

## ELECTIONS (§ 328\*)—FALSE REGISTRATION.

Under Rem. & Bal. Code, § 4775, punishing any person causing any name to be placed on the registry list otherwise than as provided by law, an information, alleging that accused when registering gave as his place of residence what was not in fact such residence, without alleging that his residence was not in the precinct for which he registered, charges no offense.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 355-363; Dec. Dig. § 328.\*]

Department 1. Appeal from Superior Court, King County; John F. Main, Judge.

Frank Ross was convicted of crime, and he appeals. Reversed.

Gill Hoyt & Frye, for appellant. John F. Murphy and George H. Rummens, for the State.

PARKER, J. The defendant has appealed to this court from his conviction, in the superior court for King county, upon an information charging as follows: "He (said Frank Ross) in the county of King, state of Washington, on the 26th day of January, 1911, did willfully, unlawfully, and feloniously place or cause his name to be placed upon the registry list, for qualified voters at any election to be held during the year A. D. 1911, of the First precinct of the First ward of the city of Seattle, said county and state, otherwise than in the manner provided by law, to wit: That on said date the said Frank Ross appeared in person before Albert Linstrom, then and there a duly and regularly qualified and sworn deputy clerk of the city of Seattle, King county, state of Washington, and applied to be registered as a voter in said city, county, and state, and gave his name, and number of place of residence as Western Hotel, N. E. Cor. First Avenue South and Washington street, in said city of Seattle, when in truth and in fact the said Western Hotel, N. E. Cor. First Avenue South and Washington street, the place of residence so given by him, was not then and there the place of residence of the said Frank Ross." Reversal of the judgment of conviction is sought, upon the grounds, among others, that the trial court erred in overruling appellant's demurrer to the information and his motion for arrest of judgment, for the reason that the information does not charge facts constituting a crime.

It is at once apparent that the only fact charged by this information, and relied upon by the prosecuting attorney to rest appellant's conviction upon, is that he gave as the place of his residence the Western Hotel, which was not then his place of residence. There is nothing in this information, even inferentially indicating that appellant was

not lawfully entitled to vote in the precinct for which he registered. The provisions of our statute which, it is claimed by the prosecuting attorney, make the mere giving of a wrong place of residence for registration a crime are found in section 4775, as follows: "If any person shall falsely swear, or affirm, in taking the oath or making the affirmation prescribed in section 4768, or shall falsely personate another, and procure the person so personated to be registered, or if any person shall represent his name to the city or town clerk, or officer of registration, to be different from what it actually is and cause such name to be registered, or if any person shall cause any name to be placed upon the registry list otherwise than in the manner provided in this act he shall be deemed guilty of a felony, and upon conviction be punished by confinement and hard labor in the penitentiary not more than five years nor less than one year."

Let us notice these several acts, with a view to determining whether or not the act charged against appellant is among them. It is plain that appellant is not charged with falsely swearing to any of the facts embodied in the oath prescribed by section 4768, for that oath is silent as to place of residence of the voter, except as to it being in the state, county, and precinct for certain periods. It is plain that appellant is not charged with impersonating another, and procuring such person to be registered. It is plain that appellant is not charged with representing his name to be different from what it actually is. We have then to consider only the last clause of that portion of the section mentioning the acts which are punishable thereunder, to wit, "If any person shall cause any name to be placed upon the registry list otherwise than in the manner provided by this act." This is the crime which the prosecuting attorney contends was committed by appellant when he gave his place of residence. We are not able to agree with this contention. We do not think that merely alleging that appellant gave his place of residence different from what it was in fact, without any allegation that his residence was not in the precinct for which he registered, charges him with the crime mentioned in this last-quoted clause. This is not one of the facts embodied in the oath prescribed by law which the person registering must take. It seems to us that, if the Legislature had intended to visit this severe penalty upon one who merely gave an untruthful statement as to his exact place of residence, there would have been much clearer language so indicating than we find here. The fact that the statement of the voter's residence in the prescribed oath descends in its details only to the precinct, together with the fact that these other acts, declared to be criminal, are

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



specifically enumerated in section 4775, leads us to conclude that the act charged against appellant is not a crime under that section. As said in *State ex rel. Coon v. Hay*, 51 Wash. 576, 581, 99 Pac. 748, 749: "The penalty for violating this statute is severe. It should not attach, unless the meaning of the language is plain and the violation clear."

The judgment is reversed.

MOUNT and FULLERTON, JJ., concur.

#### STATE v. ORT et al.

(Supreme Court of Washington. Dec. 2, 1911.)

#### 1. PUBLIC LANDS (§ 184½, \* New, vol. 13, Key No. Series)—LANDS OF STATE—SALE—MISTAKE—VACATION—STATUTES.

Rem. & Bal. Code, § 6680, providing that any sale or lease of state land made by mistake, or not in accordance with law, or obtained by fraud or misrepresentation, shall be void, and the contract to purchase or lease issue thereon shall be of no effect, and the holder shall be required to surrender the same to the commissioner of public lands, applies to executory contracts only, and does not entitle the state to maintain an action to set aside patents to land sold as agricultural because it in fact contained over 1,000,000 feet of timber per quarter section which was not sold separately from the land, as required by the existing statute.

#### 2. PUBLIC LANDS (§ 184½, \* New, vol. 13, Key No. Series)—LANDS OF STATE—SALE—VACATION.

Where the state approved applications for the purchase of state land, on the belief that it was agricultural, and did not contain timber of material value, and executed patents therefor, the state could not thereafter recover the land, in the absence of fraud for mere mistake in determining the character of the land.

Department 1. Appeal from Superior Court, Lewis County; A. E. Rice, Judge.

Action by the State against O. O. Ort and others, to set aside certain patents of state land. Judgment for defendants, and the State appeals. Affirmed.

W. V. Tanner, Geo. A. Lee, and S. H. Kelleran, for the State. Dysart & Ellsbury and Forney & Ponder, for respondents.

FULLERTON, J. In April, 1906, one O. O. Ort and one Elwood Purcell made separate applications to purchase from the state two certain adjoining quarter sections of state land, situate in Lewis county. In his application, which was made upon one of the state's forms, Ort stated in answer to specific questions that the land was agricultural and pastoral, and that he did not consider it valuable as timber land. Purcell stated in his application that the quarter section he sought to buy was all agricultural land, being nearly all swamp and creek bottom, with scattering fir timber, not valuable for timber. On receipt of the applications,

the state sent out its inspector to view the lands and make a report thereon. The inspector reported the land to be suitable chiefly for agricultural purposes, having but little timber upon it, which was of no considerable value. The state board having charge of the disposition of the state lands accepted the statements of the applicants and the report as true, and acting thereon sold the land to the respective applicants at the minimum price allowed by law, and issued deeds on behalf of the state therefor. The procedure followed by the state officers was that required by the then existing laws relating to the sale of state lands of the character these were assumed to be, and on their face were regular and sufficient to pass the state's title in the lands to the purchasers. After acquiring title to the lands, the purchasers conveyed them to the Carlisle-Pennell Lumber Company, a corporation; in fact, it is conceded in the record that the purchases were made in the behalf of that company; it desiring control of the lands as a means of protecting timber lands it owned in the vicinity, and because the only feasible route for a logging road from such timber lands to the market place for logs was over these quarter sections.

The then existing statutes, relating to the sale of state lands, however, provided that whenever the estimated amount of timber of commercial value on any quarter section exceeded 1,000,000 feet the timber thereon should be sold separately from the land, under a condition that the same should revert to the state, if it was not removed from the land within three years from the date of purchase. Some time after the sales of these lands had been consummated, the land officers of the state discovered that each of the quarter sections contained timber of commercial value estimated to exceed 1,000,000 feet, and conceiving that the sale thereof, without first selling the timber thereon separately, was in contravention of the statute, and therefore invalid, caused the present action to be begun to recover the same. In the complaint, it is alleged that the inspector who examined the land reported that there was not merchantable timber on the same to exceed 1,000,000 feet through inadvertence, neglect, or mistake, and that his report and the applications of Ort and Purcell were "false and fraudulent in this: That said land contained more than 1,000,000 feet of merchantable timber, to wit, more than 8,000,000 feet of fir, cedar, and hemlock." Issue was taken on the allegations of the complaint, and a trial had, which resulted in a judgment in favor of the defendants. The state appeals.

On the trial, the state made no attempt to show fraud on the part of the applicants for the land, or on the part of the cruiser who

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

inspected the land on behalf of the state. It contented itself with showing that each quarter section of the land contained at the time of the application and sale more than 1,000,000 feet of merchantable timber, and that its officers were led to believe the contrary through the inadvertence or mistake of its inspector.

[1,2] Section 6680 of the Code (Rem. & Bal.) provides that any sale or lease of state land made by mistake, or not in accordance with law, or obtained by fraud or misrepresentation, shall be void, and the contract of purchase or lease issued thereon shall be of no effect, and that the holder of such contract or lease shall be required to surrender the same to the Commissioner of Public Lands. It is on this section of the statute that the state bases its claim of right to recover. It contends that these quarter sections were not sold in accordance with law, but by mistake and inadvertence, because they contained at the time of the sale more than 1,000,000 feet of timber of commercial value, and hence could not be sold under the statute, without first selling the timber thereon separately from the land itself. The evidence convinces us that each of the two quarter sections did have timber of commercial value thereon exceeding 1,000,000 feet, and that under the statute the timber thereon should have been sold first and apart from the land; but we are unable to concede that for this reason alone the state may maintain the present action. In each of these instances, the purchase price of the land has been paid, and deeds have been issued. The state has thus parted with its title to the property, and if it sets aside the sale it must do so on some equitable principle that authorizes an individual to set aside and declare for naught his executed contracts. The statute relied upon by the state, as we view it, has no application to a case of this kind. It will be noticed that it refers throughout to executory contracts; contracts wherein the state has not parted with its interests, and wherein something remains to be done by each of the parties before the sale is consummated. But here the contract is executed. Each of the parties have dealt at arm's length, and have completed the transaction. The state therefore stands in relation to the respondents as one attempting to avoid its executed contract.

That the state may have innocently made a mistake as to the character of the land is no ground for setting aside its sale. It can vacate and set aside its consummated sale of land only in those cases where fraud has been practiced upon its officers by the purchasers, or through their connivance. This we held in *State v. Heuston*, 56 Wash. 268, 105 Pac. 474. That was a case where the state sought to set aside a deed executed for certain oyster lands, which it was claimed

had been sold under a mistake as to the character of the land. But we held that the state was obligated to discover the character of the land prior to the time it made the sale, and that the finding of its officers to the effect that the land was of a character that could be sold in the manner in which it was sold was conclusive upon the state, in the absence of fraud practiced upon it by the purchaser.

Such, also, is the case at bar. Whether this land contained more than 1,000,000 feet of timber was a question of fact, which the state determined adversely to the contention when the sale was made. It cannot now vacate the sale then made on the mere showing that it was mistaken as to the fact. As we say, it must be made to appear that the mistake was brought about by the fraud or connivance of the purchasers.

The judgment of the trial court was right, and it will stand affirmed.

DUNBAR, C. J., and GOSE, MOUNT, and PARKER, JJ., concur.

#### JOHNSON v. JOHNSON et al.

(Supreme Court of Washington. Dec. 2, 1911.)

##### 1. PLEADING (§ 418\*)—WAIVER OF OBJECTION—RULING ON DEMURRER.

An assignment of error that a court erred in overruling a demurrer to a complaint will not be considered on appeal of the cause, where the defendants answered, and proceeded to trial on the merits.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1403-1406; Dec. Dig. § 418.\*]

##### 2. EXECUTION (§ 222\*)—SALE—NOTICE—STATUTORY PROVISIONS—ACTUAL NOTICE.

Under Laws 1899, c. 53, § 3, which provides that the notice necessary of a sale under execution, order of sale, or decree shall be by posting notices and by publication, an owner of property which is levied upon and sold to satisfy judgment is not entitled to personal notice of the sale.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 629-633; Dec. Dig. § 222.\*]

##### 3. EXECUTION (§ 256\*)—SALE—NOTICE—SUFFICIENCY.

In an action to set aside a judicial sale of property as fraudulent, evidence held to show the notice of sale to the owner.

[Ed. Note.—For other cases, see Execution, Dec. Dig. § 256.\*]

##### 4. EXECUTION (§ 250\*)—SALE—VACATION—INADEQUACY OF PRICE.

Mere inadequacy of price at a judicial sale will not justify the setting aside of the sale where the disparity is not so gross as to shock the conscience, and the estate is sold at public auction on legal notice, and no fiduciary relation exists between the purchaser and the owner.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 703-707; Dec. Dig. § 250.\*]

##### 5. EXECUTION (§ 228\*)—SALE—VACATION—FIDUCIARY RELATION OF PURCHASER.

No fiduciary relation exists between a person owning property and an attorney who has acted for the wife of such person in securing a divorce, which will prevent such attorney from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

bidding on and buying the estate on a sale to satisfy a judgment rendered against the owner for costs and attorney's fees in the divorce suit.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 642-647; Dec. Dig. § 228.\*]

Department 2. Appeal from Superior Court, King County; J. D. Hinkle, Judge.

Action by August A. Johnson against Anna E. Johnson and others. From a judgment for plaintiff, defendants appeal. Reversed, with directions to dismiss.

George B. Cole, for appellants. F. B. Carpenter, for respondent.

DUNBAR, C. J. Respondent, August A. Johnson, and appellant Anna E. Johnson were formerly husband and wife, and owned certain community property in King county, Wash., among which was lot 10, block 30, of Gilman Park, the land in controversy. The appellant Johnson brought an action for divorce against the respondent Johnson, and a decree of divorce was granted in the superior court of King county, Wash. A division of property was made by the court, and the said lot 10 was awarded to the respondent. There was also a judgment for \$100 attorney's fees, and costs amounting to \$40, entered against respondent Johnson. This judgment was not paid, and on April 22, 1908, the sheriff of King county levied on said block 10, and sold it on July 6, 1908, to appellant Cole for \$154.80. During all the time between the awarding of the judgment against the respondent on January 27, 1908, and March 10, 1910, the said lot was rented by respondent to one Charles Hegstrom, and on March 10, 1910, appellant Cole served a notice of ownership and to pay rent on said Hegstrom, and on February 14, 1911, this action was brought by respondent Johnson, asking that the sale of said lot 10 be decreed fraudulent and void, and that said sale be set aside and vacated, alleging a decree of divorce, the awarding of lot 10 to the respondent, the renting of the same to Hegstrom; that the sale was fraudulently procured by the appellant Cole; that no notice of sale had been served upon him, and that he did not know that any levy was ever made on said lot until about December 1910, alleging publication in an obscure newspaper; that the appellant Cole was in possession of the lot, and claimed the same as his property and the property of his wife, and other matters not necessary to be mentioned. The appellants denied the material allegations of the complaint. The respondent replied to some immaterial affirmative matters in the answer, and the case was tried before Hon. J. D. Hinkle, a visiting judge in King county, with the result that the sale of lot 10, block 30, Gilman Park, King county, Wash., made by the sheriff of King county on the 6th day of June, 1908, was declared null and void, set aside, and vacat-

ed. It was also adjudged that the plaintiff, the respondent in this case, should recover the sum of \$25 for the rental value of said premises from the time possession was taken of it by appellant Cole up to the time of the trial. From this judgment this appeal is taken.

[1] Inasmuch as the defendants answered and proceeded to the trial of the cause on the merits, we will not discuss the first assignment, viz., that the court erred in overruling the demurrer to the complaint. But the whole record convinces us that the court did err in adjudging that the deed to appellant Cole should be set aside, canceled, and annulled. This case, it seems to us, falls squarely within the rule announced in *Merritt v. Graves*, 52 Wash. 57, 100 Pac. 164, excepting that that case was free from any question of estoppel on the part of the plaintiff, the action for relief having been brought before the confirmation of sale in the form of objections to the confirmation, and here there is an attack upon the judgment of confirmation and of sale more than two years and a half after sale and one year after the deed had issued to the appellant. It is true that respondent testifies that he was not served with notice of the sale, and that notice was not given according to law, but this allegation he fails to substantiate by proof.

[2, 3] He was not entitled under the law to personal notice. Laws 1899, p. 86, § 3. It fairly appears from the testimony that constructive notice was given, and, so far as the personal notice is concerned, the appellant testifies in the most positive manner that, shortly after the judgment was rendered, he told the respondent that the judgment was a lien on his property, and that he must satisfy the judgment, or that he (appellant Cole) would issue an execution and sell his property, and that the respondent defied him, and threatened him with disbarment proceedings and other dire punishment; that the conversation was in appellant's office; that the altercation became so violent that the appellant ordered respondent out of his office; and that a physical encounter was narrowly averted. This is denied by the respondent, but the appellant's testimony is in substance corroborated by witness E. E. Peck, who testified that he had explained to respondent that the judgment was a lien upon his real estate; that Cole had intimated to him that he would issue an execution and sell the property, and that he had better look after it; and that respondent had answered that, if Cole tried a thing of that kind, he would fix him. There was some attempt to impugn the motives of Mr. Peck, but it was an absolute failure. Mr. Peck had been attorney for respondent in the divorce proceedings, but this conversation he had with him was after

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

he had settled up with him, and was evidently a good-natured attempt on his part to save his former client from unnecessary costs. This proof of personal notice to respondent is legally immaterial, since he was a party to the action, and knew of the judgment and of its force and effect. But it is important as showing the lack of conspiracy or of any hidden or ulterior action on the part of the appellant, looking to the deception or overreaching of the respondent in the matter of the sale.

[4] So that there is nothing left in this case but the inadequacy of the purchase price. The amount bid on the property by Cole was \$195.50. The testimony on the part of the respondent was that the property was worth from \$1,700 to \$1,800; on the part of the witnesses for the appellant, that it was worth about \$1,000, the appellant himself, at the time of the trial, offering to take \$1,000 for it. But, while the amount bid was disproportionate, it is the general rule that inadequacy of price alone will not justify the setting aside of a judgment sale unless the disparity is so gross as to shock the conscience, and particularly where the estate is sold at public auction on legal notice, and where no fiduciary relation exists. In discussing the inability of attorneys to purchase property and in noticing cases discussing that proposition, it was said by this court in *Merritt v. Graves*, supra: "But the prohibition in question has no application to a case of this kind. The appellant was the attorney for the plaintiff in the original action, but she has not appealed, and is not complaining. No relation of trust or confidence existed between the appellant and the respondent, and appellant was under no legal or moral obligation to protect him or his rights. The plaintiff in the action might have become the purchaser at the sale."

\* \* \* True, the attorney occupied a position of trust and confidence towards his client, and could not become the purchaser at the sale against her will. If she did not consent to the purchase, she might by acting promptly claim the benefit of the purchase or oppose confirmation, but the matter was one solely between her and her attorney, and a stranger will not be heard to complain."

[5] And so in this case there was no fiduciary relation whatever existing between respondent and attorney Cole. He was attorney for respondent's opponent in the divorce proceeding. He was in no way intrusted with respondent's interests. On the contrary, his duty to his client placed him rather in the position of an adversary, and it must have been so understood, and he had the same right that any stranger would have to bid on the estate, not of his client, but of the respondent, in any open market. Nothing that is said in *Roger v. Whitham*,

56 Wash. 190, 105 Pac. 628, 134 Am. St. Rep. 1105, militates against this rule. There the rule in relation to buying of estates by attorneys was applied, and it was held that a city attorney could not bid in property at a public sale conducted by him and assert equitable defenses against the owner, because he was charged as a trustee as well for the owner of the property charged with the lien of a specific assessment as for the city, and was bound to perform his full duty to each; and that in such case slight attending circumstances indicating unfairness were sufficient to sustain the discretion of the court in setting aside a sale for a great inadequacy of price. This opinion voices almost universal authority, and was based upon justice and fair dealing. But in this case, there being no fiduciary relation at any time and no circumstances proven tending to show unfairness, inadequacy of the price alone is not sufficient to annul the sale.

The judgment is reversed, with instructions to dismiss the action.

CROW, ELLIS, MORRIS, and CHADWICK, JJ., concur.

#### STATE v. HARSTED.

(Supreme Court of Washington. Dec. 4, 1911.)

##### 1. INDICTMENT AND INFORMATION (§ 110\*)—INFORMATION—REQUISITES.

Under Rem. & Bal. Code, § 2456, defining sodomy, and section 2414, subd. 6, providing that every person who shall assault another with intent to commit a felony shall be guilty of assault in the second degree, an information alleging that accused feloniously assaulted prosecutor with intent to commit sodomy is sufficient without setting forth the precise facts constituting the attempt.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 289-294; Dec. Dig. § 110.\*]

##### 2. WITNESSES (§ 344\*)—IMPEACHMENT.

Where, on a trial for assault with intent to commit sodomy on a boy 11 years old, there was no direct offer to prove that the boy suffered from a venereal disease, the exclusion of evidence as to whether a physician had examined the boy, and as to whether he had tested the boy's blood to ascertain the presence of such disease, was not erroneous under the rule that particular acts of immorality cannot be shown to discredit a witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1120-1125; Dec. Dig. § 344.\*]

##### 3. CRIMINAL LAW (§ 768\*)—CAUTIONARY INSTRUCTIONS.

An instruction that the jury should free their minds from prejudice and sympathy, either for accused or any other person, and an instruction that they should bring to bear a judgment unaffected by any feeling of prejudice or sympathy, was not prejudicial to accused, as requiring the jury to determine the case freed from any of the mental processes by which men usually arrive at conclusions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1798-1802; Dec. Dig. § 768.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes.

#### 4. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

It is not error to refuse an instruction, when there is no evidence to support it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. § 814.\*]

#### 5. CRIMINAL LAW (§ 789\*)—INSTRUCTIONS—"REASONABLE DOUBT."

A charge that the state has the burden of proving every fact necessary to a conviction beyond a reasonable doubt, that the expression "reasonable doubt" means a doubt founded on some good reason, and must not arise from sympathetic feelings, but must arise from the evidence or lack of evidence, etc., correctly charges on reasonable doubt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1846-1849, 1904-1922; Dec. Dig. § 789.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 5958-5972; vol. 8, p. 7779.]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Ole Harsted was convicted of crime, and he appeals. Affirmed.

Gill, Hoyt & Frye, for appellant. John F. Murphy, Hugh M. Caldwell, and H. B. Butler, for the State.

GOSE, J. This is an appeal from a judgment entered upon a verdict finding the appellant guilty of an assault in the second degree. The body of the information is as follows: "He, said Ole Harsted, in the county of King, state of Washington, on the 6th day of March, 1911, did then and there willfully, unlawfully, and feloniously make an assault upon the person of one Virgil Cooper, a male person, with intent then and there to commit the crime of sodomy upon said Virgil Cooper."

[1] A demurrer to the information, upon the ground that it does not state facts sufficient to constitute a crime or misdemeanor, was overruled. This ruling is assigned as error. The information was drawn under the provisions of Rem. & Bal. Code, § 2414, subd. 6. It provides: "Every person who, under circumstances not amounting to assault in the first degree, \* \* \* (6) shall assault another with intent to commit a felony \* \* \* shall be guilty of assault in the second degree." Sodomy is defined in Rem. & Bal. Code, § 2456. It is argued that, because the completed offense may be committed in more than one way, the precise facts constituting the attempt should have been set forth in the information. This argument might have merit if the appellant had been charged with having committed the crime of sodomy. It is obvious that one may be guilty of an attempt to commit the offense without the acts having proceeded far enough to indicate anything further than a general intent to commit the completed offense. Moreover, the crime is charged in the language of the statute, and that, subject to exceptions not applicable here, is

sufficient. *People v. Williams*, 59 Cal. 397; *Honselman v. People*, 108 Ill. 172, 48 N. E. 304; *Kelly v. People*, 192 Ill. 119, 61 N. E. 425, 85 Am. St. Rep. 323; *State v. Ward*, 85 Minn. 182, 28 N. W. 192; *State v. Johnson*, 114 Iowa, 430, 87 N. W. 279; *State v. Phelps*, 22 Wash. 181, 60 Pac. 134. The *Honselman* Case is directly in point. *State v. Carey*, 4 Wash. 424, 30 Pac. 729, cited by the appellant, is not in point. In that case Carey was charged with having practiced medicine without first having obtained a license. The information was held defective, in that it did not charge the acts which the statute makes definitive of the crime. *State v. Campbell*, 29 Tex. 44, 94 Am. Dec. 251, also cited by the appellant, supports his contention, but we do not desire to follow it.

[2] Virgil Cooper, the boy upon whom the assault is alleged to have been made, testified that he was 11 years old, and that after the arrest of the appellant his throat and mouth were sore. While the boy was being detained one of the juvenile officers informed the prosecuting attorney that he had reason to believe that the boy had syphilis. Acting upon this statement, the prosecutor had the appellant's bond increased. Later he had the boy examined by two physicians, who reported to him that the boy did not have that disease. These facts in reference to the syphilitic symptoms of the boy appear from the statement of the prosecuting attorney. Appellant's counsel thereafter offered to prove that the county physician "examined the boy and reported" that he had syphilis in the mouth, that the appellant's blood had been tested and "found free from exterior evidence of syphilis," and "found free from taint." His counsel further stated: "I want to examine Dr. Hall, and ask whether he has made a blood test of the boy to determine whether he has syphilis, \* \* \* and whether he did report to any official that the boy had syphilis in the mouth. \* \* \* If he had it, then he had been in the habit of committing the offense with other men. That is where we think its materiality rests." The offer was denied by the court. It is argued in the brief, and was pressed with much earnestness at the bar, that this ruling was error. We cannot acquiesce in this view. There was no direct offer to prove that the boy had syphilis. Counsel merely wanted to show that such a condition had been reported, and further wanted to inquire of the physician whether he had tested the boy's blood with a view of ascertaining whether it showed the presence of that disease. In proper cases the general reputation of a witness for immorality may be shown, but we think the better rule is that particular acts of immorality cannot be shown, either upon cross-examination or by the evidence of third persons, for the purpose of discrediting the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

witness. Cases may arise, however, where the evidence offered is of such a nature that it may be admitted within the discretion of the court. 2 Elliott on Evidence, § 978.

[3] In two instructions the court admonished the jury that they should free their minds from prejudice and sympathy, "whether for the defendant or any other person," and that they should "bring to bear a judgment that is cool, calculating, and sober, unaffected by any feeling of prejudice, uninfluenced by any feelings of sympathy, untrammelled by any anxiety or fear as to penalty." In criticism of these instructions it is said that they reiterate the caution to the jury that they must determine the case "freed from any of the mental processes by which human beings usually arrive at conclusions." We cannot think that the instructions are erroneous. It is certainly the duty of the jury to free their minds from passion, prejudice, and sympathy, and determine the case solely upon the evidence. In other words, it is the plain duty of the jury to determine the guilt or innocence of the accused from the evidence in the case, leaving the penalty, if any, to be adjudged by the court. This is not a case where by reiteration and emphasis the court indirectly gets before the jury its view of the facts. If it were, we would not hesitate to order a new trial.

[4] There was no error in the failure of the court to instruct as to an assault in the third degree. There is no evidence calling for such instruction. The appellant was either guilty as charged or not guilty. The law does not warrant an instruction covering an included crime when there is no evidence supporting it. *State v. Kruger*, 60 Wash. 542, 111 Pac. 769.

[5] In defining a reasonable doubt, the court instructed the jury as follows: "The burden is on the state of proving every fact material and necessary to a conviction by competent evidence beyond a reasonable doubt. It is not sufficient that the state should prove these facts by a mere preponderance of the testimony, nor, on the other hand, is it necessary that they should prove conclusively in such manner as to leave room for any doubt whatever. Very few things in the whole domain of human knowledge are susceptible of absolute proof. We can have a moral certainty or a reasonable certainty, which may vary in degree, but rarely an absolute certainty. *The expression 'reasonable doubt' means in law just what the words imply—a doubt founded upon some good reason.* It must not arise from a merciful disposition or a kindly sympathetic feeling, or a desire to avoid performing a disagreeable duty. It must arise from the evidence or lack of evidence. It must not be a mere whim or a vague conjectural doubt or misgiving founded upon mere possibilities. It must be a substantial doubt, such as an honest, sensible, and

fair-minded man might with reason entertain consistently with a conscientious desire to ascertain the truth. You must use your common sense as men of experience, possessing some knowledge of worldly affairs, and if, after examining carefully all the facts and circumstances in this case, you can say and feel that you have a settled and abiding conviction of guilt of the defendant, then you are satisfied of guilt beyond a reasonable doubt. If you have not such a conviction, then you should acquit him." The appellant confidently asserts that this instruction is erroneous and highly prejudicial. Specific exception is taken to the italicized words. The phrase "reasonable doubt" is so clear and exact that it may well be doubted whether an instruction has ever been formulated that served to either simplify or elucidate it. It means, however, if it can be said to be resolvable into other language, that it must be a substantial doubt or one having reason for its basis, as distinguished from a fanciful or imaginary doubt, and such doubt must arise from the evidence in the case or from the want of evidence. As a pure question of logic, there can be no difference between a doubt for which a reason can be given, and one for which a good reason can be given. When a cause has been submitted to a jury, it retires to its room for the purpose of consultation, discussion, and deliberation. These precede the verdict. In practice it is known that verdicts are sometimes reached only after long and acrimonious debate in the jury room. While it is true that the jury is not required to report to the court a reason for its verdict, it is equally true that in the consideration of the evidence one juror has a right to call upon another for a reason for his faith. The very word "deliberation" presupposes a painstaking and conscientious purpose upon the part of each juror to weigh the evidence in order that an intelligent verdict may be reached. If discussion and an interchange of views upon the evidence were not contemplated, the law would dissolve the jury after one unsuccessful ballot. Discussion tests the reasonableness of the conflicting views of the jurors, and weeds out fanciful and imaginary doubts.

In one of the cases relied upon by appellant—*Siberry v. State*, 133 Ind. 677, 33 N. E. 681—an instruction that "a reasonable doubt is a doubt which has some reason for its basis" was condemned as erroneous. The court said: "It puts upon the defendant the burden of furnishing to every juror a reason why he is not satisfied of his guilt, with the certainty which the law requires, before there can be a conviction. There is no such burden resting on the defendant or a juror in a criminal case." We cannot agree with the learned court's deduction. The duty always rests upon the state of satisfying the minds of the jury beyond a reasonable doubt of the guilt of the accused. The question is,

What constitutes such a doubt? The instruction has been sanctioned by this court. *State v. Harras*, 25 Wash. 416, 65 Pac. 774. A similar instruction was approved in the following cases: *Butler v. State*, 102 Wis. 364, 78 N. W. 590; *State v. Patton*, 66 Kan. 486, 71 Pac. 840; *Hodge v. State*, 97 Ala. 37, 12 South. 164, 38 Am. St. Rep. 145; *Vann v. State*, 83 Ga. 44, 9 S. E. 945; *People v. Guidici*, 100 N. Y. 503, 3 N. E. 493; *State v. Jefferson*, 43 La. Ann. 995, 10 South. 200; *Wallace v. State*, 41 Fla. 547, 26 South. 713; *State v. Serenson*, 7 S. D. 277, 64 N. W. 130; *State v. Morey*, 25 Or. 241, 35 Pac. 655, 36 Pac. 573. In the *Butler* Case the court said: A doubt cannot be reasonable unless a reason therefor exists, and, if such reason exists, it can be given." In the *Patton* Case an instruction defining a reasonable doubt as such a doubt "as a jury are able to give a reason for" was approved. In the *Hodge* Case the court reversed the judgment for the refusal of the court to instruct at the defendant's request that "a reasonable doubt is defined to be a doubt for which a reason could be given." The *Serenson* Case approves a like instruction. In the *Vann* Case an instruction was approved which stated that "the doubt must be a reasonable doubt, not a conjured-up doubt—such a doubt as you might conjure up to acquit a friend, but one which you could give a reason for." In the *Guidici* Case an instruction in the following language was approved: "You must understand what a reasonable doubt is. It is not a mere guess or surmise that the man may not be guilty. It is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence—a doubt for which some good reason arising from the evidence can be given." The court said, reading the instruction as a whole, that it only distinguishes a reasonable doubt from one which is merely vague and imaginary. In the *Jefferson* Case a charge was sustained which defined a reasonable doubt as "a serious, sensible doubt, such as you could give a good reason for." The appellant has cited *Bennett v. State* (Ark.) 128 S. W. 851, *Siberry v. State*, supra, *Blue v. State*, 86 Neb. 189, 125 N. W. 136, and *Gragg v. State*, 3 Okl. Cr. 409, 106 Pac. 350. In these cases a somewhat similar instruction to the one at bar was condemned as being erroneous and prejudicial. We are impressed, however, with the view adopted by the cases first cited, and feel constrained to hold that the instruction is not erroneous.

Other criticisms of the instruction are without merit, and require no separate consideration.

The judgment is affirmed.

DUNBAR, C. J., and FULLERTON, PARKER, and MOUNT, JJ., concur.

# KNUDSEN v. MOE BROS., Inc.

(Supreme Court of Washington. Dec. 2, 1911.)

MASTER AND SERVANT (§§ 280, 280\*)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Where plaintiff, a log loader, in placing an additional log on the car after he believed it was sufficiently loaded, yielded entirely to the order and experience of his foreman, and plaintiff was thereafter injured by the fall of the log from the car as he was setting a brake thereon, whether the danger of obeying the foreman's orders was so imminent and hazardous as to charge plaintiff with contributory negligence, and whether defendant was negligent in ordering the additional log placed on the car, was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. §§ 280, 289.\*]

Department 2. Appeal from Superior Court, Kitsap County; John B. Yakey, Judge.

Action by Louis Knudsen against Moe Bros., Incorporated. Judgment for defendant, and plaintiff appeals. Reversed.

Martin J. Lund, for appellant. Peterson & Macbride, for respondent.

CROW, J. Action by Louis Knudsen against Moe Bros., Incorporated, a corporation, to recover damages for personal injuries. At the close of plaintiff's evidence, the defendant's challenge to its sufficiency sustained, and the action was dismissed. The plaintiff has appealed.

The only question presented is whether the trial judge erred in sustaining respondent's challenge and dismissing the action. From the evidence the following facts appear: Respondent corporation is the owner of a logging camp in Kitsap county, together with a railroad, logging trucks, and machinery which it uses in conducting a logging business. Appellant was employed as a member of respondent's loading crew. On March 25, 1909, with the assistance of other employes, he loaded one set of trucks, by placing three logs, two large and one small, in the first or lower tier, the small log in the center, and by also placing one large log in the second or upper tier. Appellant regarded the car as then completely and safely loaded. While the employes were waiting for a locomotive to remove the trucks, one Chris Moe, respondent's foreman, ordered appellant to place another log on the load. To this order appellant objected, contending an additional log might not remain when the trucks were moved. The foreman repeated the order, insisting there was plenty of room. Thereupon appellant, deferring to his superior judgment, with the assistance of other employes and in the presence of the foreman, placed another log on the car as securely as possible. After this had been done, the locomotive arrived and, with the loaded trucks, proceeded to the main track, where the truck was to be left on a slight grade. To hold it on the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

grade it was necessary to set the brake by means of a brake wheel located at one side of the truck. It was appellant's duty to set the brake. While he was thus engaged, the last log which had been loaded fell from the truck and injured him.

Appellant in part testified as follows: "Q. Tell the jury in your own way how it happened. A. I was there as a loader, and I had the load finished in my own judgment. I thought it was a load, and I was there standing waiting for the loco. Q. You mean the locomotive? A. Yes; I was waiting for it to come up and take the load away, and while I was standing there waiting Mr. Chris Moe came up and told me I had room for another log on the load, and I told him I did not think any more would stay on, and he said, 'Yes; put another one on and it will stay,' and so I thought he knew better than I did, and that I had better put it on, because he knew more than I did, had more experience, and I put it on, and I tried to get the crew to bring me the smallest log they could find, and they brought me a broken cedar log that was split, a flat one, and I put it on. \* \* \* Q. And while you were doing the work, where was Mr. Chris Moe? A. He was there standing by the landing, and the locomotive came up and hitched onto the load, and I went on the locomotive, and Chris Moe and Andrew Moe were on the locomotive, too, and I rode down to the switch, and when we came down to the switch I turned the switch and shoved it on the main line, and there was an empty truck between the load and the locomotive, and I went between that empty truck and the load till it was ready to stop, and I went and set the brakes, and as I grabbed the brake the log came off and struck me. \* \* \* Q. Whose duty was it at that time to set the brakes? A. It was mine. There was nobody else there to set them. Q. What, if anything, was said to you about setting the brakes? A. Andrew Moe told me to set the brake. Q. And what was the nature of the track, as to whether it was level? A. It was a little lower, so that it could not stay unless the brake was set. There was a little hill there."

The appellant thus yielded his judgment to that of the foreman, and obeyed his instructions, thinking he had the most experience and knew best. The evidence shows appellant thought the car was sufficiently and safely loaded; that the order of the foreman was then given; that in obedience thereto appellant placed another log in the manner he thought best; that he then believed it would remain, but that it fell and injured him. The questions presented are: Whether respondent's foreman was negligent in ordering appellant to place another log on the trucks; whether the resulting danger was so imminent and certain that a reasonably prudent man, in the exercise of caution, would not increase the load; and whether appellant was negligent in obeying the order.

Under the evidence these questions were for the jury, notwithstanding the facts that the additional log was loaded by appellant and another employé without assistance or further instruction from the foreman, and that the appellant thought it would remain. Appellant abandoned his former opinion, the result of his own judgment, in deference to the experience and knowledge of the foreman, who was his superior and authorized to employ and discharge the men. As an employé it was appellant's duty to obey the foreman's orders, unless they were so manifestly dangerous that a prudent man, in the exercise of due caution, would refuse to obey. A servant's obedience to the master's orders is an absolute necessity to the successful conduct of any industrial occupation. His refusal might deprive him of employment and means of livelihood. Ordinarily a servant yields his judgment to the superior judgment and discretion of the master. If he does, and is injured by reason of his obedience to the master's orders, it will ordinarily become a question for determination by the jury, in such an action as this, whether the danger of obeying the order was so imminent and hazardous as to charge the servant with contributory negligence and preclude him from recovering damages.

In *Van Duzen Gas, etc., Co. v. Schellies*, 61 Ohio St. 298, 810, 55 N. E. 998, 1001, the court well said: "There is much reason in the rule that allows a favorable construction to be placed on the act of the servant done in obedience to the order of his superior, though involving danger. Obedience to orders given by a master becomes a habit with the servant. He obeys without much questioning the prudence of the order. It is expected that he will do so, and without such obedience the business of the master could not be successfully conducted. It is then both reasonable and proper that the master should be held to a reasonable responsibility for what he orders his servants to do; and the conduct of a servant in obeying an order, under such circumstances, should not be too closely criticised by courts in administering the law. Whilst the law will not excuse the servant, where the thing ordered is plainly and manifestly perilous, it will do so where a man of ordinary prudence and care would, under the circumstances, have obeyed the order, although involving danger. A servant has the right, and is expected, to rely somewhat on the superior knowledge and skill of one placed in authority over him."

In *Withlam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900, an action for personal injuries, the plaintiff was on an upright scaffold held by braces. A portion of the braces had been removed. The foreman ordered plaintiff to remove another brace, which he did. Plaintiff then attempted to leave the scaffold by passing through a window, when the scaffold fell and threw him to the ground. The foreman's order was the neg-



ligence charged. The plaintiff recovered damages, and the only question presented on the appeal was whether the danger was so apparent and imminent that a man of ordinary prudence and intelligence would have refused to obey the foreman's order. Upon this question, after citing numerous authorities, we said: "The master, of course, is not now estopped to claim that the act of the servant was foolhardy and reckless; but, in view of his previous command, such a defense should be viewed with some suspicion and scrutinized with care. It is reasonable to assume that neither the appellant nor the foreman deemed the act overhazardous at the time, and evidently the jury did not so consider it. It seems to us that reasonable minds might well differ as to the danger that might result from the act which the appellant was directed to perform, and in such cases the jury's verdict is conclusive on the court, in so far as its right to direct a judgment is concerned."

The language quoted is especially pertinent to the facts now before us. From the evidence we cannot say, in view of the order of the foreman, that appellant was so foolhardy and reckless in loading another log that he must be held guilty of contributory negligence as a matter of law; nor can we say the appellee was not guilty of the negligence charged against it. These questions were issues of fact for the jury.

The judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and ELLIS, and MORRIS, JJ., concur.

#### BRUHN et al. v. STEFFINS.

(Supreme Court of Washington. Dec. 2, 1911.)

APPEAL AND ERROR (§§ 376, 390\*)—BONDS ON APPEAL—"ADVERSE PARTY."

An "adverse party," within Rem. & Bal. Code, § 1721, requiring the giving of a bond on appeal to the adverse party, is one whose interests will be affected by a reversal or modification of the judgment appealed from; and where the court, in a suit by individuals and a corporation to quiet title, quieted title in the corporation against defendant, without determining that the individuals had any rights in the land, a bond on defendant's appeal, making the individuals obligees, is so defective as to amount to no bond, and defendant may not file a new bond, under section 1734, but the appeal must be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2011-2016, 2077-2088; Dec. Dig. §§ 376, 390.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 224-227; vol. 8, pp. 7567-7568.]

Fullerton, J., dissenting.

Department 1. Appeal from Superior Court, Franklin County; E. K. Pendergast, Judge.

Action by Charles Bruhn and others

against J. E. Steffins and others. From a judgment against defendant Steffins, he appeals. Dismissed.

Horrigan & Coad, for appellant. Englehart & Rigg, for respondents.

MOUNT, J. Motion to dismiss the appeal herein. It appears that Charles Bruhn and the Pasco-Columbia River Realty Company, a corporation, brought an action against J. E. Steffins and others to quiet title to certain lands in Franklin county. Upon issues joined the trial court entered a judgment in favor of the Pasco-Columbia River Realty Company, quieting its title to the lands against the defendant J. E. Steffins. The judgment was not in favor of Bruhn and wife, and they have no interest therein. J. E. Steffins gave a notice of appeal from the judgment. The notice was served upon Bruhn and wife, and also the Pasco-Columbia River Realty Company. The appellant filed a cost bond on appeal. This bond recites: " \* \* \* That we, J. E. Steffins, appellant in the above-entitled action, as principal, and Daniel Horrigan, as surety, are held and firmly bound to Charles Bruhn and Pauline Bruhn, his wife, in the above-entitled action, in the penal sum of two hundred (\$200) dollars, for the payment of which sum, well and truly to be made, we bind ourselves firmly, jointly, and severally by these presents." The bond then, after describing the judgment appealed from, recites: "Now, therefore, if the above-bounden appellant, J. E. Steffins, will pay to the said Charles Bruhn and Pauline Bruhn, his wife, the respondents herein, all costs and damages that may be awarded against the appellant on this appeal, or on the dismissal thereof, not exceeding the sum of two hundred (\$200) dollars, then this bond to be void; otherwise, in full force and effect."

The statute requires the bond to be given to the "adverse party." Rem. & Bal. Code, § 1721. An adverse party is one whose interests will be affected by a reversal or modification of the judgment appealed from. *Seattle Trust Co. v. Pitner*, 17 Wash. 365, 49 Pac. 505. It is plain, therefore, that Bruhn and wife are not adverse parties, for they have no interest in the judgment in any way. The bond is no protection whatever for the Pasco-Columbia River Realty Company, which is the only adverse party, because this court could not enter a judgment against the surety in the bond, for the bond precludes such a judgment. Neither could the Pasco-Columbia River Realty Company maintain an action upon the bond, for it is not so conditioned.

Appellant relies upon the case of *Westland Publishing Co. v. Royal*, 36 Wash. 390, 78 Pac. 1096. In that case the bond ran to the state of Washington, and we held that the intent was manifest that the bond was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for the protection of the adverse party. In this case, however, it is not manifest that the bond was for the protection of the adverse party, because it is plainly for one who had ceased to have any interest in the litigation.

Appellant insists that he should now be permitted to file a new bond, under the provisions of section 1734, Rem. & Bal. Code. If this were an informality or defect in a bond otherwise sufficient, this section would apply; but this bond is so defective that it amounts to no bond or security at all for the respondent Pasco-Columbia River Realty Company, which is the only adverse party.

The appeal is therefore dismissed.

DUNBAR, C. J., and PARKER and GOSE, JJ., concur.

FULLERTON, J. (dissenting). I am of the opinion that section 1734 of the Code was passed for the express purpose of permitting defects such as are shown in the present bond to be corrected. I am compelled to dissent, therefore, from the order of dismissal.

#### STATE v. CRAMER.

(Supreme Court of Idaho. Nov. 22, 1911.)

(Syllabus by the Court.)

#### 1. BANKS AND BANKING (§ 84\*)—INSOLVENCY—CRIMINAL RESPONSIBILITY OF OFFICERS.

Where the vice president and business manager of a bank, with full knowledge that his banking institution is insolvent and will not be able to meet its obligations and repay its depositors in the ordinary and due course of business, permits or consents to such banking institution continuing to receive deposits through its regular employes, he is criminally liable under the provisions of section 2985, Rev. Codes.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 210, 211; Dec. Dig. § 84.\*]

#### 2. BANKS AND BANKING (§ 84\*)—INSOLVENCY—CRIMINAL RESPONSIBILITY OF OFFICERS.

Section 2985, Rev. Codes, was enacted for the special purpose of protecting those who place their money on deposit in banking institutions, and the Legislature clearly intended in enacting said section to make all the officers who have knowledge of the condition of the bank responsible for the acts of employes thereof in receiving deposits.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 210, 211; Dec. Dig. § 84.\*]

#### 3. BANKS AND BANKING (§ 84\*)—INSOLVENCY—CRIMINAL RESPONSIBILITY OF OFFICERS—"RECEIVING DEPOSITS AS OFFICER OF THE BANK."

Certain instructions offered on behalf of the defendant and refused by the court considered, and instruction given by the court approved, to the effect that if at the time the deposit in question was received said bank was kept open with the knowledge and consent and under the general authority of the defendant as an officer of said bank for the doing of business and the reception of deposits, and said defendant

knew that deposits were being received, though not personally receiving the same, then said deposit in question was received by defendant as an officer of said bank, within the meaning of the statute.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 210, 211; Dec. Dig. § 84.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 5990-5992.]

#### 4. BANKS AND BANKING (§ 84\*)—CRIMINAL RESPONSIBILITY OF OFFICERS—"INSOLVENT."

The word "insolvent," as used in section 2985, Rev. Codes, and as applied to banking institutions, means that a bank is insolvent when its assets and property are of such a character and value or in such a condition that it is unable to meet the demands made upon it in the usual and ordinary course of banking business.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 210, 211; Dec. Dig. § 84.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3647-3655; vol. 8, p. 7689.]

#### 5. BANKS AND BANKING (§ 84\*)—CRIMINAL RESPONSIBILITY OF OFFICERS—"INSOLVENT."

Instructions refused and instructions given by the court with reference to the meaning of the term "insolvent" as used in section 2985 considered, and instructions given by the court approved.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 210, 211; Dec. Dig. § 84.\*]

#### 6. CRIMINAL LAW (§ 59\*)—PARTIES TO OFFENSES—PRINCIPALS AND ACCESSORIES.

Section 7697 specifically abrogates all distinctions heretofore existing between accessories and principals. Under the statute of this state an accessory is now prosecuted as a principal. Citing State v. Bland, 9 Idaho, 806, 76 Pac. 780.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 59.\*]

#### 7. BANKS AND BANKING (§ 84\*)—INSOLVENCY—CRIMINAL RESPONSIBILITY OF OFFICERS.

Section 2985 makes an officer of a bank liable as a principal and not as an accessory. Under the evidence in this case, the defendant was properly convicted as a principal, and even if any distinction between principals and accessories were recognized in this state, it would not apply in the case at bar under the provisions of said section 2985.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 84.\*]

(Additional Syllabus by Editorial Staff.)

#### 8. WORDS AND PHRASES—"BANKER."

A "banker" is one who traffics in money, receives and remits money, negotiates bills of exchange, receives money in trust, to be drawn again, or its equivalent, as the owner has occasion to use it.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 1, pp. 695-697.]

Appeal from District Court, Lincoln County; Edward A. Walters, Judge.

Leo Cramer was convicted of receiving a deposit in an insolvent bank while an officer of such bank, and he appeals. Affirmed.

N. M. Rulick, McFadden & Brodhead, Angel & Lamme, and Frank T. Disney, for appellant. D. C. McDougall, Atty. Gen., and J. H. Peterson and O. M. Van Duyn, Asst. Attys. Gen., for the State.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

BRYAN, District Judge. On the 31st day of February, 1911, an information was filed against the defendant and others in the district court in and for Blaine county, the charging part of the information being as follows: "That on the 31st day of August, A. D. 1910, at the city of Halley, county of Blaine, state of Idaho, the said John J. Plumer, then being an officer, to wit, president of the Idaho State Bank, a corporation organized and then and there existing under the laws of the state of Idaho and as such corporation then and there engaged in a general banking business at the said city of Halley, and the said Leo Cramer then being an officer, to wit, vice president of said bank, and the said Arthur B. Cutts, then being an officer, to wit, cashier of said bank, and the said Hugh Cramer, then being an officer, to wit, director of said bank, did, as such officers of said bank, at the time and place aforesaid, and before the filing of this information, willfully, unlawfully, feloniously and fraudulently, and with intent on the part of each of said officers to cheat and defraud one Helen Foster, receive a deposit in said bank in the sum of forty dollars, lawful money of the United States of America, of and from the said Helen Foster, which said money was then and there the property of said Helen Foster; and which said Idaho State Bank was insolvent at the time said deposit was received as aforesaid, and each of said officers knew that said bank was insolvent at the time of receiving said deposit." The defendant was tried on said information, and on April 25, 1911, the jury returned a verdict of guilty as charged in said information. From this judgment the defendant has appealed to this court.

This prosecution is founded upon section 2985 of the Rev. Codes of Idaho, which is as follows: "The owners or officers of any bank who shall fraudulently and with intent to cheat and defraud any person, receive any deposit knowing that such bank is insolvent, shall be deemed guilty of a felony, and punished, upon conviction therefor, by a fine not exceeding one thousand dollars, or by imprisonment in the State Penitentiary not exceeding two years, or by both such fine and imprisonment, at the discretion of the court."

The transcript shows that upon the trial the state introduced evidence showing the following facts: That on August 31, 1910, the Idaho State Bank was open for business and was transacting business in the usual course; that on said date and while said bank was open for business, one Helen Foster, named in the information, having an account in said bank, deposited therein the sum of \$40; that said deposit was received by Arthur B. Cutts, cashier of said Idaho State Bank, and an entry made by him in the pass book of said Helen Foster; that said bank did not open for business on September 1, 1910, and has never been opened

for business since said date, but that the said bank has been in the hands and under the control of a receiver appointed by the court; that said deposit made by said Helen Foster was entered upon the books of said bank in the usual course of business, and that the same was not returned to her, but appeared to her credit upon the books of said bank at the time the receiver was appointed and took charge; that the above-mentioned defendant was and had been for a number of years the active manager and in control of said bank and directed its affairs and had knowledge of the actual condition of said bank during all of the said time and well knew that at the time deposit was received in said bank that said bank was insolvent; that on the date of the reception of said deposit the said defendant was vice president and director of said bank; that the Idaho State Bank named in the information was insolvent on the date of the reception of the deposit of the said Helen Foster, named in the information, and well knew that the cash value of its assets upon said date was not equal to its liabilities, exclusive of capital stock, surplus fund and interest fund; that on the said date the said Idaho State Bank was insolvent and was unable on said date to pay its indebtedness or obligations in the due course of business; that on said date the defendant, Leo Cramer, was in and about the banking room and adjoining rooms in said bank, and well knew that the said bank was open for business and the reception of deposits and was actually receiving deposits in the usual course of business.

At the conclusion of the introduction of evidence counsel for defendant submitted to the court the following instructions: "Instruction No. 2. The jury are instructed that, unless they find from the evidence beyond a reasonable doubt that the defendant, Leo Cramer, himself, actually received the deposit set out in the information, then they must acquit the defendant. Instruction No. 3. The jury are instructed that if it should appear from the evidence that the deposit of money referred to in the information was actually received into the Idaho State Bank by the cashier of the bank, Arthur B. Cutts, or by any employé or officer of said bank other than the defendant, Leo Cramer, then the defendant must be acquitted."

The court indorsed the said instructions "Refused and not given," and of its own motion gave the following instruction: "Instruction No. 18. That to authorize a conviction of the defendant it is not essential that he should have personally received the deposit in question or that he should have known that such deposit was made. If you believe from the evidence beyond a reasonable doubt that on the 31st day of August, 1910, at the city of Halley, county of Blaine, state of Idaho, one Helen Foster deposited \$40 in cash in the Idaho State Bank, and that said deposit was actually delivered to

Arthur B. Cutts, the cashier of said bank; and if you further believe that said bank was on said day open and kept open with the knowledge and consent and under the general authority of Leo Cramer as an officer, to wit, the vice president of said bank, if you find he was such officer, and other officers of said bank, for the doing of business and the reception of deposits, and that said Leo Cramer as such officer knew that deposits were being received in said bank on said day then you may find that said deposit so made by said Helen Foster was received, within the meaning of the statute, by Leo Cramer as such officer of said bank."

[1,3] The ruling of the trial court in refusing to give instructions Nos. 2 and 3 requested by the appellant, and the giving of instruction No. 18 by the court upon his own motion, will be considered in connection with the sufficiency of the evidence. The sufficiency of the evidence and the ruling of the trial court present the same question, whether "an officer of an incorporated banking institution, with knowledge of its insolvency, can be held to have received a deposit where a deposit is actually received by another officer of said institution." If the evidence in this case is sufficient to support the verdict, then the court committed no error in refusing to give instructions Nos. 2 and 3 and in giving instruction No. 18. The questions thus involved have been exhaustively discussed in a number of decisions rendered by the highest courts of a number of the states, and there is some conflict in the conclusions reached. It is true, however, that a number of the decisions are based upon the particular language of the statute involved, and we shall attempt in this opinion to review the leading cases upon both sides of the question. A very able discussion of this question is to be found in the case of *State v. Mitchell*, 98 Miss. 259, 51 South. 4, 28 L. R. A. (N. S.) 1072, the facts summarized being as follows: "The Scranton State Bank was a banking corporation organized under the laws of the state of Mississippi, with branch banks at Moss Point and Ocean Springs, Jackson county, Miss. All of the books of the bank and all of the loans were kept and made at the office of the parent bank in Scranton, and the only functions the branch banks performed were to receive and pay out deposits. Edmund Mitchell, appellee, resided and did business in Scranton, and was at the date of the reception of the deposit, and had been for many years prior thereto, one of the directors of the said Scranton State Bank, and as such director was then and there one of the managing officers of the said bank. As such director, and necessarily one of its managing officers, appellee was indicted \* \* \* together with the other directors and officers of said bank, for receiving a deposit of money in the branch bank at Ocean Springs, in

said county and state, while said Scranton State Bank was in an insolvent condition, and 'when then and there the said appellee knew, or had good reason to believe, that the said Scranton Bank was insolvent.' To this indictment the appellee entered a plea of not guilty, and on this issue a jury was legally drawn and impaneled to try said cause, and the state then submitted its case, showing the above facts, together with the following facts; that is: That at the time of the reception of the deposit charged in the indictment against the appellee the appellee was not in the branch bank, nor was he in the town of Ocean Springs, but was at said time in Scranton, a place some 14 miles from the place where said deposit was received, going about his ordinary everyday duties. At the conclusion of the evidence offered for and on behalf of the state, the defendants announced that they had no evidence to offer, but filed a motion to exclude the evidence offered on the part of the state, and requested the court to instruct the jury to find peremptorily the defendant not guilty of the crime charged. The state then requested the court to instruct the jury in substance as follows: 'That even though the jury might believe that the defendant, the appellee, was not present at the time of the reception of the deposit charged in the indictment, and even though they might believe from the evidence that he did not know of this specific deposit being made in said branch bank, yet if the jury further believed from the evidence beyond a reasonable doubt that the defendant was a director in the Scranton State Bank, and that said branch bank at Ocean Springs on the date laid in the indictment was kept open through the direction of said appellee and the other directors of the bank for the reception of deposits, and further believed from the evidence beyond a reasonable doubt that the appellee knew, or had good reason to believe, on said date, that the said bank was in an insolvent condition, then you should find the defendant guilty as charged.'

In discussing the case the court said: "The motion to exclude the evidence offered by the state and the peremptory instruction prayed for by the appellee to find the defendant not guilty were granted by the court, and the instruction prayed for by the state was refused, to which actions of the court the state excepted." Upon the trial it was shown that the deposit was actually received by one Louis Lundy, the cashier of the said branch bank at Ocean Springs; "that this defendant at that time was some 14 miles away, at Scranton, where the parent bank was located. It is perfectly clear from the evidence that the said branch bank was utterly insolvent on the day of the reception of this deposit, and had been for some time prior thereto; that the said branch bank was kept open for the reception of deposits under the authority of the directors and

managing officers, and that the managing officers and directors of the said branch bank knew the bank was insolvent, but did not close the doors of the bank when they knew it had become insolvent, and did not give any instructions to cease the reception of deposits, although said insolvency was well known to them. The main defense pressed by the appellee, this being an appeal by the state to settle the legal question involved in the giving of the peremptory charge for the defendant and the refusal of the charge indicated supra for the state, was that, under this statute, no one of the officers or employes of a bank can be convicted unless the particular employe or officer indicted actually manually received the deposit," etc.

After a very elaborate discussion of the questions involved the appellate court held that the instruction given by the trial court was error, and that under the facts stated the defendant, who had been one of the managing officers of the bank, and who permitted those who were working under his direction to receive deposits, and who had knowledge of the insolvency of the bank, and who took no steps to close the same, nor to prevent the further taking of deposits, could be prosecuted for unlawfully receiving deposits.

In the case of *State v. Eifert*, 102 Iowa, 188, 65 N. W. 309, 71 N. W. 248, 38 L. R. A. 485, 63 Am. St. Rep. 433, the court instructed the jury as follows: "In determining whether the defendant received the alleged deposit of C. H. Mohling, you are instructed that it is not necessary that the evidence should show, or that you should find, that the defendant in person received such deposit, nor that he was personally present when it was received from said Mohling, if received at all; it is enough if it was received by the cashier or agent of defendant under his authority. But you are further instructed that even though the defendant instructed Theodore Eifert to close the bank, and refuse to receive or accept further deposits, and that, after such instructions to so refuse deposits, the said Theodore Eifert did accept and receive from said Mohling the deposit in question, if so you find from the evidence, still, if the defendant, with knowledge thereof, accepted and retained as a deposit the amount so received from said Mohling by said Theodore Eifert, and placed among and treated it as a part of the funds or assets of the bank, having full knowledge from what source and under what circumstances and by whom it was received, he will be deemed to have knowingly accepted such sum as a deposit. If, however, such deposit was so received without his authority, and was not accepted by him, if at all, with full knowledge of the manner and circumstances of its being deposited, if at all, then he will not be deemed

to have knowingly received or accepted such deposit."

The court said: "Exception is taken to so much of this instruction as relates to the action of the defendant in knowingly accepting and retaining the deposit, after full knowledge from whom and under what circumstances it had been made. The argument of defendant is that when the deposit was received and accepted by defendant's son, and entered upon the books of the bank and upon the depositor's book, the whole transaction was concluded. Now, the facts appear to be that the son had for a long time been in the bank, assisting his father; that the father was in the city of Waverly when the son, who had charge of the bank, received this deposit; that it was received on the afternoon of August 15, 1893, and several hours after the son had received a telephone message from his father to close the bank and to take no more deposits; that the father returned to Tripoli the same evening, and then learned that this deposit had been received, contrary to his orders; that said money was put into the assets of the bank; and that defendant never paid or tendered it back to Mohling. Now, when did defendant 'knowingly accept and receive' this money as charged in the indictment? We think he must be said to have done so when he returned home, and first knew of the fact of its receipt. If he had given no directions to stop business and refuse further deposits, then it might be said that he should be concluded by the transaction when the money was in fact received by his son, who had authority to act for him. But, having expressly directed the son to cease business and refuse deposits, he had no reason to suspect or believe that his orders would not be obeyed. It cannot therefore be said that he knowingly received and accepted the deposit when it was handed to his son, and by him accepted, without the father's knowledge, and against his express direction. When, however, he arrived home that evening, he became acquainted with all the facts; he then knew that this deposit had been accepted by the son after he had directed him to take no more deposits; he knew who made the deposit; he knew he was then insolvent, and that he had been before the son had received the deposit; and, knowing all the facts, he did not repudiate the transaction, but retained and accepted the money, at the same time knowing that his bank would never open again. It seems to us that when defendant, after full knowledge of all the facts, on the evening after his return, failed to repudiate the act of his son, and took no steps looking to a return of the deposit to Mohling, he then knowingly received and accepted the deposit. \* \* \* The gist of the offense charged in the prosecution is in knowingly receiving and accepting a deposit, knowing that he was then insolvent. Surely one whose agent, without his knowl-

edge or authority, and in disobedience of his express instructions, receives and accepts for his principal money as a deposit, will not by such act be rendered liable criminally for knowingly receiving and accepting the money, but it cannot be doubted that, after coming into possession of all the facts, the principal may so ratify the act heretofore done as to make it binding upon himself, and the basis of a criminal liability. If the defendant had, on becoming acquainted with what had been done, promptly disavowed the act of his son, and returned the deposit to Mohling, he would not have been guilty, as it could not have been said that he knowingly received and accepted the deposit."

In the case of *Carr v State*, 104 Ala. 4, 16 South. 150, the court said: "The evidence showed that defendant and his wife, as partners, carried on a banking business in Colbert county, Ala., under the name and style of 'Tuscumbia Banking Company'; that the defendant was the managing and controlling member of said firm; and that one Harrington was the agent of said firm, and acting cashier and bookkeeper thereof, at the time the deposit involved here was made. It was also made to appear that on the day said deposit was made the defendant was away from Tuscumbia, the town where the business was being carried on, and that the deposit was received by said Harrington for the Tuscumbia Banking Company. On these facts it was contended by the defendant, through objections to and motions to exclude testimony and requests for instructions, that he did not receive the deposit alleged in the indictment, and should be acquitted on the uncontroverted evidence; the theory of the defense in this regard being that no other than a direct, personal, manual receipt of deposits can fill the terms of the enactment. There is nothing in this position. The defendant, as a member and manager of the firm called the Tuscumbia Banking Company, carried on the business of banking at Tuscumbia; he thereby, so long as the bank was kept open, invited the public, and Robert J. Abernathy as one of the public, to make deposits with said firm; whether present or absent personally, he provided means for the acceptance of this invitation, by the employment of Harrington to take possession of deposits tendered in consequence of it for him, and the act of Harrington in so doing is his act as fully in every sense as if he had performed it by his own hands; and this wholly regardless of all considerations as to whether Harrington himself might be held in criminal responsibility for his act as agent. The receipt of the deposit was in the usual course of business, which the defendant carried on and kept open for the very purpose, among others perhaps, of receiving on deposit the funds of other persons, and no matter what agencies he employed he is guilty under the statute if he at the time knew, or had good cause to believe, that the Tuscumbia

Banking Company was in a failing or insolvent condition. 1 Morse on Banks & Banking, § 178; 1 Whart. Cr. Law, § 247; 2 Whart. Cr. Law, § 1503; *State v. Cadwell et al.*, 79 Iowa, 432 [44 N. W. 700]."

In the case of *State v. Cadwell*, 79 Iowa, 432, 44 N. W. 700, the court said: "At the time the deposit in question was received, one John X. Aleck was cashier of defendant's bank at Logan, and issued the certificate; and at the time neither of the defendants was present. The certificate, against the objections of the defendants, was admitted in evidence, and the ruling is made a ground of complaint here. A specific ground of complaint in argument is that the defendants were indicted for receiving the deposit, and it is not competent to show on the trial that the money was received by another than the defendants personally. We think no such rule has ever been held by a court of last resort. On the contrary, a general and well-recognized rule is that, if a person does the act constituting the offense, through the agency of another, the act is his, and it is unnecessary to aver the agency in the indictment. It may be charged directly as his act, and proof that he did the act through the agency of another will sustain a conviction. Whart. Crim. Ev. (9th Ed.) §§ 102, 112; Whart. Crim. Law (9th Ed.) § 322; *State v. Neal*, 7 Fost. (N. H.) 131; *Commonwealth v. Nichols*, 10 Metc. (Mass.) 259, 43 Am. Dec. 432; *Stoughton v. State*, 2 Ohio St. 562; *Brister v. State*, 26 Ala. 107."

Continuing, the court said: "It is further said, in this connection, that the defendants are not charged with permitting or conniving at the receiving of the deposit, but with receiving it themselves, and that, under the averments of the indictment, the proofs as to Aleck's receiving the money are not admissible." The rule above announced is conclusive of this question. The defendants are indicted as a firm of bankers, and as such they are charged with receiving the money; and it is entirely immaterial whether they received it in person, or through their cashier. In law, if they permitted him to do it for them, they did it themselves.

In the case of *State v. Sattley*, 131 Mo. 464, 33 S. W. 41, the court used the following language: "The defendant argues that to make defendant liable for the reception of the deposit by one of the employes acting under his direction and authority such authority must have been given after he knew the bank was in failing circumstances. This cannot be true. The moment he became aware the bank was in failing circumstances the law devolved upon him the duty of revoking the authority of any employé under him and subject to his control to receive any further deposit and his failure to prevent further deposits must be construed as a continuing authority to receive them, an assenting thereto, because by one word it was in his power to close the bank, or no-

tify all parties that no more deposits would be received. This was the plain measure of his duty as prescribed by the law, which he was conclusively bound to know."

In the case of *State v. Yetzer*, 97 Iowa, 423, 68 N. W. 737, the court held: "That an officer of an insolvent bank, who, knowing of its insolvency, permits or connives at the receiving of deposits is guilty of the offense described, whether he is a managing party or not;" and the court also held that "it is not necessary, to constitute a violation of such statute by an officer of the bank, who does not personally receive the deposit, that the person actually receiving it knows that the bank is insolvent, when such officer knows it, and allows such person to receive it for the bank."

Counsel for appellant with much force and earnestness insist that under the statute the defendant cannot be convicted of the offense charged unless it be shown that he, in person, manually received the deposit in question, and in support of this theory of law cite the case of *Ex parte Rickey*, 31 Nev. 82, 100 Pac. 134, 135 Am. St. Rep. 651. After a careful examination of this case, together with the authorities cited, we are of the opinion that the cases, from which quotations have heretofore been made, more accurately state the rule applicable to prosecutions in this state under our statute. To adopt the rule thus announced would in effect annul the provisions of the statute on which this prosecution is founded. It would open the door to the grossest of fraudulent transactions on the part of banking officers and give them every opportunity for defrauding the public by receiving deposits through dummy and temporary employes, to hold that such officers are not liable under the statute for the receipt of deposits after the bank becomes insolvent, unless they have personally and manually received the deposits and done all the acts enumerated by the statute. Where such an officer has full knowledge that his banking corporation is insolvent and is unable to continue in its regular course of business as a banking institution, and he permits or consents to the corporation continuing to receive deposits through the regular employes of the bank and at the same time knows that the bank will not be able to meet its obligations and repay its depositors in the ordinary and due course of business, he is criminally liable and deserves to be dealt with in the manner pointed out by the statute.

[2] We have no doubt but that the statute was enacted for the chief purpose of protecting those who place their money on deposit in banking institutions, and that the lawmakers clearly intended to make all officers of such banks responsible for the acts of the employes thereof in receiving deposits where such officers, knowing of the insolvent condition of the bank, permit the bank to continue receiving deposits or acquiesce therein,

and that such officers become criminally liable under the statute.

[4, 5] The next question presented upon the argument is: When does a banking institution become insolvent within the meaning of the statute above quoted? During the trial counsel for appellant submitted upon this question their instructions Nos. 5, 6, 7, 8, and 9, which instructions were refused, and the court upon its own motion gave instructions Nos. 19, 20, and 21. We think defendant's proffered instruction No. 6 fairly states appellant's position upon the question of insolvency, which is as follows: "Instruction No. 6. The jury are instructed, that in this case, it is incumbent upon the prosecution to prove, among other material facts, to the satisfaction of the jury and beyond a reasonable doubt that at the time referred to in the information, the Idaho State Bank was insolvent. That is, that the cash value of its assets, realizable within a reasonable time in case of liquidation by the officers and owners of said bank as ordinarily prudent persons ordinarily close up their business, was not equal to its liabilities exclusive of capital stock, surplus fund and interest fund."

This instruction was refused, and in its stead the court gave the following instructions:

"Instruction No. 19. You are instructed that a bank is insolvent when its assets and property are of such character and value that it is unable to meet its demands in the usual and ordinary course of business.

"Instruction No. 20. You are instructed that, within the meaning of the foregoing instruction, it is not essential that the bank shall have on hand sufficient cash to pay all its depositors, or any, considerable number of them, on the same day, or in case of a run on the bank or some extraordinary demand, but that it is only necessary for it to have on hand cash or available assets sufficient to meet the demands that are usually made on it from day to day in the ordinary course of business.

"Instruction No. 21. You are instructed that the 'demands' of a bank, within the meaning of the foregoing instructions, are all sums owing by it to other banks, firms, corporations, or persons, whether for money borrowed, or for money deposited with it either on time certificates of deposit, or on general deposit subject to check; but the amount owing by the bank to its stockholders, as such, for its capital stock and surplus, if any, should not be considered as a debt against the bank within the meaning of the foregoing instructions."

We think that the instructions tendered by appellant and refused, and those given by the court, squarely present the question as to when a bank becomes insolvent within the meaning of the law.

Counsel for appellant contends that a bank is insolvent within the meaning of the stat-

ute when it does not possess sufficient assets to pay within a reasonable time all its liabilities through its own agencies, and that a bank is insolvent when the cash value of its assets, realizable within a reasonable time by the officers and owners of said bank as ordinarily prudent persons would ordinarily close up their business, was equal to its liabilities, exclusive of capital stock, surplus fund, and interest fund. That is, a bank might be insolvent in the limited sense in which the term is used in bankruptcy proceedings, and still not be insolvent within the meaning of the statute under which this case is prosecuted. That the term "insolvent" as used in the statute means insolvent in the broad general sense in which that term is understood as indicating a deficiency of one's assets to meet his liabilities when such assets are disposed of by the owner thereof in the usual way. With this contention of counsel we are unable to agree.

Webster's International Dictionary defines the word "insolvent" as follows: "Not solvent; not having sufficient estate to pay one's debts; inability to pay one's debts as they fall due in ordinary course of business, etc." The Century Dictionary defines "insolvent" thus: "Not solvent; unable or inadequate to satisfy all claims; bankrupt, as an insolvent debtor or estate." Under this definition the Century Dictionary quotes from *Cunningham v. Norton*, 125 U. S. 77, 8 Sup. Ct. 804, 31 L. Ed. 624: "When a person is unable to pay his debts he is understood to be insolvent." The following definition of "insolvent" is given in *Bouvier's Law Dictionary*: "The condition of a person who is insolvent or unable to pay his debts"—quoting 2 Kent, 389; one who is unable to pay his debts as they fall due in the usual course of trade or business, although his assets in value exceed the amount of his liabilities, or the embarrassment is only temporary—citing *Morey v. Milliken*, 86 Me. 464, 30 Atl. 102; *Langham v. Lanier*, 7 Tex. Civ. App. 4, 28 S. W. 255; *Corey v. Wadsworth*, 99 Ala. 68, 11 South. 350, 23 L. R. A. 618, 42 Am. St. Rep. 29.

In the case of *Cunningham v. Norton*, supra, the syllabus is as follows: "When a person is unable to pay his debts he is insolvent." The only reference to the term "insolvent" in the body of the opinion is as follows: "It is objected that the deed of assignment does not, on its face, show that the assignor was insolvent, or in contemplation of insolvency. The obvious answer is that if this is a necessary requirement, the deed does state that the assignor 'is indebted to divers persons in considerable sums of money, which he is at present unable to pay in full.' When a person is unable to pay his debts, he is understood to be insolvent. It is difficult to give a more accurate definition of insolvency." *Minton v. Stahlman* (Tex. Cr. App.) 34 S. W. 222; *Baxter v. Coughlin*, 70 Minn. 1, 72 N. W. 797.

[8] It may be conceded that there is some

little conflict of authorities on this question, but we think the great weight of authority follows the rule given by the trial court. The rule laid down by the court applies in bankruptcy cases, and it seems to us that the same rule should apply with equal force to bankers. Bankers are trusted with the people's money, and the people are entitled to look to them for protection; theirs is a public trust. Quoting from *Baker v. State*, 54 Wis. 376, 12 N. W. 16: "A banker is one who traffics in money, receives and remits money, negotiates bills of exchange, receives money in trust, to be drawn again, or its equivalent, as the owner has occasion to use it. \* \* \* The very nature of the business prevents it from being conducted by a person isolated from all communication with others. The business, therefore, not only affects the banker or broker, but every person who deals with him as such. The business is not confined to the property of the banker or broker, but involves all property passing through his hands or intrusted to his keeping. A bank implies capital, and capital invites confidence. A man holding himself out as a banker or broker thereby gives public proclamation that he has money, and property readily convertible into money, in his possession and subject to his control, and for that reason he may be safely trusted. It requires no argument to show that such assurance is most inviting and influential with the mass of the people, especially with those unacquainted with the history and character of the man. With them the banker or broker is intrusted with money merely because he is a banker or broker, and hence supposed to have surplus capital as a standing guaranty of his agreements and his integrity." We believe that the Legislature in enacting the statute under which the defendant is prosecuted in this case intended to use the word "insolvent" in the sense that a bank receiving deposits is insolvent when it reaches that financial condition where it cannot conduct business in the usual and ordinary course of such business. For these reasons, we think the court's instructions, taken as a whole, fully and fairly state the law applicable to this question.

[9] Counsel for appellant further assign as error the ruling of the court in refusing to give defendant's instructions Nos. 21 to 30 relating to accessories. In said proffered instructions defendant contends that under the facts disclosed by the evidence in this case defendant could not be convicted as a principal, though charged as such in the information, and that it therefore became the duty of the court to instruct the jury upon the subject of accessories. Section 7697 of the Rev. Codes specifically abrogates all distinctions heretofore existing between accessories and principals, and so under the statute of this state an accessory is now prosecuted as a



principal. *State v. Bland*, 9 Idaho, 806, 78 Pac. 780.

[7] However, in the case at bar, the appellant, if guilty at all, is guilty as a principal, and he has been so prosecuted. The statute upon which this prosecution is founded clearly and undoubtedly makes an officer of a bank liable as a principal and not as an accessory, and where the facts disclosed are such as the record in this case presents, he is properly convicted as a principal, and the law of accessories, if any distinction was recognized in this state, would not apply to such case.

Counsel for defendant have brought to this court other assignments of error in the rulings of the trial court in the giving and refusing of certain other instructions. We have examined the ruling of the court on these questions, and, finding no error, deem it unnecessary to review the same at length. It follows that the judgment of the trial court should be affirmed, and it is so ordered.

STEWART, C. J., and AILSHIE, J., concur.

#### SIMS v. MILWAUKEE LAND CO.

(Supreme Court of Idaho. Nov. 4, 1911.)

##### (Syllabus by the Court.)

#### 1. EVIDENCE (§ 83\*)—PRESUMPTIONS—REGULABILITY OF ACTS OF OFFICERS.

Where application is made for a ferry license and a license is authorized and granted by the board of county commissioners, it will be presumed that the board performed their duties as required by law and that such license was issued according to law and is valid upon its face, and in the absence of evidence to the contrary is prima facie sufficient to show the right of the party to whom the license was issued to construct and operate such ferry.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 83.\*]

#### 2. EVIDENCE (§ 178\*)—BEST AND SECONDARY EVIDENCE—PROCEEDINGS OF COUNTY COMMISSIONERS.

Where the board of county commissioners, upon an application for a ferry license, takes all the steps required by statute, but mislays or loses the papers and documents filed by the applicant, and such papers and documents cannot be produced, and the board has failed to make a record of such proceedings, then and in such case it is proper for the applicant to show by oral testimony what the board in fact did do, and the board's entire proceedings. This would in no way contradict the record of the board, and was the only way to prove the acts of the board, and was the best evidence obtainable for the purpose of proving such matter.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.\*]

#### 3. FERRIES (§ 14\*)—COUNTY BOARD—PROCEEDINGS—VALIDITY.

The statutes of this state require certain proceedings to be taken by the applicant and the board of county commissioners in granting a ferry license, and, if the statutory proceedings are taken and the board issues a license, such license will be held valid, notwithstanding the fact that the complete proceedings of the board

were not made a matter of record on the minute book.

[Ed. Note.—For other cases, see Ferries, Dec. Dig. § 14.\*]

#### 4. COUNTIES (§ 53\*)—COUNTY BOARD—PROCEEDINGS—VALIDITY.

Under the provisions of sections 1911 and 1912, Rev. Codes, the board of county commissioners are required to keep a minute book in which must be recorded all orders and decisions made by them and the daily proceedings had at all regular and special meetings, but the statute does not make this requirement a jurisdictional matter; in other words, the statute does not make the recording upon the minute books a prerequisite to the validity of the acts and proceedings of the board; while the statute does direct that such matters be recorded, yet the proceedings are not invalid by reason of the failure to so record such matters.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 66-70; Dec. Dig. § 53.\*]

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by Robert C. Sims against the Milwaukee Land Company. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

McFarland & McFarland, for appellant.  
J. L. McClear, for respondent.

STEWART, C. J. This is an action brought by Robert C. Sims against the Milwaukee Land Company, a corporation, for damages aggregating the sum of \$1,615, alleged to have been sustained by the plaintiff by the wrongful, unlawful, wilful, and malicious acts and interference by the defendant with a certain ferry constructed and operated by the plaintiff across the St. Joe river, under a ferry license granted to him by the board of commissioners of Kootenai county, on the 21st of November, 1907. The answer puts in issue the allegations of the complaint, and in addition the defendant tendered an affirmative defense, and alleged: That prior to July 1, 1907, certain lands were conveyed to Albert L. Flewelling by the owners, and that said Flewelling between the times of the conveyance of said lands to him and prior to July 1, 1907, and the 9th day of December, 1907, was entitled to the possession and in the possession of said property, and that on the 9th day of December, 1907, said Flewelling conveyed said property to the defendant, who has since remained and now is the owner thereof. That prior to December 9, 1907, the defendant had purchased and there had been conveyed to it and it was seised in fee simple various other parcels of land extending along the left bank of the St. Joe river, abutting immediately upon said river, both above and below the parcels of land purchased from Flewelling. That in the year 1907 Flewelling erected at a point a short distance below the property owned by him a mill, and in December of 1907 conveyed all the said lands and mill to the defendant, and thereafter the defendant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

erected another mill on said property, and ever since the erection of said mill said Flewelling and the defendant have maintained and operated said mills and engaged in the manufacture of lumber; and for the purpose of operating said mills, which were for the most part supplied with timber cut upon lands tributary to the St. Joe river, it became necessary for the said Flewelling and for the said defendant to drive a line of piling in said river, and near to the left bank thereof, extending from a point above the head of navigation of said river and far above the property owned by Flewelling and to a point below the sawmill, and to connect the same with boom sticks to hold the logs until they were manufactured. That, since said piling was driven and the boom sticks attached, the same have been maintained so far as required and necessary by the defendant, and are so maintained to the left of the trend of the channel of said river in such manner as not to interfere with the use of said stream for the purposes of navigation. That some time in the winter of 1907 and 1908, and the spring of 1908, the plaintiff began to transport people in rowboats from a point on the right bank of said St. Joe river to a point on the left bank thereof, situated in or near lot 8 in section 20, and upon land belonging to the defendant, at which point the plaintiff would land such passengers; and would cause his said boats to be attached to pilings driven into the bed of said stream upon the lands of said defendant, and make a landing upon the lands of the defendant, and continuously used the same, and thereby committed constant and continuous trespass upon the lands of the defendant, against its will and consent and without right or authority; and to better enable the plaintiff to transport passengers over and across the stream, and to enable the plaintiff to transport teams over and across the same and to land them upon the defendant's said lands, the plaintiff, without right or authority so to do and against the will and without the consent of the defendant, attached a cable to the lands of the defendant upon the left bank of said stream at the point aforesaid, and sought to maintain the same. That the defendant, to the end that such trespass upon its said lands might be hindered and prevented, caused to be erected upon its own lands, upon the left bank of said river and immediately in front of the place where the said plaintiff was wrongfully landing as aforesaid, a fence, and did unfasten and remove from its said lands said cable so wrongfully attached by the plaintiff.

Thus it will be seen that, while the answer denies the issuing of a ferry license by the board of county commissioners to the plaintiff and his right to operate a ferry at the place described in the license, the answer also presents affirmative matter, wheth-

er or not the ferry constructed by the plaintiff made its attachment upon the lands of the respondent, and whether the business carried on by such ferry landed passengers and freight carried by the ferry upon the lands of the defendant, and thereby the plaintiff trespassed upon the lands of the defendant, without right and against the will and consent of the defendant. The cause was tried to the court and a jury, and, after the evidence of the plaintiff was in, a motion was made for a nonsuit for the reason that the plaintiff had failed to prove any case, which motion was sustained and judgment was entered in favor of the defendant, dismissing the action and for costs. A motion for a new trial was made and overruled, and this appeal is from the judgment and from the order overruling the motion for a new trial.

Appellant assigns 23 different specifications of error, upon which he relies upon this appeal. It will be unnecessary to examine each of these specifications separately, for the reason that the principal question presented arises out of the action of the trial court in admitting and refusing to admit certain testimony offered by the plaintiff. At the trial the plaintiff was called as a witness, and testified that he commenced operating a ferry about the 1st of December, 1907; that it was a public ferry, and he operated it as such. Counsel for appellant then had a certain document marked for identification, "Plaintiff's Exhibit A, Ferry License," and the witness testified that before commencing to operate the ferry he had obtained from the board of county commissioners of Kootenai a license or charter to do so. He was then handed "Exhibit A" and asked to state what it was, and in answer replied, "It is a ferry license, giving me a franchise to operate a ferry at St. Joe, Idaho," and testified that he received the same before he commenced to operate such ferry. Such license was then offered in evidence, which was objected to by counsel for respondent, because it had not been shown that the board of county commissioners of Kootenai county directed in proper form the clerk of the board to issue this license, or that the proper procedure before acquiring the ferry license was taken by the board. The witness, after some other matters were inquired into, testified that after receiving the franchise he proceeded to obtain permission from the company's agent to fix a landing on the south side of the river, suitable to accommodate the business, and dug down the banks to a suitable grade for the approaches, and stretched a cable so as to permit boats to pass and repass, and cut down the banks of the river upon the particular suggestion of Mr. Holmes, agent for the respondent; that he showed the appellant just what shape and what place to cut; that the bank on the north side of the river

he cut down to meet his own ideas; that the ground was dedicated to the public as a street; that the place where he did the cutting was dedicated to the public and was a public street, and was a road; that it had been used as a street since the platting of a certain piece of property in 1907, in August, the witness thought; that he did not know how long it had been used as a public road before that; that on the south side where the ferry landed there was a thoroughfare, which had been used by the public as a thoroughfare or road since the summer of 1896; that he had the cable stretched across the river and operated this ferry by means of a cable; that the *dead man*, where the cable was fastened, was in the old public road on the south side; that the cable was fastened on the north side of the bank to a windlass suspended by two *dead men*; that this cable was attached to the drum of the windlass about 25 feet from the bank, just to the left of the ferry approach on the other side.

The appellant then testified to the obstruction and interference placed by the respondent, and to his loss, and to the loss he sustained during such obstruction and interference, and the damages he sustained, and general inquiry was made as to his improvements and the obstructions of the respondent. He was then asked this question: "Do you know whether or not notice was published in a newspaper in this county for four consecutive weeks, specifying the location, time, and place, when and where application would be made for this charter or license to run that ferry?" Objection was made to this question because it was not the best evidence, and the objection was sustained by the court. Thereupon D. E. Danby was called as a witness and testified: "I am clerk of the district court, ex officio auditor and recorder, and clerk of the board of county commissioners. On the 21st day of November, 1907, I was deputy clerk, auditor and recorder, and deputy clerk of the board of county commissioners." His attention was called to certain parts of the record of the board of county commissioners and identified by him, and the same was offered in evidence as "Exhibit B," and was objected to upon the part of counsel for respondent upon the ground that the record was not complete in itself and is insufficient upon which to base the issuance of a ferry license; that the board of county commissioners is a board of inferior and limited jurisdiction, and there is no presumption of law that the statutes giving ferry licenses have been complied with, which objection was sustained by the court, to which ruling the plaintiff then and there duly excepted. The witness then testified that he had examined the records and files of the clerk of the board for documents and papers concerning the matter of the application of R. C. Sims to keep and maintain a ferry on the St. Joe river, and did not find

any application for such license and did not find any bond given and did not find any notice or proof of publication of notice or any proof of publication; that he had made diligent search for them; that he searched through the files filed in the vault in his office where such papers are usually kept; and that he had no recollection of ever having seen such papers that he remembered of. Whereupon "Exhibit A" was offered in evidence, which exhibit reads as follows: "Know ye, that by the order of the county commissioners' board, within and for the county of Kootenai, in the state of Idaho, at the October term thereof, for the year 1907, on the 21st day of November, 1907, R. C. Sims was granted a license to keep a ferry on the St. Joe river at the head of navigation for twelve months, from the first day of October, 1907. And he having filed his bond, as required by law, these are, therefore, to authorize the said R. C. Sims to keep said ferry at the place and for the time aforesaid, and to ask, demand and receive pay thereat, at the following rates, to wit: (Then follows the rates to be charged for transportation.) In testimony whereof, I, T. L. Quarles, clerk of the county commissioners' board, within and for the said county aforesaid, have hereunto set my hand and affixed my official seal. Done at office this 21st day of November, 1907. T. L. Quarles, Clerk, By D. E. Danby, Deputy." Objection was again made by counsel for respondent that the record was not a record of proceedings of the board of county commissioners, and was not sufficiently complete to justify its introduction in evidence, because it does not set forth the facts necessary to give the board jurisdiction, and fails to fix the bond, and that the license as issued does not comply with the record. This objection was sustained by the court, and exception was taken.

Counsel for appellant also offered in evidence "Exhibit B," identified by the witness D. E. Danby, clerk of the board, as the record made by the board on November 20, 1907, authorizing the issuance of the ferry license to the appellant, and an objection was made by counsel for respondent for the reasons heretofore given, and the objection was sustained. This record reads as follows: "November 20, 1907. Commissioners' Proceedings. In the matter of the petition of citizens of St. Joe, to grant a license for running a ferry to R. C. Sims, the ferry to be established at a point 200 feet north of the north end of the island, shown on the United States government plat, in lot 10, section 20, township 46 N. range 1, E. B. M., across the St. Joe river at that point, was taken up for consideration, and after being fully advised in the premises, the said petition was duly approved."

[1] It is urged in this court by counsel for respondent that it was necessary for the appellant, before he introduced his ferry license, to show by the record of the board that the

petitioner for the license and the board had fully complied with the requirements of sections 1015; 1037, and 1038, Rev. Codes. Section 1015 provides that the board of commissioners, granting authority to construct a toll bridge or to keep a public ferry, must at the same time fix the bond, the amount of the license tax, the rate of tolls, and make all necessary orders relative to the construction, erection, and business of the ferry. Section 1037 provides, among other things, that the applicant for a ferry license must publish a notice in a newspaper in each county where the ferry touches, for four successive weeks, specifying the location and the time and the place when and where the application will be made, and that after notice is given the application must be made in writing, under oath, to the board of commissioners of the proper county, and that the landings of the ferry must be described and the names of the owners thereof given, if known, and, if the applicant is not the owner of the land, that notice of the application be served on the owner thereof, at least 10 days prior to the application. Section 1038 provides that, at the hearing, proof of giving the notice as required by the preceding section must be made, and any person may appear and contest the application, and if the board finds the ferry is a public necessity or convenience, and that the applicant is a suitable person, authority to erect such ferry may be granted.

It will be seen that the record made by the board of commissioners with reference to issuing the ferry license, "Exhibit B," does not state that the board fixed the amount of the penal bond to be given, or fixing the amount of license tax to be paid, and made no orders relative to the construction, erection, or business of the ferry, or that notice was published and service made in accordance with section 1037, Rev. Codes. The sections of the statute above referred to, however, make no provision that the proceedings of the board with reference to issuing ferry licenses shall be recorded. The only provisions of the Code which would indicate that the board should record its minutes are contained in sections 1911 and 1912, Rev. Codes. Section 1911 provides that: "The clerk of the board must: (1) Record all the proceedings of the board." And section 1912 provides: "The board must cause to be kept: (1) A 'minute book' in which must be recorded all orders and decisions made by them, and the daily proceedings had at all regular and special meetings." These sections of the statute require the board to record all the proceedings of the board; but the statute nowhere requires or provides that a failure to record the proceedings of the board renders the proceedings by the board void. It will be presumed that public officers perform their duties as the law requires, and where it is shown, as in this case, that a ferry license has been issued to an applicant upon the order of the board of county commission-

ers in the absence of evidence showing the contrary, the court will presume that the applicant and the board followed the law and pursued the method required by law to authorize the issuing of such license. When, therefore, the appellant offered the license as proof of his authority to construct and maintain a ferry at the place named in the license, and such license showed upon its face that it was issued under the authority of the board of county commissioners and by their direction, it will be presumed that the license was legally issued and conferred authority on the applicant to construct and maintain a ferry as therein described and was sufficient, *prima facie*, to establish the plaintiff's right to maintain such ferry.

[2] In this case, however, counsel for appellant offered to show by the clerk of the board and by other oral evidence that a petition had been duly presented to the board, that the board had acted thereon, that a bond had been fixed, and that notice and proof had been made in accordance with section 1037, *supra*, and evidence which in other respects showed that the board had fully complied with the law, notwithstanding the fact that the same had not been entered upon the minutes of the board. This was objected to as not the best evidence and because the statute was mandatory. This evidence was proper. If the board took all of the steps required by the statute, but mislaid or lost the documents and papers presented to them by the applicant, and such papers and documents could not be produced, and a full and complete record of their proceedings was not made, then it was proper for the applicant to show by oral testimony what the board in fact did with reference to the application and the board's entire proceedings. This would in no way contradict the record of the board and was, under the facts, the very best evidence of the facts and truth obtainable; and this would be particularly true in this case because the statute does not provide that the proceedings of the board shall be void unless recorded upon their records.

[3,4] If the applicant did those things required of him by law in making his application for a license, and upon doing so the board had issued to him a license, he could not be denied the rights conferred upon him by the license by the mere failure of the board to record the minutes showing such proceedings, and the license upon its face was sufficient, in the first instance, to show his right to construct and maintain the ferry, and, if the respondent under its answer was able to show that the plaintiff had not complied with the law, then that was a matter of defense. The license issued to appellant recited on its face that a bond had been filed as required by law. The court was in error in holding that the statutory requirements with reference to procuring a license and the procedure before the board must be shown affirmatively upon the records of the

board. While these matters are matters that are required by law to be done, such as making the application and giving the notice and fixing the bond and the license fee by the commissioners, a record of which should have been made in the minutes of the board, still if they were done, and the board issued a license, the license would be valid in the first instance notwithstanding the fact that such facts were not shown upon the minutes of the board's proceedings.

Whether the appellant, by constructing the ferry where he did construct it, trespassed upon property belonging to the respondent, was an issue which could have been tried in the case under the pleadings; but that issue was one presented by the answer.

Objection was also made to the introduction of the record of the board of commissioners on November 20, 1907, and the license issued to the appellant herein, for the reason that there is a variance between the order of the board and the license as to the location of the ferry. In the order of the board it is recited that a petition was under consideration for the establishment of a ferry, "at a point 200 feet north of the north end of the island, shown on United States government plat, on lot 10, section 20, township 46 North, R. 1 E. B. M., across the St. Joe river at that point"; while in the license the place of location is described as follows: "To keep a ferry on the St. Joe river at the head of navigation." It does not appear that the place of location fixed by the license is any different from that fixed in the order. The head of navigation may be 200 feet north of the north end of the island, as shown in the order, and there is nothing to show that the applicant did not locate the ferry at the place designated in the order and as described in his license.

For the foregoing reasons, the judgment in this case is reversed, and a new trial is ordered. Costs awarded to the appellant.

AILSHIE and SULLIVAN, JJ., concur.

HIBLER et al. v. SMITH et al.

(Supreme Court of Idaho. Nov. 14, 1911.)

(Syllabus by the Court.)

#### REVIEW OF EVIDENCE.

Evidence examined, and held sufficient to support the verdict and judgment as to the first three causes of action, and insufficient to support the judgment as to the fourth cause of action.

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by G. F. Hibler and others against Grant Smith and others. Judgment for plaintiffs, and defendants appeal. Affirmed in part, and reversed in part.

McBee & La Veine and Charles L. Heltman, for appellants. J. L. McClear, for respondents.

AILSHIE, J. In this case the plaintiffs sued on four causes of action. Defendants admitted the first cause of action, and made a tender into court of the amount due.

It is claimed on this appeal that the evidence is not sufficient to support the verdict and judgment on the other three causes of action. The evidence is sufficient to support the judgment as to all but the fourth cause of action, and as to that there is a total lack of material or substantial evidence to support the claim there alleged.

The judgment will be affirmed as to the first three causes of action, and is hereby reversed as to the fourth cause of action, and the case is hereby remanded, with direction to grant a new trial on the fourth cause of action. Costs of appeal will be equally divided between appellants and respondents.

STEWART, C. J., and SULLIVAN, J., concur.

#### FENTON v. BOARD OF COM'RS OF ADA COUNTY.

(Supreme Court of Idaho. Oct. 30, 1911.)

(Syllabus by the Court.)

#### 1. SCHOOLS AND SCHOOL DISTRICTS (§ 103\*)—COUNTY BOARDS—APPEAL FROM DECISION.

Under the provisions of section 1960 of the Rev. Codes, an appeal may be taken from any act, order, or proceeding of the board of county commissioners by any person aggrieved thereby, or by a taxpayer of the county.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 103.\*]

#### 2. SCHOOLS AND SCHOOL DISTRICTS (§ 103\*)—COUNTY BOARDS—APPEAL FROM DECISION.

Held, under the provisions of said section, that an appeal may be taken from the order of the board, making a levy of taxes under the provisions of section 65 of the school laws of 1911 (Sess. Laws, p. 510).

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 103.\*]

#### 3. FORMER CASE DISTINGUISHED.

The case of Feltham v. Board of County Commissioners, 10 Idaho, 182, 77 Pac. 332, cited and distinguished.

#### 4. SCHOOLS AND SCHOOL DISTRICTS (§ 103\*)—COUNTY BOARDS—APPEAL FROM DECISION—PROCEDURE.

Held, that it was not reversible error to admit in evidence the stipulation of facts in the case.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 103.\*]

#### 5. MANDAMUS (§ 4\*)—NATURE OF REMEDY—EXISTENCE OF OTHER REMEDY.

Where an appeal is given by law, and such appeal is not a plain, speedy, and adequate remedy in the due course of law, a resort may be had to mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 934; Dec. Dig. § 4.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

# 6. TAXATION (§ 25\*)—CONSTITUTIONAL PROVISION—CONSTRUCTION.

The provisions of section 2 of article 7 of the Constitution, which declares "that the Legislature shall provide such revenue as may be needful by levying a tax by valuation," etc., applies to the raising of revenue for state purposes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 59; Dec. Dig. § 25.\*]

# 7. COUNTIES (§ 24\*)—MUNICIPAL CORPORATIONS (§ 73\*)—POWER TO TAX—CONSTITUTIONAL PROVISIONS.

Under the provisions of section 6 of article 7 of the Constitution, the Legislature is prohibited from imposing taxes for the purpose of any county, city, town, or other municipal corporation, but may by law vest in the corporate authorities the power to assess and collect taxes for all purposes of such corporations.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 24; Dec. Dig. § 24;\* Municipal Corporations, Cent. Dig. §§ 177, 178; Dec. Dig. § 73.\*]

# 8. COUNTIES (§ 24\*)—MUNICIPAL CORPORATIONS (§ 73\*)—POWER TO TAX—CONSTITUTIONAL PROVISIONS.

Held, that said section is an inhibition on the Legislature from imposing taxes for any of the purposes mentioned in said section.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 24; Dec. Dig. § 24;\* Municipal Corporations, Cent. Dig. §§ 177, 178; Dec. Dig. § 73.\*]

# 9. SCHOOLS AND SCHOOL DISTRICTS (§ 99\*)—TAXATION—CONSTITUTIONAL PROVISIONS—"MUNICIPAL CORPORATION."

Held, that a school district is not a "municipal corporation," within the meaning of said section 6, art. 7, of the Constitution.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 99.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4620-4627; vol. 8, p. 7726.]

# 10. SCHOOLS AND SCHOOL DISTRICTS (§ 10\*)—ESTABLISHMENT—CONSTITUTIONAL PROVISIONS.

Under the provisions of section 1, art. 9, of the state Constitution, it is made the duty of the Legislature to establish and maintain a general uniform and thorough system of public, free common schools, and the Legislature has a large discretion under the provisions of the Constitution in making laws to accomplish said purpose.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 10.\*]

# 11. COUNTIES (§ 81\*)—DUTIES OF OFFICERS—CONSTITUTIONAL PROVISIONS.

Under the provisions of section 11 of article 18 of the Constitution, county, township, and precinct officers must perform such duties as shall be prescribed by law.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 118-121; Dec. Dig. § 81.\*]

# 12. SCHOOLS AND SCHOOL DISTRICTS (§ 99\*)—TAXATION—CONSTITUTIONAL PROVISIONS.

Under the provisions of the Constitution, the Legislature had the authority to require the board of county commissioners of each county to levy a tax of not less than five mills nor more than ten mills on each dollar of taxable property in their respective counties, for school purposes.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 99.\*]

# 13. SCHOOLS AND SCHOOL DISTRICTS (§ 99\*)—TAXATION—CONSTITUTIONAL PROVISIONS.

Held, that section 65 of an act providing a code of laws on education for the public school system of Idaho, etc. (Sess. Laws 1911, p. 510), is not repugnant to the provisions of the state Constitution, and that its provisions are mandatory.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 99.\*]

Alshie, J., dissenting.

Appeal from District Court, Ada County; Carl A. Davis, Judge.

Appeal by James A. Fenton from an order of the Board of County Commissioners of Ada County, levying a tax of three mills on the dollar for general school purposes for the county for the year 1911. From a judgment for the taxpayer, the Board of County Commissioners appeals. Affirmed.

D. C. McDougall, Atty. Gen., J. H. Peterson and O. M. Van Duyn, Asst. Attys. Gen., Charles P. McCarthy, Pros. Atty., and Martin & Martin, for appellant. Wyman & Wyman, for respondent.

SULLIVAN, J. This is an appeal from an order of the board of county commissioners of Ada county, whereby they levied a tax of three mills on the dollar on all taxable property in Ada county, for general school purposes. An appeal was taken from said order of the board to the district court, and after a trial before that court the order of the board was set aside, and judgment against the commissioners entered, and the cause was remanded to the board, with directions to proceed in accordance with law, from which judgment the board of county commissioners appeal. Upon perfecting the appeal to the district court, the board appeared and moved to dismiss the appeal, on the ground that the order in question was not an appealable order, and that if the appellant had any remedy it was by mandamus.

[1, 2] The question of whether an appeal lies from such an order of the board is presented on this appeal. It is provided by section 1950 of the Rev. Codes that: "An appeal may be taken from any act, order or proceeding of the board by any person aggrieved thereby or by any taxpayer of the county when any demand is allowed against the county, or when he deems any such act, order or proceeding, illegal or prejudicial to the public interests." In *Village of Ilo v. Ramey*, 18 Idaho, 642, 112 Pac. 126, in construing said section 1950, this court said: "That section of the statute, however, authorizes an appeal to be taken by a taxpayer in the county from any order which he may deem prejudicial to the public interest." Said order affects every taxpayer in the county, inasmuch as it fixes a rate of taxation upon all of the property in the county,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

and is therefore an appealable order under the provisions of said section.

[3] In the case of *Feltham v. Board of County Commissioners*, 10 Idaho, 182, 77 Pac. 332, this court held that the statute authorizing appeals from the order of the board of county commissioners does not authorize an appeal from an order of the board of equalization, and that a board of equalization is a constitutional body, exercising powers and duties separate and distinct from those exercised by the board of commissioners, and it therefore has no application to this case, as this is an appeal from an order of the board of county commissioners and not from the board of equalization.

[4] The second point raised on this appeal is as to whether the court erred in admitting in evidence the stipulation of facts entered into by counsel. Said stipulation of facts contains much matter that is irrelevant and immaterial in this case, but we do not think it was reversible error to admit it.

[5] It is next contended by the appellant that mandamus is the proper remedy, and not appeal. We have above held that an appeal would lie from said order of the board, under the provisions of section 1950. An appeal in some cases may not be a plain, speedy, and adequate remedy in the due course of law, although an appeal might be given by statute, and in such cases a resort may be had to mandamus. However, where an appeal is provided by law, if a party concludes that an appeal will be as effective for his purpose, and secure to him an adequate remedy, he may proceed by appeal; and if the plaintiff in this case so concluded, as he evidently did, he certainly had a right to that remedy, and could thereby obtain such relief as an appeal affords, even if he is not able to procure thereby all the relief to which he is in fact entitled. There is nothing in the contention of appellant that plaintiff's only remedy was by mandamus.

The decision of this case involves the proper construction of section 65 of an act of the Legislature, providing a code of laws on education for the public school system of Idaho, etc. (Sess. Laws 1911, p. 510), which section is as follows: "For the purpose of establishing and maintaining public schools in the several counties of the state, the board of county commissioners of each county shall, at the time of levying the taxes for state and county purposes, levy a tax of not less than five (5) mills nor more than ten (10) mills on each dollar of taxable property, in their respective counties, for school purposes. Said taxes must be assessed and collected in each county as other taxes for state and county purposes. For the further support of the public schools, there shall be set apart by the county treasurer of each county and placed in the county school fund all moneys arising from fines, forfeitures or breaches of any

of the public penal laws of the state." Is that section constitutional and mandatory?

[6] It is contended by counsel that the commissioners had the discretion to investigate and make such levy of taxes as would supply the necessities of the school district (provided they had the authority to make any levy whatever, which is also denied by counsel); and they also contend that when the board exercised that discretion, and made the levy and ascertained the amount necessary, that their action therein became final, and cannot be inquired into by the courts, and in support of that contention is cited section 2 of article 7 of the Constitution, which reads in part as follows, "The Legislature shall provide such revenue as may be needful by levying a tax by valuation," etc. Counsel contend that said section is a restriction on the power of the Legislature, and that the Legislature cannot levy or authorize the levy of any tax in an amount in excess of what is "needful" or necessary for the purpose for which it is levied, and an attempt to authorize an excessive levy is contrary to said provision of the Constitution, and void. The part of said section above quoted commands the Legislature to provide such revenue as may be needful by "levying a tax by valuation," etc., and applies particularly to revenue for state purposes, and contemplates that only "needful" revenue shall be collected, and that means sufficient revenue for the purpose for which it was intended; and the Legislature must decide that question, so far as state taxes are concerned. That section must be construed with other sections of the Constitution.

[7, 8] Section 6 of article 7 of the Constitution provides as follows: "The Legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporations." That section is an inhibition on the Legislature from imposing taxes for the purpose of any county, city, town, or other municipal corporation, and gives (if necessary to do so) the Legislature power to vest in the corporate authorities of such municipalities the power to assess and collect taxes for all purposes of such corporations. That section emphasizes the fact that the provisions of said section 2 of article 7 authorize the Legislature to levy taxes for state purposes, and not for county or municipal purposes.

[9] It is contended by counsel, under the provisions of said section 6 of article 7, that the Legislature has no power to authorize or command the county commissioners to make a tax levy of any kind for the benefit of the school districts of the respective counties, for the reason that such districts are munic-

ipal corporations, and have the right to levy all needful taxes, without any interference from the board of county commissioners or the Legislature. We are unable to agree with that contention. We do not think that a school district is a municipal corporation within the meaning of that term as used in said section 6.

Dillon, in his work on Municipal Corporations, § 24, classifies school districts as quasi corporations with most limited powers; and it is said in 28 Cyc. 131, referring to school districts, that "such bodies, although not 'municipal corporations' nor 'municipalities' in the proper sense, must be construed as falling within such terms in a constitution, statute, or other instrument, if such appears to be the intention."

We do not think it was the intention of the framers of the Constitution, or of the Legislature in enacting laws in regard to school districts, to treat them as municipal corporations. An act, approved March 11, 1893 (Sess. Laws, p. 198), which is an act entitled "An act to establish and maintain a system of free schools," declares regularly organized school districts to be bodies corporate. Section 34 of said act is as follows: "Each regularly organized school district in this state is hereby declared to be a body corporate by the name and style of school district number \_\_\_\_\_ in the county of \_\_\_\_\_ state of Idaho; and in that name the trustees may sue and be sued, hold and convey property for the use and benefit of such district, and make contracts the same as municipal corporations in this state."

The Legislature then merely declares school districts to be bodies "corporate," and not "municipal corporations," and the language of said section accentuates the idea that the Legislature did not consider them municipal corporations, as it is further provided in said section that such districts may "make contracts the same as municipal corporations." Had the Legislature considered them municipal corporations, it would not have provided that such districts could make contracts the same as municipal corporations. The framers of the Constitution did not recognize school districts as "municipal corporations." Article 12 of the Constitution of this state is devoted to the subject of municipal corporations, and it nowhere mentions school districts, and we do not think it includes them. While school districts are a part of the county organization, they are subdivisions created by law for convenience and efficiency in administration, and the Constitution provides for a county superintendent of public instruction (see article 18, § 6), whose duties must be prescribed by law, and under the law such officer is placed in general supervision of the district schools.

In *McCabe v. Carpenter*, 102 Cal. 469, 36 Pac. 836, the court said: "Public and municipal corporations are both mentioned in the

section quoted from the Constitution. But I think school districts have generally been considered a part of the county organization, and so they are regarded in the statute under consideration."

In the Constitution of California, school districts are not considered municipal corporations, but a part of the county organization. In the states of California, Colorado, South Dakota, Nebraska, Montana, and Washington, they have constitutional provisions similar to our own, and in those states, as we understand their statutes, the county commissioners or county supervisors are authorized to levy taxes, within minimum and maximum limits, similar to this state, and, so far as has been called to our attention, every state having constitutional provisions like our own, not only permits district levies, but authorizes a levy by the county board for the use and benefit of the school districts.

The Constitution of Illinois provides that the corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with power to assess and collect taxes for corporate purposes. It will be noted that school districts are there mentioned, and the Legislature is there authorized to vest in such districts the power to assess and collect taxes for corporate purposes. This, however, has not prevented the Legislature from authorizing a county levy (Rev. Stat. 1908, p. 1902), and also a district levy (page 1944). The Legislature of this state no doubt has the authority to authorize school districts to assess and collect taxes for district purposes; but, as it has not delegated that entire power to such districts, it no doubt concluded that the provisions of section 1, art. 7, of the Constitution, could be more effectively carried out by requiring the boards of commissioners to levy a tax for that purpose between a minimum and maximum rate, as prescribed by law, which we think it had the power to do.

Prior to statehood, the Legislature had absolute control of the common schools. It established a system of public schools which it no doubt believed to be best suited to the needs of our people; there being no constitutional prohibition against such action. In 1866 the territorial Legislature passed an act, entitled "An act to establish a common school system, and to provide for the maintenance and supervision of public schools." Third Terr. Sess. Laws, p. 122. The second section of that act provided as follows: "For the purpose of establishing public schools in the various counties of this territory, it shall be the duty of the county commissioners of each county at the time of levying the taxes for county and territorial purposes to levy taxes of not less than one and a half mills nor more than two mills," and that provision remained in force with slight changes until the adoption of our Constitution.



[10] The framers of the Constitution recognized the great importance of education, and they proposed, and the people adopted, section 1 of article 9, which is as follows: "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the Legislature of Idaho, to establish and maintain a general, uniform and thorough system of public, free common schools."

Thus we find that since 1866 down to the present time the words "establish and maintain" have been an integral part of our common school system. From our statutes and Constitution, there can be no doubt as to the purpose of the people regarding the common schools. The great object sought was the creation of a public school system that would be efficient and enduring; and while that duty was imposed on the Legislature by the Constitution a large discretion was given to it, in which to "establish and maintain a general, uniform, and thorough system of public, free common schools," and the history of the public schools of this state shows that the Legislature has efficiently and wisely carried out said provision of the Constitution in the enactment of general laws for that purpose. Schools cannot be established or maintained without revenue, and there is no inhibition in the Constitution on the Legislature from delegating the authority to raise revenue for that purpose to proper local officers. The legislative branch of the government has the exclusive power of taxation, except as limited by the Constitution, and has authority under the Constitution to delegate that power, within the provisions of the Constitution, to municipalities or their officers. See 2 Dillon, *Municipal Corporations* (3d Ed.) § 740.

As stated in *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. 698: "It cannot be doubted that the Legislature may delegate to local officers the power to make rules for the government of local schools and to levy taxes for their support; and, if this be true, it necessarily results that it is a valid exercise of power to enact a statute for that purpose. If a valid statute is enacted, committing to the local officers the power to govern schools and raise revenues for their maintenance, the Legislature does provide for a system of common schools 'by law,' and this is what the Constitution requires."

If, under said provision of the Constitution, the Legislature has by general law made provisions for the government and support of the common schools by providing suitable machinery, and committing the details of its operation to local officers, they then have complied with the provisions of said section 1 of article 9 of the Constitution. The Legislature might delegate the exclusive authority to the board of trustees of each district to levy the taxes for school purposes within its district; but the Legislature has not done so. However, each district may levy a special tax, and the board of commissioners is

authorized to levy not less than five mills and not more than ten mills, to be apportioned among the districts as provided by law.

It was well known that there were school districts in the state containing a small amount of taxable property and that it would be impossible without classification to raise a sufficient amount of money by taxation on such property to maintain the school in such district for the time required by law; and the method adopted by the Legislature in requiring the several boards of county commissioners to levy a tax of not less than five mills nor more than ten mills for public school purposes, and to divide it among the districts, as provided by law, would assist the weaker districts, and thus enable them to give the children in such districts the required amount of schooling per year.

[11] Article 18 of the Constitution is in regard to county organization and government, and section 11 of that article provides that county, township, and precinct officers shall perform such duties as shall be prescribed by law.

[12, 13] This court held, in *Fremont County v. Brandon*, 6 Idaho, 482, 56 Pac. 264, that the powers of the board of county commissioners were statutory and limited, and that such boards can only exercise those powers granted to them by the statute. In *Conger v. Commissioners of Latah County*, 5 Idaho, 347, 48 Pac. 1064, this court held that the county commissioners have only such jurisdiction and power as is conferred on them by law. The only power that such boards have conferred on them by the laws of this state in regard to levying taxes for common school purposes is contained in said section 65, and the only power given them there is to levy a tax of not less than five mills nor more than ten mills on the dollar. They have no statutory power to levy a school tax of less than five mills, and if they have no statutory power to do so, then they have no authority whatever to do so. As the Legislature has granted the board power to levy a school tax of not less than five mills and not more than ten, that is the limit of the board's power. The Legislature has enacted a general and uniform law for the purpose of establishing and maintaining the public schools of the state, and has provided by law that the board of county commissioners of the several counties should perform certain duties in connection therewith; and said general law provides that, in order to maintain the public schools of the state, the board of county commissioners of each county shall levy not less than five mills nor more than ten mills each year, for school purposes upon the taxable property of the county, and that is the only power granted to such board in that matter. It is clear that the Legislature is not prohibited, either expressly or impliedly, by any provision of the Constitution from requiring the several boards of county com-

missioners to perform such duty, and that it has full power and authority to fix a minimum and maximum limit by which the several boards shall be governed in levying such taxes; and if any district does not receive sufficient money therefrom then it is left to the district to provide a special tax to cover any deficiency.

The principal difficulty seems to be that a five-mill levy will raise more money than many of the districts will need. If that be true, it is unfortunate; but it is not for this court to attempt to deprive the Legislature of any power or authority given it by the people. The difficulty in this matter arises out of assessing the property of the state at a much higher value than it has heretofore been assessed, without changing the law in regard to the amount of the levy to be made by the board of county commissioners, and it no doubt has been unfortunate for the people to have the assessed valuation so increased, and the fixed levies not changed to conform therewith; but this court must take the law as it finds it, and interpret it according to the clear intention of the lawmaking power. No doubt, if the Legislature had known that the assessed valuation was going to be so much increased, they would have changed the fixed levies at the last session; but, as they had no information of any such increase, no change in the fixed levies was made, and this court has no power to change such levies.

The Supreme Court of California, in discussing the power given to the board of trustees to levy a school tax on lands outside of the city, in *Visalia Savings Bank v. City of Visalia*, 153 Cal. 206, 94 Pac. 888, said: "The fact that the board of trustees of the city is given power, at the request of the board of education, to levy a tax on lands outside of the city may afford a plausible excuse for indulgence in some general chatty talk about constitutional principles; but this power given the board of trustees does not violate any existing inhibition of the Constitution which has been pointed out to us. In our opinion, therefore, this contested power is not unconstitutional, but is valid and effective." See, also, *Board of Education v. Board of Trustees*, 129 Cal. 599, 62 Pac. 173.

It was held by the Supreme Court of Kentucky, in *Macklin v. Trustees of Common School District No. 9*, 88 Ky. 592, 11 S. W. 657, that the Legislature had the constitutional power to authorize the trustees to levy a tax, not exceeding a given rate, and in the course of the opinion, the court said: "It is urged, however, that the Legislature had no constitutional power to do so. It is true the Legislature must always prescribe the rule under which the taxation is imposed. It must originate the authority. It cannot refer this power to another body, but, having prescribed the rule, it need not fix the exact sum to be raised, or the particulars

of the expenditure. It would often be impossible for it to do so wisely, owing to the infinite variety of local needs and interests. Here it authorized the taxation. It provided that it should not exceed a certain sum. It prescribed the rule. It made the law, while the trustees merely give effect to it. One is legislation, and the other administration. Thus the Legislature may unquestionably authorize the council of a city to order the assessment and collection of a tax, not exceeding a certain sum, for a certain purpose." See, also, *Robinson v. Schenck*, 102 Ind. 307, 1 N. E. 698, which is a leading case upon some of the questions here involved.

It is a familiar and fundamental principle of construction, applicable to state Constitutions, that the Legislature of the state has plenary power in regard to all matters of legislation that belong to or reside in the people, except when restricted by express provisions or necessary implications in the Constitution of the state and of the United States.

It is stated by Judge Cooley, in his work on *Constitutional Limitations* (7th Ed.) p. 126, as follows: "In creating a legislative department and conferring upon it the legislative power, the people must be understood to have conferred the full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit to impose, and to the limitations which are contained in the Constitution of the United States."

A state constitution is not a grant of power to the Legislature, but a limitation upon powers already plenary.

In *People v. Draper*, 15 N. Y. 532, Chief Justice Denio, speaking for the court, said: "The people, in framing the Constitution, committed to the Legislature the whole law-making power of the state which they did not expressly or impliedly withhold. Plenary power in the Legislature for all purposes of civil government is the rule. A prohibition to exercise a particular power is an exception."

Counsel for appellant cite certain decisions to the effect that taxes for municipal purposes should be left to the control of municipal corporations. The rule there laid down is no doubt correct under the Constitutions of the states from whence such decisions come, and would be correct under the provisions of section 6 of article 7 of the Constitution above quoted, which prohibits the Legislature from imposing taxes for the purpose of any county, city, town, or other municipal corporation. However, under our Constitution and law, a school district is not a municipal corporation; and the Constitution makes it the duty of the Legislature to establish and maintain free public schools, and in doing so may require the boards of county commissioners of the several counties to levy and collect a tax therefor. We

find no inhibition in our Constitution against such Legislation, and we find nothing in the Constitution prohibiting the Legislature from fixing a maximum and minimum amount between which such tax may be levied. The Legislature had full power and authority to enact said section 85, and it is not repugnant to any provision of the Constitution, and is mandatory. Where boards of county commissioners have not complied with the provisions of said section, they ought to comply therewith at once, or as soon as possible.

The judgment of the district court must therefore be affirmed, and it is so ordered.

STEWART, C. J., concurs.

AILSHIE, J. (dissenting). I find myself out of harmony with what is said in the majority opinion in this case. It is doubtful if anything that I may say in a dissenting opinion in this case can be of any value in any further proceeding in this matter, and yet the opinion is so violative of what I conceive to be the spirit of our Constitution, and the power and authority of the political department of the state government to levy and collect taxes, that I feel constrained to make a few general and passing observations on what seems to me to be an unwarranted and unprecedented exercise of judicial power in coercing executive and ministerial officers in the exercise of their discretion in making tax levies.

Before passing to the main question involved, I must pause to say that I do not believe there exists under our statute any such thing as the right to appeal from an order of the board of county commissioners, fixing tax levies. Such a right, in my judgment, has never been granted by the Legislature, and it was never anticipated that any one should have the right to appeal from an order fixing the rate of taxation. If this thing can be done, it lies in the power of any taxpayer to lock the wheels of county government by appeals and continued litigation, and in the meanwhile leave the county without revenue or the means of meeting the current expenses of county government. Section 1950 of the Revised Codes, which grants the right of appeal "from any act, order or proceeding of the board," is found in article 5 of chapter 2 of title 11 of the Political Code. This article is dealing purely with "county finances and claims against the county." This section has reference solely to such acts, orders, and proceedings of a board of county commissioners performed by them as such officers, and does not have reference to acts which might with equal propriety have been imposed upon any other person or official, and which have been for convenience imposed upon the board of county commissioners, and which acts constitute separate and independent acts from those ordinarily discharged by a board of county commissioners.

This principle was fully and clearly recognized in *Feltham v. Board of County Commissioners*, 10 Idaho, 182, 77 Pac. 332. That was an appeal from an order of the board of commissioners when sitting as a board of equalization. This court held in that case that the statute did not authorize an appeal from an order of the board of equalization. In the course of that opinion, it was said: "It is also worthy of observation that the board of county commissioners, as such, meet at stated periods for the transaction of the regular county business, but at none of these meetings are they authorized to equalize assessments, or to sit as a board of equalization. On the other hand, it is provided by law that they shall meet at a specified time each year as a board of equalization, and examine the assessment roll, and equalize the assessments of property within their respective counties."

The foregoing extract is pertinent to the case at bar. Here the board of commissioners are required and directed by statute to meet at a certain time each year, for the purpose of making the tax levy. They do not transact any regular county business at this meeting. This session is for a specific purpose, and the Legislature at no place has intimated that it intended an appeal might lie from an order made by the board at such time and under such circumstances. The *Feltham* Case was followed and approved by this court in *Humbird Lumber Co. v. Morgan*, 10 Idaho, 327, 77 Pac. 433. The case of *Village of Ilo v. Ramey*, 18 Idaho, 642, 112 Pac. 126, is not in point, for the reason that hearing petitions for the incorporation of towns and villages, and making orders accordingly, is made by statute a part of the regular business of a board of county commissioners, and is transacted at the same time and along with other county business at the regular meetings of the board.

There is another reason why the holding of the majority of the court appeals to me as most unreasonable and unsound. The court holds in this case that the Legislature has the right to make a tax levy on all property in the state for common school purposes, and that they have properly exercised that power, and levied a tax of five mills to the dollar on all the taxable property of the state. It is held that the board of commissioners have no discretion whatever in the matter until after they exceed the minimum of five mills fixed by the Legislature. Now, in the case at bar, the board did not make a levy reaching the minimum of five mills, but, on the contrary, made a smaller levy of three mills. Under the holding of the majority of the court, the levy for school purposes up to the extent of five mills is purely a ministerial act, to be performed by the board of commissioners, and might as well have been performed by the assessor or county auditor. In any event, there would be no discretion whatever in the matter. If this

be true, it is puerile to talk about appealing from such an order. Appeals do not lie from ministerial acts. Appeals only lie from judicial, quasi judicial, and discretionary acts. For the foregoing reasons, I have no doubt that an appeal does not properly lie from an order of the board of commissioners, fixing a tax levy, and it is equally clear that the Legislature never so intended.

This brings me to the real and vital question involved in this case. Section 65 of the school law adopted by the Legislature at the 1911 session thereof (Sess. Laws 1911, p. 510), among other things, provides as follows: "For the purpose of establishing and maintaining public schools in the several counties of the state, the board of county commissioners of each county shall, at the time of levying the taxes for state and county purposes, levy a tax of not less than five (5) mills nor more than ten (10) mills on each dollar of taxable property, in their respective counties, for school purposes." If this statute is constitutional and mandatory, then of course it is imperative upon the board of county commissioners to levy a tax for school purposes of not less than five mills. Under the well-recognized rules of construction, this section, if unconstitutional in the mandatory form, might still be held constitutional in a directory form, on the principle that the Legislature has never intended to pass an act which would be in violation of the Constitution, and that no statute ought to be construed as unconstitutional when any other construction is possible. In re Gale, 14 Idaho, 761, 95 Pac. 679.

Before proceeding with a consideration of the merits of this case, I may say that none of the authorities cited are in point, and that they furnish but little light on the subject under consideration, except in so far as they discuss the general subject or tax levies and the constitutional authority therefor. None of the cases cited deal with a constitutional provision identical with our own; neither do any of the cases deal with the same question here raised, or consider it in the same form or light in which it is presented to this court. I have given the cases a rather careful examination, in order to gather what information I might from them, and after doing so I deem it needless for me to review or discuss them in this opinion.

It is proper in the very outset of a discussion of this question to recognize and note the plain and palpable fact which confronts us that the Legislature has by the foregoing statute made a *direct and positive tax levy for common school purposes*. This statute passes beyond the realm of legislation prescribing the method and procedure for levying and collecting taxes, and is an *absolute levy by the Legislature to the extent of five mills on the dollar*. Now, if this is a levy for state purposes, it is authorized by section 2 of article 7 of the Constitution, but if it is a levy for any other purpose it is prohibited by section

6 of article 7. The latter section provides that: "The Legislature shall not impose taxes for the purpose of any county, city, town, or other municipal corporation, but may by law invest in the corporate authorities thereof, respectively, the power to assess and collect taxes for all purposes of such corporations." Now the opinion of the majority of the court, when stripped of all rhetoric and argument and reduced to its vital essence, holds that a tax for maintaining the public common schools is a *state purpose*, and is a *county purpose*, and is a *school district purpose*. In other words, they hold that the Legislature may make a levy, as it has done in this case, namely, five mills; that the board of county commissioners may make a levy of any sum that they may see fit between five and ten mills; and that after this, and over and above the levy made by the board and the state, the school district may make an additional levy for the same purpose. I find the majority opinion contains the following sweeping, omnibus statement, which really seems to cover everything that the court holds on this subject: "The Legislature of this state no doubt has the authority to authorize school districts to assess and collect taxes for district purposes; but, as it has not delegated that entire power to such districts, it no doubt concluded that the provisions of section 1, art. 7, of the Constitution, could be more effectively carried out by requiring the boards of commissioners to levy a tax for that purpose between the minimum and maximum rate, as prescribed, by law, which we think it had the power to do." It will be seen from the foregoing extract that the court considers that the Legislature has ample power to make tax levies for school purposes, and that at the same time it may be bountifully lavish in *delegating* and dividing up that power, so that all the counties and school districts may share in that generosity, not only to the extent of paying the assessment made by the state Legislature, but, if not content with paying the sum so levied, they may make additional assessments to their complete satisfaction.

I have read the majority opinion with great care, but in vain, to ascertain, if possible, the theory on which the Legislature is held to possess the power to make a direct levy for these purposes. Article 7 of the state Constitution is devoted to the subject of "finance and revenue," and that article, from first to last, indicates to my mind the purpose of the framers of the Constitution to intrust the subject of levying and collecting taxes to the local and municipal authorities for whose benefit the tax is to be raised, and whose citizens will of necessity have to pay such tax. This idea is accentuated and specifically set forth by section 6, above quoted. The framers of the Constitution recognized the supervision, management, and control of the public common schools as a part of the scheme of county government, and we accordingly find that by section 6 of article 18 the

Constitution has provided that there shall be elected biennially in each of the several counties of the state a list of county officers, among which is a "county superintendent of public instruction." In pursuance of the recommendation and direction of section 1, art. 9, of the Constitution, the Legislature has provided for the creation and organization of school districts in the several counties, and has provided by general law a method by which the county superintendent and the board of county commissioners may organize school districts. These districts are subdivisions of the county, organized for the purpose of more effectively carrying out the purposes of county government, and enabling one of the county officers, namely, the county superintendent, to effectively discharge his duties and accomplish the purposes of his office, as laid out in the scheme of county government. The management and conduct of the public common schools of the county is as much a part of the plan of county government, as provided for by our Constitution, as is the duty of the county auditor, or any other officer named by the Constitution.

It is well settled that the exercise of the police power, the protection of the health and morals of the people, is a matter for which the county or municipal corporation must levy such taxes as it may be, in the opinion of the local authorities, necessary to raise. It is a well-known fact, which was recognized by section 1, art. 9, of the Constitution, that education is necessary in order to protect the morals of the people and maintain the "stability of a republican form of government," and so the levy of a tax for this purpose is as much of a county purpose, as is the raising of taxes to pay the sheriff and constables of the county, or the surveyor or coroner; and there is no more danger or likelihood of county commissioners failing to discharge their full duty in the one instance than in the other. The people who elect these officers are just as loyal to the common schools and the educational branch of the local government as they are to any other branch or department of municipal government. It is begging the question, subverting the Constitution, and slandering the people to say that a minimum levy for school purposes must be made by the Legislature, in order to insure the maintenance of the public schools. There is no danger but that the county commissioners and the school districts will see to it that sufficient revenue is raised to keep the schools open. All wisdom, patriotism, and love of the public schools is not to be found exclusively and alone in any branch of the government; there is fully as much remaining among the citizens at home, and they can safely be trusted with the destiny of the district school.

There is a further reason why the power to levy and collect taxes for common school purposes should be, and evidently was in-

tended by express provision of the Constitution to be, left to the county and school district authorities, rather than to the state Legislature. Section 1 of article 9 of the Constitution provides as follows: "The stability of a republican form of government depending mainly upon the intelligence of the people, it shall be the duty of the Legislature of Idaho, to establish and maintain a general, uniform and thorough system of public free common schools." Now this provision of the Constitution, though written in mandatory form, cannot be anything more than directory to the Legislature; and no court ever assumed to hold such a provision other than directory, for the reason that no power or authority is known, whereby the Legislature may be compelled or coerced to perform a duty. This section is merely the declaration of the policy of the state, and a recommendation to the Legislature to provide for and execute that policy. Section 9 of the same article provides that every child of sufficient mental and physical ability shall attend the public schools throughout the period between the ages of six and eighteen years for a time equivalent to three years. It will be seen from these provisions that the Constitution admonishes the Legislature to provide a system of "public, free common schools." If the duty were imposed upon the Legislature of making these tax levies from session to session, there would be no method of compelling or coercing a levy sufficient to run the schools for any fixed or definite length of time. If, on the other hand, the power rests where the Constitution placed it, with the local authorities—the board of commissioners and the several school districts—then the Legislature may provide, as it has done, that schools shall be conducted in the several districts for at least a given period of time each year, and after so doing the courts may by proper writs command the county and district authorities, should they decline, to levy a sufficient tax each year to raise enough revenue to conduct the schools for the required length of time. The Legislature has properly and wisely provided, by subdivision "d" of section 54 of the School Laws of 1911 (Sess. Laws 1911, p. 504), that the length of time a school shall be taught in the several districts of the state "shall not be less than four months by a legally qualified teacher in a district having less than twenty pupils of school age, nor less than six months in districts having between twenty and seventy-five pupils, inclusive, nor less than nine months in districts having more than seventy-five pupils." It is accordingly made the duty of the county commissioners and school districts to provide sufficient revenue to keep the schools open for the periods provided by law.

It is equally as clear from the provisions of the Constitution that it was never intended that either the Legislature or any of

the counties or municipal corporations of this state should levy and collect a tax from the people of the state, in order to pile up a surplus revenue in the state and several municipal treasuries in excess of the current needs for the several purposes of state and municipal government. The Legislature can never tell or foresee the value of the property of the state as the same will be assessed for any subsequent year. It therefore follows, as a matter of course, that the Legislature is not in a position to and cannot tell what rate of taxation is necessary in order to raise the required amount to maintain the public schools of the several counties of the state for any given year. Again, the Legislature is not in a position to know how many children of school age will be enumerated for any given year in any given county. On the contrary, the county authorities do know. They then know the value of the property as assessed for that year, and they know the number of school children within the county. They may therefore make an intelligent levy, sufficient and ample for the purpose of maintaining the schools within the county for the required length of time, and yet not wring from the taxpayers an unreasonable and unnecessary sum, to be hoarded away in the public treasuries. Even for the purposes of running the state government, the Legislature does not undertake to fix the rate of the tax levy, but requires a gross sum to be raised, and leaves the rate to be fixed by the county commissioners after the assessment has been made and the total valuation of the property has been ascertained. This is the essence of local self-government. It brings the question of levying and collecting taxes directly to the authorities selected by the people for that purpose, who are in a position to know the amount necessary and the conditions under which the work must be done.

This case is a patent and crying illustration of the principle I am now discussing. Here the Legislature has undertaken to say to the people of this state that they must pay five mills on the dollar for common school purposes, and yet it appears in this case and the companion case that the amount of 2.45 mills in the one county and 3 mills in the other county will raise all the money necessary for the schools of the counties for the current year, with the exception of about five districts in Ada county, which can be supplied by special levies. It appears from the figures submitted that three mills levied in Ada county will raise  $1\frac{1}{2}$  times as much money for common school purposes this year as was raised last year in the same county, and that there are only 500 more school children in the county this year than last. It appears that there are 53 school districts in Ada county, and that all the districts within the county can maintain their schools for the full period required

by law on the revenue raised by the levy of three mills, which has been made by the commissioners, with the exception of five districts. It appears that last year there were three districts in the county that did not maintain school for the full period required by law. On the other hand, it is asserted that many of the districts have a large sum of money in the treasury to their credit, and that some districts have enough money left in the treasury to maintain the schools therein for the full period required by law this year, without the use of any of the money which will be raised by this year's tax levy. This condition exists without any of the districts resorting to the privilege granted them by statute to make *special levies*. It appears that three out of these five districts could not maintain their schools for the full time required by law without making a special levy, even though the full sum of five mills were levied for this present year. In the Kootenai County Case, the commissioners offered to prove that the levy of 2.45 mills, made by the board, would produce sufficient funds to pay the ordinary and necessary expenses of the school for the present fiscal year, and that if the levy be raised to five mills Independent School District No. 1 of that county would obtain a great advantage over the other districts of the county, by reason of the share it would obtain from the county apportionment. Notwithstanding these conditions, this court solemnly says by its decree that the people of these counties must pay at least five mills into the common treasury for school purposes, when it appears from the record that at least two mills of this sum will not be needed for the present year, except in the five districts above mentioned. This, to my mind, is an alarming and dangerous procedure. It is destructive of local self-government, and results in wringing from the hands of the taxpayers of the several counties moneys that are not needed for any public purpose whatever, and imposes on them a burden wholly unauthorized and unjust. It is dangerous, too, for the reason that it is an invasion by the judicial department of the state government, of the executive and political branch of the government. It is an unusual and very extraordinary power for a court to exercise in undertaking to direct taxing officers to make specific and certain tax levies, in the face of a record showing that the extra revenue is not needed.

My associates say that "the difficulty in this matter arose out of assessing the property of the state at a much higher value" than heretofore, without changing the "fixed levies." I shall not travel beyond the record to speculate on the causes for this situation, but we should not forget that the law, prescribing the valuation at which property in this state shall be assessed, has been on the statute book for more than 20 years,

and has heretofore been held valid and compulsory by the unanimous opinion of this court. *First National Bank v. Washington County*, 17 Idaho, 315, 105 Pac. 1053. The majority also add the following comment: "No doubt, if the Legislature had known that the assessed valuation was going to be so much increased, they would have changed the fixed levies at the last session; but, as they had no information of any such increase, no change in the fixed levies was made, and this court has no power to change such levies." It should be remembered in this connection that the last session of the Legislature repealed section 603 of the Revised Codes, which fixed a like minimum and maximum levy for school purposes, and instead thereof enacted section 65, hereinbefore quoted, as a part of the new school code. *It must be assumed, therefore, that they at least had the matter of a school levy and school revenue under consideration.* This illustrates and emphasizes what I am trying to make clear, that the Legislature can never foresee what any future assessment will be, and that is especially true in a new and growing state like this. For this very reason, the framers of the Constitution intended to leave the fixing of tax levies to the county and municipal authorities where the tax is to be raised.

This is an application to a court of equity to procure a writ, commanding and compelling the board of commissioners to enter upon their records a levy of not less than five mills for school purposes. The statute, as well as the rules of this court (section 4978, Rev. Codes; rule 65 [98 Pac. xiii] Supreme Court), requires that the application must be made upon the affidavit "of the party beneficially interested." The question arises in my mind how a party can be *beneficially interested* in procuring a writ to compel the levy of an increased tax rate over that already levied, where it appears that the money is not needed, and that it cannot be used during the current year for the purposes for which it is sought to have the levy made. Is it possible that the petitioner here is *beneficially interested* in paying a heavier tax than that which has been levied against him? But if it may be answered that he is *beneficially interested* in maintaining the public schools, then the question arises as to what interest he can have in accumulating a surplus fund in the county treasury over and above that necessary to run and maintain the schools for the fiscal year for which such tax is raised. The answer to these questions is obvious. *He can have no beneficial interest in procuring such a writ.* It occurs to my mind that, even if it were conceded that the statute here invoked is constitutional, and that it may be construed in the mandatory form, still, under the facts and circumstances of this case, where the rate already levied raises all the fund necessary for school purposes, a court of equity

is usurping a function which has never been recognized by such courts in compelling the doing of a useless thing, and the performance of an act which accomplishes no good, but, on the other hand, imposes a grievous burden on large numbers of taxpayers and citizens. The judgment of this court will compel the extraction from the pockets of the people of over half a million dollars in taxes more than is needed for any public purpose, and which will not result in keeping the public common schools in 90 per cent. of the districts open a single day longer this year than they would be open, were this judgment not entered. There should be reason and justice in the law, and in judgments and decrees executing the law, and when destitute of those elements, it is time to halt and ascertain whence we are journeying.

I am satisfied that it was never the purpose of the Legislature to invade the power of the local authorities to levy taxes for school purposes. The Legislature was only interested in having the public schools kept open for at least a given length of time in each district (section 54, subd. "d," Sess. Laws 1911, p. 504), and the rate to be levied was only an incident in the accomplishment of that purpose. One county might be very wealthy and compact, and still have but few children of school age, in which case a small tax rate would suffice; another county might be sparsely settled and comparatively poor, but, on account of its size, have many school districts, and therefore require a much higher rate. This is a matter to be dealt with by the local authorities exclusively.

The tax rolls for this year have presumably been completed in accordance with the statute (sections 1724, 1726, Rev. Codes) and delivered to the collectors, who are now receiving payments of taxes and issuing receipts therefor. Under these conditions, I fail to understand what justification the courts have for ordering a further tax levy and the revision of the entire tax roll of a county, and the taxpayer who has paid his taxes to again seek the collector and pay a further tax for this year. The mischief such an order will work will be irremediable, and this all for the sake of collecting excess revenue. I cannot give my consent to such a procedure.

In my opinion, to construe section 65 of the school law as mandatory is to hold it unconstitutional, as violative of section 6, art. 7, of the Constitution; but to hold it as directory only would render it effective for the purposes for which it was enacted, and at the same time hold it valid and constitutional. Constitutions come direct from the people, and are superior to acts of the Legislature; they are adopted for a purpose, and the experience of the American people has demonstrated their importance and wisdom as a safeguard against many

unwarranted acts that have found their way through American lawmaking bodies. Constitutions ought to be obeyed, and this obedience is due from every department of the state government, as well as from the citizen. It is one of the high and important duties of courts to declare the Constitution, and to so construe acts of the Legislature as to bring them within the purview of the Constitution, if possible; but, if not possible to do so, then to declare them void, without regard to the whims or caprice of any person or class.

### DART v. BOARD OF COM'RS OF KOOTENAI COUNTY.

(Supreme Court of Idaho. Nov. 1, 1911.)

(Syllabus by the Court.)

SCHOOLS AND SCHOOL DISTRICTS (§ 99\*)—TAXATION—CONSTITUTIONAL AND STATUTORY PROVISIONS.

The provisions of section 65 of an act providing a code of laws on education for the public school system of Idaho, etc. (Sess. Laws 1911, p. 510), requiring the board of county commissioners to levy a tax of not less than five mills nor more than ten mills on each dollar of taxable property in the county, for school purposes, held constitutional and mandatory.

[Ed. Note.—For other cases, see Schools and School Districts, Dec. Dig. § 99.\*]

Ailshie, J., dissenting.

Appeal from District Court, Kootenai County; John M. Flynn, Judge.

Appeal by G. O. Dart from an order of the County Commissioners of Kootenai County, making a tax levy of 2.45 mills for public school purposes. From an order of the district court, reversing the order of the Board of County Commissioners, and from a judgment in favor of plaintiff, the Board of Commissioners appeals. Affirmed.

N. D. Wernette and Elder & Elder, for appellant. Whitla & Nelson, for respondent.

SULLIVAN, J. This is an appeal from the order of the board of county commissioners, levying 2.45 mills on every dollar of taxable property in Kootenai county, for general school purposes. An appeal was taken from that order to the district court, where, after some proceedings in said court, the county commissioners filed their answer, whereupon the plaintiff moved for judgment on the pleadings. Said motion was granted, and judgment entered in favor of the plaintiff, from which judgment this appeal is prosecuted.

The determination of this case depends upon a proper construction of section 65 of an act providing a code of laws on education for the public school system of Idaho (Sess. Laws 1911, p. 510). Upon the authority of the case of *Fenton v. Board of County Commissioners of Ada County*, 119 Pac. 41, de-

cided at this term of this court, wherein it was held that the provisions of said section were constitutional and mandatory, the judgment of the lower court must be affirmed, and it is so ordered.

It will not be necessary in this opinion for us to discuss at any length the various questions raised, as they are fully disposed of in the case above cited and referred to.

Costs of this appeal are awarded to the respondent.

STEWART, C. J., concurs.

AILSHIE, J. For the reasons stated by me in *Fenton v. Board*, I dissent from the opinion of my Associates in this case.

### INDEPENDENT SCHOOL DIST. NO. 1 OF KOOTENAI COUNTY v. BOARD OF COUNTY COM'RS et al.

(Supreme Court of Idaho. Nov. 1, 1911.)

Appeal from District Court, Kootenai County; John M. Flynn, Judge.

Application by Independent School District No. 1 of Kootenai County for a writ of mandate to the Board of County Commissioners and others. From a judgment denying the writ, the applicant appeals. Reversed.

Whitla & Nelson, for appellant. Elder & Elder and N. D. Wernette, for respondents.

PER CURIAM. On the authority of *Dart v. Board*, supra, decided at this term of court, and *Fenton v. Board*, 119 Pac. 41, decided at this term of court, the judgment entered in this case must be reversed, and it is so ordered. Costs awarded to appellant.

### PARK v. JOHNSON et al.

(Supreme Court of Idaho. Nov. 11, 1911.)

(Syllabus by the Court.)

#### 1. FORMER DECISION FOLLOWED.

The case of *Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525, approved and followed.

#### 2. SUFFICIENCY OF EVIDENCE.

Evidence in this case examined, and held sufficient to support the judgment.

#### 3. WITNESSES (§ 268\*)—CROSS-EXAMINATION—

SCOPE—GOOD FAITH OF PURCHASER OF NOTE.

In an action upon a promissory note, where the plaintiff testifies in chief and in support of his complaint that he purchased the note before maturity and paid therefor a consideration, and that the plaintiff was well acquainted with the payee of the note and had been for many years, and that the note purchased was of a number of the same kind, it is proper on cross-examination to interrogate the plaintiff fully as to all facts connected with the transaction involved in the purchase of said note in order to aid the jury in determining whether the note was in fact purchased in good faith before maturity and for value.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 931-948; Dec. Dig. § 268.\*]

#### 4. BILLS AND NOTES (§ 345\*)—INDORSEMENT—BONA FIDE PURCHASERS.

Where action is brought upon a promissory note, and it is alleged that the plaintiff pur-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



chased the note before maturity in due course of business and paid therefor a consideration, and an answer is made denying the transfer before maturity, or at all, for value or otherwise, and that the note was fraudulent from its inception, the jury may take into consideration all the circumstances surrounding the transaction in determining whether the purchase was made in good faith, and whether such circumstances were sufficient to give notice to the plaintiff or to lead an ordinarily prudent man to make inquiry as to whether the note possessed any infirmities which would affect its collection, and if the jury conclude that the circumstances surrounding the purchase of the note were sufficient to cause an ordinarily prudent man to make inquiry or investigate the circumstances under which the note was executed, and the plaintiff refrained from making such inquiry, then and in such case such facts were sufficient to authorize a jury to find that such holder was not a holder in good faith and without notice.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 849-852; Dec. Dig. § 345.\*]

#### 5. BILLS AND NOTES (§ 538\*) — ACTIONS — INSTRUCTIONS.

An instruction, which covers the provisions of section 3509, Rev. Codes, and adds thereto, "and the court instructs the jury that if you find from the evidence in this action that the title of McLaughlin Bros. in controversy was defective by reason of fraud, illegal consideration, or for any reason, then it becomes incumbent upon the plaintiff to show that he was a holder in due course, and in order for him to do so he must prove sufficient to show that he is a holder within the meaning of the definition above given," is erroneous by reason of including the words, "or for any reason."

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1895-1910; Dec. Dig. § 538.\*]

#### 6. BILLS AND NOTES (§ 345\*) — APPEAL AND ERROR (§ 1068\*) — INSTRUCTIONS — HARMLESS ERROR.

An instruction, which directs the jury that the presence of suspicious circumstances means bad faith, is erroneous. The existence of suspicious circumstances alone will not destroy the good faith of a transaction, but it is such circumstances as would charge the purchaser of a note, as an ordinarily prudent man, with bad faith or notice of the infirmity in the instrument, or defect in the title of the person from whom he makes the purchase. This error, however, taken in connection with other instructions covering the same subject and the strong and conclusive evidence, was not of such prejudicial character as to warrant a reversal.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 849-852; Dec. Dig. § 345;\* Appeal and Error, Dec. Dig. § 1068.\*]

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by Howard C. Park against J. T. Johnson and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Reed & Boughton and Elder & Elder, for appellant. Whitla & Nelson, for respondents.

STEWART, C. J. This is an action to recover upon a promissory note for \$1,125, dated Cœur d'Alene, Idaho, March 28, 1906, and due three years from date, and executed jointly and severally by respondents to McLaughlin Bros. and by McLaughlin Bros. indorsed and transferred before maturity for

value received, to the plaintiff, appellant herein, who claims to be the owner of the same. The answer admits the execution of the note sued on and puts in issue the plaintiff's ownership of said note and the transfer to plaintiff by McLaughlin Bros. before its maturity, and alleges that the note was originally obtained through fraud and deception at the time the note was executed and that there was a breach of a warranty. The cause was tried to a jury and a verdict rendered for the respondents. Judgment was entered accordingly. This appeal is from the judgment, and also from the order overruling a motion for a new trial.

[1] The appellant assigns 52 errors, many of which have been discussed and passed on by this court in the case of Winter v. Nobs et al., 19 Idaho, 18, 112 Pac. 525, a case almost identical with the one now under consideration.

[2] In fact, the Winter-Nobs Case was upon one of four promissory notes given by the respondents to McLaughlin Bros. in the same transaction in which the note sued upon in this action was given, and the only material difference between the facts of the two cases is that in the Winter Case McLaughlin Bros. indorsed and transferred the note to Winter, and in the present case McLaughlin Bros. indorsed and transferred the note to the appellant, Park. The evidence in the present case is even stronger and more convincing than the evidence in the Winter Case, but is of the same general nature and kind and proves the same state of facts; and in the opinion above referred to this court held that the evidence was sufficient to justify the verdict. With that decision we are still in full accord, and apply the rule there laid down to the present case.

[3] It is contended upon this appeal, however, that the trial court erred in permitting certain questions to be propounded to the appellant on cross-examination. The evidence of plaintiff was taken by deposition. The appellant was asked many questions with reference to his acquaintance with McLaughlin Bros. and the transaction he had with them at the time the note was purchased, and whether he had bought other notes from McLaughlin Bros. previous to the purchase of the note in controversy in this case, and whether payment of the notes so purchased was refused and suit brought, and the defendants made the same answer made in the present case. These questions were all objected to upon the ground that they were incompetent, irrelevant, immaterial, and improper cross-examination. The questions were certainly material and relevant upon the issue of fraud and misrepresentation tendered by the answer. They were proper questions for cross-examination, for the reason that the plaintiff testified on direct examination that he had known the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

firm of McLaughlin Bros. for probably 15 years and purchased 11 notes from McLaughlin Bros. through John R. McLaughlin on the 5th day of February, 1909, of which the note sued on in this action was one; that he paid for the note in controversy the sum of \$1,300.96 by check; that he presented said note for payment, and payment was refused. The deposition of the plaintiff was offered as evidence in chief and as part of his proof in making his case and opened the door for a cross-examination of the plaintiff upon all matters stated in his direct examination with reference to the purchase and time of purchase and consideration paid for said note. Section 6079 of the Revised Codes says: "The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith." The plaintiff having testified to his purchase of the note, the time he made such purchase, his acquaintance with McLaughlin Bros. from whom he made the purchase, and the amount he paid therefor, and that he was the owner of such note, gave the right to cross-examine him as to all matters of fact in relation to such purchase, and it was permissible on such cross-examination to inquire as to his relationship with McLaughlin Bros., the duration and character of it, and the other transactions of the same kind and character as the one involved in this case, and whether he had purchased other notes from McLaughlin Bros. executed in payment of the purchase of other property of the same kind, and whether he was compelled to bring suit for the collection of the same, and were the same defenses made as in the present case. The questions propounded on cross-examination all tended to show the circumstances surrounding the transaction between himself and McLaughlin Bros. in purchasing said note, and relate to facts which went to the question of the good faith of the plaintiff in purchasing the note sued upon. It was disclosed by this evidence that the plaintiff and McLaughlin Bros. were residents of the city of Columbus in the state of Ohio, and that they had been acquainted for the past 15 years, and that plaintiff had had numerous transactions with McLaughlin Bros. in purchasing other notes issued for the sale of other stallions, and that McLaughlin Bros. was a solvent and responsible concern, and, notwithstanding these facts, the plaintiff did not pursue his right to collect the note purchased from the indorser, McLaughlin Bros. whose solvency he knew, but he came to the state of Idaho and brought this action for the purpose of recovering the amount due on the note from the defendants, when he had no knowledge whatever that any of the defendants were solvent or that he would in the end be able to collect anything from the defendants.

[4] These facts were circumstances which the jury and the court might consider and

from them determine whether they were sufficient to give notice to the plaintiff, or to put him on his inquiry, that the note possessed any infirmities which would in any way affect its collection. If the circumstances surrounding the purchase of the note were sufficient to give to an ordinarily prudent man notice, and the plaintiff refrained from making inquiry with reference to the transaction out of which the note originated, he is not in the position of a holder in good faith without notice. The questions propounded upon cross-examination and permitted by the trial court all related to the transaction surrounding the purchase of the note by the plaintiff from McLaughlin Bros., and the facts shown all tended to prove that the plaintiff did not purchase the note in question in good faith or in due course of business before maturity.

Section 3509 of the Revised Codes provides: "A holder in due course is a holder who has taken the instrument under the following conditions: First, that the instrument is complete and regular upon its face; second, that he became the holder of it before it was overdue and without notice that it had been previously dishonored, if such was the fact; third, that he took it in good faith and for value; fourth, that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it."

So the inquiries made of the plaintiff with reference to his acquaintance with McLaughlin Bros. and the many transactions he had had with such firm in handling other notes made payable to McLaughlin Bros. and given for other stallions sold by McLaughlin Bros., and the knowledge the plaintiff had of McLaughlin Bros.' business, and that they had had litigation upon notes purchased by him from them in which breach of warranty and fraud in the inception of the notes was made a defense, and the same was sustained by the highest courts of other states upon the same state of facts as involved in this case; and the fact that the plaintiff pursued the defendants in the state of Idaho and took no steps to hold the indorsers upon the note—were circumstances and facts which tended to show that he did not take the note in good faith or for value, and that at the time it was negotiated he had notice of infirmities in the note and the defect of the title of McLaughlin Bros., and, with such facts before him, made no inquiries as to the truth of the same. He places himself in the position where he cannot claim as a holder in good faith without notice. *Schmueckle v. Waters et al.*, 125 Ind. 265, 25 N. E. 281; *State Nat. Bank v. Bennett*, 8 Ind. App. 679, 36 N. E. 551; 2 Ency. of Ev. 526; *Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525.

[5] The court gave to the jury an instruction defining a "holder in due course," and,

in addition to the provisions found in section 3509, added to subdivision 4 the following: "And the court instructs the jury that if you find from the evidence in this action that the title of McLaughlin Bros. to the note in controversy was defective by reason of fraud, illegal consideration, or for any reason, then it becomes incumbent upon the plaintiff to prove that he was a holder in due course, and in order for him to do so he must prove sufficient to show that he is a holder within the meaning of the definition above given." This addition to the statutory definition was intended and in fact states the rule with reference to the burden of proof shifting to the plaintiff from the defendant, where it is shown that the note in its inception was fraudulent and illegal, in which case the burden of proof shifted from the defendant to the plaintiff and the plaintiff was required to prove that he was a holder in due course within the meaning of the statute. This instruction should not have included the words "or for any reason," as such words are of such an uncertain import that there is a possibility the jury might consider some matter not properly included within the evidence; but the mere use of such words in the instruction we do not think destroys or lessens the effect of the direction of the court, as to the burden of proof, where, as in the case under consideration, the note sued upon was obtained by fraud and misrepresentation, and that the use of such words could in no way prejudice the rights of the defendant.

[8] Serious complaint is made against instruction No. 11. This instruction reads as follows: "The court instructs the jury that the term 'good faith' means not only honesty of intention, but the absence of suspicious circumstances, or, if such circumstances exist, then such inquiry as will satisfy a prudent man of the validity of the transaction, and the court instructs the jury that if there were such circumstances surrounding the alleged purchase of the note in controversy by the plaintiff, as would put an ordinarily prudent man upon inquiry and lead him to believe that there was or might be a defect in the title of the person negotiating the note, or a good defense to the note by the maker in the hands of the person negotiating the same, and the purchaser under such suspicious circumstances makes no attempt to ascertain the truth, he cannot claim 'good faith' in accepting the instrument."

This instruction is clearly erroneous, in that the court instructs the jury that the term "good faith" means the "absence of suspicious circumstances." The existence of suspicious circumstances will not destroy the good faith of a transaction, but it is such circumstances as would charge the purchaser of a note, as an ordinarily prudent man, with bad faith, or notice of the in-

firmity in the instrument, or defect in the title of the person from whom he makes the purchase. The error, however, taken in connection with other instructions covering the same subject and the strong and almost conclusive evidence, was not of such prejudicial character as to warrant a reversal. We think the correct rule of law bearing on this phase of the case has been correctly answered by this court in *Winter v. Nobs*, supra, in which this court said: "It is contended by appellant that mere suspicious circumstances are not sufficient to put a purchaser of a note on inquiry, and that it is necessary, in order to defeat his right of recovery, to either show actual notice of the fraud or notice of such facts and circumstances as would charge him with actual bad faith in taking the paper without investigating the circumstances under which it was issued." And, after quoting the statute, this court says: "We think it is only actual knowledge of the defect or infirmity or notice of such facts and circumstances as would put a man on inquiry, and would charge him with bad faith or the imputation of dishonest dealing that was intended by the statute to defeat a recovery."

We have examined the other instructions given, and we think they state the law as announced by this court in *Winter v. Nobs*, supra, and that there are no grounds for reversing the judgment.

The judgment is affirmed; costs awarded to respondent.

AILSHIE and SULLIVAN, JJ., concur.

### BASHOR v. BELOIT.

(Supreme Court of Idaho. Nov. 15, 1911.)

(Syllabus by the Court.)

#### 1. JUDGMENT (§ 866\*)—ACTION TO REVIVE—LIMITATIONS.

Under the provisions of section 4051, Rev. Codes, an action to keep alive a judgment or decree of any court of the United States or of any state or territory within the United States may be commenced within six years from the date of the entry of the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1603-1607; Dec. Dig. § 866.\*]

#### 2. EXECUTION (§ 75\*)—TIME FOR ISSUANCE—STATUTORY PROVISION.

Under the provisions of section 4470, Rev. Codes, the party in whose favor a judgment is given may at any time within five years after the entry thereof have a writ of execution issued for its enforcement.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 164-170; Dec. Dig. § 75.\*]

#### 3. JUDGMENT (§ 903\*)—ACTION ON A JUDGMENT—TIME TO SUE.

Under the common law, the owner of a judgment may bring an action on it as a debt of record in any court of competent jurisdiction and prosecute the same to final judgment, notwithstanding his right to issue execution on the original judgment remained unimpaired, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

notwithstanding the time for issuing an execution thereon had expired.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1722, 1723; Dec. Dig. § 903.\*]

#### 4. JUDGMENT (§ 866\*)—ACTION TO REVIVE—STATUTORY PROVISIONS.

The Legislature has the power to limit the time in which an action may be brought upon a judgment to revive it, and to limit the time in which execution may issue for the enforcement of a judgment, and it may extend the time for the commencement of an action to revive a judgment beyond the period of time allowed by law for the issuance of an execution to enforce such judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1603-1607; Dec. Dig. § 866.\*]

#### 5. JUDGMENT (§§ 868, 870\*)—ENFORCEMENT—ABOLITION OF SCIRE FACIAS—EXECUTION.

The common-law writ of scire facias has been abolished by the provisions of section 4611, Rev. Codes, and as provided by section 4474, in all cases other than for the recovery of money, the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of court, upon motion, or by judgment for that purpose founded upon supplemental pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1603-1640; Dec. Dig. §§ 868, 870.\*]

#### 6. JUDGMENT (§ 868\*)—ACTION TO REVIVE—STATUTORY PROVISION.

By the enactment of said section 4474, it was not intended that the method therein provided for the revival of a judgment should be the only and exclusive method for keeping a judgment alive.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1603-1608; Dec. Dig. § 868.\*]

#### 7. JUDGMENT (§ 910\*)—ACTION TO REVIVE—RIGHT OF ACTION.

The right to commence and maintain an action on a judgment in this state is not dependent upon the right to issue an execution for the enforcement of such judgment, but is dependent upon and governed by the provisions of the statute, limiting the time in which an action may be brought upon a judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1732-1737; Dec. Dig. § 910.\*]

#### 8. JUDGMENT (§ 868\*)—ENFORCEMENT—MODES OF ENFORCEMENT.

Under the laws of this state, there is one method of procedure for keeping alive a judgment for the recovery of money, and that is by bringing an action thereon within six years from the entry of said judgment; and there are two methods of keeping judgments, other than for the recovery of money, alive: (1) By action on the judgment within six years; (2) by supplemental proceedings under the provisions of section 4474, Rev. Codes.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1603-1608; Dec. Dig. § 868.\*]

#### 9. INTEREST (§ 60\*)—JUDGMENT—COMPOUND INTEREST.

Section 1539, Rev. Codes, has reference to compounding interest arising on contract, and does not apply to penalties and interest imposed by statute, and is intended as a regulation of interest on contracts, and not of interest on judgments.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 134-137; Dec. Dig. § 60.\*]

#### 10. INTEREST (§ 38\*)—JUDGMENT—RATE.

Under the provisions of subdivision 4 of section 1537, 7 per cent. interest is allowed for money due on judgments, and under the provisions of section 1538 all money judgments bear

interest at the rate of 7 per cent. per annum until satisfied.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 79-82; Dec. Dig. § 38.\*]

#### 11. INTEREST (§ 22\*)—DISPOSITION OF PROCEEDS—INTEREST.

Under the provisions of subdivision 1 of section 4471, under an execution for the enforcement of a money judgment, the sheriff is required to satisfy the judgment and all the interest due thereon.

[Ed. Note.—For other cases, see Interest, Cent. Dig. §§ 43-53; Dec. Dig. § 22.\*]

#### 12. JUDGMENT (§ 910\*)—ACTION ON JUDGMENT—RIGHT OF ACTION.

Under the provisions of section 4051, an action may be maintained on a domestic judgment, if commenced within six years after the entry of such judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1732-1737; Dec. Dig. § 910.\*]

Appeal from District Court, Nez Perce County; Edgar C. Steele, Judge.

Action by George W. Bashor against George W. Beloit to revive a judgment. From a judgment for plaintiff, defendant appeals. Original opinion withdrawn, and, on rehearing, affirmed.

Ben F. Tweedy, for appellant. Eugene A. Cox and Charles H. Chance, for respondent.

SULLIVAN, J. This action was brought upon a judgment which was at the time of filing the complaint more than five years and less than six years old. The defendant by demurrer pleaded the statute of limitations. His demurrer was overruled, and, upon his refusal to plead further, his default was entered, and the cause was heard by the court and judgment entered against him. This appeal is from the order overruling the demurrer and from the judgment.

The appellant assigns three errors: First, that the court erred in overruling the demurrer to the complaint; second, the court erred in entering judgment upon an "expired" judgment; and, third, the court erred in rendering judgment for interest on the costs of the first judgment.

The grounds of demurrer to the effect that the complaint does not state facts sufficient to constitute a cause of action and that this action was barred by the provisions of sections 4052, 4053, 4060, 4470, and 4474, Rev. Codes, we will consider together.

Section 4052 provides that an action may be brought within five years upon any contract, obligation, or liability founded upon an instrument in writing.

Section 4053 provides that an action may be brought within four years upon a contract, obligation, or liability not founded upon an instrument in writing.

Section 4060 provides that an action for relief not otherwise provided for must be commenced within four years after the cause of action shall have accrued.

Section 4470 provides that a party in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

whose favor judgment is given may at any time within five years after the entry thereof have a writ of execution issue for its enforcement.

Section 4474 provides that in all cases other than for the recovery of money the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of court, upon motion, or by judgment for that purpose founded upon supplemental pleadings.

It appears from the complaint that this action was brought on the 18th of November, 1910, upon a judgment made and duly entered on the 25th day of November, 1904, no part of which had been paid at the date of bringing this action, and it is alleged that said judgment is a valid, subsisting judgment, and six years have not expired since the rendition and docketing of it. It thus appears that this action was commenced within six years after the entry of said judgment.

[1] Section 4051, Rev. Codes, prescribes the period within which an action on a judgment or decree may be commenced, and is as follows: "Within six years: (1) An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States. \* \* \*"

[2] It is admitted by counsel that an action to continue in force a judgment for the recovery of money might be commenced within five years after the entry of such judgment, under the provisions of said section 4052, but contends that, as an execution can only be issued for the enforcement of a money judgment within five years after its entry (section 4470), an action cannot be maintained thereon after the expiration of the period in which an execution may issue.

[3] Defendant's contention is based upon the ground that the writ of scire facias has been abolished and the Legislature has provided a substitute for that writ by the provisions of said section 4474. Conceding that to be true, it does not aid counsel in his contention, for, under the common law, the writ of scire facias in no manner prohibited or interfered with the right to bring an action upon a judgment to revive it, for under the common law a judgment might be kept alive, first, by writ of scire facias, and, second, by an action upon the judgment. One of those rights in no manner interfered with the other. The right under the common law of an action on a judgment to revive it continues in this state unless it has been destroyed by statute. It is stated in 23 Cyc. p. 1502, that: "At common law, and generally, except in so far as the right has been restricted by local statutes, the owner of a judgment may bring a suit upon it as a debt of record, in the court which rendered it or in any other court of competent jurisdiction, and prosecute the same to final judgment, notwithstanding his right to issue execution on the original judg-

ment remains unimpaired, or, on the other hand, notwithstanding the time for issuing execution has expired; and it is not necessary to allege or show any other cause for suing on the judgment than the fact that it remains unpaid." So far as the statutes in this state are concerned, under the provisions of said section 4051, it is expressly provided that an action upon a judgment or decree may be commenced within six years after its entry. We have there the right expressly given that is recognized by the common law, except under the statute the right to bring such action is limited to six years.

[4] We find no prohibition in the Constitution against legislation for enforcing, reviving, and renewing judgments, and, therefore conclude that that matter is within legislative discretion. The Legislature may permit suit to be brought upon a judgment for a renewal or revivor of it, or it may deny that privilege. It may permit a judgment to be revived and extended upon notice, or it may require an action for that purpose, or it may permit execution to be issued during any period of time whatever for the enforcement of it; it may establish a period of limitation beyond which an execution may not issue to enforce it; or it may permit an execution to issue at any time until the judgment is fully satisfied, and may authorize an action of revivor to be brought after the limitation for the issuance of execution has expired. These are all matters of legislative policy, and the procedure in different states varies greatly. If the Legislature had not abolished the writ of scire facias (section 4611, Rev. Codes), and had enacted no statute limiting the time in which an action might be brought upon a judgment, the common law in regard to writs of scire facias and actions on judgments would be in force in this state.

[5] However, the Legislature has abolished said writ, and it has limited the time in which an execution may issue for the enforcement of a judgment to five years without a revival (section 4470), and has limited the time in which an action may be brought upon a judgment to six years. Section 4051, Rev. Codes. The duty of the court in the case at bar is merely to construe the several statutes which have been adopted in this state bearing upon this subject, as this entire matter is left to statutory regulation.

[6] In abolishing the writ of scire facias and enacting a substitute therefor by the provisions of section 4474, the substitute was not intended to be the exclusive method by which a judgment might be revived or kept alive, and the fact that a judgment for the recovery of money was excluded from the provisions of said section 4474 is no indication that the Legislature intended to exclude such judgments from the provisions of section 4051.

[7] Under our law the right to maintain an action on a judgment is not dependent upon

the right to issue an execution thereon, but is dependent on and governed by the provisions of said section 4051, limiting the time in which an action may be brought on a judgment.

Counsel's main contention is that the judgment sued on herein was "dormant" or "dead," and so "dormant" and "dead" that it could not be made the basis of an action. But the Legislature has declared otherwise by the provisions of section 4051, and its action therein is not expressly or impliedly prohibited by any provision of our Constitution.

It is stated in 11 Cyc. of Pl. & Pr. p. 1089: "At common law, and by the overwhelming weight of authority in this country, the right to maintain an action upon a domestic judgment is not at all dependent upon the right to issue an execution thereon. Thus an action may be maintained upon a dormant judgment, and it may equally well be maintained upon a judgment which is not dormant, and upon which execution might issue."

[8] Under the provisions of our statutes there is one method for keeping a judgment for the recovery of money alive, and that is by action on the judgment; and there are two methods of keeping other judgments alive, one of which is by action on the judgment, and the other by proceedings under the provisions of section 4474.

It is stated in 23 Cyc. p. 1447, as follows: "An action of debt on the judgment is always a proper form of proceeding; and where the statute provides a special remedy for the revival of judgments, as a writ of scire facias or a motion for that purpose, it is not exclusive of the common-law right of action on the judgment, but cumulative thereto, so that the creditor may pursue either remedy." The author cites in support of that proposition cases from Iowa, Kansas, Louisiana, Montana, and Texas.

Appellant cites, as maintaining his position, the case of *Mawhinney v. Doane*, 40 Kan. 676, 17 Pac. 44. The laws of Kansas prescribe one period of time for keeping a judgment alive when both the plaintiff and defendant are still alive, and a different period of time where one or both of the parties are dead. In that case both parties were dead, and the action to revive was not brought within the period of limitation for that class of actions and has no application to this case whatever.

[12] The next question presented is whether an action can be maintained for the revival of a domestic judgment under the provisions of section 4051, which prescribe the period of six years in which an action may be commenced upon a judgment or decree of any court of the United States, or of any state or territory within the United States. That section was adopted from the laws of California. See Cal. Prac. Act 1850, p. 345, §

17; Sess. Laws of Idaho 1863-64, p. 555, § 16. Under the laws of California and the laws of Idaho, until 1877 the period of limitation for the commencement of an action upon a judgment and the time in which an execution might be issued on such judgment coincided and were the same. The power to enforce and the power to renew the judgment ceased at the same time; but in 1877 (see Sess. Laws of Idaho, p. 55), said section 16 of the practice act of Idaho was amended, limiting the time in which an action might be commenced on a judgment to six years instead of five.

In 1859 the Supreme Court of California, in the case of *Ames v. Hoy*, 12 Cal. 11, had under consideration said section of the statute, and the question whether a suit might be maintained upon a domestic judgment was then considered, and in the course of the opinion the court said: "Several questions are made: (1) That suit cannot be maintained in this state on a domestic judgment. At common law actions could be so maintained. 1 Ch. Pl. 103, 104. There is nothing in our statute which divests the right; and the policy and inconvenience, suggested by the appellant, applied as well in England as here. The chief argument is that there is no necessity for a right of action on a judgment, inasmuch as execution can be issued to enforce the judgment already obtained, and no better or higher right or advantage is given to the subsequent judgment. But this is not true in fact, as in many cases it may be of advantage to obtain another judgment in order to save or prolong the lien; and in this case the advantage of having record evidence of the judgment is sufficiently perceptible. The argument that a defendant may be vexed by repeated judgments on the same cause of action is answered by the suggestion that an effectual remedy to the party against this annoyance is the payment of the debt."

In *Stewart v. Lander*, 16 Cal. 373, 76 Am. Dec. 538, referring to the case of *Ames v. Hoy*, the court said: "We held that such an action might be maintained even though an execution might be issued to enforce the judgment." That action was brought on a domestic judgment.

In *Quivey v. Hall*, 19 Cal. 98, the action was brought upon a domestic judgment.

In the well-considered case of *Mason v. Cronise*, 20 Cal. 212, Mr. Chief Justice Field, speaking for the court, construed the statute of limitations of California, which is similar to our section 4051, and stated, among other things: "The section does not, in terms, except judgments recovered within the state; but, on the contrary, its language embraces the judgments and decrees of any court of any 'state or territory within the United States.' It would seem, according to the natural import of the words

used, that there could be no question as to the application of the section to domestic judgments."

In *Hobbs v. Duff*, 23 Cal. 596, the court said: "The action having been brought within five years from the date of the decree, it is not barred by the statute." That action was on a domestic judgment.

In *Rowe v. Blake*, 99 Cal. 167, 33 Pac. 864, 87 Am. St. Rep. 45, the Supreme Court of California stated: "The right to bring an action upon a judgment or decree is recognized by that act as the subject of a civil action and may be brought within five years. Section 336, Code Civ. Proc. The provisions of this section are applicable to domestic judgments. *Mason v. Cronise*, 20 Cal. 211."

In *Trenouth v. Farrington*, 54 Cal. 278, the court held that section 336, Code Civ. Proc., applied to domestic judgments.

In *Baker v. Hummer*, 31 Kan. 325, 2 Pac. 808, the court held that an action could be maintained on a dormant domestic judgment.

Said section 4051 having been adopted from California and construed to include domestic judgments before the same was adopted by this state, is a cogent reason for holding that said section applies to domestic judgments; and, aside from that, we think it a very reasonable construction of said statute to include domestic judgments therein.

As this action may be maintained on a domestic judgment, and as the action is not barred by the statute of limitations or otherwise, the court did not err in overruling said demurrer.

[8] The third error assigned is to the effect that the court erred in rendering judgment for interest on the original judgment. Appellant contends that the court had no authority to render a judgment whereby interest was allowed upon the judgment which included interest up to the date of the judgment, and cites section 1539 and other sections of our Revised Codes in support of his contention. Section 1539 provides as follows: "Compound interest is not allowed, but a debtor may agree in writing to interest on interest overdue at the date of such agreement." That section has reference to compounding interest on contracts. It was never intended to apply to penalties and interest imposed by statute. In the case of taxes, the principal amount due draws interest at the rate of 18 per cent., and the whole amount due is computed at the time of the sale and fixed by the sale as a lien upon the property. The same thing occurs in a number of other proceedings under our statutes. None of these, however, come within the terms of the statute against compounding interest, for the reason that the provisions of said section 1539 were intended as a regulation of interest on contracts and not on judgments. It was designed to prevent the imposition upon borrowers of

heavy exactions by compounding interest at frequent intervals.

[10] That being true, the provisions of our statute in regard to the rendition of judgments for debt, damages, or costs and interest thereon must be considered in deciding this question. The following sections of our statute should be considered:

"Sec. 1536. In all judgments rendered by any court for any debt, damages, or costs, and in all executions issued thereon, the amount must be computed, as near as may be, in dollars and cents, rejecting small fractions; and no judgment or other proceeding is erroneous for such omission.

"Sec. 1537. Where there is no express contract in writing fixing a different rate of interest, interest is allowed at the rate of seven cents on the hundred by the year on: \* \* \* (4) Money due on the judgment of any competent court or tribunal.

"Sec. 1538. Parties may agree in writing for the payment of any rate of interest, on money due or to become due on any contract, not to exceed the sum of twelve per cent. per annum; any judgment rendered on such contract shall bear interest at the rate of seven per cent. per annum until satisfied."

"Sec. 4914. The clerk must include in the judgment entered up by him, any interest on the verdict or decision of the court, from the time it was rendered or made, and the costs, if the same have been taxed or ascertained; and he must, within two days after the same are taxed or ascertained, if not included in the judgment, insert the same in a blank left in the judgment for that purpose, and must make a similar insertion of the costs in the copies and docket of the judgment."

"Sec. 4471. \* \* \* (1) If it (the execution) be against the property of the judgment debtor, it must require the sheriff to satisfy the judgment, with interest. \* \* \*"

Under our statutes, costs become a part of the judgment. They are entered up in the judgment and docketed with it and are collected by the same execution on which the judgment is collected. Interest due at the date of the judgment is also computed and entered as part of the judgment. The total amount due for damages, interest, and costs are entered as the judgment, and under the provisions of subdivision 4 of section 1537 7 per cent. is allowed for money due on judgments, and under the provisions of section 1538 any judgment rendered on contract bears interest at the rate of 7 per cent. until satisfied.

[11] These provisions clearly contemplate that judgments bear 7 per cent. interest, and this applies to the total amount of the judgment, including costs at the date of its entry, and the intention of the Legislature is indicated by subdivision 1 of said section 4471, which provides that, if an execution for the enforcement of a judgment be against

the property of the judgment debtor, it must require the sheriff to satisfy the judgment with interest thereon. That means interest on the full amount of the *entire* judgment. It was not the intention to segregate the principal sum for which the judgment was rendered from the interest that was due thereon at the date of the judgment, but to compute interest on the total amount of said judgment and costs from the date of the judgment.

Finding no error in the record, the judgment of the trial court must be affirmed, and it is so ordered. Costs are awarded to the respondent.

STEWART, C. J., and AILSHIE, J., concur.

**IDAHO-WESTERN RY. CO. v. COLUMBIA CONFERENCE OF EVANGELICAL LUTHERAN AUGUSTANA SYNOD.**  
(Supreme Court of Idaho. Nov. 13, 1911.)

*(Syllabus by the Court.)*

**1. EVIDENCE (§§ 474, 502\*)—OPINION EVIDENCE—SPECIAL KNOWLEDGE AS TO SUBJECT-MATTER—VALUE.**

It is not necessary to qualify a witness as an expert before allowing him to testify as to the value of property sought to be taken under condemnation proceedings or the damage that will be sustained to the remaining property by reason of the severance of the part taken. He must necessarily claim to have some knowledge on the subject before testifying as to values, and such knowledge and information may be tested on cross-examination by the condemnor, and his means of knowing values and the reasons which lead him to make his estimate as to the value of the property and the damages which will be sustained may be disclosed on cross-examination, and the weight to be given to his evidence is a proper subject for the consideration of the jury.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2217, 2306, 2307; Dec. Dig. §§ 474, 502.\*]

**2. EMINENT DOMAIN (§ 131\*)—MEASURE OF COMPENSATION—"MARKET VALUE."**

In estimating the value of property taken for public use, it is the market value of the property which is to be considered, and the market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is not obliged to have the property.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 353; Dec. Dig. § 131.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4383-4388; vol. 8, p. 7717.]

**3. EMINENT DOMAIN (§ 134\*)—PROCEEDINGS TO TAKE PROPERTY—EVIDENCE AS TO COMPENSATION.**

Where property sought to be taken under condemnation proceedings has no market value, evidence is admissible to show that the property is valuable for some peculiar or specific purpose or is especially valuable on account of its formation, location, natural or artificial adaptability to a particular use or to the peculiar use to which it is then applied, and in such a case evidence of the foregoing effect is admissible, and

may be considered by a jury as a proper subject of inquiry in arriving at a just estimate of the value to be placed upon the property taken and the damage that will be sustained by reason of severing the same from the property remaining.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 356; Dec. Dig. § 134.\*]

**4. EMINENT DOMAIN (§ 122\*)—COMPENSATION FOR PROPERTY—PAYMENT BEFORE TAKING.**

The Constitution prohibits the taking of the property of another for any use until just compensation has been paid therefor, and this must be done whether the property has a market value or not. In every case a fair and just compensation must be ascertained, and this should be done as nearly as possible in the same manner and by taking into consideration the same facts, circumstances, and elements of value which would be taken into account by the vendor and purchaser if they were bargaining between themselves as to the fair price which the one would accept, and the other would pay, for the property.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 122.\*]

**5. EMINENT DOMAIN (§ 138\*)—COMPENSATION—INJURIES TO PROPERTY NOT TAKEN.**

Under the statute of this state (section 5220, Rev. Codes), where a condemnor is seeking to take a portion of a larger tract of land for a public use, it is proper and necessary to take into consideration and to introduce evidence to show the damage that will be sustained to the remaining parcel of land "by reason of its severance from the property sought to be condemned" and the "construction of the improvement proposed" by the condemnor.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 370; Dec. Dig. § 138.\*]

**6. EMINENT DOMAIN (§§ 202, 203\*)—PROCEEDINGS TO TAKE PROPERTY—EVIDENCE AS TO COMPENSATION.**

An educational institution, commonly known and designated as a college, is not ordinarily a commercial or money-making institution, and cannot be said to have a market value in the ordinary and legal acceptance of that term; and, where property devoted to such use is sought to be taken by a railroad company under the power of eminent domain, it is proper to introduce proofs showing the character of the location, its special fitness and adaptability for the uses to which it is then or may be devoted, the state of development and improvement of the property, the nature of the improvements, and the depreciation that will result to the remaining portion of the property after the severance therefrom of the part taken under condemnation, and such evidence is proper for the consideration of the jury in arriving at the true value of the property to be taken and the damage that will be sustained.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 541, 542; Dec. Dig. §§ 202, 203.\*]

**7. EMINENT DOMAIN (§ 104\*)—COMPENSATION—ELEMENTS—NOISE.**

The noise usually incident to the operation of railway trains should not be taken into consideration as an element of damage in ordinary condemnation cases, for the reason that the taking of property for railroad purposes is authorized by the Constitution and statute, and condemnation is allowed therefor, and the noise of operating the road goes along with the use. Where, however, the property is already devoted to such a special and peculiar use that the taking of a part brings the use and the incidental noise so near to the remaining property as to render the noise a private nuisance to the owner of the remaining property except for the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



condemnation, and greatly depreciates its value for such special use, the question of noise may be considered in ascertaining the damage that will be suffered to the remaining property after the severance.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 278-281; Dec. Dig. § 104.\*]

**8. EVIDENCE (§ 501\*)—OPINION EVIDENCE—EXAMINATION OF WITNESSES—EXPLANATION OF FORMER TESTIMONY.**

Where a witness in a condemnation proceeding testifies on behalf of the landowner that the land sought to be taken is of a certain value, it is not error for the witness to be allowed to thereafter explain that he bases his estimate upon the fact that the land could be subdivided into town lots, and would for such purpose sell for the amount fixed by him as the value of the property.

[Ed. Note.—For other cases, see *Evidence*, Dec. Dig. § 501.\*]

**9. WITNESSES (§ 372\*)—BIAS—CROSS-EXAMINATION.**

Where a witness was called by the condemnor in condemnation proceedings, and testified to what he considered to be the value of the property sought to be condemned, and that he had advised the owner of the property to settle with the company, it was not prejudicial error to allow the landowner on cross-examination to ask the witness if he had not sold to the plaintiff company his residence which was situated between the center of the city and the property being condemned, and if he had not received the sum of \$25,000 for such property, where it appeared that such was in fact the case. Such evidence was admitted on the theory that it tended to show the prejudice and bias of the witness in favor of the condemning company.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.\*]

**10. EMINENT DOMAIN (§ 203\*)—PROCEEDINGS TO TAKE PROPERTY—ADMISSIBILITY OF EVIDENCE.**

Where a railroad company is condemning a part only of a tract of land, and does not indicate or stipulate the specific manner in which it intends to use the property or the number of tracks it proposes to lay or whether it will use the land for switching purposes, it is competent and proper for the landowner to introduce evidence to show the probable damage that it will sustain by reason of the most numerous and injurious use to which the railroad company might lawfully put the property under its condemnation for railroad purposes.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 542; Dec. Dig. § 203.\*]

**11. INSTRUCTIONS—NO ERROR.**

Instructions examined, and held sufficient when read as a whole to substantially state the law of the case, and that they contain no prejudicial error.

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by the Idaho-Western Railway Company against the Columbia Conference of Evangelical Lutheran Augustana Synod. From a judgment for defendant for \$9,000, plaintiff appeals. Affirmed.

Charles L. Heitman, J. L. McClear, and F. M. Dudley, for appellant. McNaughton & Berg and H. M. Stephens, for respondent.

**AILSHIE, J.** This action was brought by the appellant to condemn a strip of land 100 feet in width along the southwest side of

the premises belonging to the respondent corporation, and which is occupied by it for college purposes. The respondent is maintaining and conducting what is known as the Cœur d'Alene College in the suburbs of Cœur d'Alene City, and the lands sought to be condemned are a part of the college campus. On the filing of the complaint notice was issued and served, and thereupon the court appointed commissioners to assess the damages. The commissioners met and heard the proofs, and made and filed their report. The majority of the commissioners found that the value of the land to be taken was \$3,000, and that the damage that would be caused to the remainder of the land by reason of the severance and taking of the part condemned would be \$2,000. The college corporation declined to accept the amount allowed by the board, and the case was thereafter tried in the district court, and the jury returned a verdict for the sum of \$5,000 as the value of the property to be taken and \$3,900 as the amount of damages that would be sustained to the remainder of the property by reason of the severance, and \$100 for fences and cattle guards. Judgment was thereupon entered, and this appeal has been prosecuted by the condemnor. The only issue that was tried in the district court was the question as to the amount of damages which the college corporation would sustain by reason of the taking and the severance of the land condemned from the remainder of the tract. The appellant has assigned ninety and nine errors, and inferentially concedes that the court was correct in the balance of his rulings. We shall not be able to take up these assignments of error in detail, and consider or discuss them all in a written opinion. We have examined them in detail, however, and will consider the most prominent and important ones, and will treat in this opinion such assignments as seem to merit consideration in a written opinion.

The chief complaint made by appellant is against various rulings of the trial court in permitting the president of the college, Dr. Jespersen, to testify concerning the investigation that was made by the committee before determining to acquire this particular tract for college purposes and to give his opinion as to the needs of a college campus, and the effect upon the value of the college property that the appearance of the campus has, and to describe the college and tell of its condition and the state of its growth and the increase in students, and to also testify as to depreciation in the value of the property for college purposes if the land sought to be condemned be taken and used for railroad purposes, and that, if the use which the condemnor intended to make of the property should render it necessary for the college corporation to sell its property in order to purchase and locate somewhere else,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the buildings and improvements placed upon the land, aggregating about \$40,000, would only sell for a very small percentage of the cost price for any other use or purpose than college purposes. Dr. Jespersen was also allowed to testify to the damaging and detrimental effect upon the college work that would result from the noise of locomotives and trains passing back and forth over this ground so near to the college buildings. Other witnesses were allowed to testify along the same lines and to the same effect. Teachers, instructors, and college professors were called and testified along the same general lines, and the music teacher was allowed to testify as to the effect that noise of trains and locomotives so near would have upon the giving of musical instruction in the college and the conducting of that line of college work. The greater number of the errors assigned on this appeal go to the admission of evidence of the character and to the general effect above mentioned. We are now called upon to determine whether or not this class of evidence was admissible on behalf of respondent or prejudicial to the appellant.

[1] In the first place, appellant urges that the witnesses who were called on behalf of respondent to testify as to the value of the property to be taken and the damage that would be sustained were not qualified and competent to testify upon the subject of value. We do not consider that the objection is well taken. The appellant had the privilege of cross-examining these witnesses which it exercised to the full extent, and this examination disclosed the extent of the knowledge and information that the several witnesses had on the subject of values, and the reasons which led them to make the estimates they did. The jury was competent, and, indeed, that was its province, to determine the weight to be given the evidence of the several witnesses on this subject. Evidence of value and damages in such cases as this should not be limited or confined to so-called expert witnesses; indeed, it could not be, for the reason that it would be practically impossible to tell just what would constitute an expert in such matters. A witness must necessarily claim to know something about the value of such property before he can fix any value, and the extent and value of that knowledge will be fully disclosed on cross-examination. The jury are well qualified to determine the weight to be given the evidence of the several witnesses after they have been cross-examined as to their means of knowledge and the sources of their information upon which they base their estimates. 2 Lewis on Eminent Domain, § 654; Id. § 435, Original Edition.

[2] It is argued by appellant that the only line of evidence that was admissible was such as would show the market value of the property to be taken, and that any other evidence as to special uses to which the owner

desired to put the property or to which it might be adaptable was improper and inadmissible. In *Portneuf-Marsh, etc., Co. v. Portneuf Irrigating Co.*, 19 Idaho, 483, 114 Pac. 19, this court in determining the rule for the assessment of damages in such cases quoted with approval the following extract from 2 Lewis on Eminent Domain (3d Ed.) § 706: "In estimating the value of property taken for public use, it is the market value of the property which is to be considered. The market value of property is the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it. In estimating its value all the capabilities of the property and all the uses to which it may be applied or for which it is adapted are to be considered, and not merely the condition it is in at the time and the use to which it is then applied by the owner. It is not a question of the value of the property to the owner. Nor can the damages be enhanced by his unwillingness to sell or because of any sentiment which he has for the property. On the other hand, the damages cannot be measured by the value of the property to the party condemning it, nor by its need of the particular property."

[3] Following that quotation, this court said: "It is often difficult to determine the market value of property, for the reason that there may be no general demand for the same, or it may be that the property is only valuable for a specified purpose as was the case here, and a value can only be estimated upon the basis of the fitness of the property for the specific use on account of its formation, its location, or other specific, natural, or artificial adaptability to the use for which it is sought. In a case, therefore, where no general market value can be ascertained, these latter elements must be taken into consideration and are proper subjects of inquiry in arriving at the value of the property." In the same opinion we quoted with approval from *Ranck v. Cedar Rapids*, 134 Iowa, 563, 111 N. W. 1027. In the latter case the Iowa court was considering the competency of evidence admitted and the measure of damages applicable in a case where the condemnor was seeking to condemn a lot for an approach to a bridge. The landowner had fitted up a livery barn and undertaking rooms on the property, and had carried on business there for some 16 years, and had established a reputation for his business and location, and on the trial of the case the court admitted evidence showing the length of time the landowner had maintained his business thereon and the character and nature of the business he was conducting, "and that the situation was well adapted to and valuable for such business," and "that the long use of the premises for such use tended to increase its value therefor." The Supreme Court sustained the action of the trial court in admitting the evidence along this line, and cited a long line of

authorities sustaining its position. Among that list of authorities, which we will not reproduce here, will be found cases holding to the following effect: (1) That evidence is admissible to show the adaptation and value of the property for any legitimate purpose or business, even though it has never been so used, and the owner has no present intention to devote it to such use; (2) that it is proper for the owner to prove the presence and value of undeveloped mineral deposits in the land taken; (3) that the cost and value of a house and other improvements on the premises may be shown; (4) that the value of a salt well, though not being utilized, may be shown; (5) that the value of trees on the land may be proven; (6) that the value of growing crops lost by reason of the condemnation may be proven; (7) that the kind and value of crops produced in other years may be proven, and that the income which might be derived from the property is proper to be shown; (8) that the owner has an established and lucrative business on the premises may be proven; (9) that the price paid for the property is a pertinent fact for the consideration of the jury; (10) that evidence of cost as affecting estimates of value of property of the kind shown to be taken is admissible; (11) that loss and inconvenience which must be incurred by the interruption of business or its enforced removal to another location may be introduced as a material fact bearing upon the value of the property. We do not wish to be understood as approving the holdings of all these cases, but rather cite them to show the length to which the courts have gone in the admission of evidence in such cases.

[4] An examination of these various holdings will show that evidence along the lines indicated has been admitted in the several states for the purpose of advising the jury of the true situation of the property, and its utility and value for the various and several uses to which it may be placed by its owner or a possible purchaser. After citing the cases in support of the various holdings, the Iowa court adds the following comment, which seems to us logical and reasonable and a very practical view to take in such matters: "The cases we have thus far cited may not all be of controlling authority in this state, but they serve well to illustrate the marked tendency of the courts to liberality in the admission of proof of any and all facts having any legitimate tendency to aid the jury in arriving at the value of the property appropriated under power of eminent domain. The fact that the owner is denied the ordinary right to refuse to sell his property, except at his own price and on his own terms, affords no reason for awarding him more than a just compensation; but it does afford good reason why he should be given every opportunity to disclose to the jury the real character of the property, its location, its surroundings, its use, its improvements, if any, and their age, condition,

and quality, its adaptability to any special use or purpose, its productiveness and rental value, and, in short, everything which affects its salability and value as between buyers and sellers generally. Though acting under legal compulsion, the owner stands in some degree in the attitude of a seller of property, the price of which is to be fixed and settled by the jury, and, so far as he can do so within the bounds of truth and fairness, he is entitled to display all the attractive and desirable features of such property which may tend to enhance its value in the market, and thus secure the highest obtainable compensation therefor. The party condemning has, of course, the correlative right to rebut the showing thus made by disputing its truth and by proof of other facts which affect the value of the property unfavorably. It is true that market value and intrinsic value are not necessary equivalents, but proof of the latter is often competent evidence for consideration in determining the former." Justice Deemer dissented from the majority opinion in the foregoing case, but his dissent was placed upon the ground that the entire property was taken in that case, which in his opinion renders such inquiries improper, and so the point made by the dissent in that case is not involved in the present case, for the reason that the condemnation here did not seek to take but a small portion of the entire tract, and so really the dissenting opinion in the Iowa case adds force to the majority opinion so far as the point involved is applicable to the case at bar.

In *Sanitary District v. Chicago & Pittsburg, Ft. W. & C. Ry. Co.*, 216 Ill. 575, 75 N. E. 248, the sanitary district sought to condemn a portion of the station and terminal grounds in the city of Chicago used and occupied by the Pittsburg & Ft. Wayne & Chicago Railway Company and the Pennsylvania Railroad Company, and the question of the manner of establishing the value of the property arose and was discussed at great length. The court, among other things, said: "Where lands proposed to be taken have a market value, such value is the standard of just compensation because it will give to the owner all he is entitled to under the law. But that method of valuation cannot be applied to property which has no market value. The Constitution and the law require that the owner of property shall receive such compensation that he will be as well off after the taking as he was before. To do that, it is necessary to determine what the property is worth to the owner, and, unless he receives what it is worth to him, he does not receive just compensation. It is matter of common knowledge that such property as this and devoted to such a use is not bought and sold in the market or subject to sale in that way, and that such property has no market value in a legal sense. The property being devoted to a special and particular use,

the general market value of other property was not a criterion for ascertaining compensation, although it might throw some light on the actual value." See, also, *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 20 L. Ed. 557.

[5] The foregoing discussion naturally brings us to an inquiry as to what the statute of this state says with reference to assessing damages in such cases. Section 5220 of the Revised Codes provides as follows: "The court, jury, or referee must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: (1) The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein; if it consists of different parcels, the value of each parcel and each estate or interest therein shall be separately assessed; (2) if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff; (3) separately, how much the portion not sought to be condemned, and each estate or interest therein, will be specially and directly benefited, if at all, by the construction of the improvement proposed by the plaintiff; and if the benefit shall be equal to the damages assessed, under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value. \* \* \* It will be observed by the foregoing statute that under the laws of this state three facts are to be determined in a condemnation suit where it is not sought to take the entire tract of land but only a portion thereof: First, the value of the property sought to be condemned together with all the improvements thereon pertaining to the realty; second, if the property sought to be condemned constitutes only a part of the larger parcel, the damages which will accrue to the remaining portion by reason of the severance must be assessed; and, third, if the property sought to be condemned constitutes a part of a larger parcel, the benefits which will accrue to the remaining portion after the severance of the part condemned must be ascertained and assessed and be deducted from the damages that will be sustained by the severance. Our statute, therefore, provides not only for the assessment of damages for the value of the property taken, but, in addition thereto, provides for the assessment of damages and benefits sustained and received by the remaining parcel of land after the severance, and which is caused "by reason of its severance from the property sought to be con-

demned" and the "construction of the improvement proposed" by the condemnor. Under this statute, it was properly for the landowner to introduce such evidence and proofs as were available, tending to show the depreciation in value which would result to the remaining portion of its land after the severance of this particular tract, and in doing so the statute specifically authorizes taking into consideration "the construction of the improvement in the manner proposed by the plaintiff." This latter provision of the statute clearly authorizes the landowner to introduce evidence showing the damage and injury that the particular improvement or structure for which the condemnation is sought will cause to the remainder of his property. The statute requires the condemnor to disclose the purpose for which he is seeking to condemn the property and the general nature and character of the improvement or structure he expects to erect in order to bring himself within the Constitution and statute (section 14, art. 1, Const.; section 5210, Rev. Codes), and entitles him to maintain his condemnation proceeding. A. may be using his property for a purpose that would in no manner be disturbed or damaged by reason of the construction and operation of a railroad along and over a portion of such property, while B. may be using his property for a purpose which would be partially or wholly destroyed by reason of the construction and operation of a railroad along and over a part of such land. So the question of the use to which the property is to be applied, the nature of the improvement, and the manner in which the improvement is to be made and the use carried on becomes important.

[6] In the case at bar the respondent corporation is maintaining and operating an educational institution. This is not a commercial or money-making institution in the ordinary sense of that term, and yet it is one of the most commendable and laudable purposes to which men can apply themselves, and the use is one of the most worthy and legitimate uses to which property can be applied. The Constitution recognizes the fostering and maintaining of educational institutions as one of the highest uses, and declares it essential to the stability of our form of government. Section 1, art. 9. It would be purely a production of the imagination to talk about a college site or college property having a market value. "A reasonably prudent business man" is not going to invest anything in those institutions as a business or commercial enterprise. Whatever he invests in such an institution, he does it solely as a donation. We know there is no such a thing as a market value within the ordinary and legal acceptance of that term for such property. This is a sectarian or denominational institution, and it is a matter of such common knowledge that we would have no hesitancy in taking judicial

notice of the fact that such institutions are dependent upon donations and endowments and those who are charitably and philanthropically inclined for their existence, support, and maintenance. These institutions partake largely of an eleemosynary character, and yet the property built up for such purposes is ordinarily expensive, and becomes of great value for the specific work and purpose for which it is established. The fact that there is no market value for such property affords no justification whatever for the taking of the property without payment of just compensation. Whenever the property is of such character and nature that it has no market value, its value for the uses and purposes to which it is being devoted and to which it is peculiarly adaptable may be shown, and the authorities above cited fully sustain and justify this position. It was competent for the college corporation to introduce evidence to show that the construction and operation of a steam railway line along and over its campus grounds would be a permanent and lasting detriment to the remaining college property, and that it would impair its usefulness and mar its inviting situation and prospect. The evidence that was introduced along this line was competent and admissible under the statute.

Counsel for appellant contend, however, that evidence of this kind of injury and damage was not admissible, for the reason that the Constitution of this state provides simply for the payment of "a just compensation" for the "taking" of private property, and does not require the payment for damages sustained. Counsel recites the provisions of the various Constitutions and the history of their adoption in the several states. We quote the following from appellant's brief as an interesting and instructive review of the adoption of this damage provision in the several Constitutions: "The Constitution of Idaho, unlike the Constitutions of Alabama, Arkansas, California, Colorado, Georgia, Illinois, Kentucky, Louisiana, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, and Wyoming, does not prohibit the damaging of property. It provides simply that 'private property may be taken for public use, but not until a just compensation, to be ascertained in a manner prescribed by law, shall be paid therefor.' The omission of the damage clause is significant. Prior to 1870 that clause was not to be found in any Constitution, and the courts had uniformly held that under the prohibition against taking consequential damages were not recoverable. The Ohio and Kentucky courts had given an unusually wide definition as to what constituted a taking, but we believe there was no dissent from the general proposition that consequential injuries were *damnum absque*

*injuria*. It was felt that this limitation frequently resulted in hardship; and in 1870 Illinois adopted a constitutional amendment providing that private property should not be taken or damaged for public use without compensation. This provision was soon followed in many of the states, by West Virginia in 1872, by Arkansas and Pennsylvania in 1874, by Alabama, Missouri, and Nebraska in 1875, by Colorado and Texas in 1876, by Georgia in 1877, by California and Louisiana in 1879; all prior to the adoption of the Idaho Constitution. The effect of the damage clause was repeatedly determined by various courts prior to 1889, including the United States Supreme Court. *Chicago v. Taylor*, 125 U. S. 161, 8 Sup. Ct. 820, 31 L. Ed. 638. And see list of cases and history of amendment in *Brown v. Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161. The same year that the Idaho Constitution was adopted the states of Montana, North and South Dakota, and Washington adopted Constitutions, and all included therein the damage clause. And when the convention in Idaho framed the Constitution of that state, omitting such clause, and it was so adopted, the conclusion must be that the omission was deliberate and because the people of that state believed that, owing to the conditions there existing, the public interests demanded that the additional burden of paying consequential damages should not be imposed on those taking property for public uses. And there is nothing in the Idaho Constitution requiring compensation except for the taking of property."

While our constitutional provision omits the words "or damaged" which are found in many Constitutions immediately following the word "taken" as it occurs in our Constitution, this provision does not prevent the Legislature from adding the requirement that compensation be made for the damages sustained to the remaining property by reason of the taking; in other words, the omission of the words "or damaged" from the Constitution does not prevent the Legislature from imposing a condition to that effect by statutory enactment. It is true that the Legislature in this state has not gone to that extent; in other words, it has not authorized the collection of damages under the eminent domain statute previous to the taking, where there is no actual physical taking of the property, but it has provided that the damages done to the remaining portion of the property from which the condemned portion is taken shall be paid before the condemnor is allowed to take the property sought.

[7] The appellant has in this same connection made complaint of the action of the court in permitting evidence to be introduced as to the damage that may be sustained from the noise of passing trains and engines, and insists that this is a mere incident to the use of the property and that it

necessarily follows in the ordinary use of railroad property, and cannot therefore be taken into consideration in estimating damages. It is argued that the college corporation might sustain the same damage from a railroad being operated over adjoining property acquired from someone else, and still would not be entitled to recover damage for such noise or disturbance. This may all be conceded, and yet it in no way militates against the right of the respondent corporation to have the jury consider the question of disturbance from noise by reason of constructing and operating the railroad over land which now belongs to the college corporation and which the railroad seeks to take for such purposes. The construction of the improvement here proposed is a railway line. A result of the construction and operation of that line will be noise from passing trains and locomotives, and that noise, according to the proofs, will be a serious detriment to the peculiar business of this corporation. It will amount to a private nuisance to the school except for the condemnation. The noise usually incident to the operation of railway trains should not be considered as an element of damage in the ordinary case, for the reason that such a purpose is lawful and condemnation is allowed therefor, and the noise of operating a railroad goes along with the use. Where, however, the property is already devoted to such a special and peculiar use that the taking of a part brings the use and incidental noise so near as to render the noise a private nuisance to the owner of the remaining property, except for the condemnation, and greatly depreciates its value for such special use or renders it valueless, this element ought to be considered in ascertaining the damage that will be suffered to the remaining property after the severance.

This question was under consideration by the Supreme Court of Massachusetts in *Baker v. Boston Elevated Ry. Co.*, 183 Mass. 178, 66 N. E. 711. There it was sought to condemn property for an elevated street railway. The landowner offered evidence to show the damage he would sustain by reason of the noise incident to the operation of the railroad. The Supreme Court of Massachusetts was called upon apparently for the first time to construe chapter 548, § 8, of the Statute of 1894 of that state. While that statute is very different in form from our statute (section 5220), still in substance and effect it is very similar to ours in so far as it goes. Their statute provides for the assessment of damages that will be sustained and the assessment of benefits or improved value by reason of the location of construction or maintenance of the railway, and the landowner shall be given an amount equal to the sum which the damages he will sustain exceeds the benefits he will receive. The court concluded in that case that the

landowner was entitled to have the question of noise that would be caused by the constant running of cars along his premises considered as an element of damage in establishing the compensation to be allowed him. In *Omaha Southern Ry. Co. v. Beeson*, 36 Neb. 361, 54 N. W. 557, the Supreme Court of Nebraska held that evidence of annoyance of defendant on account of smoke and ashes from the engines of passing trains near his residence was properly admitted. The court there said: "If the house was rendered intrinsically less valuable by reason of dust and smoke from passing engines, that fact was admissible, not as an independent element of damage, but to be taken into consideration in determining the value of the entire tract as it then was burdened by the right of way."

[8] One witness that was called on the part of the respondent in this case testified to what he considered to be the value of the land sought to be taken, and later on in explaining his evidence and giving his reasons for placing such a value on the property stated that it would be worth so much if divided up and placed on the market as town lots. We fail to see any serious error in this evidence. The jury were able to judge of the value of the evidence thus given and the speculative character of the evidence. On the other hand, we cannot say that it was improper to allow witnesses to testify to such a use to which the property could be devoted. 2 *Lewis on Eminent Domain* (3d Ed.) § 712; *Sanitary Dist. of Chicago v. Pittsburg, Ft. W. & C. Ry. Co.*, 216 Ill. 575, 75 N. E. 249; *Ranck v. Cedar Rapids*, 134 Iowa, 563, 111 N. W. 1027. In *Omaha Southern Ry. Co. v. Beeson*, supra, the landowner was permitted to introduce evidence showing that his tract of land before the condemnation was so situated that it could have been divided up into subdivisions and sold as town lots, but that after the condemnation such could not be done. The court said: "If the railroad track was so constructed as to render subdivision impracticable and the value of the property thereby impaired, such fact amounts to a direct injury to the property for which the owner may recover in a condemnation proceeding." The foregoing was said with reference to the property remaining after the condemnation. Here the evidence was given with reference to the land actually taken. In this case the evidence was perhaps more speculative.

[9] Appellant complains seriously of the action of the court in permitting the respondent to cross-examine the witness Hamilton who was called by appellant to testify as to the reasonable market value of this property. Mr. Hamilton is a resident of Coeur d'Alene City and cashier of the Coeur d'Alene Bank & Trust Company, and testified that the land was worth about \$1,000 an

acre. He also testified that he had written a letter to the president of the college urging the president to settle with the railroad company. On cross-examination counsel for the respondent was allowed to ask the witness if he did not formerly live between the college property and the center of the city and in the way of the line of railroad. He answered that he did. They then asked him if he did not sell his residence property to the railroad company, to which he answered in the affirmative. He was then asked if he did not get \$20,000 for his place. Objection was made to that, and the court held that it was not admissible as fixing a standard of value. Counsel for respondent urged, however, that the evidence was admissible for the purpose of showing the credibility of the witness and his interest or bias in connection with the railroad company and this transaction, and the court admitted the evidence on that theory and for that purpose alone. Pursuing this course of cross-examination, it later developed that Mr. Hamilton had sold his residence to the railroad company for \$25,000. It is now urged by the respondent that this evidence was admissible as tending to show the relation between the witness and the railroad company and his bias in favor of the company. They argue that the receipt by the witness of \$25,000 from the company for his property would tend to have a persuasive influence on his mind when it came to fixing values on property which would have to be paid by the railroad company. However this may be, we do not think the introduction of this evidence was of such a prejudicial character as to have been injurious to the appellant or to call for a reversal of the judgment.

[16] The appellant also complains of the action of the court in allowing witnesses on behalf of the appellant to testify as to the probable annoyance and damage that would be produced to the school and school property by the use of this land for railroad purposes in the event it should lay a double track or should use the ground for switching purposes. The objection made to this line of evidence was based on the grounds that it did not appear in the case that the railroad company intended to do anything more than build a single line of track over this ground. As we understand the rule in such cases, the company might have bound itself by its pleadings and proceedings, or by stipulation, in the action to maintain only a single track, and not to use the ground for switching purposes. It did not, however, see fit to do this. It was competent, therefore, for the landowner to prove the damage that it would probably sustain by reason of the most numerous and injurious use to which the condemning party might lawfully put the property under its

condemnation for railroad purposes. This rule is very clearly stated by 1 Lewis on Eminent Domain (3d Ed.) § 391.

A number of errors have been assigned touching the action of the court in giving certain instructions, and refusing to give others requested by the appellant. What we have said with reference to the evidence that was admitted in this case, and the rulings of the court in the course of the trial render it unnecessary for us to discuss the instructions. The court's instructions to the jury were in line with his rulings on the admission of evidence. We have examined the instructions, and, taken as a whole, we do not think they were in any manner unfair or prejudicial to the appellant.

The judgment in this case seems rather large, and yet it is amply justified by the evidence. Indeed, many witnesses placed the value of the property and damage that would be sustained to the remaining property after the severance much above that found by the jury. We fail to find anything in the record in this case that would justify us in disturbing the judgment. The judgment must therefore be affirmed, and it is so ordered, with costs in favor of the respondent.

STEWART, C. J., and SULLIVAN, J., concur.

# BALCH v. GLENN et al.

(Supreme Court of Kansas. Nov. 11, 1911.)

## (Syllabus by the Court.)

### 1. AGRICULTURE (§ 1\*)—BOARDS AND OFFICERS—ENTOMOLOGICAL COMMISSION.

The statute creating the Entomological Commission and providing for the extermination of San Jose scale and other orchard pests (Gen. Stat. 1909, c. 103, art. 43) is a valid exercise of the police power.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. § 1.\*]

### 2. CONSTITUTIONAL LAW (§ 62\*)—DISTRIBUTION OF GOVERNMENTAL POWERS—DELEGATION OF LEGISLATIVE POWER.

The statute is not invalid because it delegates to the commission the power to declare the existence of conditions which call into operation the provisions of the statute.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 62.\*]

### 3. CONSTITUTIONAL LAW (§ 63\*)—DISTRIBUTION OF GOVERNMENTAL POWERS—DELEGATION OF LEGISLATIVE POWER.

The Legislature of the state may declare that to be a nuisance which is detrimental to the health, morals, peace, or welfare of its citizens, and may confer power upon local boards or tribunals to exercise the police power of the state when in the judgment of such tribunals the conditions exist which the Legislature has declared constitute such nuisance.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. § 63.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**4. CONSTITUTIONAL LAW (§ 320\*)—DUE PROCESS OF LAW—ENTOMOLOGICAL COMMISSION.**

Nor is the statute in question unconstitutional on the ground that it provides for taking private property without due process of law. It rests wholly with the Legislature whether, in the exercise of its power of police regulation, the individual whose property is destroyed shall receive compensation therefor.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 771; Dec. Dig. § 320.\*]

**5. EMINENT DOMAIN (§ 2\*)—CONSTITUTIONAL PROVISIONS—TAKING PROPERTY WITHOUT COMPENSATION.**

The statute is designed to protect and promote the horticultural interests of the state and, in effect, makes all orchards, trees, shrubs, and plants infested with the pests mentioned in the statute public nuisances, and, being a proper exercise of the police power, is not unconstitutional because it authorizes the expense of abating such nuisance to be charged against the property of the owner.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. § 2.\*]

**6. CONSTITUTIONAL LAW (§ 318\*)—DUE PROCESS OF LAW—PROCEEDINGS OF ENTOMOLOGICAL COMMISSION.**

Nor is the statute unconstitutional because no separate tribunal is provided by which the owner may contest the amount of expense which shall be charged against his property. The act requires notice to be served upon the owner, stating the amount of expense incurred by the commission, and notifying him that unless such expense be paid within 20 days the same will be taxed against his property. *Held* that, ample notice being provided which gives the property owner an opportunity to question the amount of such expense in an action in any court of competent jurisdiction before his property is affected, he is afforded due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 946; Dec. Dig. § 318.\*]

**7. AGRICULTURE (§ 1\*)—BOARDS AND OFFICERS—PROCEEDINGS—LIEN.**

The lien given by the statute upon premises for the expense of abating such nuisance thereon is not for a delinquent tax, but for an indebtedness due the county, and the provision authorizing such expense to be collected as other taxes are collected is not obnoxious to any constitutional inhibition.

[Ed. Note.—For other cases, see Agriculture, Dec. Dig. § 1.\*]

*(Additional Syllabus by Editorial Staff.)*

**8. CONSTITUTIONAL LAW (§ 251\*)—“DUE PROCESS OF LAW.”**

Though the phrase “due process of law” does not necessarily mean a judicial proceeding, neither does it necessarily mean a special tribunal for the express purpose of hearing the merits of a particular controversy, and where ample notice is provided, giving an owner opportunity to have a hearing in a court of competent jurisdiction before his property is affected, he is afforded due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 726-727; Dec. Dig. § 251.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2256; vol. 8, p. 7644.]

Appeal from District Court, Sedgwick County.

Action by S. W. Balch against A. P. Glenn

and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Adams & Adams, for appellant. W. A. Ayres, Earl Blake, and Jno. S. Dawson, Atty. Gen., for appellees.

PORTER, J. In this suit the appellant challenges the validity of chapter 386 of the Session Laws of 1907, as amended by chapter 27 of the Session Laws of 1909, creating the Entomological Commission and providing for the extermination of San Jose scale. Appellant is the owner of a large orchard of apple and peach trees, grapes, and other fruit, and sued to enjoin the defendants from entering upon his premises for the purpose of inspecting, spraying, and destroying the fruit trees and vines and from causing the expenses incurred in the performance of such services to be taxed against his property. In their answer appellees admitted that they were about to inspect, and, if necessary, destroy, the trees, vines, and other shrubbery on appellant's premises, and that the costs and expenses incurred by them would be taxed against his property. They alleged that appellant's orchard is infected with San Jose scale and asked that he be enjoined from interfering in any manner with the work of the commission in exterminating the same. On the trial the court found the acts of the appellees justified and enjoined appellant from interfering with the proceedings. From this judgment he appeals.

Chapter 386 of the Laws of 1907 creates the Entomological Commission, to consist of the secretary of the state board of agriculture, the secretary of the Kansas State Horticultural Society, the professor of entomology of the University of Kansas, the professor of entomology at the State Agricultural College, and a nurseryman actively engaged in the nursery business within the state, to be appointed by the Governor. The purpose of the act is the suppression and extermination of San Jose scale and other injurious insect pests and plant diseases. In order to accomplish such purpose, the entomologists, their assistants and employes, are authorized to enter upon the premises of any private individual and inspect, destroy, treat, or experiment upon such insects or plant diseases. In case the officers mentioned or their employes shall find such insects or diseases to exist, they are required to mark in some conspicuous way all trees, vines, shrubs, or plants so infested, and to give notice in writing to the owner, tenant, or person in charge of the premises, of the condition thereof. The act then provides that, if the owner or person in charge shall not within 10 days thereafter destroy or treat the same in accordance with the regulations and rules of the commission, the commission shall cause the work to be done. The act of 1907 provided that the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



expenses of such extermination or treatment, properly certified by the commission, should be collected by the county attorney of the county where such premises are located, who was directed to account therefor to the commission. The Legislature of 1909 amended the act so as to provide that the expense incurred in inspecting, treating, and exterminating such insect pests should be paid by the owner of the premises within a certain time after the services were performed, in default of which it should be taxed against the property and collected in the same manner as delinquent taxes. The amendment, so far as it relates to the present controversy, reads as follows: "The necessary expense thereof shall be paid by the owner or owners of the real estate from which said infestation has been removed in pursuance of this act. The state entomologist or his deputy shall serve or cause to be served upon said owner or any one in possession and in charge of said real estate, a notice, stating the amount of said charge, and further stating that if said charge be not paid to the county treasurer of the county wherein said real estate is located within twenty days from the date of the service of said notice, that the same will become a lien upon said real estate. Copy of said notice, together with the proof of service, shall be at once filed with the county clerk, and if said amount is not paid within the time therein stated, said county clerk shall spread the same upon the tax roll prepared by him and said amount shall become a lien against said real estate and be collected as other taxes are collected, and said real estate shall be sold for nonpayment of said taxes the same as now or hereafter may be provided by law for sale of real estate for delinquent taxes. Should the owner of said real estate not pay said charges within the stated time, the same shall be presented to the board of county commissioners by the county clerk and by them allowed and paid out of the general fund of said county by the county treasurer, and when said amount is collected as taxes it shall be paid into the general fund of said county. The cost of eradication or treatment of such infestation, as above stated, shall be paid to the county treasurer, to whom the county clerk shall certify all amounts due as reported to him by the entomologist in charge. The county treasurer shall forward to the state treasurer on the first of each month all amounts thus received. These amounts shall be paid into the general fund of the Entomological Commission." Laws 1909, c. 27, § 1; Gen. Stat. 1909, § 8732.

There was ample evidence to warrant the finding that appellant's orchard is infested with San Jose scale. It is conceded that the appellees were attempting to follow the provisions of the statute. They and their employes had gone upon the premises of the appellant and had marked certain trees and shrubs for destruction and had marked others for treatment by spraying. They had

given the appellant due notice in writing ordering him within 10 days thereafter to treat and destroy the pest under the rules and regulations of the commission. Upon his failure to comply with the order, the commission was about to cause the work to be done and the expense thereof charged against appellant's property.

[1, 2] The appellant asserts that the act of 1907 as amended by that of 1909 is unconstitutional. Generally stated, his contentions are: "That the law deprives him of his property without due process of law, and therefore violates the fourteenth amendment to the federal Constitution; that it deprives him of the right to a jury trial in violation of section 5 of the Bill of Rights; that it attempts to confer judicial power upon the commission and its employes and to give them authority to determine the amount of taxes which shall be assessed against the appellant's property without notice or opportunity to contest the amount thereof; that it violates section 1 of article 11 of the Constitution of Kansas, requiring a uniform and equal rate of assessment and taxation. Little, if any, attempt is made in the brief to argue these propositions separately, but counsel for appellant urge the following specific objections to the statute: (1) That there is no method of procedure or hearing provided by which appellant's right to protest against the destruction of his property is preserved; that the law delegates to the commission and its employes the power to mark trees for destruction without a hearing or trial as to the necessity thereof; (2) that it fails to prescribe any compensation for property destroyed, whether taken rightly or wrongfully; (3) that no notice or opportunity is provided by which the appellant may contest the amount of the expenses which shall be taxed against his property. Most of these objections rest upon what appears to be a failure to distinguish between the exercise of the power of eminent domain and the exercise of the power of police regulation. Many cases are cited where legislative enactments have been held invalid on the ground that they provide for taking private property for public use without compensation. These authorities have no application to the present case. The courts have universally recognized the distinction between the two powers. Under the exercise of the one, private property cannot be taken either for public or private use without compensation; in the exercise of the other, the use of property may be limited, or controlled, or the property itself destroyed, without any compensation therefor being made to the owner. It is no objection to the validity of laws passed in the proper and lawful exercise of the police power that provision is not made for compensation to the individual whose property may be affected thereby. Property taken or destroyed for the purpose of abating a nuisance or to prevent the spreading of a pestilence is not taken for

public use. All private property is held subject to such reasonable restraints and burdens as in the opinion of the Legislature will secure and maintain the general welfare and prosperity of the state. It is held subject to the obligation that it shall not be used so as to affect injuriously the rights of the community. It belongs to the legislative branch of the government "to exert what are known as police powers of the state, and to determine primarily what measures are appropriate, or needful, for the protection of the public morals, the public health, or the public safety." *Mugler v. Kansas*, 123 U. S. 623-661, 8 Sup. Ct. 273, 297 (31 L. Ed. 205); *Mo. Pac. Ry. Co. v. Finley*, 38 Kan. 550, 16 Pac. 951.

In the exercise of this power the Legislature may be justified in excluding property dangerous to the property of citizens of the state, as, for example, animals having infectious or contagious diseases. The police power is said to be inherent in government, but can only be exercised by authority of legislative enactment. It is for the Legislature to determine what laws are needed and appropriate to promote the public welfare and to prevent the infliction of public injury. So long as the Legislature, in attempting to exercise this power, does not violate any of the provisions of the organic law or encroach upon some power vested in Congress by the federal Constitution, the exercise of its discretion is not subject to review by the courts. *Matter of Application of Jacobs*, 98 N. Y. 98, 50 Am. Rep. 636. In the language of Justice Gray, in *Blair & Hutchinson & Smith v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94: "All rights of property are held subject to such reasonable control and regulation of the mode of keeping and use as the Legislature, under the police power vested in them by the Constitution of the commonwealth, may think necessary for the preventing of injuries to the rights of others and the security of the public health and welfare. In the exercise of this power, the Legislature may not only provide that certain kinds of property (either absolutely or when held in such a manner or under such circumstances as to be injurious, dangerous or noxious) may be seized and confiscated upon legal process after notice and hearing; but may also, when necessary to insure public safety, authorize them to be summarily destroyed by the municipal authorities without previous notice to the owner—as in the familiar cases of pulling down buildings to prevent the spreading of a conflagration or the impending fall of the buildings themselves, throwing overboard decaying or infected food, or abating other nuisances dangerous to health." 100 Mass. 139, 140, 97 Am. Dec. 82, 1 Am. Rep. 94.

[5] It cannot be doubted that the Legislature possessed the power to declare that the existence of San Jose scale, which is well known to be injurious and dangerous to the fruit industry of the state, constitutes a

nuisance. The evidence in the case at bar shows beyond question that this particular pest is so prevalent in Sedgwick county as to become a source of great danger to the fruit growers in the community, as well as to those in other sections of the state. The statute, viewed in the light of the evidence, and aided by facts which common experience and observation teach respecting the danger to an important industry of the state from the presence of insect pests, must be regarded as appropriate and well calculated to accomplish the purpose of the Legislature, and therefore a proper exercise of the police power. Similar laws have been upheld in other states. Thus in *County of Los Angeles v. Spencer*, 126 Cal. 670, 673, 59 Pac. 202, 203, 77 Am. St. Rep. 217, 220, it was said: "It is known that the existence of the fruit industry in the state depends upon the suppression and destruction of the pest mentioned in the statute. The act in question is therefore a proper exercise of the police power which the Legislature has, under section 1 of article 19 of the Constitution, to subject private property to such reasonable restraints and burdens as will secure and maintain the general welfare and prosperity of the state. *Abeel v. Clark*, 84 Cal. 226 [24 Pac. 383]; *Train v. Boston Disinfecting Co.*, 144 Mass. 523 [11 N. E. 929] 59 Am. Rep. 113."

The law in question here is of the same character as are the quarantine laws, pertaining to Texas cattle and splenic fever, which the Legislature has enacted for the purpose of preventing the infection of cattle and other live stock. It falls within the miscellaneous cases referred to by Judge Cooley in his *Constitutional Limitations*, as follows: "And there are other cases where it becomes necessary for the public authorities to interfere with the control by individuals of their property, and even to destroy it, where the owners themselves have fully observed all their duties to their fellows and to the state, but where, nevertheless, some controlling public necessity demands the interference or destruction. A strong instance of this description is where it becomes necessary to take, use, or destroy the private property of individuals to prevent the spreading of a fire, the ravages of a pestilence, the advance of a hostile army, or any other great public calamity. Here the individual is in no degree in fault, but his interest must yield to that 'necessity' which 'knows no law.'" Cooley, *Constitutional Limitations*, p. 878.

Cases sometimes arise where the exigencies of the situation require private property to be destroyed immediately in order to prevent the spread of pestilence or some other calamity, and where, under all the circumstances, the loss which the individual suffers is so inconsiderable in comparison with the benefit to the public that in the opinion of the Legislature he is regarded as ful-

ly compensated by his individual share in the benefit accruing to the public. Other cases will arise where it is apparent that, if no action is taken by the state, the property of the individual will be destroyed or rendered of little or no value. In *Shafford v. Brown*, 49 Wash. 307, 95 Pac. 270, the Supreme Court of Washington had under consideration a statute giving power to a county fruit inspector to destroy fruit infected with insects, and held that the owner of such fruit had no cause of action against the inspector for damages for its destruction for the reason that it had no value.

It is true that in some of the laws providing for the abatement of nuisances the Legislature has made provision for compensation to the individual for the loss of his property where it has been destroyed. Thus the statute authorizing the live stock sanitary commissioner, when, in his opinion, it shall be necessary, to prevent the spread of any contagious or infectious disease among the live stock of this state, to destroy animals with, or which may have been exposed to, certain diseases, provides that he shall first cause the animals to be appraised (Gen. Stat. 1909, § 9138), and the owner is to be paid the value as fixed by the appraisal; but the statute expressly provides that this right of indemnity for such loss shall not extend to cases where such animals have been brought into the state in a diseased condition or from an infected district or state or brought into the state in violation of any law or quarantine regulation, or to cases where the owner has violated the quarantine law or disregarded any regulation of the sanitary live stock commissioner, nor to any case where the animal came into the possession of the claimant with knowledge that it was diseased or had been exposed to contagion (Gen. Stat. 1909, § 9143). The same statute (section 9139) provides that in fixing the value of any such animal the commissioner shall be governed by the value thereof at the date of the appraisal, so that the state does not undertake to compensate the owner for any loss occasioned by the disease or infection. And for some reason which the Legislature deemed sufficient it is further provided in the same section as follows: "That no animal or animals shall be appraised except those affected with contagious pleuro-pneumonia of cattle or foot-and-mouth disease or such as have been exposed thereto." The Legislature acted upon the theory that, in the exercise of the police power for the purpose of affording protection to the live stock industry of the state, it might authorize the destruction of private property, making provision in some cases for full compensation to the owner thereof, in other cases for partial compensation, and still in others for no compensation. The act for the protection of domestic animals is not before us, and its constitutionality is therefore not in question. Its validity, however, has not, so far

as we are aware, been attacked upon any of the grounds urged against the statute now under consideration.

In 1883 the Legislature enacted a law providing for the appointment of sheep inspectors and prescribing their duties. The act, which seems never to have been assailed as invalid, authorizes such inspectors to order the owner of sheep afflicted with certain diseases to cause the same to be dipped or otherwise treated, and, when the owner fails to comply with such order, he is subject to a fine which is made a lien upon the sheep. There is a further provision that the inspector shall then cause the sheep to be treated and the costs and expenses shall be charged against the sheep and made a lien thereon, which shall be collected in any court of competent jurisdiction. Laws 1883, c. 144.

A similar act was passed by the Legislature of 1909 for the suppression of tuberculosis in cattle, which authorizes the owner of any animals found to be so infected to deliver them to the sanitary live stock commissioner and to receive from him an order on the board of county commissioners of the county in which the diseased animals are located for 50 per cent. of the appraised value of such animals as if they had not been diseased, provided that no county shall recognize such order unless such animals have been owned in the county at least 120 days prior to the time the tuberculin test was administered to them. Laws 1909, c. 169.

It rests wholly with the Legislature to determine whether in the exercise of its power of police regulation the individual whose property is destroyed shall receive compensation therefor. In the statute of which appellant complains no such provision appears. Doubtless the Legislature considered—what is most obvious—that no serious hardship is likely to result to the owner of property through the enforcement of its provisions. No tree or shrub is to be destroyed until upon inspection it is found to be so seriously infested with insect pests as to be of no practical value. On the other hand, if its condition is found to be such that it can be preserved by spraying or other treatment, and the owner, after due notice thereof, refuses to give it proper treatment, the state steps in and for the purpose of preventing the spread of the infestation administers the necessary treatment and frequently preserves the property from ultimate destruction. The owner, by being compelled to pay the necessary expense incurred in the treatment and preservation of his property, is required to pay only what is justly due the state.

[4] There is no force in the objection that the statute is repugnant to the fourteenth amendment. That clause of the federal Constitution does not limit the subjects upon which the police power of the state may be exerted, nor was it designed to interfere with the power of the state to enact laws

for the preservation of the health, morals, peace, or welfare of the people. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Minneapolis Railway Co. v. Beckwith*, 129 U. S. 26, 9 Sup. Ct. 207, 32 L. Ed. 585; *Prohibitory Amendment Cases*, 24 Kan. 700.

In *Mugler v. Kansas*, supra, it was contended that the state, by prohibiting, in its Constitution and laws, the manufacture or sale of intoxicating liquors for general use as a beverage, deprived the citizen of his property in violation of the fourteenth amendment. The court held that a prohibition simply upon the use of property for purposes declared by the Legislature to be injurious to the health, morals, or safety of the community, "cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit" (123 U. S. 668, 669, 8 Sup. Ct. 301, 31 L. Ed. 205), for the reason that the owner is not disturbed in the control or use of his property for lawful purposes nor restricted in his right to dispose of it, but its use is forbidden only for certain purposes prejudicial to the public interests. The court, however, went much further and held that: "The destruction, in the exercise of the police power of the state, of property used, in violation of law, in maintaining a public nuisance, is not a taking of property for public use, and does not deprive the owner of it without due process of law." Syl. Upon this proposition the late Justice Harlan, in the opinion, used this language: "Nor can legislation of that character come within the fourteenth amendment, in any case, unless it is apparent that its real object is not to protect the community, or to promote the general well-being, but, under the guise of police regulation, to deprive the owner of his liberty and property without due process of law. The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and consistently, with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law. In the one case, a nuisance only is abated; in the other, unoffending property is taken away from an innocent holder." 123 U. S. 669, 8 Sup. Ct. 301, 31 L. Ed. 205.

The statute is not invalid because it delegates to the commission the power to declare the existence of conditions which call into

operation the provisions of the statute. The Legislature of the state may declare that to be a nuisance which is detrimental to the health, morals, peace, or welfare of its citizens, and may confer power upon local boards or tribunals to exercise the police power of the state when in the judgment of such tribunals the conditions exist which the Legislature has declared constitute such nuisance. Similar power has been conferred upon cities of the first class to remove certain nuisances, and to tax the costs of the proceedings upon the property where the nuisances are located. Gen. Stat. 1909, § 918. Like authority is conferred upon the sanitary live stock commissioner to determine that domestic cattle or live stock are infested with certain contagious diseases. Gen. Stat. 1909, § 9136.

"The Legislature of the state may declare that a nuisance which is so in fact, and may create a commission with power to determine whether the conditions defined by the act exist." Cooley, *Constitutional Limitations*, p. 882, n. 1.

[3] In determining whether the conditions exist which the Legislature declares constitute a nuisance—that is, whether a particular orchard or some portion thereof is so infested with insect pests as to require treatment or extermination—the commission exercises some discretion which is in a limited sense judicial, but no more so than the discretion generally exercised in the enforcement of police regulations. It is like the discretion exercised by inspectors of health, food, grain, milk, and live stock, by the various state boards and commissions, and by city officers charged with the enforcement of police regulations, which, in order to be effective, often require prompt and summary execution, and which from their nature call for the exercise of more or less discretion in the officers whose duty it is to make them effective.

The same objection was urged against the act creating the board of railroad commissioners and acts supplementary thereto. It was held that, although the board is required to exercise judgment and discretion and to make orders for the regulation and control of railroads and other common carriers, the act does not confer upon the board either executive or judicial powers. *State v. Railway Co.*, 76 Kan. 467, 92 Pac. 606. To the same effect is *Schaake v. Dolley*, 85 Kan. 598, 118 Pac. 80, where it was held that the granting or refusing of an application for a bank charter by the charter board calls for the exercise of discretion, and that the act creating the board is not invalid because it provides that the board shall refuse a bank charter if upon examination it shall determine against the public necessity of the business in the community in which it is sought to establish such bank. The statutes construed in both of the foregoing cases were passed by the Legislature under the police power of the state. The precise question was before the Supreme

Court of California in County of Los Angeles v. Spencer, 126 Cal. 670, 59 Pac. 202, 77 Am. St. Rep. 217, where a statute almost identical with this was construed, and it was held that: "A statute designed to protect and promote the horticultural interests of the state, which declares that all places, orchards, etc., infested with the pests mentioned in the statute, are public nuisances, and which act is a proper exercise of the police power, is not unconstitutional on the ground that it confers judicial powers upon the horticultural commissioners, where a commissioner, in determining whether any particular place is a nuisance, must necessarily exercise some discretion which, in a strict sense, is judicial in its nature." Syl. par. 3.

[6] Nor is the act invalid because no procedure or method is provided by which the owner may contest the necessity for the destruction of his property. The exigencies of the situation and the conditions which the Legislature had in mind require prompt and summary action. The fruit industry of a large portion of the state might be jeopardized by delays resulting from almost any method or procedure which could be devised by which the owner could have a hearing as to the necessity for the destruction of his property. If his orchard is infested with the dangerous pests which the statute was designed to exterminate, the Legislature declares the condition to constitute a nuisance which the interests of the state require shall be abated promptly and summarily. In order that private property might not be liable to destruction under the provisions of the statute, except where the conditions actually exist, the Legislature provided that the commission shall be composed of persons possessing a scientific and practical knowledge of horticulture. And, when those persons have determined that an orchard or some portion of it is infested with such insect pests, it would seem that the question is one about which there could be little room for reasonable minds to differ. Under the police power the Legislature may, when necessary, authorize the seizure and confiscation or destruction of private property without previous notice to the owner. *Blair & Hutchinson & Smith v. Forehand*, 100 Mass. 136, 97 Am. Dec. 82, 1 Am. Rep. 94.

It is urged that the act is unconstitutional because it authorizes the cost of the proceeding to be charged against the property of the owner without notice to him or opportunity to question the amount thereof. The act, however, requires notice in writing to be served upon the owner stating the amount of expense incurred by the commission and notifying him that unless the same be paid within 20 days the same will be taxed against his property. He therefore has notice before any lien is created upon his property, and before it can be taken or sold. Having this notice, he is relegated to his

common-law remedies. If he believes the amount charged is greater than it should be, he has ample time to determine what is the proper charge, tender the same to the county clerk, and enjoin in any court of competent jurisdiction the collection of a greater amount.

[8] It has been held by the Supreme Court of the United States that the phrase "due process of law" does not necessarily mean a judicial proceeding. *McMillen v. Anderson*, 95 U. S. 37-41, 24 L. Ed. 335. On the other hand, it does not necessarily mean a special tribunal created for the express purpose of hearing the merits of the particular controversy. Where ample notice is provided which gives to the property owner an opportunity to have a hearing in any court of competent jurisdiction before his property is affected, he is afforded due process of law.

[7] But we do not regard the cost of the proceedings as a tax, although the act refers to it as a tax to "be collected as other taxes are collected." It is merely the expense of abating a nuisance, and there are various ways which the Legislature might have adopted for its collection. They might have provided for its collection by an action against the owner, after his neglect or refusal, upon due notice, to abate the nuisance, following the method provided for collecting the cost and expenses of inspecting and treating diseased sheep (Gen. Stat. 1909, § 9097); or, the method prescribed where infected cattle are taken by order of the sanitary live stock commissioner under section 9136 (Gen. Stat. 1909), which provides that all the costs and expenses of taking, holding, and caring for such animals shall be paid by the owner, and, if not so paid, the animals shall be advertised and sold in the same manner as personal property on execution.

Instead of adopting either of these methods, the Legislature provided that the cost of abating the nuisance should be paid by the owner of the property, and in default of such payment the board of county commissioners should pay it so that the work of the commission should not be delayed, and then gave the county a lien upon the real estate for the indebtedness due it from the owner and authorized the county to enforce such lien by the method employed in the levying and collection of taxes. The California statute gives to the county a lien upon the real estate for the expenses incurred and provides for its enforcement by an ordinary action. It was held that the lien is not for a delinquent tax, but merely for an indebtedness due to the county. *County of Los Angeles v. Spencer*, supra.

Since the expense incurred by the commission is not a tax, the act is not repugnant to the provision of the Constitution which requires a uniform and equal rate of assessment and taxation.

The act being constitutional and valid, the court properly denied the appellant the re-

hief prayed for, and the appellees were entitled to a permanent injunction against his interfering with the execution of the law.

The judgment is affirmed. All the Justices concurring.

DOUGLASS v. LOFTUS et al.  
(Supreme Court of Kansas. Nov. 11, 1911.)

(Syllabus by the Court.)

1. CONSTITUTIONAL LAW (§ 152\*)—IMPAIRING OBLIGATION OF CONTRACTS—CONTRACTS PROTECTED—JUDGMENT.

A judgment for damages for a trespass to real estate, where the tort benefited the tortfeasor's estate to the full extent of the actual damages recovered by the injured party, is not a judgment upon a tort, pure and simple, but upon a cause of action so far contractual as to bring the judgment within the protection of the provisions of the federal Constitution against legislation impairing the obligation of a contract.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 521; Dec. Dig. § 152.\*]

2. CORPORATIONS (§ 217\*)—STOCKHOLDERS—LIABILITY FOR CORPORATE DEBTS—RIGHT OF ACTION.

Where such a judgment was rendered against a corporation June 30, 1906, upon a cause of action which accrued prior to 1899, neither the statute of 1898 (Laws Sp. Sess. 1898, c. 10, § 14), which took effect January 11, 1899, changing the remedy of a stockholder from a single action to an action by a receiver, nor the act of 1903 (Laws 1903, c. 152), repealing all provisions for enforcing the liability of stockholders, nor the constitutional amendment of 1906 (article 12, § 2), limiting the stockholder's liability to the amount of the stock owned by him, deprived the judgment creditor of the right to maintain a suit on such judgment against a stockholder under the statute as it existed at the time the cause of action accrued.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 217.\*]

3. CORPORATIONS (§ 217\*)—STOCKHOLDERS—LIABILITY FOR CORPORATE DEBTS—RIGHT OF ACTION.

The right of the judgment creditor in the case mentioned in the preceding paragraph to maintain such an action is preserved by the general saving clause (section 9037, subd. 1, Gen. Stat. 1909), which provides that the repeal of a statute shall not affect any right which accrued under it, although no action or proceeding was commenced for the enforcement of such judgment until after the repeal of the statute.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 217.\*]

4. JUDGMENT (§ 858\*)—REVIVAL.

The revivor of a judgment against a corporation is unnecessary in order to maintain a suit to collect the amount thereof from a stockholder. It is still evidence of the validity, character, and amount of the creditor's claim.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 858.\*]

5. CORPORATIONS (§ 245\*)—DESCENT AND DISTRIBUTION (§ 126\*)—STOCKHOLDERS—LIABILITY FOR CORPORATE DEBTS—ESTATE OF DECEASED STOCKHOLDER.

The estate of a deceased stockholder is liable upon stock held and owned by him in the same way and to the same extent that he was liable in his lifetime. The heirs at law or devisees of a deceased stockholder are liable, in a

suit upon a judgment rendered against the company after the stockholder's death, to the extent of the property inherited by or devised to them.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 245;\* Descent and Distribution, Cent. Dig. §§ 466-469; Dec. Dig. § 126.\*]

6. LIMITATION OF ACTIONS (§§ 34, 58\*)—EXECUTORS AND ADMINISTRATORS (§§ 202, 437\*)—STOCKHOLDERS—LIABILITY FOR CORPORATE DEBTS—LIMITATIONS.

A judgment was rendered against a corporation June 30, 1906. Execution issued February 15, 1907, and was returned unsatisfied for want of property on which to levy. *Held:* (1) There was no unreasonable delay in the issuance of an execution; (2) the right to maintain an action against a stockholder upon the judgment accrued upon the return of the execution unsatisfied; (3) the judgment creditor had three years thereafter in which to begin an action to enforce the judgment against a stockholder; (4) the claim of a judgment creditor of the corporation against the estate of a deceased stockholder is not provable in the probate court until it has been reduced to judgment against the estate, and the limitation contained in the executors' and administrators' act has no application to such a claim.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 327; Dec. Dig. §§ 34, 58;\* Corporations, Cent. Dig. §§ 1084-1093; Executors and Administrators, Dec. Dig. §§ 202, 437.\*]

Appeal from District Court, Leavenworth County.

Action by Charlotte B. Douglass, executrix of the estate of John C. Douglass, against Mary R. Loftus, as administratrix of the estate of Matthew Ryan, Sr., and others. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Frank Doster and A. El. Dempsey, for appellant. Getty, Hutchings & Carson, W. Littlefield, T. J. White, and W. W. Hooper, for appellees.

PORTER, J. In this suit Mrs. Douglass, as executrix of her husband's estate, seeks to recover from certain stockholders of the Leavenworth Coal Company the amount of a judgment against the company in favor of her husband, rendered in his lifetime. The petition recites that for a long time prior to 1899 the Leavenworth Coal Company, by means of subterranean and hidden tunnels and underground workings, had secretly trespassed upon and into the coal beds on the land of John C. Douglass, and had carried away and converted his coal to its own use; that in 1899 and 1900 he had brought two actions against the company for damages for such trespass and conversion; that these actions were consolidated, and a trial was had, resulting in a judgment in his favor, on June 30, 1906, for \$67,387.50 damages and costs, and that on February 15, 1907, an execution on the judgment issued against the coal company, which was returned unsatisfied.

The petition then alleges that Matthew

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Ryan, Sr., who died on the 20th day of June, 1893, was a large stockholder in the coal company, owning 1,953 shares, of the aggregate par value of \$97,650; that he died testate, and devised his property, including the shares of stock aforesaid, to the defendants, who are his children and grandchildren; that the shares of stock constitute a part of his unsettled estate which has not been distributed or administered. The petition further alleges that in his lifetime John C. Douglass commenced a suit in the district court of Leavenworth county on the identical cause of action herein set forth, and against the same defendants or their privies and predecessors in interest, which suit was pending at the time of his death, and was afterward revived in the name of the plaintiff, as executrix of his estate; that the suit so revived was thereafter, upon a change of venue, removed to the court of common pleas of Wyandotte county, where it remained pending until February 5, 1910, at which time, upon leave of court, it was dismissed without prejudice. The present action was commenced January 28, 1910. A copy of the entry of judgment in favor of John C. Douglass against the coal company was attached to and made part of the petition. The prayer is for judgment against the administratrix as such, and against the heirs and devisees, for the amount of the judgment against the coal company, and that the same be charged as a lien upon the property of the Ryan estate.

The defendants filed demurrers to the petition, on the ground that it fails to state a cause of action. The court sustained the demurrers. Mrs. Douglass appeals, and assigns the ruling as error.

A number of reasons are advanced which, it is contended, furnish sufficient grounds for sustaining the demurrers. The main question to be decided is whether the amendment to the stockholder's liability law, or its subsequent repeal, defeats the plaintiff's right of recovery. To enforce the Constitution as it stood previous to the constitutional amendment of 1906, the Legislature enacted two provisions. One authorized a judgment creditor of a corporation to issue execution, or he might proceed by action against any stockholder; the other authorized a creditor to sue a stockholder, if the corporation had been dissolved, leaving debts unpaid. Under these statutes, the remedy of the creditor was by a single action against a single stockholder. At the special session of 1898, the Legislature, by a law which took effect January 11, 1899 (Laws Sp. Sess. 1898, c. 10, § 14), changed the remedy to one of a suit by a receiver against the stockholders generally, in favor of the creditors generally. In 1903 all provisions for the enforcement of stockholders' liability were repealed, and at the general election of 1906 article 12, § 2, of the Constitution, was amended, abrogating the double liability of

stockholders, and leaving each stockholder liable only to the amount of stock owned by him. The question is whether either the statutory amendment, providing a different remedy, or the subsequent repeal of all provisions for enforcing a stockholder's liability, or the subsequent amendment to the Constitution, bars the plaintiff's right to maintain this action under the statute as it existed prior to January 11, 1899. A judgment founded on a tort is not a contract, and for that reason is not protected by the provisions of the federal Constitution against the impairment of contract obligations by state legislation. *Louisiana v. Mayor of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554, 28 L. Ed. 1038; *Freeland v. Williams*, 131 U. S. 405, 9 Sup. Ct. 763, 33 L. Ed. 193; *Henley v. Stevenson*, 67 Kan. 4, 72 Pac. 518. In the case last cited, the record failed to disclose the nature of the litigation which resulted in the judgment against the corporation, and whether or not any contractual liability existed between the judgment creditor and the corporation prior to the time the act of 1898 took effect; and it was therefore held that it did not appear that the creditor was entitled to pursue the remedy under the earlier statute.

[1] The defendants claim that in the original action John C. Douglass sued the coal company for a statutory trespass, that his action was in tort, and the judgment now sought to be enforced must be classed as one for a tort, pure and simple. The character of the action upon which the judgment is founded must be determined solely from what is stated concerning it in the petition in this case. Obviously it was brought under the provisions of the statute (section 9692, Gen. Stat. 1909) authorizing treble damages in certain kinds of trespass, since treble damages were claimed. However, the plaintiff either failed as to the allegations entitling him to more than compensation in his proof, or (what seems more probable) waived all claim to damages under the statute, because it appears from the entry of judgment, a copy of which is attached to and made a part of the petition in this case, that no such damages were allowed. On the contrary, the court first found the actual value of the coal taken and converted, and gave judgment for the value, and no more. That part of the entry of judgment reads: "The court, after hearing the evidence and argument of counsel thereon, and being fully advised in the premises, finds that said defendant, as alleged in the petition, wrongfully took and converted to its own use all of the coal underlying the lots mentioned in plaintiff's petition, as amended, and from under the streets and alleys adjoining said lots, tracts, pieces, and parcels of ground. That at the times said coal was taken and converted it was of the value of \$67,387."

The court then rendered judgment for the actual value of the coal wrongfully taken and converted.

Notwithstanding the adoption of the Code, the substantive distinction between actions on contract and those in tort still exists. In cases which are often found occupying the "twilight zone" between the two forms, it is difficult to determine whether they belong strictly to the one class or the other. These are cases where, upon substantially the same facts, the law permits a recovery in the same action of damages for the breach of an implied contract, or for the wrongful act of the defendant. "Where a person takes and sells the property of another, the owner may elect to waive the tort and sue upon the implied contract for the value of the same; and whether he has so elected, and the nature of the action brought, are to be determined by the court from the pleadings." *Smith v. McCarthy*, 39 Kan. 308, syl. par. 1, 18 Pac. 204. Previous to the adoption of the Code, the tort was waived by bringing an action in assumpsit upon the implied promise to pay. Under the code system of pleading, whether the tort is waived is to be determined ordinarily from the facts stated in the complaint. *Smith v. McCarthy*, supra. The only facts stated in the petition which would indicate that the tort was not intended to be waived is that treble damages were claimed. The statute, authorizing treble damages for certain kinds of trespass, provides as follows: "If any person shall dig up, quarry or carry away any \* \* \* mineral \* \* \* in which he has no interest or right, standing, lying or being on land not his own, \* \* \* the party so offending shall pay to the party injured treble the value of the thing so injured \* \* \* or carried away, with costs, and shall be deemed guilty of a misdemeanor, and shall be subject to a fine not exceeding five hundred dollars." Section 1, c. 113, Gen. Stat. 1868; section 9692, Gen. Stat. 1909. It would seem difficult, if not impossible, to state a cause of action under the statute, entitling a plaintiff to treble damages, without at the same time stating facts which would permit him to waive the tort and recover on the implied promise the actual value of the property converted.

In *Wright v. Brown*, 5 Kan. 600, 603, the petition set up a claim for treble damages against the defendant for cutting down and carrying away trees growing upon plaintiff's land. The court refused to compel the plaintiff to elect as to whether he would proceed for the actual damages or for treble damages. It was held that the trial court ruled rightly, because the petition was obviously intended for treble damages, "and was good for either, so that there was nothing to elect." The Code has abolished the forms of actions. While the substantive distinction between actions on contract and those in tort remain, there is not much of

substance left by which to distinguish an action on contract from one in which the plaintiff, upon the same statement of facts, may recover on contract or in tort, and without being subject to a motion to compel him to elect which course he will take.

Whether an action is *ex contractu* or *ex delicto* cannot always be determined from the character of the damages claimed, though the relief demanded has in some cases been considered controlling. 1 Ency. Pl. & Pr. 147, and cases cited in note 1. It is of no importance what the plaintiff calls his action. "Under our Code, a plaintiff is not required to state whether his cause of action is founded upon contract or tort; and generally, if he should make such a statement, and be mistaken, the statement would be immaterial." *Akin v. Davis*, 11 Kan. 580, syllabus. This necessarily follows from the provision that all that is required in a petition is "a statement of facts constituting the cause of action, in ordinary and concise language, and without repetition." Civ. Code, § 92 (Gen. St. 1909, § 5885).

It is well settled that where a petition contains a good cause cause of action for a breach of contract, express or implied, the addition of averments appropriate to a cause of action for a wrong will not change the action from contract to tort, and where a doubt exists the courts are inclined against construing the pleading as stating a cause of action for a tort. Where the petition otherwise states a cause of action in contract, the courts generally regard the averments which are appropriate to an action in tort as mere surplusage. *Bernhard v. City of Wyandotte*, 33 Kan. 465, 467, 6 Pac. 617; *Smith v. McCarthy*, supra; *Chase v. Railway Co.*, 70 Kan. 546-554, 79 Pac. 153; *Railway Co. v. Hutchings*, 78 Kan. 758, 99 Pac. 230; *Delaney v. Implement Co.*, 79 Kan. 126-129, 98 Pac. 781. In the latter case it was held: "In determining whether a petition states a cause of action *ex contractu* or *ex delicto*, it must be considered in its entirety, but with special reference to its prominent and leading allegations. Where the averments make it doubtful whether the action is on contract or in tort, every intendment must be made in favor of construing it as an action on contract." Syllabus. In the opinion a case is cited where the action was held to be *ex contractu*, and one of the reasons stated for so holding was that an action *ex delicto* would have been barred by limitation. *St. Louis, I. M. & S. R. Co. v. Sweet*, 63 Ark. 563, 40 S. W. 463.

This court, in *Chase v. Railway Co.*, supra, went quite as far. There the plaintiff, who was a passenger, brought suit against the company for damages for being ejected from a train. The petition was framed on the theory that the right to recover was for the wrongful act of the conductor in expelling her from the train; but the petition stated facts sufficient to show that the company



had violated its contract of carriage, entered into with the plaintiff. It was held that the action was one of contract, and that the averments respecting the tortious acts of the conductor should be treated as surplusage. In the opinion it was stated that if the action were held to be in tort, and not on contract the plaintiff could not recover, and the judgment which the trial rendered against her on a demurrer to the evidence in that event would be affirmed. The court, however, disregarded all the averments of the petition which were appropriate to an action in tort, and, finding therein sufficient facts stated to constitute a cause of action on contract, held the other averments to be surplusage, and reversed the judgment. The court held that she might ignore the tortious acts of the conductor, and all reference thereto, in her petition, and recover upon a contract which was not in terms declared upon, but which the law took cognizance of from the statements of fact in the petition, from which it appeared that the relation of carrier and passenger existed between her and the company.

Here the tort was one which benefited the tort-feasor's estate to the full extent of the actual damages sustained by the injured party. In such cases, where the recovery may be had upon either theory, upon the facts stated in the petition, and it appears that the judgment was rendered only for the actual value of the property converted, precisely as though the action had in fact been based upon the implied contract alone, and as though the tort had been waived when the action was filed, we think, within the principle of the foregoing cases, the action might well be held as one upon the implied contract, and not as an action in tort. At all events, the judgment was not for a tort, pure and simple, but upon a cause of action essentially contractual. It was for a trespass, by which the wrongdoer (the coal company) had appropriated to its own use the property of another, and the cause of action was so far contractual as to bring the judgment within the protection of the federal Constitution against the impairment of the obligation of a contract.

[2] Neither the statute of 1898, which took effect January 11, 1899, and changed the remedy to enforce the stockholders' liability from a single action against a single stockholder to an action by a receiver against the stockholders generally for the benefit of all the creditors, nor the act of 1903, repealing all provisions for enforcing the liability of stockholders, nor yet the change in the Constitution in 1906, could deprive the plaintiff of the right to maintain a suit against a stockholder under the statute as it existed at the time the cause of action upon which the judgment is founded accrued to John C. Douglass, which the petition avers was long prior to 1899. The petition alleges facts which show that the liability of the coal

company arose prior to the 1st day of January, 1899, and this was 11 days before the statute took effect, changing the remedy.

[3] The general saving clause (section 9037, subd. 1, Gen. Stat. 1900) provides that the repeal of a statute shall not affect any right which accrued under it. This has been repeatedly held to preserve rights accrued, although no action or proceeding had been commenced for their enforcement. *Willetts v. Jeffries*, 5 Kan. 470; *Jenness v. Cutler*, 12 Kan. 500, 511, 512; *Ayres v. Probasco*, 14 Kan. 175; *School District No. 13 v. State*, 15 Kan. 43-49; *Henley v. Meyers*, 76 Kan. 736, 93 Pac. 173, 17 L. R. A. (N. S.) 779. In the latter case it was applied to the holder of a judgment rendered against a corporation, in an action founded upon tort, upon which an execution had been issued and returned nulla bona, before the repeal of the act changing the remedy from a single action to a suit by a receiver.

In *Woodworth v. Bowles*, 61 Kan. 569, 60 Pac. 331, it was held that the effect of the statute for the enforcement of a stockholder's liability is to make the relation between the creditors and stockholders contractual in its nature, and therefore within the protection of the same clause of the federal Constitution. The particular statute construed there was an act which vests in receivers of insolvent banks a right of action for the enforcement of the statutory liability of stockholders, but the same principle is involved as in the present case. The liability of the corporation to the creditor in that case was on contract. Conceding that in the present case the liability was for a tort, the tort was of a character which benefited the tort-feasor's estate to the same extent that it diminished the estate of the injured party. It was a tort which the person injured might waive, and recover the full amount of his loss, upon a contract which the law in such cases raises by implication. We think, therefore, that the obligation of the stockholder to respond to a suit for damages resulting from the commission of a tort of this character is as fully protected by the federal Constitution as though it rested wholly on contract.

In the opinion in *Henley v. Meyers*, supra, the case of *Woodworth v. Bowles*, supra, is cited in support of the settled doctrine "that a corporate creditor, who became such while the earlier statute was in force, could not be deprived of his right to proceed thereunder by the enactment of the new law." 76 Kan. 741, 93 Pac. 174 (17 L. R. A. [N. S.] 779). In the *Henley* Case, it was the stockholder who was claiming a vested right in the remedy, and asserting that the creditor was obliged to proceed against him, if at all, under the earlier statute, which had been superseded, and which the creditor had not followed. The stockholder contended that any change in the remedy as to him was in violation of the obligation of his contract. The questions determined by the decision were that the law

of 1898, substituting for all other remedies a suit by a receiver, applies to a stockholder who became such before the change in the remedy, even though the new remedy might be more efficient than the old, and incidentally more burdensome to the stockholder, so long as it involved no actual increase of his liability. It was further decided that the word "dues," as used in article 12, § 2, of the Constitution before the amendment of 1906, is broad enough to cover a judgment rendered against a corporation in an action for a tort; and that the same section of the statute which the plaintiff in this case is seeking to invoke (section 1192, Gen. Stat. 1889, repealed by chapter 10, § 14, Laws Sp. Sess. 1898) applies to judgments founded on a tort, as well as upon contract.

Whether the Legislature might not, by changing the remedy to one of a suit by a receiver, or by repealing all provisions for enforcing such liability, destroy the creditor's right to pursue the stockholder upon a judgment founded upon a tort was not before the court, and was not passed upon. Nor was there anything determined in that case from which it necessarily follows that such a change in the remedy or the repeal of all remedies for enforcing such a judgment against the stockholders would constitute an impairment of the obligations of any contract. We deem it wholly unnecessary to determine that question, in view of the conclusion we have reached respecting the nature of the judgment sought to be enforced in this proceeding.

[4] This disposes of the principal contention in the case. Other reasons are suggested in support of the demurrer, but few of them require extended comment. This is not a suit upon a judgment, but to enforce a stockholder's liability for the debts of the corporation. Revivor of the judgment was unnecessary. The failure to revive it prevents its enforcement against the coal company, the judgment debtor; but it is still evidence of the validity, character, and amount of the creditor's claim, and res judicata as to all these matters, in a suit to enforce the liability of the stockholder under the law as it stood prior to 1899. *Scroggs v. Tutt*, 23 Kan. 181-189; *Halsey v. Van Vleet*, 27 Kan. 474-478. The only purpose of revivor is to keep the judgment alive, so that it may be enforced by execution against the "representatives, real or personal, or both, as the case may require." Civ. Code, § 436 (Gen. St. 1909, § 6031). To the same effect is the case of *Atlantic Trust Co. v. Dana*, 128 Fed. 209, 62 C. C. A. 657, involving the construction of section 436 of the Civil Code and the Kansas laws, relating to the liability of the stockholders for debts of the corporation.

[5] It can hardly be seriously contended that the estate of a deceased stockholder is not liable upon stock owned by him to the same extent that the stockholder was liable in his lifetime. In *Cook on Corporations*

(5th Ed.) vol. 1, § 248, it is said: "The estate of a deceased person is liable upon stock held and owned by the decedent in the same way and to the same extent that the stockholder was liable in his lifetime. Accordingly an executor or administrator of the estate of a deceased stockholder is chargeable upon the shares of the decedent to the extent of the property that comes into his hands as the personal representative of the deceased. The cause of action against a stockholder, arising from his statutory liability, is not defeated by his death. The action may proceed against his estate." To the same effect is *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, 30 L. Ed. 864. See, also, *Fidelity Insurance, Trust & S. D. Co. v. Mechanics' Sav. Bank*, 97 Fed. 297, 38 C. C. A. 193, and authorities cited in a note to the same case in 56 L. R. A. 228. Counsel for defendants practically concede this to be the law, but insist that the demurrers of all the defendants, other than Mary Loftus, administratrix, were properly sustained. The purpose of the suit, if judgment be obtained, is to have such judgment declared a lien upon the real property of the estate, and upon any undistributed portion of the personal property of the devisees. The heirs at law or devisees are personally liable for the debts of the ancestor to the value of the property received by them. *McLean v. Webster*, 45 Kan. 644, 26 Pac. 10; *Rohrbaugh v. Hamblin*, 57 Kan. 393, 46 Pac. 705, 57 Am. St. Rep. 334; *Cooper v. Ives*, 62 Kan. 395-401, 63 Pac. 434. In the case last cited, the heir of a deceased stockholder was held liable to the extent of the property inherited by her upon a judgment rendered against the company after the stockholder's death. In *Matteson v. Dent*, 176 U. S. 521, 20 Sup. Ct. 419, 44 L. Ed. 571, a stockholder in a national bank died intestate. The shares in final settlement of the estate were distributed among his heirs. It was held that the stock could be followed into the hands of the distributees for the purpose of subjecting it to an assessment, made for the purpose of meeting the liabilities of the bank arising out of its insolvency, although the bank became insolvent subsequent to the death of the stockholder.

[6] The judgment against the coal company was rendered June 30, 1906. Execution issued February 15, 1907, and was returned unsatisfied 90 days thereafter. John C. Douglass died February 27, 1908, after commencing suit against these defendants upon the same cause of action. That suit was revived in the name of his executrix, and dismissed without prejudice eight days after the present suit was filed. Section 22 of the Civil Code (section 5615, Gen. St. 1909) gives a plaintiff whose action fails otherwise than upon the merits one year after such failure to commence a new action. Plaintiff's contention is that she commenced the present suit in anticipation of the failure of the former. We see no good reason why this

may not be done. It seems to accord with the spirit and intention of the statute under which she might have brought the second suit eight days later. If the bringing of it before the dismissal of the former be regarded as premature, the conditions as they existed from and after the failure of the other suit permitted her to maintain it, and to appropriate the benefits of section 22.

But, if the present suit be regarded as an independent action, it is not barred, because it was brought within three years from the return of the execution against the coal company. The right to maintain an action against the stockholder upon the judgment accrued upon the return of the execution unsatisfied provided, of course, the issuance of the execution was not delayed for an unreasonable time. *A. T. & S. F. R. Co. v. Burlingame Township*, 36 Kan. 628, 14 Pac. 271, 59 Am. Rep. 578; *Kulp v. Kulp*, 51 Kan. 341, 32 Pac. 1118, 21 L. R. A. 550; *Bank v. King*, 60 Kan. 733, 57 Pac. 952; *Henley v. Meyers*, supra. The execution was issued in less than eight months after the judgment was obtained, and the delay cannot be held unreasonable.

Another contention is that the claim, not having been presented for probate and allowed as a claim against the state, is barred by the limitation provided in the executors' and administrators' act. The statute as it stood prior to 1899 provided a special procedure for enforcing the liability of stockholders for corporate debts. We are not aware of any cases where it has ever been held that a claim of the character sued upon here must be probated. Cases will be found holding that, before the estate or an heir or devisee can be held liable upon an unpaid subscription to stock by the decedent, the claim must be proved against the estate; but this follows from the nature of the claim, which is upon a direct liability of the decedent, the same as upon an unpaid promissory note or account. The plaintiff had no claim provable in the probate court, until it was reduced to a judgment against the estate. All plaintiff had was a judgment against the coal company. Now, the probate court could not allow it as a demand against the estate until the right to collect it from the estate had been determined in an action brought by the judgment creditor in some court of competent jurisdiction, under the provisions of the statute which authorized the creditor to maintain such action.

Nor is the petition subject to demurrer on the ground that it fails to show service of summons on the coal company in the original action. The presumption is, in the absence of anything to the contrary, that the court and its officers proceeded regularly. None of the other grounds urged in support of the

ruling are of sufficient importance to require comment.

The judgment will be reversed, and the cause remanded, with directions to overrule the demurrers. All the Justices concurring.

#### PEOPLE v. WHITE. (Cr. 1,689.)

(Supreme Court of California. Nov. 8, 1911.)  
CRIMINAL LAW (§ 1020\*)—APPEAL—JURISDICTION—ORDER QUASHING INFORMATION.

Under Const. art. 6, § 4, providing that the Supreme Court shall have appellate jurisdiction in all criminal cases where a judgment of death has been rendered, and that the District Courts of Appeal shall have jurisdiction in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where a judgment of death has been rendered, an appeal from an order setting aside an information charging defendant with murder prior to any judgment should have been taken to the District Court of Appeal and not to the Supreme Court.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1020.\*]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Thomas White was informed against for murder, and from an order setting aside the information the People appeal. Case transferred to the District Court of Appeal.

U. S. Webb, Atty. Gen., and Benjamin K. Knight, Dist. Atty., for the People. W. G. Williams and D. C. Clark, for respondent.

ANGELLOTTI, J. This is an appeal to this court by the people from an order of the superior court of Santa Cruz county made before judgment, setting aside the information presented and filed therein charging the defendant with the crime of murder.

This court is without appellate jurisdiction in this case. While it is true that the information charges a crime punishable by death, neither judgment of death nor any other judgment has yet been rendered. The Constitution gives us appellate jurisdiction "in all criminal cases where judgment of death has been rendered," and gives to the district courts of appeal jurisdiction "in all criminal cases prosecuted by indictment or information in a court of record, excepting criminal cases where judgment of death has been rendered." Const. art. 6, § 4. It is clear that the appeal should have been taken to the District Court of Appeal for the First District, instead of to this court, and it must now be transferred to that court.

It is ordered that the cause be transferred from this court to the District Court of Appeal for the First District.

We concur: SHAW, J.; MELVIN, J.; SLOSS, J.; LORIGAN, J.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

**MERING v. SOUTHERN PAC. CO.**

(Sac. 1,846.)

(Supreme Court of California. Nov. 7, 1911.  
Rehearing Denied Dec. 6, 1911.)**1. CARRIERS (§ 155\*)—CONTRACT OF SHIPMENT—VALIDITY.**

Where a carrier did not refuse to transport freight, except under a special contract limiting liability for gross negligence, and then only to the extent of a valuation fixed in the contract, but such contract was thoroughly discussed before executed, and no objection was made to it by the shipper, who inserted in the contract in his own handwriting the valuation on the property, the contract was not imposed on the shipper and the carrier's liability was as fixed by it.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 677, 679, 682-685; Dec. Dig. § 155.\*]

**2. CARRIERS (§ 158\*)—CONTRACTS OF CARRIAGE—CONSTRUCTION.**

A shipping contract voluntarily entered into, which fixes an agreed valuation of the property which forms the basis for the freight charges, is an agreement fixing the valuation of the property, and not a contract limiting the liability of the carrier, and under the contract the carrier is only liable as stipulated, and then only to the extent of the valuation fixed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 663-667, 699-703½, 708-718½; Dec. Dig. § 158.\*]

**3. CARRIERS (§ 228\*)—CARRIAGE OF LIVE STOCK—NEGLIGENCE—BURDEN OF PROOF.**

Where an animal shipped in a healthy condition arrived at its destination 46 hours later in a dying condition, the carrier transporting it under a contract limiting its liability for gross negligence was prima facie guilty of gross negligence, and, to escape liability, it had the burden of showing that the death of the animal was not occasioned by such negligence, though the shipper did not accompany the animal, and though under the contract he assumed the duty of accompanying, feeding, and watering the animal, since the shipper's agreement did not relieve the carrier from the duty of properly caring for the animal during transportation, which proper care involved feeding and watering.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 228.\*]

Shaw, J., dissenting in part.

In Bank. Appeal from Superior Court, Yolo County; K. S. Mahon, Judge.

Action by E. B. Mering against the Southern Pacific Company. From a judgment for defendant, plaintiff appeals. Reversed.

E. B. Mering and J. E. Strong, for appellant. Arthur C. Huston, for respondent.

**LORIGAN, J.** This appeal is before us on a hearing granted after a decision of the District Court of Appeal for the Third Appellate District, affirming the judgment and order appealed from.

Plaintiff sued to recover from defendant the value of a certain mare shipped by him over the road of the defendant from the city of Woodland to Redwood City, in this state. The complaint alleged the shipment of the mare; that plaintiff did not accompany her

and did not retain exclusive or any control over her in transit; that defendant in transporting said mare to said Redwood City was grossly negligent and grossly failed to properly care for said mare, by reason whereof said mare arrived at Redwood City about 46 hours after being shipped, in a gaunt and emaciated condition, and thereafter on the following day died from the effects of said treatment. Judgment was asked for the sum of \$508, the alleged value of the animal.

The defendant in its answer admitted the shipment of the mare, denied the allegations of carelessness and neglect, and averred that the mare was shipped under a certain contract attached to the answer as part thereof, in which contract plaintiff had stated the value of the mare to be \$20, agreed to accompany her and feed and water her, and further agreed that in no event "is first party (defendant) \* \* \* to be liable for any loss or damage to said live stock not proven to have been caused by the gross negligence of the first party in performance of, or failure to perform, some duty which under the terms of this contract is due from first party to second party as to said live stock," and averred faithful and complete performance of said contract "and all of the obligations imposed upon it by law as a common carrier or otherwise," that "defendant assumed liability only to the extent of the agreed valuation of said mare as stated in said contract, to wit, the sum of \$20, and that the compensation for the transportation of said mare was based on that value." The court found that the mare was shipped under the contract as alleged in the answer, found against plaintiff as to all of his averments of neglect and carelessness of the defendant, and also found that "it is not true that the condition of said mare or the death of said mare was due to any act or omission of said defendant, \* \* \* or that the said mare died from the effects of any treatment of said defendant or from the effects of any act or omission of said defendant; \* \* \* and it is not true that plaintiff has been damaged in the sum of \$508, or any other sum, by the defendant." Judgment was entered that plaintiff take nothing by his action, and that defendant recover its costs.

Plaintiff appeals from the judgment, and from an order denying his motion for a new trial, and asserts as grounds for a reversal the insufficiency of the evidence to sustain two findings made by the court.

The first attack is made on the finding that the mare was delivered to the defendant to be transported under a written contract between plaintiff and defendant attached to the answer under which defendant assumed liability for gross negligence, and for this only, and to the extent of the value of the mare as stated in the contract.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[1] The claim of appellant is that the evidence shows that the contract relied on was not freely and fairly made, but was forced and imposed upon him by the shipping agent of the defendant at Woodland. It is not pretended that the defendant refused to ship the mare under any other contract than by the special contract entered into; or that the alternative of shipping under an ordinary bill of lading which would have rendered the defendant liable for full damages was denied him. As executed the contract was entirely acceptable to the plaintiff at the time. Its provisions were thoroughly discussed between plaintiff, who was a practicing attorney, and the agent of the defendant, before it was executed. There was no objection on the part of the plaintiff as to any of the terms of the contract, the only discussion between himself and the agent being as to the valuation of the mare to be stated in the contract and as to the attention—watering and feeding—which would be given the mare in transit by the defendant, as the plaintiff did not intend to accompany her. These were the only matters discussed, and, fully understanding the terms of the contract and that it was left to himself to put a valuation on the mare and that the freight rates would be proportionate thereto and the liability of the defendant measured by such valuation, the plaintiff inserted in the contract in his own handwriting a valuation upon the mare of \$20. Under these circumstances, there is no room for the claim that the contract was imposed upon plaintiff, or that it was not freely and fairly entered into.

[2] This contract so entered into between the parties is similar to the contract which was under consideration in *Donlon Bros. v. Southern Pacific Co.*, 151 Cal. 763, 91 Pac. 603, 11 L. R. A. (N. S.) 811, where it was held that such a contract "is to be construed as an agreement fixing the valuation of the property shipped and not as a contract limiting the liability of the railroad company," that under such a contract the carrier would only be liable as stipulated for gross negligence, and then only as to the value of the animal to be shipped inserted in the contract. In the *Donlon Case* the railroad company was held liable to the extent of such stated valuation in the contract because it was guilty of gross negligence. In the case at bar as the agreed valuation of the mare under the contract between the parties was \$20, this is the only amount the plaintiff could recover even if the defendant had been guilty of gross negligence in her transportation. The trial court found that defendant had not been so negligent, and this brings us to a consideration of the other point for a reversal insisted upon by the plaintiff, namely, that this finding is not supported by the evidence.

[3] It was alleged in the complaint, and not denied by the answer, that the mare arrived in Redwood City about 46 hours after

being shipped. The evidence on behalf of plaintiff showed that the day the mare was shipped at Woodland she was well and in good condition, and that plaintiff placed a sack of hay in the car where she could reach it. A witness testified that, "when the mare arrived in Redwood City, she was very thin and gaunt and her sides were drawn. She was very thirsty, and he did not allow her to drink all she wanted. The colt looked well (there was a sucking colt five months old by her side). The next morning she refused to drink, and I called a veterinary, and he told me to take her out of the barn, or she would die, and soon after that she died." A veterinary surgeon at Woodland who had seen the mare the day before she was shipped, and who testified that she was then in good condition and well, replying to a hypothetical question which assumed that the mare was well when shipped, had been in the car 46 hours with a sucking colt by her side "and was taken off the car with her sides drawn and very thirsty and hungry, appearance dull and head drooping, and died the next day," answered as to the cause of the death of the mare, "I would say that it was probably due to not being fed or watered, but it could have been caused by other causes." This was the only evidence offered by plaintiff. Defendant offered no testimony as to whether the mare was fed or watered while in transit, or as to what care or attention she received during transportation.

It is insisted by appellant that this evidence made out a prima facie case on the part of plaintiff of gross negligence which cast upon defendant the onus of disproving the prima facie case so made, and we think this contention must be sustained.

It is not contended by respondent that if the mare had been shipped under an ordinary bill of lading, and was delivered at Redwood City in the dying condition which the evidence disclosed, that, on a showing by a plaintiff of her being in a healthy condition when shipped and arriving at her destination in an injured condition, the burden of proving that the injury or death of the animal was not occasioned by any want of care on the part of defendant would devolve upon defendant. Counsel for respondent, however, insists that under the special contract entered into between the parties and which provided that the defendant should not be liable for any loss or damage not proven to have been caused by the gross negligence of the defendant the burden of proving that the injury or loss resulted from gross negligence was upon the plaintiff.

But we think that the evidence offered by plaintiff was sufficient to make out a prima facie case of gross negligence on the part of defendant, casting the burden of proof on it to show that the death of the mare was not occasioned by such negligence on its part. While the plaintiff under the contract assumed the duty of accompanying, feeding, and

watering the mare, he did not in fact accompany her. His agreeing to do so did not relieve the defendant from the duty of properly caring for the animal during her transportation, and proper care involved feeding and watering her during the long period which the evidence shows she was upon the cars. The evidence shows that, when the mare was shipped, she was well and in good condition, and that, after being en route for 46 hours, she reached her destination in a dying condition. The veterinary surgeon testified that her condition when taken from the cars at her destination "while it could have been caused by other causes \* \* \* was probably due to her not having been fed or watered." While this testimony does not directly prove that the death of the animal was caused by a failure to feed or water her while in transit, it still amounts to a sufficient proof of facts from which a reasonable inference could be deduced that the dying condition in which she was delivered at Redwood City was attributable to a failure to feed and water her during the period of transportation. As the defendant was in exclusive control of the mare during transportation, the duty was cast upon it to feed and water her, and as a reasonable inference from the facts testified to, including the testimony of the veterinary surgeon, is that her dying condition when delivered was attributable to a failure to do this, there was a sufficient prima facie showing of gross negligence on the part of the plaintiff casting the burden of proof upon the latter to overcome the prima facie case against defendant so made.

In this view, the finding of the court complained of by appellant is contrary to the evidence, and for that reason the judgment and order denying a new trial are reversed.

We concur: HENSHAW, J.; MELVIN, J.

SHAW, J. I concur in the judgment, but I do not agree to the proposition that the contract limits plaintiff's damages to \$20. I adhere to the views expressed in my dissenting opinion in *Donlon v. S. P. Co.*, 151 Cal. 777, 91 Pac. 603, 11 L. R. A. (N. S.) 811.

#### HUMBOLDT SAVINGS BANK v. McCLEVERTY. (S. F. 5572.)

(Supreme Court of California. Nov. 7, 1911.  
Rehearing Denied Dec. 6, 1911.)

#### 1. MORTGAGES (§ 358\*)—SALE OF PREMISES BY TRUSTEE IN DEED OF TRUST—CONTRACTS—VALIDITY.

The parties to a mortgage or deed of trust may contract that the premises shall be sold as a whole, in the absence of any statutory provision requiring the trustees to sell in subdivisions.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 358.\*]

#### 2. MORTGAGES (§ 358\*)—DEED OF TRUST—SALE BY TRUSTEE—DISCRETIONARY POWER.

A deed of trust which provides that the trustee may sell the premises as a whole or in his discretion in such reasonable parcels as he, in his judgment, may deem advisable, gives the trustee the discretion to sell as a whole or in parcels, and such discretion must be exercised in good faith for the best interests of the beneficiaries, including not only the creditor, but the debtor and his successors in interest.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1072, 1073; Dec. Dig. § 358.\*]

#### 3. MORTGAGES (§ 358\*)—DEED OF TRUST—SALE BY TRUSTEE—DISCRETIONARY POWER.

A trustee in a deed of trust abuses his discretion to sell the property as a whole or in parcels, where he sells the property as a whole after a parcel has passed as a homestead on the debtor's death to his widow, as provided by Civ. Code, § 1265, and Code Civ. Proc. § 1474, since, as to the enforcement of the claim against the homestead, the widow is a surety with the right to have the other property first sold to pay the debt.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 358.\*]

#### 4. MORTGAGES (§ 369\*)—SALES BY TRUSTEE—RIGHT TO SET ASIDE—CONDITIONS PRECEDENT.

Where a trustee in a deed of trust abused his discretion by selling the property as a whole after a parcel had, as homestead, passed on the debtor's death to his widow, and the homestead was worth \$5,000, while the balance of the property was worth \$57,000, and the debt amounted to \$57,618.30, the widow, seeking to set aside the sale as to the homestead, was not required to offer to pay the entire debt secured by the deed of trust.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 369.\*]

#### 5. MORTGAGES (§ 369\*)—SALES BY TRUSTEE—RIGHT TO SET ASIDE—CONDITIONS PRECEDENT.

Where a sale under a deed of trust was improperly made, it should, as a general rule, be set aside on the application of the injured party, and a new sale ordered, but, where the creditor and the trustee placed the property in such a condition that a new sale could not be had, they must submit to such a decree as would most fairly redress the injury inflicted by them, and, where relief could not be given without compelling the creditor to accept the property wrongfully purchased at its true value, he must be held to have purchased at such value.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1093-1100; Dec. Dig. § 369.\*]

#### 6. MORTGAGES (§ 370\*)—SALES BY TRUSTEE IN DEED OF TRUST—INVALIDITY—ESTOPPEL.

Where a widow of the grantor in a deed of trust was entitled to a decree protecting her homestead rights in a part of the property sold by the trustee, selling the property as a whole, she did not waive her right to such protection by failing to ask for a resale of the other property.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 370.\*]

#### 7. MORTGAGES (§ 369\*)—SALES BY TRUSTEES IN DEEDS OF TRUST—INVALIDITY—RELIEF.

Where neither the pleadings nor the findings disclosed any reason why the court, finding that the trustee in a deed of trust abused its discretion in selling the property as a whole, while a part had passed as homestead on the debtor's death to his widow, could not order a resale of the nonhomestead property, and, in

case of a deficiency, a resale of the homestead, a decree setting aside the sale as to the homestead and adjudging that the value of the balance of the property should be considered in payment of the debt, and that the balance due should be secured by the deed of trust as to the homestead, was unauthorized.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 369.\*]

#### 8. APPEAL AND ERROR (§ 1178\*)—DISPOSITION OF CASE ON APPEAL.

Where it is probable that the facts authorizing the decree rendered exist, though the pleadings and findings do not disclose such facts, the court on appeal, adjudging the decree erroneous, will not order judgment for the party complaining, but will reverse the case, so that the facts can be established and a proper decree rendered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1178.\*]

Department 1. Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by the Humboldt Savings Bank, substituted as plaintiff on the death of one Weber, the original plaintiff, against Mary C. McCleverty. From a judgment granting insufficient relief, plaintiff appeals. Reversed.

C. E. Hatch and Alexander D. Keyes, for appellant. Fitzgerald & Abbott, for respondent.

SLOSS, J. The action was brought to recover possession of a lot of land situated on Harrison street in the city of Oakland. This is the second appeal. Upon the first appeal a judgment in favor of the defendant was reversed and the cause remanded, with leave to the defendant to file amended or additional pleadings as she might be advised. *Weber v. McCleverty*, 149 Cal. 316, 86 Pac. 706. During the pendency of the action, Weber, the original plaintiff, died, and Humboldt Savings Bank has been substituted for him.

The land involved, together with another parcel of land situated on Broadway street in Oakland, had originally been owned by Charles McCleverty, the husband of the respondent. In January, 1901, McCleverty made his promissory note for \$55,300 to Humboldt Savings Bank, and secured the same by a deed of trust of the two parcels of land. In May, 1901, the defendant Mary C. McCleverty made and recorded a declaration of homestead on the Harrison street lot. In July, 1901, default having been made in the payment of the note, the trustees named in the deed of trust, after notice duly given, sold both parcels, and conveyed the same to Adolph C. Weber, the original plaintiff, for \$57,177.40, that being the highest sum bid. In the meanwhile McCleverty had died leaving a will wherein he named his widow, the defendant herein, as executrix, the will had been admitted to probate and letters testamentary issued. Before the sale took place, the defendant demanded of the Humboldt

Savings Bank and of the trustees that in any sale to be made under the deed of trust the property which was not impressed with the homestead character should be sold first; but compliance with this demand was refused. These facts, together with the further one that the bank had failed to present a claim against the estate of McCleverty, appeared on the first appeal. The principal question there considered was whether, under section 1475 of the Code of Civil Procedure, the failure to so present a claim barred the creditor of its right to compel a sale of the homestead. Concluding that no such presentation was required as a condition to the enforcement of the rights created by a deed of trust, this court reversed the judgment in favor of the defendant. With reference to the claim that the two properties should not have been sold as a whole, we said that the pleadings were not sufficient to entitle the defendant to defeat the action on this ground, but, as above stated, permission to file amended or further pleadings was accorded to her.

Upon the return of the case to the lower court, she availed herself of such leave by filing an amended answer and a cross-complaint, in which she averred, in addition to what has already been stated, that at the time of the sale, the Broadway property (i. e., that not covered by the homestead) was worth more than \$57,177.40, the sum realized at the sale for both parcels; that if said parcel had been sold first, and separately from the homestead, it would have brought a sum in excess of the debt secured, and would have made it unnecessary to sell the homestead. It was alleged, further, that Weber, the purchaser, was the president of the Humboldt Bank, that he purchased the property as agent for the bank, and that before purchasing he had full knowledge of the facts concerning the declaration of homestead, the death of McCleverty, the defendant's demand for a sale in parcels, and the value of the respective parcels. There were also allegations to the effect that the homestead premises had been the community property of McCleverty and his wife, that the latter had remained in possession of the same at all times after her husband's death, and that such title to the said premises as had been acquired by Weber for the bank still remained in the bank.

The court found that the Broadway property was at the time of the trustees' sale of the value of \$57,565, "and would and could be sold for said sum of \$57,565, at public auction if sold separately as demanded by defendant." The amount then due on the note was \$57,618.30. If the Broadway property had been sold first and separate from the homestead property, it would not have been necessary to sell the latter except for the deficiency of \$53.30, the difference be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tween the amount due and the value of the Broadway property. In all other respects the findings are in favor of the defendant's allegations in her answer and cross-complaint.

From these findings the court drew the conclusions of law that the trustees' sale and conveyance to Weber, so far as they concern the homestead property, are invalid, and that the deed as to said homestead property be vacated and set aside; that the amount of \$57,565, the value of the Broadway property, be applied and considered in payment of the sum of \$57,618.30 due to the bank; that the balance of \$53.30, with interest, be and is secured by the deed of trust as to the homestead property; that, if defendant pay such balance within 10 days, then the whole of the debt secured by the deed of trust shall be deemed paid and satisfied, and a reconveyance shall be made to defendant, and said property shall vest in her absolutely, but, in the event of her failure to make such payment, the homestead premises shall be subject to sale under the deed of trust to satisfy said deficiency. A judgment was entered accordingly, and from this judgment the plaintiff appeals.

The facts are not in dispute; none of the findings being attacked. The appellant's position is that the court drew erroneous conclusions from these facts, and entered a judgment which is not supported by them.

[1] 1. The first contention is that under the express terms of the deed of trust the trustees were authorized to sell the property as a whole, and that the failure to sell in parcels, as demanded, afforded to the defendant no ground for setting the sale aside. The deed of trust contained this provision relative to the powers of the trustees: "They may sell said premises, as above described, as a whole, or in their discretion, in such reasonable parcels or subdivisions as they, in their judgment, may deem advisable." We do not doubt that the parties to a mortgage or a deed of trust may contract that the premises shall be sold as a whole, and that their agreement to this end is enforceable. This court has so held in the case of a mortgage, notwithstanding the provisions of the Code of Civil Procedure (sections 694 and 726) that upon an execution on foreclosure, several known lots or parcels must be sold separately. *Bank of Sonoma v. Charles*, 86 Cal. 322, 24 Pac. 1019. The right of a debtor to waive a sale by parcels applies equally to a deed of trust (*Brown v. Mortgage Co.*, 86 Miss. 388, 38 South. 312), and the validity of an agreement for a sale in bulk follows a fortiori, where, as in this state, there is no statutory provision requiring the trustees to sell in subdivisions. *Dunn v. McCoy*, 150 Mo. 548, 52 S. W. 21.

[2] But in the case at bar the parties did not make an absolute stipulation that the property should be sold as a whole. The provision above quoted gave the trustees a

discretion to sell as a whole or in parcels. This discretion they were bound to exercise in good faith for the best interests of their beneficiaries, who included, not only the creditor, but the debtor and his successors in interest.

[3] At the time of the sale, the Harrison street property did not belong to the estate of McCleverty, the debtor. It had, by virtue of its homestead character, passed, upon McCleverty's death, to his widow. Civ. Code, § 1265; Code Civ. Proc. § 1474. With respect to the enforcement of the bank's claim against this property, she stood, therefore, in the situation of a surety, and, as such, had the right to have the principal debtor's property first sold to pay the debt. Civ. Code, § 2850; *McLaughlin v. Hart*, 46 Cal. 638; *Blood v. Munn*, 155 Cal. 228, 100 Pac. 694. In view of the relations of the parties to the different parcels covered by the deed of trust, a sale as a whole, in disregard of the homestead claimant's demand and right to have the principal debtor's property first applied to the payment of the debt, was a manifest abuse of the discretion reposed in the trustees. This consideration alone, without regard to the fact, admitted by plaintiff at the trial, that the property would have realized a larger sum if the parcels had been sold separately, entitled the defendant to disaffirm the sale.

[4] 2. It is urged that the defendant was bound, as a condition precedent to her right to have the sale set aside, to offer to pay the entire debt secured by the deed of trust. It has often been held that an action to set aside a sale by trustees or on foreclosure for irregularities of any kind should ordinarily be accompanied by an offer to redeem by paying the sum due. *Sav. & L. Soc. v. Burnett*, 106 Cal. 514, 538, 39 Pac. 922; *Copsey v. Sacramento Bank*, 133 Cal. 659, 68 Pac. 7, 204, 85 Am. St. Rep. 238. The plaintiff is held to compliance with the old maxim that he who seeks equity must do equity. *Marvel v. Cobb*, 200 Mass. 293, 86 N. E. 360; *Phoenix Ins. Co. v. Rink*, 110 Ill. 538; *Garland v. Watson*, 74 Ala. 323; *Sloan v. Coolbaugh*, 10 Iowa, 31. On the other hand, there are not a few cases holding that, where a party has the right to avoid a sale, he is not bound to tender any payment in redemption. *Brewer v. Harrison*, 27 Colo. 349, 62 Pac. 224; *Lewis v. Hamilton*, 26 Colo. 263, 59 Pac. 196; *Meyer v. Jefferson Ins. Co.*, 5 Mo. App. 245; *Briggs v. Hall*, 16 R. I. 577, 18 Atl. 177. Whatever may be the correct rule, viewing the question generally, it is certainly not the law that an offer to pay the debt must be made, where it would be inequitable to exact such offer of the party complaining of the sale. *Benedict v. Gammon Theological Seminary*, 122 Ga. 412, 50 S. E. 162. Under the circumstances disclosed by this record, the defendant would be subjected to very evident injustice and hardship if her right to



attack the sale were made dependent upon an offer by her to pay the whole debt. The debt was not hers, and she was not liable for any part of it. Her only interest was in the homestead property, which, with other land, was held as security for McCleverty's note. The property which she was seeking to save from the effect of the sale was worth, according to the finding of the court, \$5,000, while the property in which she had no interest was worth over \$57,000. The debt amounted to \$57,618.30. It must be apparent from a mere statement of these facts that there is no equity in the claim that, in order to be enabled to attack an unauthorized sale of her \$5,000 homestead, she must pay, or offer to pay, a debt of \$57,000, for which she is in no way liable.

3. The decree set aside the sale, not as an entirety, but only so far as it affected the homestead property. The Broadway parcel was treated by the court as if it had actually been sold separately for the sum which the court found to be its actual value at the time of the sale. To this mode of disposing of the controversy, the appellant makes two objections, which, while they are argued under distinct heads, may well, we think, be treated together. It is contended, first, that by compelling the plaintiff to take the Broadway property at what is found to be its actual value the court is imposing upon the purchaser at the sale a bargain to which he, or his principal, never assented; and, second, that the sale of both parcels having constituted a single transaction, the defendant is not entitled to ratify a part of the sale, while disaffirming the rest, but must, by reason of her ratification of the sale of the Broadway piece, be held to have confirmed the entire transaction.

[5] Ordinarily, where it appears that a sale was improperly made, it should, on the application of the injured party, be set aside and a new sale ordered. *Wright v. Bruscke*, 62 Ill. App. 358; *Davoue v. Fanning*, 2 Johns. Ch. (N. Y.) 252; *Mason v. Martin*, 4 Md. 124; *Imboden v. Hunter*, 23 Ark. 622, 79 Am. Dec. 116; *Tompkins v. Tompkins*, 39 S. C. 537, 18 S. E. 233; *Duncan v. Home Co-op. Co.*, 221 Mo. 315, 120 S. W. 733. This is the normal and proper remedy for the wrong inflicted. The creditor is entitled to have the property sold. The attempted sale has been conducted in an unauthorized manner. The rights of all parties are protected by setting aside the action taken, and directing a new sale which shall be in accordance with the law and the agreement of the parties. But there may be cases in which a new sale is impossible. A part or all of the property may, for example, have passed into the ownership of third parties, who have purchased for value and without notice of any infirmity in the sale. But, if the party entitled to avoid the sale is not by reason of laches or otherwise chargeable with responsi-

bility for this condition, the fact that a resale is impracticable should not deprive him of all remedy for the wrong which he has suffered. It has always been the pride of courts of equity that they will so mould and adjust their decrees as to award substantial justice according to the requirements of the varying complications that may be presented to them for adjudication. *Story, Eq. Jur.* §§ 28, 439; *1 Pom. Eq. Jur.* § 60. And so, if, in a case like this, the creditor and the trustees have put the property in such condition that a new sale cannot be had, they must submit to such decree as will most fairly redress the injury which they have inflicted. If relief cannot be given without compelling the creditor to accept the property wrongfully purchased by him at its true value, he may be held to a purchase at such value. This is, in effect, the principle applied in *Blood v. Munn*, 155 Cal. 228, 100 Pac. 694. There a mortgagee of property which included a homestead had released the property other than the homestead upon payment of \$425. The property so released was worth \$1,100 and over. In an action to foreclose the mortgage, it was held that the owners of the homestead were entitled to a credit upon the mortgage debt of the real value of the property released. This result necessarily followed from the fact, common to that case and the one before us, that the homestead property was only secondarily liable for the debt, and that any other holding would deprive the owner of the homestead of the right to have the property primarily liable first exhausted. There, as here, the creditor was held to a bargain (i. e., the release of \$1,100 of his demand) to which he had never assented, but this was not deemed an obstacle to granting to the defendants the only relief which was possible. In *Drury v. Cross*, 74 U. S. 299, 19 L. Ed. 40, the Supreme Court of the United States approved a decree which, in form and effect, was very like the one here made. There the directors of an insolvent railroad corporation had, in order to relieve themselves of liability on indorsements made by them, combined with certain creditors and bondholders to have the assets of the road sold on foreclosure. By a fraudulent contrivance, the amount of bonded indebtedness outstanding was made to appear far greater than it was, and, as a result, the favored creditors succeeded in destroying competition at the sale and purchasing the property at a price greatly below its real value. The decision of the court was that the purchasers must be held liable to other creditors for the full value of the property purchased.

[6] These authorities furnish ample support for the right of a court of equity, under appropriate circumstances, to grant the form of relief embodied in the decree appealed from. What we have said is also, we think, a sufficient answer to the point that a rati-

fication of the sale of the Broadway parcel is a ratification of the entire sale. This point is, indeed, but a statement, in another form, of the proposition first discussed. If the defendant is entitled to a decree protecting her rights in the homestead, notwithstanding the fact that the sale of the other property cannot be annulled, it must follow that she does not waive her right to such protection by failing to ask for a resale of both parcels. Furthermore, it is not entirely accurate to say that the defendant has ratified the sale of the Broadway property. The only sale was one of both parcels for \$57,177.40. The Broadway piece was not sold for any specific part of this amount, and the defendant did not ask that any actual sale be permitted to stand. What she did seek and obtain was a decree that the bank be put in the position which it would have occupied if it had purchased the Broadway piece for the sum which would have been realized on a sale properly conducted. This is not a ratification of the sale which was in fact made.

But the difficulty with the case before us is that the record does not show the existence of any circumstances which would render it impracticable to order a new sale of the entire property. As has been said, a decree requiring the purchaser at the trustees' sale to take the Broadway parcel at its true value can be justified only on the ground that it is, under the circumstances, the only relief that equity can give. It is a substitute for the natural relief of ordering a new sale, and is resorted to because such new sale cannot be had.

[7] Neither the pleadings nor the findings disclose any reason why in this case the court could not have ordered a sale of all the property according to the rights of the parties; that is to say, a sale, first of the Broadway property, and, in the event of a deficiency after crediting the debtor with the rents and profits of this piece, a sale of the homestead. The pleadings of the defendant allege that the title to the homestead, conveyed to the purchaser by the trustees, still remains in the plaintiff, and the court so finds. But there is no averment or finding that the title to the Broadway parcel is not in a like situation. It is true that the plaintiff in its answer to the cross-complaint alleged that it had parted with the Broadway property to bona fide purchasers for value, and that it had lost the means of accounting for the rents and profits, but these allegations were on motion of the defendant herself stricken from the answer. She cannot, of course, after having induced the court to eliminate these averments from the issues, rely upon them as establishing a state of facts which she should have pleaded and proved as a foundation for the decree obtained by her. The pleadings

and findings, as they stand, do not justify the conclusions of law and the judgment.

[8] But, inasmuch as it is more than probable that the facts authorizing the decree rendered actually exist, we cannot assent to the claim of appellant that judgment in its favor should be ordered on this appeal. An amendment to the answer and cross-complaint, together with evidence establishing the truth of such amendment, would authorize the granting to defendant of the relief embodied in the decree here appealed from.

4. The plaintiff relies, in response to defendant's cross-complaint, upon the defense of laches, and that of the statute of limitations. Code Civ. Proc. §§ 343, 338, subd. 4. It is conceded in the reply brief that, "if the defendant was entitled to have the sale set aside as to the homestead alone without vacating the sale as to the Broadway piece, the plea of the statute of limitation and of laches ought to be overruled." We have already seen that the defendant may be entitled to this very relief. In that aspect the question of limitation and laches need not be further considered. We shall not at this time undertake to decide whether, if it should turn out that a resale of both parcels is the only remedy open to respondent, she should be held barred of her right to seek this relief. If this question should ever arise, which is hardly probable, it will be time enough to then dispose of it.

The judgment is reversed, with directions to the trial court, after permitting the defendant to amend her pleadings, to take such further proceedings as may not be inconsistent with this opinion.

We concur: SHAW, J.; ANGELLOTTI, J.

GALBREATH v. SIMAS et al. (Sac. 1,884.) (Supreme Court of California. Nov. 8, 1911.)

1. MINES AND MINERALS (§ 38\*)—CONFLICTING LOCATION—EVIDENCE—FINDINGS.

In a suit to quiet title to a placer mining claim, etc., evidence held to warrant a finding that the proper amount of assessment work was not done by defendants' vendor on the land in controversy in 1907 or 1908, and that the land was therefore subject to subsequent relocation by complainant.

[Ed. Note.—For other cases, see Mines and Minerals, Dec Dig. § 38.\*]

2. APPEAL AND ERROR (§ 1002\*)—FINDINGS—REVIEW—CONFLICTING EVIDENCE.

A verdict on conflicting evidence that the value of assessment work on a mining location was worth less than the required \$100 cannot be set aside on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

3. MINES AND MINERALS (§ 38\*)—RELOCATION—ASSESSMENT WORK—INSTRUCTIONS.

Where, in an action to quiet title to a relocated mining claim, there was evidence that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendants' grantor under the prior location did not complete the required assessment work for the years 1907 and 1908, and that complainant relocated the land in December, 1908, an instruction that, if a proper amount of assessment work was not performed in either 1907 or 1908, complainant was not required to wait until the expiration of the latter year before locating the claim, was proper.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 38.\*]

#### 4. TRIAL (§ 194\*)—INSTRUCTIONS.

Where the jury was instructed that the prior location of a mining claim by defendants' grantor was a "pretended one" only in the event the jury found that he was not a citizen of the United States, an instruction that only citizens or persons who had properly declared their intention of becoming such could locate mining claims on vacant public land, and if defendants held the ground in controversy by virtue of a sale from G., who held it by a pretended location, and was not a citizen of the United States at the time he made such pretended location, then defendants had no title, was not objectionable as instructing the jury that the location of defendants' grantor was a pretended one.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 194.\*]

Department 2. Appeal from Superior Court, Siskiyou County; James F. Lodge, Judge.

Suit by Wallace Galbreath against Manuel S. Simas and another. Judgment for complainant, and defendants appeal. Affirmed.

Taylor & Tebbe and James D. Fairchild, for appellants. C. J. Luttrell and L. F. Coburn, for respondent.

MELVIN, J. Plaintiff sued to quiet his title as against defendants to a certain placer mining claim known as the "Smugler," and to restrain said defendants from cutting wood or making excavations on said property. Judgment was rendered in favor of plaintiff. From this judgment and from an order denying their motion for new trial the defendants appeal.

The court found that the Smugler claim was a valid mining location made in accordance with the statutes of the United States, and that it covered a large part of the territory to which defendants asserted title and known as the Blue Jay placer mine; that the alleged title of defendants under deed from one Gallagher, who had located the Blue Jay in December, 1905, was invalid as against plaintiff, who located the Smugler claim in December, 1908, because neither Gallagher nor his successors in interest had performed the required assessment work on the Blue Jay claim; and that the land covered by the Smugler claim was open to location when Galbreath located thereon in December, 1908.

[1] The main contention of appellants is that the findings are not supported by the evidence. They maintain (1) that Gallagher's citizenship at the time he located the Blue Jay placer claim was clearly proven; (2)

that the proper amount of assessment work was done by Gallagher in 1907; and that (3) more than \$100 worth of work was done on the property by Gallagher or those in privity with him during the year 1908 and before the 29th day of December of that year.

Upon the first point little discussion is necessary, because the other two questions were determined adversely to defendants upon conflicting testimony. Gallagher was permitted to testify fully with reference to the years he had spent in the United States, his naturalization, the fact of his registration in California in 1908 by presentation of a certified copy of his naturalization papers to the county clerk of the county in which he lived, and of his participation in elections ever since. Whether or not this was the best evidence need not be considered here, for it seems to have been introduced without objection. Respondent concedes that it was sufficient, if believed, to justify the jury in the conclusion that Gallagher was a citizen, but calls the attention of the court to the impeachment of Gallagher as a witness, which, he asserts, was so complete that probably nothing which Gallagher said was accepted as verity by the jurors.

Regarding the work done on the Blue Jay claim in 1907 and 1908, the evidence, as we have said before, was conflicting. Gallagher himself testified that in the year 1907 he performed more than \$100 worth of work, giving in detail the items of labor. He was contradicted by other witnesses in regard to the details of the work which, according to his statement, was performed by him during that year. David Ream testified that no work was done on the Blue Jay in 1907. Zoll contradicted Gallagher with reference to the alleged removal by ground sluicing of a quantity of earth 24 feet long, 9 feet wide, and 3 feet thick from the Blue Jay claim. Gallagher stated that he was accustomed to go by way of a certain shaft on the property into a tunnel where there was water and that he frequently performed work in said tunnel, but according to the witness Ream there was no connection between the shaft and the tunnel. The tunnel itself was on the Hawkins claim, and not within the lines of the Blue Jay at all; and there was no water in said tunnel. Similar testimony was given by witness Le May. There were certain other contradictions of Gallagher's testimony which need not be considered here in detail. It is sufficient to say that they were of enough importance to justify the jury in finding against the defendants with reference to the value of the work performed upon the claim in 1907.

Appellants do not say that Gallagher performed \$100 worth of work on the Blue Jay claim in 1908, but they do most positively assert that they, as the equitable owners of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the property, put work upon it as the representatives of Gallagher to an amount greatly in excess of \$100. They say that there was an oral agreement between themselves and Gallagher which amounted to a lease with the privilege of purchasing; the understanding being that appellants were to do the requisite amount of work which was to apply on the price to be paid for the property. The Blue Jay claim was adjacent to the patented claim which was called by all the witnesses the "Hawkins." This was the property of the appellants. The Blue Jay was on higher ground than the Hawkins. In 1908 the appellants built a reservoir which was partly on the land covered by the Blue Jay claim, and dug a ditch through that territory for a distance of more than 800 feet. Respondent contends in opposition to this that appellants had no contract with Gallagher; that the work done on the Blue Jay was not for the benefit of that claim, but merely to get a better head of water for mining operations on the so-called Hawkins claim; and that the jury was justified in the conclusion that the work performed by appellants in 1908 on the Blue Jay was of a value less than \$100.

One witness testified that while Rose was at work on the reservoir he was asked if he was not working on Gallagher's land. He replied with an uncomplimentary reference to Gallagher who, he said, claimed "the whole country," but did not work on anything. Witness Le May told while on the stand of a conversation which he had had with Gallagher in October, 1908, wherein Gallagher admitted, in effect, that his assessment work had not been done, and made no reference to any contract to sell his property; but the most important evidence offered by plaintiff to show that no contract existed for the sale of the property by Gallagher to the appellants was that which indicates that a line was run between the Hawkins and the Smugler claims by a surveyor who had been engaged for that purpose, establishing the boundaries between these claims to the satisfaction of the parties hereto. The surveyor Nolan testified that appellant Simas, respondent Galbreath, and Ream (who claimed an interest in the Smugler with Galbreath) were present when he ran the line and were satisfied with it. He was corroborated by both Ream and Galbreath, the last-named witness also testifying that appellant Rose suggested the employment of the surveyor and agreed to pay half the expense of establishing the line between the two claims. It seems hardly credible that, if Simas and Rose were the equitable owners of the Blue Jay, they would have thus recognized Galbreath's right in the Smugler which included practically the same territory as the Blue Jay and at a time long subsequent to the performance by them of the work which as they asserted

at the trial had been done for the purpose of perfecting Gallagher's title. There is also much force in the position of respondent that the work of Rose and Simas was for the benefit of the Hawkins claim. Much of the Blue Jay is uphill from the reservoir, ditch, and penstock which were constructed by appellants, and the water could be advantageously used on a small part only of that claim.

Upon the subject of the value of the improvements constructed by appellants in 1908 there was a wide diversity of testimony. Both Rose and Perry testified that the reservoir was 70 feet long and from 25 to 35 feet deep, and that the ditch was approximately 600 feet long, 20 inches in width, and 20 inches in depth. The cost of the ditch and the dam they asserted was \$200. Appellants' witness Graves, a civil engineer, estimated that the dam constructed by them contained 48.6 cubic yards of earth. Ream testified that the dam could be built for \$40 and the ditch for \$25. Witnesses Le May, Mathewson, and Utne, all experienced men in such matters, made estimates somewhat lower.

[2] It will thus be seen that there was a distinct conflict of evidence upon the subject of the value of work done by the appellants in 1908, and we cannot say that the jury was not justified in concluding that the improvements made that year were worth less than \$100. There is no merit in appellants' contention that no evidence was offered by Galbreath of the posting of his original notice of location and the recollection of a copy thereof. Galbreath and one other witness testified to these facts.

On the cross-examination of Galbreath, he was asked if Ream had not previously located the Smugler claim and an objection to the question was sustained. This ruling was proper, but, even if it had been erroneous, it was cured by subsequent testimony that Ream had been a former claimant and had forfeited his right to the property long before any of the transactions connected with this case occurred. Ream was also permitted, over an objection, to testify how one of the corners of the Hawkins claim was marked according to his observation made at the time Mr. Nolan was running the line between the Hawkins and Smugler claims. If this was error, we cannot see how appellants could possibly have been harmed by it.

Appellants complain that Gallagher's answer to a question on direct examination was stricken out. He had answered in the affirmative the question: "Are you the locator of this claim?" On cross-examination, however, he was compelled to answer the question: "How did you happen to locate this claim that had been located and held by Dave Ream and others?" Even conceding that the rulings of the court on these two matters were not consistent, we cannot say how appellants were prejudiced for subsequently Gallagher testified fully regarding

all his acts with reference to the location of the Blue Jay.

[3] Appellants also complain of an instruction in which the jury was told that respondent did not have to wait until January 1, 1909, before relocating the claim, unless the assessment work had been fully performed in 1907. The language criticized is not properly subject to objection when taken in connection with the preceding portion of the instruction which was in part as follows: "If you find that the defendants did construct the reservoir in Stewart Gulch, and did construct the ditch testified to in the year 1908, under an agreement with Gallagher to do his assessment work upon the Blue Jay claim, but that such work was not of the value of \$100, and that they did not continue to, in good faith, complete such assessment work, but, on the contrary, did cease work on or about the month of November, then I charge you that the plaintiff had the right to go upon said land and locate it on or about the 29th day of December of that year." By this instruction the jury was told that, if a proper amount of assessment work was not performed in either 1907 or 1908, respondent did not have to wait until the expiration of the latter year before relocating the claim. Applied to the facts of the case we find no error in the instruction.

[4] By another instruction the jurors were told that only citizens or those who had properly declared their intention of becoming such citizens can locate mining claims upon vacant unappropriated public land of the United States, and that, if a person not a citizen go through the form of locating a claim and selling it to others, he has nothing to sell and the buyers acquire nothing by the purchase. The instruction then proceeds as follows: "If, therefore, you find that defendants hold the ground in dispute herein by virtue of a sale from P. J. Gallagher, who held it by a pretended location, but who was not a citizen of the United States at the time he made such pretended location, then I charge you that the defendants have no title whatever to said premises and you must find for the plaintiff." Appellants contend that by this language the jurors were told that Gallagher's location was a pretended one, and that this was an instruction upon a matter of fact. A reading of the quoted language in view of that which immediately precedes it entirely destroys this argument. The jury was instructed that Gallagher's claim was a "pretended one" only in the event of their finding that he was not a citizen of the United States. There was nothing misleading in the instruction.

The judgment and order are affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

# CAMPBELL et al. v. MORAN et al.

(L. A. 2,732.)

(Supreme Court of California. Nov. 9, 1911.)

## 1. TAXATION (§ 679\*)—TAX TITLE—IRREGULARITY IN ASSESSMENT OR SALE—MAILING NOTICE.

Pol. Code, § 3897, as amended by St. 1907, p. 697, requires that a tax collector, making a resale of land under authority from the state, shall not only give notice of the sale by publishing a notice in a newspaper for a specified time, but that he shall also mail a copy of such notice, postage prepaid and registered, to the party to whom the land was last assessed next before the sale at his last known post office address, and sections 3780 and 3817 give the owner of land sold to the state for taxes the right to redeem it before the state disposes of it. Property was assessed in 1902 to James Moran, and on nonpayment of taxes was sold to the state in 1903, and after the lapse of five years from such sale the tax collector attempted a resale of it. The last assessment before the sale was in 1908 and was to "Nellie S. Moran," whose address as written on the assessment book was "833 S. Spring St.," to whom no notice of the sale was ever mailed, but a notice of such sale was sent by registered mail, addressed to James Moran, 249 South Spring street, Los Angeles, Cal., which returned to the tax collector before the sale without having been delivered. Held, that the provision as to notice by mailing, being for the benefit of the previous owner, was a jurisdictional prerequisite to a valid sale by the state, and that the sale was ineffectual; so that the purchaser acquired no title.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.\*]

## 2. TAXATION (§ 679\*)—TAX TITLE—NOTICE OF SALE—PERSONS TO BE NOTIFIED—"LAST KNOWN POST OFFICE ADDRESS."

Under Pol. Code, § 3650, which requires an assessor to state in the assessment of property the name and post office address, if known, of the person to whom the property is assessed, the address shown on the last assessment constitutes the last known post office address so far as the tax records are concerned, and, in the absence of other information, the tax collector must take notice of the address so shown and mail the notice of resale to such address.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.\*]

## 3. TAXATION (§ 788\*)—TAX DEEDS—EFFECT AS EVIDENCE—NOTICE OF SALE.

The recital, in a deed from the state on a resale of land sold to it for taxes, as to the mailing of a copy of the notice prescribed by Pol. Code, § 3897, as amended by St. 1907, p. 697, is made, by section 3898, only prima facie evidence of the facts recited.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555-1569; Dec. Dig. § 788.\*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Edgar W. Campbell and others against Nellie Skinner Moran and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

C. A. Stice and Walter J. Horgan, for appellants. O. B. Carter and Schweitzer & Hutton, for respondents.

ANGELLOTTI, J. This is an action to quiet plaintiffs' alleged title to the land described in the complaint, being a lot in the city of Los Angeles. Defendant Nellie Skinner Moran had judgment that plaintiffs have no interest in the property, and that, as against them, she is the absolute owner thereof. Plaintiffs appeal from the judgment, and from an order denying their motion for a new trial.

It was stipulated at the trial that plaintiffs have no title to the property except such as they may have acquired by virtue of an attempted sale by the state on account of nonpayment of state and county taxes for the year 1902, and that, unless the title to the property be shown to be vested in plaintiffs by virtue of such attempted sale, the title to the property in controversy is vested in said Nellie Skinner Moran.

[1] For the purposes of a decision herein, it will be necessary to consider only one of the many points made by respondents in support of the determination of the trial court.

The assessment of the property for the year 1902 was to "James Moran." The tax thereon not having been paid, the property was sold to the state on July 1, 1903, and, no redemption having been made within five years from the date of such sale, a deed of the property was made to the state by the tax collector on July 2, 1908. Pol. Code, § 3785. Thereafter, in the year 1909, it was attempted to make a sale of this property through the tax collector of Los Angeles county as authorized by and in accord with the provisions of section 3897, Political Code. The attempted sale was had on February 19, 1909, and plaintiffs were the purchasers at such sale. The last assessment of this property "next before the sale" was in the year 1908 and was to "Nellie S. Moran," defendant herein, and the address of said defendant, written on the assessment book, was "833 S. Spring St." It was definitely shown by the evidence that no notice or copy of notice of this sale was ever mailed by the tax collector to said Nellie S. Moran, or to any person at the address shown by the last assessment. A notice of such sale, with the postage thereon prepaid, and registered, had been mailed, addressed to "James Moran, 249 South Spring street, Los Angeles, California," and this had been returned by the postmaster to the tax collector on February 8, 1909, without having been delivered. As we understand the record, this was the only notice by mail of the sale that was ever attempted to be given, and is the notice by mail referred to in the deed from the state as having been given. No claim to the contrary is made by counsel for plaintiffs.

Upon these facts it must be held, in view of the findings of the trial court in favor of defendants, and in view of the decision of this court in the recent case of *Smith v. Fur-*

*long*, 117 Pac. 527, that the attempted sale by the state was ineffectual for any purpose, and that consequently plaintiffs are without any interest in the property. It is required by section 3897, Political Code, as amended in 1907, that the tax collector making the sale under authorization from the state, shall not only give notice of the sale by publishing a notice in a newspaper for a specified time, but also that he shall "mail a copy of said notice, postage thereon prepaid and registered, to the party to whom the land was last assessed next before the sale, at his last known post office address." The owner of land sold to the state for taxes being given by statute the right to redeem the same at any time before the state shall have disposed of it (Pol. Code, §§ 3780 and 3817), it was held that this provision as to notice by mailing, enacted by the Legislature, was a substantial requirement for his benefit, compliance with which was essential to the validity of a sale by the state; in other words, that "the giving of notice by mail, as section 3897 requires, is a jurisdictional prerequisite to a valid sale by the state," at least in all cases where the address of the party is not unknown.

[2] As section 3650, Political Code, requires the assessor to state in the assessment of property "the name and post office address, if known, of the person to whom the property is assessed," it was substantially held in the same case that the address shown on the last assessment constitutes the last known post office address, so far as the tax records are concerned, and that, in the absence of information of a different address, the tax collector must take notice of the address so shown and mail the notice thereto. In this case, as we have seen, not only was no notice mailed to any person at the address so shown, but no notice was mailed to the party to whom the land was last assessed next before the sale, at any address, and the notice in fact mailed, addressed to another person, was returned undelivered to the tax collector.

[3] The recital in the deed from the state as to the mailing of a copy of the notice, even if assumed sufficient to show such mailing as the statute requires, was only prima facie evidence of the facts recited (Pol. Code, § 3898; *Smith v. Furlong*, supra), and it was open to defendant to show that the recital was untrue, and that the statutory requirement in this regard had not been complied with. This was certainly sufficiently shown to warrant the conclusion of the trial court that the requirement had not been complied with, a conclusion we must assume the court reached, in view of its general findings in favor of defendants.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.

## SMITH v. BOSTON. (L. A. 2,744.)

(Supreme Court of California. Nov. 10, 1911.)

## 1. TAXATION (§ 811\*)—ACTION TO QUIET TAX TITLE—JUDGMENT—FINDINGS.

A finding, in an action to quiet title under a tax deed, that the plaintiff was not the owner of the premises mentioned in the complaint nor of any part thereof and has no interest in such premises, is sufficient to support a judgment for defendant.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 811.\*]

## 2. TAXATION (§ 788\*)—TAX DEEDS—EFFECT AS EVIDENCE—RECITALS.

A recital in the deed of a tax collector, given on a resale of lands by the state, is prima facie evidence of the fact recited.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555-1569; Dec. Dig. § 788.\*]

## 3. TAXATION (§ 788\*)—ACTION TO TRY TAX TITLE—TAX DEED—EFFECT AS EVIDENCE.

Pol. Code, § 3897, requires the tax collector, before selling for the state land sold to it for taxes, to mail a copy of notice of sale to the person to whom the land was last assessed next before the sale at his last-known post office address. A deed of a tax collector recited that as the address was unknown, the collector did not mail a copy of such notice to the party to whom the land was last assessed next before such sale, and there was no evidence in conflict therewith or proof of actual notice. It appeared from the record that the property on the year next before the sale was assessed to "Andrew J. Boston, Santa Monica," and that the year previous to that the address was given as "232 S. Ocean avenue, Santa Monica, Cal." Held sufficient to warrant a conclusion by the trial court that the recital in the deed of the tax collector, to the effect that the address of the party to whom the property was last assessed was unknown, was false.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1555-1569; Dec. Dig. § 788.\*]

## 4. TAXATION (§ 679\*)—TAX TITLE—EFFECT OF IRREGULARITY IN SALE—NOTICE.

The giving of notice by mail, to the party to whom the property was last assessed before the tax sale, of a resale of land, after deed to the state for nonpayment of taxes, is a jurisdictional prerequisite to a valid sale by the state, and a sale without such notice, where the address was not unknown, is invalid and passes no title to the purchaser.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 679.\*]

## 5. TAXATION (§ 810\*)—ACTION TO TRY TAX TITLE—EVIDENCE.

Evidence, in an action to quiet title under a tax deed, held sufficient to support a finding that plaintiff had no interest in the property.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 810.\*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action to quiet title by J. H. Smith against Andrew Boston. Judgment for defendant, and plaintiff appeals. Affirmed.

Walter J. Horgan and C. A. Stice, for appellant. Tanner, Taft & Odell, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from a judgment in favor of defend-

ant and from an order denying plaintiff's motion for a new trial in an action brought by him to quiet his alleged title to a lot of land in the city of Santa Monica, Los Angeles county.

It is admitted that plaintiff has no title to the property except such as he may have acquired by virtue of an attempted sale by the state on account of nonpayment of state and county taxes for the year 1901. If plaintiff acquired no title thereby, admittedly defendant, who is shown by the evidence to have acquired the property in the year 1902 and to have ever since been in possession thereof and living thereon, paying all taxes levied thereon, was entitled to judgment against plaintiff.

It will be necessary to notice but one of the many points made in support of the judgment.

[1] It was found as a fact by the trial court, in response to the issue made by the complaint and answer, that the plaintiff is not the owner of the premises mentioned in the complaint, nor of any part thereof, and has no interest in or to said premises. The finding is in no way dependent upon or inconsistent with other findings of certain specific facts, and without regard to such other findings constitutes sufficient support for and compels the judgment that was given. This finding is fully sustained by the evidence, as we shall proceed to show.

[2, 3] The attempted sale by the state, through the tax collector of Los Angeles county, was in the year 1908, and the last assessment "next before the sale" was in the year 1907. The transcript on appeal shows that the property was then assessed, as it had been for the year 1906, to "Andrew J. Boston," and that his address was given in such assessment of 1907 as "Santa Monica," and in the assessment of 1906 as "232 S. Ocean avenue, Santa Monica, Cal." It furthermore showed "tax statements and receipts to Andrew J. Boston" for the years 1904 and 1905. It was claimed on a motion by plaintiff to amend the transcript, heard at the time of the argument of this appeal, that the engrossed and settled statement on motion for new trial states that the assessment for the year 1907 was to "Andrew J. Borton," instead of "Andrew J. Boston." This was denied by defendant, and the case was submitted for decision with the understanding that, if it was found to be a material matter, the submission would be set aside and an opportunity given plaintiff to substantiate his claim. We are satisfied that a determination of this question regarding the correctness of the transcript is not essential to a proper disposition of this appeal, and that it may be assumed that the name of the property owner was given in the assessment of 1907 as "Andrew J. Borton." It still remains that the record shows that the ad-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dress of the person to whom the property was assessed was given on the assessment as "Santa Monica."

It is established *prima facie* by the deed of the tax collector, and there is no evidence in conflict therewith, that no copy of the notice of sale was mailed, as required by section 3897 of the Political Code, "to the party to whom the property was last assessed next before the sale, at his last-known post office address"; it being recited in the deed, exactly as it was recited in *Smith v. Furlong*, 117 Pac. 527, "and whereas the address being unknown, W. O. Welch, tax collector, as aforesaid, did not mail a copy of said notice, postage thereon prepaid, to the party to whom the land was last assessed next before such sale." It thus appears that a copy of the notice was not mailed to "Andrew J. Borton" at the address shown by the assessment or at all. It was further shown by uncontradicted evidence that a copy of the notice was not mailed to Andrew J. Boston at all, so that if we assume that the transcript is correct and that the assessment for the year 1907 was to him instead of to Andrew J. Borton, as claimed by plaintiff, nevertheless the notice by mail required was not given. In either event, the requirement of section 3897 of the Political Code that a copy of the notice be mailed, with the postage thereon prepaid, and registered, "to the party to whom the land was last assessed next before the sale (who was either Borton or Boston), at his last-known post office address," was not complied with, although in such assessment an address was shown. Even if the assessment was, as claimed by plaintiff, to "Borton," instead of "Boston," it is apparent from the record that the use in the name of the letter "r" instead of "s" was a mere clerical error, and it may be that the mailing of a notice to "Boston" would have been sufficient; but as to this it is unnecessary to decide. No notice was mailed to either "Boston" or "Borton." It furthermore appears that Boston never had any actual notice of such proposed sale. It is established by *Smith v. Furlong*, supra, that the evidence hereinbefore stated was sufficient to warrant a conclusion by the trial court that the recital in the deed of the tax collector to the effect that the address of the party to whom the property was last assessed was unknown was false, and that such post office address was by legal intentment known to the tax collector; the court saying: "It is evident, therefore, that if the address was unknown to the tax collector it was because he had failed to avail himself of the ample means of knowledge readily accessible to him and furnished by law for that purpose, one of these books being the record of the assessment from which his authority to make the deed was derived." It is further established by *Smith*

*v. Furlong*, supra, that such evidence fully supports a conclusion that the requirement of section 3897 of the Political Code as to mailing a notice of the sale has not been complied with.

[4] It is still further established by that decision that a failure to comply with the requirement renders the attempted sale by the state invalid and ineffectual to pass any interest in the property to the purchaser. See, also, *Campbell v. Moran* (L. A. No. 2,732, decided November 9, 1911) 119 Pac. 89.

[5] It is therefore manifest that, without regard to any of the other points made in support of the judgment of the lower court, plaintiff was not shown to have any interest in the property, and that the finding to that effect is fully supported by the evidence.

The judgment and order denying a new trial are affirmed.

We concur: SLOSS, J; SHAW, J.

#### WHITTIER v. HOME SAVINGS BANK OF LOS ANGELES et al. (L. A. 2,641.)

(Supreme Court of California. Nov. 8, 1911.)

##### 1. EVIDENCE (§ 417\*)—PAROL EVIDENCE—VARYING CONTRACT.

A construction company contracted with a city to improve certain streets, and defendant M. advanced the contractor money, taking as security assignments of the contracts. Afterwards defendant bank made other loans to the contractor, taking assignments of the same contracts, subject to M.'s rights. Plaintiff did part of the work for the construction company, and in payment received orders from it upon M. and the bank, directing them to turn over to plaintiff bonds to cover the amount of the work done, and the bank indorsed on each order, "Accepted for whatever the equity of the" construction company "may be." Thereafter, on March 1, 1909, the construction company being unable to complete the improvements, it, M., and the bank executed a written contract with plaintiff, which recited the latter's interests in doing the work on the remaining two streets to be repaired, and that plaintiff agreed to do the work for the sum of \$2,600. The work was done by plaintiff, and that sum paid to him by the bank and M. Held, in an action against the bank for money received by it, which plaintiff claims should have been applied to his claims under his orders, that evidence that, when plaintiff presented his orders to the bank for acceptance, he was informed of an agreement by it with the construction company to advance further sums to that company, if necessary, on the security of the contracts assigned, did not vary the terms of the conditional acceptances of plaintiff's orders.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1874-1899; Dec. Dig. § 417.\*]

##### 2. BILLS AND NOTES (§ 516\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action for money received by defendant bank, which plaintiff claimed should have been applied to his claims under orders given to him upon the bank, and accepted by it in payment for work done in repairing streets, held to show that plaintiff and the bank contemplated that the acceptance should only

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



apply to the equities of the general contractor existing at the completion of all the contracts.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 516.\*]

### 3. EVIDENCE (§ 425\*)—PAROL EVIDENCE—COLLATERAL CONTRACT.

Defendants, who were creditors of an insolvent contractor for city work for money advanced, and who held an assignment of the contract as security therefor, agreed in writing with plaintiff, a subcontractor on the work, who had received orders on defendants for payments due him, accepted by defendants to be paid out of any "equity of" the principal contractor, that plaintiff should complete the contract, for which defendants would pay him \$2,600, which was done. *Held*, that evidence of an oral agreement between the parties that the \$2,600 should be retained by defendants for their reimbursement out of the first collections on the work done by plaintiff was not objectionable, as varying the written contract for the completion of the contract by plaintiff.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1862; Dec. Dig. § 425.\*]

### 4. MONEY RECEIVED (§ 1\*)—GROUNDS OF OBLIGATION.

The action for money had and received will not lie against a party into whose hands the money is not shown to have come.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. § 1.\*]

Department 2. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by F. W. Whittier against the Home Savings Bank of Los Angeles and others. From a judgment for plaintiff for a less amount than claimed, he appeals. *Affirmed*.

Crouch & Crouch, for appellant. Scarborough & Bowen (H. M. Barstow, of counsel), for respondents.

MELVIN, J. Plaintiff sued for something over \$6,000 on a count for money had and received to his use and benefit. Judgment was given in his favor against the Bank of Los Angeles for \$428.51. From this judgment he appeals.

The Tamped Oil Roads Company, a corporation, had entered into contracts to improve five streets in the city of Los Angeles known as Budlong avenue, Griffin avenue, Matthews street, Scott street, and Montana street. Defendant S. A. McCready had loaned to the corporation certain sums of money, and had taken as security for such loans assignments of certain of the contracts with the city. Subsequently the defendant Bank of Los Angeles made loans to the Tamped Oil Roads Company, and took assignments of the same contracts, subject, however, to the claims of S. A. McCready. During the progress of the work, F. W. Whittier, the plaintiff in this action, was awarded the contracts for the cement work upon all of these streets. In payment of his claims for such work, orders were given by the Tamped Oil Roads Company to Whittier. Four of these orders were dated October 31, 1908, and by each of them S. A. McCready and the Bank of Los Angeles were

instructed to turn over to F. W. Whittier sufficient bonds to cover the bill of Whittier for the work done on the street mentioned in the order; the approximate amount being specified in each demand, respectively, as follows: \$1,046.90 for Budlong avenue, \$1,107.54 for Griffin avenue, \$1,084.60 for Matthews street, and \$2,948.44 for Montana street; amounts aggregating \$6,187.48. On each claim the proper officer of the Bank of Los Angeles wrote, "The above order accepted for whatever the equity of the Tamped Oil Roads Company may be." These acceptances were written on the date of the orders themselves, October 31, 1908. Some time in December, 1908, the Tamped Oil Roads Company gave to Whittier a similar order for cement work done on Scott street. The amount demanded was \$3,956.55, and the order was accepted precisely as the others had been. It will be seen that orders, aggregating something over \$10,000, had thus been provisionally accepted by the Bank of Los Angeles prior to the year 1909. Before the acceptances of October 31, 1908, McCready and the Bank of Los Angeles had advanced to the Tamped Oil Roads Company on its interest-bearing notes secured by assignments of contracts, sums amounting in all to approximately \$15,000. Between that date and December 12, 1908, the Tamped Oil Roads Company gave to the Bank of Los Angeles its notes for sums which amounted in the aggregate to \$1,500.

By March 1, 1909, it had become apparent that the Tamped Oil Roads Company was insolvent and unable to complete its contracts with reference to Montana and Scott streets, and on that day an agreement was made, whereby Whittier undertook to finish the work on said streets. This contract was in writing. In it the Tamped Oil Roads Company, McCready, and the Bank of Los Angeles appeared as parties of the first part, and Whittier as the party of the second part. It recited the existence of the contracts for the work on the two streets, specified that McCready and the Bank of Los Angeles had certain interest in said contracts for money loaned for constructing said work, recited that the work had not been fully accomplished, and declared that the parties of the first part desired Whittier to complete the contracts for the street work. Then follows Whittier's engagement to do the work for the sum of \$2,600. It was further agreed that this contract should in no wise affect or change the rights of Whittier under his arrangement with the Tamped Oil Roads Company to furnish the cement work for the two streets. The work under this agreement was done by Whittier, and he was paid \$2,600, furnished by the Bank of Los Angeles and McCready in equal portions. This money was advanced ostensibly to the Tamped Oil Roads Company on the note of Thomas S. Hutton, its general mana-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ger, and was secured by a pledge of the capital stock of the company.

On August 6, 1909, the plaintiff owed the Bank of Los Angeles and McCready \$3,244.51, and this indebtedness was paid on that date, at Whittier's request, from the proceeds of the Scott street contract. On August 9, 1909, the Tamped Oil Roads Company gave the Bank of Los Angeles written instructions, which were in part as follows: "We desire, direct and instruct that the various obligations of the Tamped Oil Roads Company to S. A. McCready and to your bank, be paid (so far as the funds remaining after the reservations below mentioned will permit) in the order of their dates—the oldest first. In the application of the various funds of the Tamped Oil Roads Company now in your hands and yet to be received by you, to the payment of your various indebtednesses, you will pay the said indebtednesses from the following sources: (1) Take all but \$1,046.90 of the proceeds of Budlong Ave. (2) Take all but \$1,107.54 of the proceeds of Griffin Ave. (3) Take all but \$1,084.60 of the proceeds of Matthews St. (4) Take all but \$2,948.44 of the proceeds of Montana St. These various reservations are for the purpose of paying the orders of Mr. F. W. Whittier, dated October 31, 1908. If, after making the above applications and reservations, there should be an unpaid balance on the Tamped Oil Roads Company's indebtedness to you incurred prior to October 31, 1908, then you shall pay any such deficiency thus remaining from the amounts above reserved for F. W. Whittier."

[1, 2] Appellant's principal contentions are (1) that plaintiff's orders should have been given priority over the \$2,600 advanced March 1, 1909, for the completion of the work on Montana and Scott streets; and (2) that they should have taken precedence also of the notes, aggregating \$1,500, given to cover advances made after the provisional acceptances of the orders of October 31, 1908. On the trial Witness Callander, who was an officer of the Bank of Los Angeles, testified, over appellant's objection, that at the time of the making of the contract with Whittier for the completion of Scott and Montana streets there was a parol agreement between the parties to the written contract that the \$2,600 advanced by McCready and the bank, for the purpose of paying appellant, should be repaid from the first collections that might come in for the finished work upon those two streets. Appellant insists that the admission of evidence of such parol agreement was in violation of sections 1624, 1625, and 1698 of the Civil Code, and section 1856 of the Code of Civil Procedure. As there was at the date of the written agreement sufficient money in the possession of the Bank of Los Angeles, collected on work performed on the four streets, exclusive of Scott street, to pay all of appellant's claims covered by the orders of October 31, 1908, appellant contends that

this money was equitably his own, and that any agreement, whereby he should be obligated to permit the repayment of the note signed by Hutton out of that fund, would necessarily be in writing in order that it might be available against him; and that the introduction of parol testimony to establish such a contract is an endeavor to make him responsible for the "debt, default, or miscarriage" of another, by proof of a verbal agreement. Section 1624, subd. 2, Civ. Code. Respondent's answer to this is that Whittier's orders were accepted, subject to the equity of the Tamped Oil Roads Company, and that he took the acceptances with full knowledge that there might not be any surplus to which such orders could attach. On October 19, 1908, when the bank made a loan on a note from the Tamped Oil Roads Company for \$3,500, accompanied by a second assignment of all contracts theretofore assigned, there was also a separate written assignment of the Scott street and Matthews street contracts, which was "given as a partial security for a loan made by the Bank of Los Angeles to the Tamped Oil Roads Company"; said loan bearing even date therewith. At the same time, there was a verbal agreement between the same parties that advances should be made, if necessary, up to \$5,000, secured by the contracts so assigned. Such verbal agreement was not one by which the terms of the written contract were sought to be varied, but, as the court below aptly said, was admissible in evidence "to show a separate agreement about collateral on the loans thereafter to be made." When Whittier presented his orders for acceptance, he was informed of the engagement of the bank to furnish further sums for the completion of the contracts. There was ample testimony upon this point, and it was not improperly admitted, as varying the terms of the conditional acceptance, because that writing itself could not be understood without an explanation of the equities involved. Mr. Pirtle, an officer of the bank, testified that in informing Mr. Whittier why the bank would not accept his orders, except subject to the prior repayment of money loaned the contractor: "We told him it was because of the money due from the Tamped Oil Roads Company to Mr. McCready and the Bank of Los Angeles, and that we didn't know how much money it would require to complete those streets; that we couldn't tell what amount of money the Tamped Oil Roads Company would have over and above the amount furnished to complete them. Consequently we couldn't put ourselves in the position of assuming something, or accepting something, unless we knew that the money would be coming in to pay it." We think, in view of this testimony, that Whittier and the defendant Bank of Los Angeles contemplated an acceptance applicable only to the equities which might exist at the completion of all the contracts. Therefore we

cannot regard Whittier as the equitable owner of the unapplied moneys collected and held by the bank when he made the verbal contract of March 1, 1909, that the \$2,600 advanced should be repaid from the first collections for the finished work on the streets. It was necessary to the preservation of the security of the bank, McCready, and appellant that the street work should be finished, and it was in view of their common interest that the written contract of March 1, 1909, was made.

[3] But appellant most emphatically insists that any verbal contract made at that time must have been merged in the written agreement (Civ. Code, § 1625), and that the verbal agreement, if made, was of no avail because it sought to alter the terms of a written contract. Section 1698, Civ. Code, and section 1856, Code Civ. Proc. This would undoubtedly be true, if the written contract dealt in any way with the matter of the recoupment of the bank and McCready for their outlay of \$2,600; but it does not treat of that subject. It is in its essence merely an engagement on the part of Whittier to finish the work on two streets, and the promise of the other parties to pay him \$2,600. He fulfilled his engagement, and they performed their promise. In support of his position, appellant cites such cases as *Harrison v. McCormick*, 89 Cal. 328, 26 Pac. 830, 23 Am. St. Rep. 469; *Gardiner v. McDonogh*, 147 Cal. 315, 81 Pac. 964; *Germain Fruit Co. v. Armsby Co.*, 153 Cal. 586, 96 Pac. 319; *Beall v. Fisher*, 95 Cal. 568, 30 Pac. 773; *McDonald v. Poole*, 113 Cal. 438, 45 Pac. 702; and *Stone v. Harris*, 146 Cal. 555, 80 Pac. 711. The first three of these are all cases in which evidence was offered to show sale by sample of commodities, mentioned in written contracts, and this court held that such evidence was not admissible to vary the terms of written contracts. The fourth case was one in which a judgment was reversed, because the plaintiff had been permitted to testify to prior agreements flatly contradicting the terms of a deed which he had accepted from defendant. The fifth case was one in which the price of certain street work was fixed by written contract, and defendant sought to establish a different price by oral testimony. *Stone v. Harris* was a case in which it was held that "a clause of the contract, giving to the trustees power to act as may be directed by a majority of the owners in acreage, cannot be construed to empower such majority to authorize a lien for any work not incidental to the levee system described in the contract." Respondent contends that the verbal agreement proven in this case comes under the principle laid down in such cases as *Savings Bank of So. Cal. v. Asbury*, 117 Cal. 103, 48 Pac. 1083, in which it was said: "The rule that an agreement in writing supercedes all prior or contemporaneous oral negotiations or stipulations concerning its

matter has no application to a collateral agreement, upon which the instrument is silent, and which does not purport to affect the terms of the instrument." See, also, *Wolters v. King*, 119 Cal. 173, 51 Pac. 35; *Sivers v. Sivers*, 97 Cal. 519, 32 Pac. 571; *Guidery v. Green*, 95 Cal. 685, 30 Pac. 786. We think that this is the correct view of the matter. The consent to the repayment of the \$2,600 which had enabled Whittier to complete the work, and thus protect his own security and that of the bank and McCready, was a most natural collateral agreement, and one that did not need to be in writing. The default of their common debtor made it highly desirable for Whittier and the other interested parties to have the work on the streets finished. Plaintiff received \$2,600 for the work actually done under the written contract, and accomplished the payment of his notes for more than \$3,000 from the money collected on the Scott street work. What more natural than that the creditors whose additional advances made such work possible should desire that their contributions to the common cause should operate as a first lien on the moneys collected from the city? And what more natural than a collateral agreement, whereby Whittier should consent to such an arrangement, when the advancement by the bank and McCready placed him in a position to make valuable his contingent claims, which the default of the original contractor, unless remedied by prompt measures to complete the unfinished work, might have rendered entirely valueless? There was no error in permitting proof of the oral agreement.

What has been said about the repayment of the \$2,600 applies in large measure to the notes aggregating \$1,500. We have previously discussed plaintiff's knowledge of the fact that the assignment of all contracts for street work as of October 19, 1908, had been made to secure future as well as past advances, and we have shown that his equities were to depend upon and be determined at the time of a final settlement. Therefore the advances equal to the sum of \$1,500, although made after the signing of the provisional acceptances, created liens upon the moneys obtained from the city and those liens were payable prior to his claims.

[4] Appellant contends that the judgment should have run also against the Home Savings Bank, but, although it was shown that the Home Savings Bank had taken over certain assets of the Bank of Los Angeles there was no showing that the contracts and collections involved in this suit were among such assigned matters. Nor was there any error in refusing to give judgment against S. A. McCready and A. W. McCready, her attorney in fact, even if it be conceded that the Bank of Los Angeles acted as their agent. A. W. McCready testified positively that he never saw one of Whittier's orders from the Tamped Oil Roads Company until

the morning of the trial, and doubtless the court believed him. Additionally it must be remembered that this was an action for moneys had and received, and according to the uncontradicted testimony the Bank of Los Angeles had collected all payments made by the city on contracts for street work. There was no evidence that either of the McCreadys had received any of these moneys. No further alleged errors require notice.

The judgment is affirmed.

We concur: HENSHAW, J.; LORIGAN, J.

# In re FITZGERALD'S ESTATE.

(L. A. 2,958.)

(Supreme Court of California. Nov. 9, 1911.)

## 1. WILLS (§ 647\*)—CONSTRUCTION—RESTRAINTS ON MARRIAGE.

A will which gives to testator's widow the residue of his estate for life, "except as hereinafter qualified," and on her death the remainder to his son absolutely, and which declares that in the event of the remarriage of the widow the estate shall be divided, and one-third shall go to the widow and two-thirds to the son absolutely, gives to the widow all the residue during widowhood, and is not invalid, as in restraint of marriage, within Civ. Code, § 710, providing that conditions imposing restraints on marriage, except on the marriage of a minor, are void, but not affecting limitations, where the intent is not to forbid marriage, but only to give the use until marriage.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1533-1538; Dec. Dig. § 647.\*]

## 2. EXECUTORS AND ADMINISTRATORS (§ 315\*)—DISTRIBUTION OF ESTATE—CONSTRUCTION OF WILL—CONCLUSIVENESS.

Where the construction of a will is necessarily presented for decision on a petition for final distribution, a decision, construing the will, is conclusive on the beneficiaries.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1809; Dec. Dig. § 315.\*]

Department 1. Appeal from Superior Court, Los Angeles County; James C. Rives, Judge.

Proceedings for the final distribution of the estate of Frank A. Fitzgerald. From a decree of final distribution, Edward B. Fitzgerald appeals. Reversed and remanded.

Thos. C. Ridgway, for appellant. Hass, Garrett & Dunnigan and Charles S. Burnell, for respondent.

ANGELLOTTI, J. This is an appeal from a decree of final distribution.

The deceased died testate, leaving him surviving his wife, Lillian A. Fitzgerald, and a son, Edward B. Fitzgerald, and leaving an estate, consisting of real and personal property, valued at about \$13,000. His will, after providing for the payment of debts, expenses of last sickness and burial, and costs of administration, and the payment of a legacy of \$500 to his son, Edward B., provided as follows:

"3rd. To my wife, Lillian A. Fitzgerald, I give, devise and bequeath the entire use of the rest, residue and remainder of my estate, real and personal and wheresoever situated, for the term of her natural life, except as hereinafter qualified, and upon her death the remainder of my estate shall go to and vest absolutely in my son, Edward B. Fitzgerald.

"4. In the event, however, that my said wife shall marry again, then I will and direct that the provisions made in paragraph three, shall immediately cease and terminate, and my estate be divided as follows: to my wife, one-third and to my son two-thirds thereof absolutely and in fee simple, and in such case, the five hundred dollar legacy to my son named in paragraph two shall be estimated as a part of my estate in making said division, and if previously paid shall be deducted from the share to be received by him.

"5th. In the event that my said son shall die before me leaving no issue, I give, devise and bequeath to my wife, Lillian A. Fitzgerald, all my estate, real and personal and wheresoever situated, absolutely and without condition after the provisions of paragraph one have been met and satisfied. However, should my wife come into the possession of my entire estate as herein provided, and not marry again, or having married again have no issue, it is my desire and request that she will dispose of what may remain of my estate at her death in favor of my brother James E. Fitzgerald or his children, but this request shall in no way limit or affect her rights or power of absolute disposition of said estate."

By the will, the wife was appointed executrix without bonds.

The will having been admitted to probate, the administration of the estate was proceeded with to the settlement of the final account and distribution of the residue of the estate, valued at something over \$12,000; all charges of administration, debts, and the legacy to the son, having been paid. The contest on distribution was between the widow, who has not married again, and the son; the widow claiming that the fourth provision of the will is void, as being a prohibited condition in restraint of marriage, and that she was entitled to have distributed to her the whole residue of the estate for the term of her natural life, with the remainder over on her death to the son. The lower court adopted this view, and distributed the residue of the estate accordingly, viz., "to said Lillian A. Fitzgerald for the term of her natural life, she to have the entire use thereof during said term, with the remainder on her death to Edward B. Fitzgerald." This is an appeal by said Edward B. Fitzgerald from such decree.

[1] In this state, the rule in regard to con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ditions imposing restraints upon marriage is to be found in our Civil Code; section 710 thereof providing as follows: "Conditions imposing restraints upon marriage, except upon the marriage of a minor, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage." The main contention of appellant is that, in the case at bar, taking all of the provisions of the will together, there was no intent to forbid marriage, but simply an intent to give the use of all of the property until marriage, and that the provisions of the will should be construed as giving merely the use of all the property until marriage, and not an estate upon condition subsequent.

Learned counsel for the widow admits that all the authorities compel the conclusion that a gift to a wife "during such time as she shall remain my widow," or "until her second marriage," without other words indicating a life estate, would be a valid disposition, both under the common law and under section 710, Civil Code, and that the estate thus given would terminate ipso facto upon the remarriage of the wife. It is admitted that in such a case there would be no taking of a larger estate, determinable upon condition subsequent, but simply a valid limitation. But it is urged that the will is so written that a life estate in the residue was first given, and that it was then sought to make this life estate subject to a condition subsequent, working a divestiture in the event of remarriage.

Taking all of the provisions of the will together, the general intention of the testator is very clear. There is not the slightest indication that there was any design on his part to deter his wife from contracting another marriage, or that he had any objection whatever to her so doing. All of the provisions are consistent only with the idea that he felt it was fair and necessary that she should have the use of all the residue of his estate for her support and maintenance so long as she remained his widow, but that if she married again, thus presumably obtaining other means of support, the son ought properly to receive his fair share of the property at once, and the residue should be at once divided between the wife and the son in such proportions as seemed equitable. If she never contracted another marriage, the use of all the residue would be necessary to her during the term of her natural life, and the only thing he could fairly do for the son was to give him the remainder upon her death. If she did marry, her right to the use of all the residue should at once cease, and she would take absolutely and in fee one-third of such residue, and the son should take in the same way the remaining two-thirds. If the son should die before the testator, leaving no issue, thus leaving the wife as the sole person as to whom obligation ex-

isted to make provision for, she was to take absolutely and without condition the whole estate after payment of debts, etc., even though, as was expressly recognized, she might marry again. This was clearly the intended scheme of the testator, a scheme absolutely fair, and to which, in view of section 710, Civil Code, there can be no legal objection. Practically the only question here is whether this clear intent has been expressed in such legal form that the courts may carry it into execution. Respondent would have us, in an endeavor to defeat this intention, construe the provisions of the will as showing that the testator has adopted a prohibited mode of accomplishing his purpose, viz., that he gave his wife an estate *for her natural life*, and then attempted to make this life estate subject to a condition subsequent against remarriage. We do not think that such a construction of the language is at all necessary or reasonable.

The third and fourth provisions of the will before us, which must be read together, may certainly be reasonably construed as giving the use of the residue to the wife only to the time of her marriage. What is said in the third provision as to the use for the term of her natural life is immediately followed therein by the words "except as hereinafter qualified," and the qualification is, "in the event, however, that my said wife shall marry again," then the "provisions made in paragraph three shall immediately cease and terminate." It is precisely as though he had written "for and during her natural life, unless she shall marry again, in which case this provision shall immediately cease, and my estate be divided as follows," etc., which was substantially the language considered in *Mann v. Jackson*, 84 Me. 400, 24 Atl. 886, 18 L. R. A. 707, 30 Am. St. Rep. 358. The court there, noting the recognized distinction between *conditions* in restraint of marriage annexed to testamentary dispositions, and restraint on marriage contained in the very terms of the *limitation* of the estate given, and the policy of the courts, when not restrained by compulsory rules, "to seek to discover the intention of the testator from the whole instrument, rather than from any particular form of words," had no difficulty in deciding that, in view of the clear intent of the testator, evidenced by all the provisions of the will, "if it is here necessary and proper to recognize and maintain the distinction between a limitation and condition subsequent, the language of this will should be held to constitute a valid limitation, and not an illegal condition." In *Holbrook v. Bunker*, 213 Pa. 93, 62 Atl. 368, 2 L. R. A. (N. S.) 545, 110 Am. St. Rep. 537, the gift was to a niece of the testatrix "during the term of her natural life, or so long as she remains unmarried," with a gift over "in case of her death or marriage." It is apparent

that there is no substantial distinction between this language and the language used in the will before us. It was the view of the court that it was the intent of the testatrix, not to prohibit marriage, but simply to provide an income to the legatee so long as she was unmarried and presumably dependent on her own exertions for her maintenance. It was substantially said that it would be a reproach to the law that, of two donors intending to do exactly the same thing, one shall succeed, and the other fail as a violator of law, merely because one scrivener knew what he was about, and wrote "so long as the donee shall remain unmarried," and the other was ignorant or careless, and wrote "for life, if so long the donee remains unmarried." The words of the will were held appropriate to show an intention, not to prohibit or restrain marriage, but simply to provide for the use of the property by the donee so long as she remained unmarried, and the provision was upheld as a valid limitation. As we have seen, the plain intent of the testator here was not in any degree to restrain or even to discourage marriage by his widow, but simply to postpone any division of the residue of his estate between her and his son while she remained unmarried, and to give to her during such time the sole use thereof. The language that he has used, taking all the provisions of the will together, is appropriate to show and does show this intention, and we are satisfied that there is nothing in any of the particular words used that requires us to hold that there is any prohibited condition imposing a restraint upon marriage.

Estate of Alexander, 149 Cal. 146, 85 Pac. 308, relied on by respondent, is not in point. The will in that case, by reason of its own peculiar language, was construed as showing the intent to give the property to a daughter "on condition that she remains unmarried." It was said that the language used imported a condition, and no reason appeared why it should be given any other construction. In this regard, the provisions of the will differed materially from those of the will before us, and the construction there given does not assist here. Assuming that the will did give to the daughter, on condition that she remains unmarried, it was simply held that the condition of remaining unmarried was given full operation by referring the time of its performance to the death of the testator, and that the daughter, not having married at that time, took an absolute fee in the property, free of condition. The portion of the opinion quoted by respondent, reading as follows, viz., "But if it be said that the intent was that this language should constitute a condition subsequent, terminating her estate in fee,

and vesting it in others on her marriage at any time, the condition would be void, as in restraint of marriage," is, of course, correct; but it has no bearing whatever on the questions presented by the case at bar.

[2] It is not to be doubted that the question here discussed was necessarily presented for decision on the petition for final distribution, or that any decision reached thereon will be conclusive as to the respective rights of the devisees and legatees. See *Jewell v. Pierce*, 120 Cal. 79, 52 Pac. 132.

It follows from what we have said that the residue of the estate of deceased should be distributed in accord with the third and fourth provisions of the will.

The decree appealed from is reversed, and the matter remanded for proceedings, not inconsistent with the views herein expressed.

We concur: SHAW, J.; SLOSS, J.

#### THOMSON v. SUPERIOR COURT OF MENDOCINO COUNTY et al.

(S. F. 5,821.)

(Supreme Court of California. Nov. 9, 1911.)

JUSTICES OF THE PEACE (§ 155\*)—APPEAL—  
"RENDITION OF JUDGMENT."

Within Code Civ. Proc. § 974, authorizing appeal from a justice within a certain time after the "rendition" of the judgment, judgment is not rendered till it is "entered," and mere entry of memorandum of the verdict is not enough; as, while section 891 provides that in case of trial by jury judgment must be entered by the justice "at once," in conformity with the verdict, section 893 provides that it must be entered substantially in the form required by section 667, and that "no judgment shall have effect for any purpose till so entered."

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. § 627; Dec. Dig. § 155.\*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6082-6084.]

In Bank. Certiorari on the petition of Henry T. Thomson, directed to the Superior Court of the County of Mendocino and J. Q. White, judge thereof. Writ dismissed.

Preston & Preston, for petitioner. McNab & Hirsch, for respondents.

MELVIN, J. A writ of certiorari was issued from this court, directed to the superior court of Mendocino county and the judge thereof, requiring the certification here of the proceedings in the case of *Ed. Gibson v. Henry T. Thomson et al.*, appealed to the said superior court from the justice's court of Round Valley township, county of Mendocino. In his petition, Thomson prayed for a writ of certiorari and for mandate, to compel the setting of the appealed case for trial in the superior court.

The action in the justice's court was in claim and delivery. Trial was had before a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

jury, and a verdict in favor of the plaintiff was rendered on June 25, 1910. On the same day, the justice of the peace made an entry in his docket as follows: "June 25. Court called and a jury of twelve men sworn to try the case. After hearing the evidence they brought in a verdict for plaintiff for the return of the horse or \$100.00 in lieu thereof, and costs of suit." On June 27th plaintiff served and filed his memorandum of costs. On June 30th defendant Thomson's attorneys prepared his notice of appeal to the superior court, and served it upon plaintiff. Thomson's attorneys also caused an undertaking on appeal in the sum of \$300 to be prepared. About July 18th the notice of appeal was sent to the justice of the peace by the attorneys for Thomson, accompanied by a letter, in which he was requested to make sure that the judgment was entered as of June 25, 1910, and to file the notice of appeal before filing the bond. Similar directions were sent with the form of appeal bond to the defendant, who caused it to be signed by two sureties. It was then given to the justice for filing. The undertaking, however, was filed July 18, 1910, and the notice of appeal on July 20th, 19 days after service of said notice on the plaintiff. On the 15th of August, 1910, the justice of the peace entered in his docket a formal judgment.

These proceedings were duly certified to the superior court, and respondent in that cause moved said court to dismiss the appeal upon the grounds that (1) it was premature, as no judgment had been entered on June 25, 1910, and no appeal had been taken within 30 days after the entry of judgment of August 15, 1910; and that (2) no undertaking on appeal had been filed with the justice of the peace. The motion was granted upon both grounds; the court basing the ruling as to the second ground upon the circumstance that the undertaking was filed before and not within 30 days after the filing of the notice of appeal. The superior court also denied appellant Thomson's motion to set the cause for trial. In the answer to the petition herein, counsel for respondent point out the fact that the undertaking on appeal, although it contains a form of verification, signed by both sureties, shows no signature to the jurat by the justice of the peace, or any other person empowered to administer and certify oaths.

The most important question for consideration is whether or not the entry of the verdict by the justice of the peace on June 25, 1910, was a sufficient compliance with the law's requirement that the judgment shall be entered. Section 893 of the Code of Civil Procedure provides that: "The judgment of a justice of the peace must be entered substantially in the form required in section 667, and where the defendant is subject to arrest and imprisonment thereon, the fact must be stated in the judgment. No judgment shall have effect for any purpose until

so entered." The last sentence was added to the section in 1907. Respondent contends that by the addition of the final sentence the Legislature intended to place appeals from justices' courts upon the same footing as those taken from judgments of the superior court, and to make the section above quoted analogous to section 664 of the same Code. He insists, therefore, that an appeal taken from a judgment in a justice's court prior to the final entry of such judgment is premature, and must be dismissed; citing *McHugh v. Adkins*, 117 Cal. 228, 49 Pac. 2; *Bell v. Staacke*, 137 Cal. 307, 70 Pac. 171; *Estate of More*, 143 Cal. 493, 77 Pac. 407. In reply to the contention that the memorandum of the jury's verdict in the docket is practically an entry of the judgment, he insists that, since section 667 of the Code of Civil Procedure, to which reference is made by section 893 of the same Code, prescribes the form of a judgment, the form has become substance, citing *Simmons v. McCarthy*, 118 Cal. 624, 50 Pac. 761. Our attention is also called to the fact that the justice is required to enter in his docket separately "the verdict of the jury and when received," and "the judgment of the court specifying the costs included and the time when rendered." Subdivisions 8 and 9 of section 911, Code Civ. Proc.

Petitioner calls our attention to *Lynch v. Kelly*, 41 Cal. 233, and *Montgomery v. Superior Court*, 68 Cal. 407, 9 Pac. 720, as having settled the question here presented. But respondent insists that those decisions are not now in point, because they dealt with the law as it existed before the mandatory provision contained in the last sentence of section 893, Code of Civil Procedure, had become a part of that section. The former case was one in which there was an attempt to set aside a sale, made under an execution issued from a justice's court, on the ground that no formal entry of judgment had been made prior to the issuance of execution. Whether there could be an appeal from a judgment when no judgment had been entered was not considered. The case of *Montgomery v. Superior Court*, supra, was considered by the District Court of Appeal of the Third appellate district, in the recent case of *Jane v. Superior Court*, 116 Pac. 293. The court was considering a case exactly like the one before us in the particular that an attempted appeal from a judgment of a justice's court had been dismissed for want of jurisdiction, where the transcript of the justice's docket showed only an entry of the verdict of the jury. The court, by Mr. Presiding Justice Chipman said: "Section 974, Code of Civil Procedure, provides that: 'Any person dissatisfied with a judgment rendered in a civil action in a police or justice's court, may appeal therefrom to the superior court of the county, at any time within thirty days after the rendition of the judgment.' And the notice must state wheth-

er 'the appeal is taken from the whole or a part of the judgment.' Section 891, Code of Civil Procedure, reads: 'When a trial by a jury has been had, judgment must be entered by the justice at once, in conformity with the verdict.' And the judgment 'must be entered substantially in the form required in section six hundred and sixty-seven.'

\* \* \* No judgment shall have effect for any purpose until so entered.' Section 893, Code Civ. Proc. It seems to us that the appeal was prematurely taken, and that the superior court did not acquire jurisdiction thereby. *Montgomery v. Superior Court*, 68 Cal. 407, 9 Pac. 720, is cited by petitioner in support of the claim that the verdict was a judgment, within the meaning of the statute. In that case the justice's docket contained the following entry: 'Jury fees paid by defendant and judgment entered for the defendant for costs of suit. Defendant's costs being \$25, for witness and jury fees, and also the sum of \$1.75 for constable fees, total \$26.75. Plaintiff's costs being \$17.' It further appears that the petitioner went to trial in the superior court, and, without objection to the regularity of any proceedings, defended the case on its merits. Said the court: 'Having thus taken the chances of obtaining a verdict in his favor, we think his objection now comes too late.' It was also held that the court had jurisdiction, because the justice's record showed 'that a judgment had been entered in conformity with the verdict, and appears to be in all respects regular and sufficient.' We do not think that the justice must formulate a judgment with that particularity required of judgments required to be entered in the superior court; but that he should make some entry in his docket, showing that he has rendered judgment on the verdict, we do think is essential to a substantial compliance with the statute. His duty to enter judgment is in a sense ministerial, and its performance could probably be enforced by mandate; but nevertheless the statute requires this of him. Until such entry is made, there is no judgment from which an appeal may be taken, and, if the appeal is taken before the justice enters judgment on the verdict, it confers no jurisdiction on the superior court." We see no escape from the conclusion reached in the above case.

Our attention has been called to the difference between section 939 of the Code of Civil Procedure and section 974 of the same Code; the one providing that an appeal from a judgment in a court of record may not be taken until after the entry of judgment, while the time for an appeal from a judgment in a justice's court begins to run upon its rendition. We think it is apparent from an examination of the section of our Code, relating to justices' courts, that a judgment therein is not "rendered" until it is "enter-

ed," or can legally be held to be "entered." There is no other way of "rendering" a judgment in such a court. See sections 891, 892, and 893, Code Civ. Proc. It is in this sense that the word should be held to be used in section 974, Code of Civil Procedure. Doubtless it is the justice's duty to enter the judgment promptly. Section 891, Code Civ. Proc. But, until he does so, there is no "rendition" of the judgment, in the sense used in section 974. If he refuse, he may be compelled to act.

Our conclusion upon the point discussed above makes it unnecessary to review the other questions presented by the record.

Let the writ be dismissed.

We concur: ANGELLOTTI, J.; LORIGAN, J.; SLOSS, J.; SHAW, J.; HENSHAW, J.

LANG v. LILLEY & THURSTON CO. et al.  
(S. F. 5,925.)

(Supreme Court of California. Nov. 7, 1911.)

APPEAL AND ERROR (§ 607\*)—RECORD—MANNER OF PROCURING.

Code Civ. Proc. §§ 941a, 941b, 941c, enacted by St. 1907, p. 753, authorizing the taking of an appeal by the filing of a notice of appeal in the office of the clerk of the trial court, and sections 953a, 953b, 953c, enacted by St. 1907, p. 750, providing that when an appeal is taken a typewritten transcript may be made and filed, are independent, and where an appeal is taken under the first sections appellant may file a printed transcript and copies thereof as required by the rules of the Supreme Court, or he may file the typewritten transcript, or where he takes an appeal by serving and filing a notice of appeal and undertaking, as authorized by section 940, he may support it either by a transcript prepared and filed under sections 953a, 953b, 953c, or by a transcript printed and filed as directed by the rules of the Supreme Court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 607.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; J. M. Seawell, Judge.

Action by Joakim Lang, as administrator of Albert Lang, deceased, against the Lilley & Thurston Company and another. From a judgment for defendants, plaintiff appeals. Motion to dismiss appeal denied.

Costello & Costello, for appellant. Samuel Rosenheim and Bernard Silverstein, for respondents.

PER CURIAM. The respondents move to dismiss the appeal on the ground that no proper transcript on appeal was filed within the time allowed by the rules of this court. The appeal is from the judgment only.

The facts upon which the motion to dismiss is based are that the appeal was taken in the manner provided in sections 941a, 941b, and 941c of the Code of Civil Procedure;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



that the transcript is printed and filed in this court in accord with our rules; and that no notice was given to the clerk to prepare a transcript on appeal, and it was not prepared in the manner provided in sections 953a, 953b, and 953c of said Code.

The act of 1907, enacting sections 941a, 941b, and 941c as new sections of the Code of Civil Procedure (Stats. 1907, p. 753), provides that an appeal may be taken by the filing of a notice of appeal in the office of the clerk of the superior court. Under this mode of taking an appeal, no undertaking on appeal need be given, and the notice of appeal need not be served upon the adverse party.

The act of 1907, enacting sections 953a, 953b, and 953c as new sections of said Code (Stats. 1907, p. 750), provides that, when an appeal is taken, a typewritten transcript on appeal may be made up, as therein directed, and may be filed without printed copies.

These two statutes are entirely independent of each other. If an appeal is taken under sections 941a, 941b, and 941c, the appellant may follow it up by filing a printed transcript and copies thereof, as required by the rules of the Supreme Court, or, at his option, by filing the typewritten transcript authorized by sections 953a, 953b, and 953c. Conversely, if he takes his appeal as provided in section 940, Code of Civil Procedure, by serving and filing a notice of appeal and undertaking on appeal, he may support such appeal either by a transcript prepared and filed under sections 953a, 953b, and 953c, or by a transcript printed and filed as was customary previous to the enactment of those sections and as directed by the rules of this court.

The consequence is that the motion of the respondents is not well taken. The court has jurisdiction of the appeal by the filing of a notice either under section 940 or under sections 941a, etc., and that jurisdiction is not ousted by the method of preparing or filing the transcript. It may be gotten up and filed under the old method or under the new method, as the appellant may choose.

The motion is denied.

# ERGO v. MERCED FALLS GAS & ELECTRIC CO. (Sac. 1,751.)

(Supreme Court of California. Nov. 9, 1911.)

## 1. MASTER AND SERVANT (§ 236\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

A servant who momentarily forgets a known danger, merely because he fails to exercise his memory, and where nothing has happened to confuse or distract him, is guilty of contributory negligence, precluding a recovery for injuries received in consequence thereof.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 681; Dec. Dig. § 236.\*]

## 2. MASTER AND SERVANT (§ 236\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a servant knew that electric wires of his master were dangerous, and that for that reason he deemed it necessary to avoid them,

and that his coming in contact with them was not due to ignorance of the danger, but due to his forgetfulness at the moment of doing a particular work in the line of his service, he was, as a matter of law, guilty of contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 681; Dec. Dig. § 236.\*]

## 3. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION.

A part of an instruction, when attacked as declaring an erroneous statement of law, cannot be taken from its context, nor separated from the other instructions given; but it must be construed with reference to the entire instructions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

In Bank. Appeal from Superior Court, Merced County; L. W. Fulkerth, Judge.

Action by D. J. Ergo against the Merced Falls Gas & Electric Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

F. G. Ostrander and C. H. Wilson, for appellant. F. W. Henderson, for respondent.

PER CURIAM. The defendant has appealed from the judgment below, and also from an order denying a new trial.

Plaintiff sued to recover damages caused by an electric shock received by him while he was in the service of the defendant. The basis of his complaint is that he was directed by defendant to work in a place where he would be in close proximity to the defendant's wires, charged with a high power and dangerous electric current, and that defendant negligently failed to inform him that the electricity was then turned on to the wires, or of the dangers therefrom; that he did not know the current was on, and was ignorant of the dangers thereof and of the means of avoiding shocks therefrom; and that, while working in that place as directed, he received a severe shock of electricity from said wires, causing the damage sued for.

The defendant denied that it had directed the plaintiff to work in the dangerous place alleged, and alleged that it gave the plaintiff directions to avoid the wires in question, and instructed him in regard to the dangers from the electricity carried by them; and that the accident was caused by his failing to observe due care with respect thereto, while in proximity to the wires. Inasmuch as we have concluded that the latter defense is established by the plaintiff's own testimony, we shall not refer to the place in which he was at work further than is necessary to elucidate his testimony.

The defendant is supplying electricity to the city of Merced and its inhabitants by electricity from a generating plant at Merced Falls, on the Merced river. It is carried on three wires to a transformer house in Merced, whence it is distributed to the consumers. The accident occurred at the transformer house, which was then in course of con-

struction. Plaintiff was working for defendant as a plumber's helper, putting water pipes in said transformer house to connect with perforated cooling pipes on the roof thereof. The house had three roofs, but we are concerned with only two, which we shall call the main roof and the upper roof. The main roof covers the entire house. The upper roof covers only eight feet in width of the main roof, four feet on each side of the comb thereof, and is nearly five feet above the main roof, with walls extending from its eaves down to the main roof, both at the ends and sides. The cooling pipes were situated on the upper roof, one on each side of the crest. The plaintiff and a plumber named Bone were laying pipes to connect the water main with these cooling pipes. The three power wires, from one of which plaintiff received the shock, extend from a pole near the south end of the house into the space between the two roofs, and were there fastened to three insulators, 15 inches apart, on a cross arm, from which they were carried to the transformers. As plaintiff understood and undertook to execute the directions of the defendant with respect to the manner of attaching these connecting pipes, it was necessary to run the pipe into the space between these two roofs, and there, by means of an elbow, continue it by a so-called standpipe, about five feet long, through the roof to a connection with the cooling pipes. It was while he was engaged in attaching this standpipe to the elbow below, after it had been handed to him by Bone, who was on the upper roof above, through a hole which Bone had made in the roof for that purpose, that the plaintiff received the injury. On the north end of the house, there were other wires passing from the house, for the distribution of the current.

In answer to special interrogatories, the jury found that the plaintiff believed that the wires at the point where he was then engaged were free from electric current and harmless, and that he had not been warned of the danger which might result from coming in contact with said wires sufficiently to enable him to appreciate the extent of the danger. It also found specially that he had not been warned to be careful of said wires. In view of the evidence, this finding must have been intended to mean that he had not been warned to be careful with respect to the wires entering the south end of the house. The evidence showed without conflict that he had been warned with regard to the wires at the north end.

In regard to the warning given to him by the defendant, plaintiff's testimony was as follows: One Parker, defendant's foreman in charge of a gang of men laying water mains, directed Bone and the plaintiff how they should lay the pipes. In doing so, he first placed a ladder at the north end of the house, going up the ladder to the top of the roof; plaintiff following next up the ladder, and

Bone coming last. The wires passing out of the north end of the house came within about 18 inches of the ladder. As they ascended the ladder, Parker said, "Look out for the wires." These wires were then in plain sight, and no others were visible from that point. This was the only warning that was given to the plaintiff. Parker, it is true, said that he told Bone and Ergo how to lay the pipes, and directed them "to keep away from all wires, as they were dangerous." In view of the verdict in favor of the plaintiff, we must regard the plaintiff's testimony on this subject as correct, so far as it is inconsistent with that of Parker. It may be conceded that this warning would not have been sufficient to a person who was himself ignorant of the characteristics or dangers of electricity when carried on such wires. It appears, however, from the whole of the plaintiff's testimony that he was not so ignorant as to be unaware of this danger, although he endeavored to impress the jury with the fact that he was. The pleadings admit that at that time he was 23 years of age.

His testimony in chief on this point was in effect as follows: At the time he went into the space between the roofs to attach the standpipe, he did not know that there was a current of electricity passing over the wires at that end of the building, and did not think that there was. He did not know what the wires were. He knew they had nothing but common wire. He did not know that there were any electric wires, or anything about the wires, or that there were wires conducting the electricity from the plant of the defendant to the transformer. He had never had any experience in electrical work, and knew nothing about the handling of electrical wires.

His testimony on cross-examination was as follows: When 12 years of age he went to work as cashboy in a big Chicago department store, which was lighted by electricity. The city of Chicago was also lighted by electricity at that time. He knew that electricity furnished light, but did not know it caused the light. He had never heard that, and had never paid any attention to it. He had lived six months in Alameda, which city was lighted by electricity, and had electric cars running. He had ridden on them often, and had seen the motormen stop and start the cars, but had never asked any questions about it, and did not know how they were propelled. He had seen them climb the hills in San Francisco, and had thought it singular that they could do it without horses, but made no inquiry, and knew not how it was done, nor what the power was. The city of Merced was lighted with electricity, and he had lived there four or five years immediately prior to the accident. He had seen pumps working in Merced with wires connecting with them, but did not make any inquiry about them. He was absolutely ignorant of what is meant

by a current of electricity, or a live wire, and he did not know that electric wires carried a force of electricity or power that was used for power and lights. When he was cautioned to look out for the wires, he understood that it was dangerous to come in contact with them, and that he must keep away from them. When Parker showed him how to lay the pipe at the south end of the building, where the injury occurred, he gave no warning to be careful of the wires. When he went in between the two roofs to attach the standpipe, he saw the three wires leading in there, and was careful to avoid them. Being asked "Why?" he said, "In case there was electricity in them, and in case there was not," and added that if there was he would avoid the wire, but that he did not know that it would be dangerous if he came in contact with it, nor whether the caution given applied to the wires at the south end or not. At the moment he was attaching the standpipe to the elbow, he did not pay any attention how close he was to the nearest wire. He was then busy getting the pipe together, and wanted to be quick, because he and Bone had been told that they were slow, and that they were to hurry the work. This, he supposed, caused him to forget everything about the wires at the moment of adjusting the pipe, although he had thought of them a moment before. He saw the wires above him after he got in between the roofs, but when Bone passed the piece of pipe through the hole in the roof down to him he took hold of it, and then the wires passed out of his mind entirely. He attempted to insert the pipe into the elbow, received the electric shock, and was rendered unconscious. The jury found that the piece of standpipe, in order to extend from the roof above to the elbow, must be passed within 7 inches of one or more of the wires.

[1, 2] It is obvious from this testimony that the defendant was aware of the fact that the wires at the south end of the transformer house were dangerous, and that for that reason he deemed it necessary to avoid them, and that his coming in contact with them was not due to ignorance of the danger, but to his forgetfulness thereof at the moment of attaching the pipe. The case is not like *Giraudi v. Electric Imp. Co.*, 107 Cal. 125, 40 Pac. 108, 28 L. R. A. 596, 48 Am. St. Rep. 114, and similar cases, where it is said that a momentary failure to recollect something which had been observed some time in the past, when there is no reason or occasion to take note of it, does not, as matter of law, constitute negligence, but may or may not be negligence in fact according to the circumstances, and that in such a case it is for the jury to consider whether or not it was negligence. There was nothing unusual or unexpected in the work the plaintiff was then doing. The complaint that they were slow and the order to hurry up was made to them in the after-

noon of the previous day. There was no emergency or unexpected event at the moment of attaching the pipe to confuse or agitate him; no sudden necessity for haste or hurry in that particular operation, or at that moment, to distract his attention from the wires. He had them in mind the moment before, and avoided them. It is negligence for one thus to remember and avoid a known danger in one moment, and forget it the next, when nothing has happened to confuse or distract him, or cause such forgetfulness, except his own failure to exercise his memory. The case is not one of the exceptional kind, in which such forgetfulness may not be incompatible with reasonable care. *Brett v. Frank*, 153 Cal. 272, 94 Pac. 1051. It follows therefore that the injury the plaintiff received was caused in part at least by his own contributory negligence. Such being the case, he cannot recover from the defendant the damages caused thereby.

[3] The defendant claims that the court erred in instructing the jury as to what constitutes a preponderance of the evidence. A part of the instruction complained of is as follows: "If the weight of all the evidence in the case tending to prove the fact is of greater weight than all the evidence tending to disprove the fact, then the fact is said to be proven by a preponderance of the evidence." This passage taken alone is erroneous. It is obvious that the evidence tending to prove a fact might be so slight that it would fail to satisfy the jury of the existence of the fact, and yet it might be of greater weight than other evidence introduced, which would tend to disprove the fact. In such case the fact could not be said to be proven, either by a preponderance of the evidence or at all. But this passage cannot be thus taken from the context, nor separated from the other instructions given. It was contained in an instruction pointing out to the jury the difference between the proof, beyond a reasonable doubt, that was necessary to justify a conviction in a criminal case, and the proof by a preponderance of the evidence, necessary in a civil case. In instruction 10, given at the request of the defendant, the court charged that: "The rules applicable to a case of this character cannot be given you in a single sentence, and that there must necessarily be many exceptions and modifications to many of the rules of law that I give to you. For that reason, you must consider this charge as a whole, and so apply it as a whole to all the evidence in this case. You are not at liberty to judge the evidence by some single rule that you may pick out from this charge, and which seems to meet with your approval, but you must judge the evidence by all of the rules, with their exceptions and modifications, as I give them to you in this charge." Other instructions declare that all the facts necessary to establish the plaintiff's case must be proven by a pre-

ponderance of the evidence. Instruction 31, given at the request of the defendant, was in part as follows: "The burden of proving carelessness or negligence rests on the plaintiff, and in this case, before plaintiff is entitled to your verdict, he must produce a preponderance of the evidence; that is to say, show to a moral certainty, or, in other words, introduce that degree of proof that produces conviction in an unprejudiced mind, that the defendant was guilty of carelessness or negligence directly causing the accident and injury complained of. \* \* \* All that is required of defendant is that it produce evidence enough to offset the effect of plaintiff's evidence, and if, at the end of the case, the plaintiff has not shown by a preponderance of evidence that the defendant was guilty of carelessness or negligence directly causing the accident or injury complained of, or if the evidence is equally balanced, or if you are satisfied from the evidence that the accident was due to the carelessness or negligence of the plaintiff, or that by the exercise of ordinary care plaintiff could have guarded against or prevented the same, then I instruct you that your verdict in this case must be in favor of the defendant." In view of these latter instructions, we cannot say that the passage from the instruction first quoted would have been sufficiently injurious of itself to have justified the reversal of the order denying a new trial. But for the reasons heretofore given the motion should have been granted.

The judgment and order are reversed.

#### MARRE et al. v. UNION OIL CO. OF CALIFORNIA et al. (Civ. 895.)

(District Court of Appeal, Second District, California. Oct. 2, 1911. Rehearing Denied Nov. 1, 1911. Denied by Supreme Court Dec. 1, 1911.)

#### 1. INJUNCTION (§ 135\*)—REMEDY IN DAMAGES—DENIAL.

Where an owner of land granted defendant the right to lay pipe lines for carrying oil and telephone and telegraph lines, to be used in connection with the operation of such pipe lines, and defendant was not insolvent, it was not an abuse of discretion to refuse a preliminary injunction restraining the laying of the pipe lines, on the ground that they were to be used to carry water, and not petroleum, where in the affidavits of defendant it was stated that the pipe line would be used to transport oil and its products, and other fluids defendant might require in the conduct of its business.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 135.\*]

#### 2. APPEAL AND ERROR (§ 954\*)—DISCRETION OF TRIAL COURT—INJUNCTIONS.

The issuance of a preliminary injunction rests in the discretion of the trial court, and will not be interfered with in the absence of an abuse of such discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3818-3821; Dec. Dig. § 954.\*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

Action by Gaspar O. Marre, individually and as administrator with the will annexed of the estate of Luigi Marre, and another, against the Union Oil Company of California and another. From an order vacating a temporary restraining order, plaintiffs appeal. Affirmed.

S. V. Wright, for appellants. Paul M. Gregg, for respondents.

JAMES, J. [1] Plaintiffs brought this action for the purpose of securing an injunction to prevent defendants from laying a pipe line along and across a certain strip of land in the county of San Luis Obispo for use in the conveyance of water. Upon the filing of a verified complaint an order was issued to defendants requiring them to appear before the court, and show cause why an injunction pendente lite should not be granted. A temporary restraining order was made to prevent the doing of the acts alleged as being threatened to be done on the part of defendants. The matter came on to be heard, the plaintiffs resting their application upon an amended complaint filed at the time of the hearing on the order to show cause. Defendant resisted the application for a temporary injunction, and filed in evidence two affidavits and two certain deeds, whereupon the court denied said application and vacated the temporary restraining order theretofore made. From this order the plaintiffs have appealed.

It appears without dispute by the amended complaint of plaintiffs, and the affidavits submitted on the part of defendants, that the strip of land along which the pipe line was threatened to be constructed was included within a certain right of way acquired for railroad purposes in 1883 by the Pacific Coast Railway Company, and over which said company was then operating a line of railroad. The fee title to this land was admittedly in the estate of Luigi Marre, deceased, represented by the plaintiff Gaspar O. Marre as administrator thereof. In January, 1906, plaintiff Gaspar O. Marre as administrator, after due proceedings had authorizing him so to do, deeded to the defendant corporation certain lands, said deed including within its terms a grant of a right of way to defendant across and along land which included the right of way theretofore granted to the Pacific Coast Railway Company. This latter grant authorized defendant to "lay pipe lines for the carrying of petroleum oil and its by-products, and telephone and telegraph lines to be used in connection with the operation and maintenance of said pipe lines." over and along the property just mentioned. The contention of plaintiffs is that they were entitled to a temporary in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

junction because it was not denied on the part of defendant that the use to which the pipe line about to be constructed by it was to be put was to have water conveyed through the same and not petroleum oil or any of its by-products. It seems very clear to us from the recitals in the deed of conveyance by which the right of way for pipe lines was acquired by defendant that the uses for which the way was granted did not include the use of a pipe line for the conveyance of water. However, in one of the affidavits submitted on the part of defendant, the following statement appears: "That for the purpose of transporting oil and its products, and for the purpose of transporting such other fluids as it may require in the proper conduct of its business and have the right to transport by means of pipe lines, said defendant is now engaged in constructing a four-inch pipe line from Port San Luis to its said lands at Avila, which said pipe line is to be constructed of standard wrought iron capable of standing high pressure, and is adapted to and capable of being used for the transportation of any and all fluid substances." With this affidavit before it, the trial court then had evidence that a part at least of the uses to which the pipe line was to be put were those which could properly be claimed as the right of defendant under the terms of the conveyance made to it. It may be said that there was no sufficient denial of the fact asserted by plaintiffs, that among other uses the defendant proposed to have water conveyed through said pipe line. The relief asked for in the action included an injunction to restrain the laying of the pipe, as well as the transportation of water therethrough. Upon the evidence before it the court was justified in concluding that there was insufficient ground to entitle plaintiffs to an injunction to prevent the laying of the pipe. While it may be admitted that, if the facts as shown to the court had constituted the whole of the evidence considered upon a final trial of the action, a sufficient showing would then be made out to entitle plaintiffs to an injunction to prevent water from being conveyed through the pipe line constructed in the manner proposed by defendant. Still it cannot be said that in denying the temporary writ the trial court abused the discretion committed to it. It does not appear that defendant is insolvent or could not respond to a claim for any damages which might be caused to plaintiffs by the commission of any of the acts complained of pending trial of the action, nor that any judgment which the court might finally make in favor of the plaintiffs would be rendered ineffectual because of the failure of the court to issue a temporary injunction.

[2] It is uniformly held that the matter of the issuance of a preliminary injunction is one resting in the sound discretion of the

court, and that an appellate court will not interfere with the action of the trial judge in such a case, except where a palpable abuse of discretion is shown. *Patterson v. Board of Supervisors*, 50 Cal. 344; *Efford v. South Pacific C. R. Co.*, 52 Cal. 277; *White v. Nunan*, 60 Cal. 408; *Bigelow v. City of Los Angeles*, 85 Cal. 614, 24 Pac. 778; *Marks v. Weinstock, Lubin & Co.*, 121 Cal. 53, 53 Pac. 362.

The order is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

REEG v. McARTHUR et al. (Civ. 909.)  
(District Court of Appeal, Second District, California. Oct. 2, 1911.)

1. GUARANTY (§ 4\*)—CONTRACTS—LIABILITY INCURRED.

A contract for an exchange of lands signed by defendant and codefendant required defendant to execute a note as a guaranty that the other party would realize the amount of a note out of certain personalty. *Held*, that any liability against codefendant concerning the note is limited to liability upon defendant's failure to execute the note, and that codefendant is not a guarantor of the payment thereof.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 3-6; Dec. Dig. § 4.\*]

2. COURTS (§ 169\*)—JURISDICTION—AMOUNT IN CONTROVERSY.

Where a complaint contains a count not stating a cause of action, and the remaining counts demand an aggregate sum of less than \$300, the superior court has no jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 413-436; Dec. Dig. § 169.\*]

3. PLEADING (§ 238\*)—AMENDMENT—RIGHT TO AMEND.

Leave to amend a complaint is properly refused where it is clear that by no amendment could a sufficient cause of action be stated within the court's jurisdiction.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 238.\*]

Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by George Reeg against Mrs. L. M. McArthur and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Hanson, Hackler & Heath, for appellant. M. E. C. Munday, for respondents.

JAMES, J. [1] This action was brought by plaintiff to recover certain sums of money from the defendants; separate causes of action being set forth in four different counts in the amended complaint. These alleged causes of action were founded upon an agreement entered into between plaintiff and defendants, whereby certain real property in the state of Minnesota belonging to C. W. McArthur was agreed to be exchanged for certain real property belonging to one Mary K. Reeg, which was located in the county of Los Angeles. The plaintiff, George Reeg,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

prosecuted this action as the assignee of the said Mary K. Reeg. A demurrer to the amended complaint interposed on behalf of defendant Mrs. L. M. McArthur was sustained by the court without leave to amend, and judgment followed accordingly. From this judgment plaintiff appeals.

The agreement for the exchange of the real property is attached to the amended complaint as an exhibit, and recites the conditions which were to affect the transaction. Among other things, it is provided that the title to the land of C. W. McArthur was to be conveyed clear, except that a certain mortgage of \$3,000 was to be assumed by Mary K. Reeg, and the following condition was then inserted in the agreement: "Said C. W. McArthur to execute a note for \$500 payable on or before 1 yr. after date. Said note is to be given as a guarantee that she (meaning Mary K. Reeg) will receive \$500 out of person property such as hay, grain, horse and buggy and amt. of rent still due from tenant, all of which is now on the 1st above des. piece of property." The agreement was signed by C. W. McArthur, the latter also affixing the name of L. M. McArthur thereto, which we must assume was done with authority of the latter. The first cause of action set out in the complaint refers to the matter of price obtained for the personal property, and it is there alleged that \$40 only was all that Mary K. Reeg received upon a sale of said personal property, leaving a balance of \$460 which it was alleged was due from defendants on that account. In the cause of action referred to it is alleged that the defendant C. W. McArthur executed the \$500 note in accordance with the terms of the agreement. If the defendant Mrs. L. M. McArthur had any liability imposed upon her with respect to this promissory note, it was only a liability which might accrue upon the failure of C. W. McArthur to execute the note which he had agreed to execute. Under none of the conditions stated in the writing, can it be said that Mrs. L. M. McArthur became a guarantor of the payment of the note of C. W. McArthur. The amended complaint, therefore, considering the first count thereof alone, stated no cause of action against defendant L. M. McArthur, and the demurrer thereto was properly sustained by the court.

[2] In the other three counts of the amended complaint, plaintiff made claim for certain moneys alleged to be due as interest on a mortgage, unpaid taxes, etc. The aggregate money demand of said causes of action did not amount to the sum of \$300, and therefore the superior court had no jurisdiction to entertain them. By the demurrer interposed by defendant L. M. McArthur the ground of want of jurisdiction was assigned as an objection; and with the first cause of action eliminated from consideration, as it must be for the reasons we have stated, the demurrer

was properly sustained on the latter ground also.

[3] There was no error in the order made by the court denying plaintiff leave to amend, for the reason that it manifestly appeared that by no amendment could a sufficient cause of action be stated against Mrs. L. M. McArthur of which the superior court had jurisdiction.

The judgment is affirmed.

We concur: ALLEN, P. J.; SHAW, J.

# SOUTHERN CALIFORNIA MUSIC CO. v. SKINNER. (Civ. 963.)

(District Court of Appeal, Second District, California. Oct. 2, 1911.)

## SALES (§ 479\*)—CONDITIONAL SALE—ACTION—PLEADING—COMPLAINT.

In an action to recover a money judgment, the complaint alleged that defendant in 1909 purchased a piano from plaintiff, executing his note and an agreement in payment therefor. The note was due in four years, and the agreement provided that defendant should pay in installments of \$3 per month and that on default in any installment plaintiff might rescind the contract, and if such monthly payment was unpaid for more than 60 days the plaintiff might declare the whole sum due. The complaint further alleged that the defendant had defaulted and that plaintiff had declared the balance of the sum due. *Held*, that the complaint did not state a cause of action upon the note, for it was not due for four years, and no facts were alleged under which it might be declared due prior to the date provided, and it did not state a cause of action on the agreement because there was no allegation that defendant had been in default for 60 days.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1436; Dec. Dig. § 479.\*]

Appeal from Superior Court, Orange County; Frank F. Oster, Judge.

Action by the Southern California Music Company against M. W. Skinner. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

F. C. Spencer, for appellant. George Clark, for respondent.

SHAW, J. Action to recover a money judgment. The complaint alleges a sale by plaintiff to defendant of a piano for the sum of \$405; that on July 15, 1909, defendant executed and delivered to plaintiff his promissory note and agreement in payment therefor, a copy of which, it is alleged, is attached to the complaint; that no part of said sum of \$405, other than the sum of \$25, has been paid; that defendant has defaulted in his payments as provided in the agreement, and plaintiff has declared the balance of said sum due, no part of which balance has been paid. It is further alleged that by the terms of the note defendant agreed that should suit be brought to enforce

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the payment thereof 10 per cent. thereof should be added to any judgment rendered thereon as attorney's fees in said action. Following the complaint, as appears from the record, is a promissory note as follows: "380.-00. Los Angeles, Cal., July 15, 1909. Forty-eight months after date, for value received, I promise to pay to the order of Southern California Music Co. at their office in Los Angeles, California, three hundred and eighty dollars in lawful money of the United States, with interest at the rate of six per cent. per annum until paid. Should suit be brought to enforce the payment of this note it is agreed that 10 per cent. be added for attorney's fees, [Signed] M. W. Skinner." Following this, as shown by the record, is an agreement signed by defendant, by the terms of which he agreed to pay plaintiff the sum of \$405 for the piano in the following manner, to wit: \$25 cash on delivery of the instrument, and the balance in installments of \$8 per month, payable on the 15th day of each month. It is further provided that, in case defendant fails to pay either of the monthly installments when due, plaintiff may rescind the contract and take possession of the piano, or, if such monthly payment remains due and unpaid for a period of 60 days, plaintiff may declare the whole sum still unpaid under the contract due and payable. Defendant demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and also upon the ground that the same was uncertain, in that it could not be determined therefrom whether plaintiff's cause of action was based upon the promissory note, or upon the alleged agreement, or upon both. The demurrer was submitted to the court without argument and overruled, and upon the trial of the case the court gave plaintiff judgment for the sum of \$380 and interest thereon, together with \$38 attorney's fees, in accordance with the provision of the promissory note. Defendant appeals from this judgment.

We think the demurrer should have been sustained upon both grounds. Not only is the complaint uncertain, as alleged in the demurrer, but, however it may be regarded, it clearly fails to state a cause of action. The suit was instituted some six months after the date of the note, but the note by its terms was not due until four years after the date thereof. The agreement contains no reference whatever to the note, and the complaint is silent as to any allegation of fact under which it might be declared due prior to the date when by its terms it was made payable. Hence no facts are alleged which could entitle plaintiff to a judgment upon the promissory note.

The complaint alleges "that defendant has defaulted in his payments as in said contract provided, and plaintiff has declared the balance of the said sum now due." It was no

doubt the intention of plaintiff to allege facts which under the terms of the contract gave it the right to declare the whole sum due; but the agreement contains no provision under which the whole amount could be so declared merely because defendant had made default. The provision of the contract is that "if payments to be made under this contract shall be due and unpaid for a period of 60 days the plaintiff may at its option declare the balance still unpaid under this contract due and payable." To constitute a cause of action for a breach of the contract, assuming that such right exists, the complaint should not only allege that defendant has made default in the payment of one or more of the installments, but that such default has continued for the period of 60 days. It does not appear from the complaint that any installment, the payment of which was required under the terms of the contract, had been due and unpaid for such period.

For the reasons given, the judgment is reversed, and the trial court instructed to make an order sustaining defendant's demurrer.

We concur: ALLEN, P. J.; JAMES, J.

BARBREE et al. v. KINGSBURY, Register of State Land Office. (Civ. 869.)

(District Court of Appeal, Third District, California. Sept. 29, 1911. Rehearing Denied by Supreme Court Nov. 27, 1911.)

PUBLIC LANDS (§ 144\*)—PATENTS—VALIDITY OF APPLICATION—AMOUNT APPLIED FOR.

Pol. Code, § 3495, provides that one desiring to purchase a tract of school lands, not less than the smallest legal subdivision mentioned in a certain section, must make affidavit whether the land is suitable for cultivation, and, if not, that applicant has not entered any part of such lands which, together with that now sought to be entered, exceeds 640 acres; and further provides that land unsuitable for cultivation may be sold in quantities not exceeding 640 acres to any one person. More than 25 years ago, petitioner's predecessor applied in good faith for school land; his affidavit being true, except that it called for an excess of 2.24 acres more than 640 acres. The price was paid in full in 1909. *Held*, that the "rule of approximation," requiring the acreage covered by the application to conform as nearly as practicable to the maximum prescribed by the statute, and permitting the claim, where the excess over the statutory amount is less than the deficiency would be, should a subdivision be excluded, should, under the circumstances, be applied, so that the excess in acreage covered by the application and affidavit would not render the application void, so as to prevent the issuance of a certificate for a patent.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 144.\*]

Appeal from Superior Court, Sacramento County; C. N. Post, Judge.

Petition by W. R. Barbree and another against W. S. Kingsbury, as Register of the State Land Office, for a writ of mandate. From an order denying the petition, petitioners appeal. Reversed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Wallace M. Pence, for appellants. U. S. Webb, Atty. Gen., and Malcolm C. Glenn, for respondent.

**BURNETT, J.** This is an appeal from an order denying an application for a writ of mandate to require respondent, pursuant to section 3519 of the Political Code, to issue the usual certificate to the Governor for the issuance of a patent for certain school lands. Petitioners claim the right to the patent, as the successors in interest to one Alfred Warren, the original applicant for said lands. On January 6, 1886, Warren filed his application or affidavit to purchase the lands therein described, and the controversy here grows out of the following averments in the said affidavit: "That said land is not suitable for cultivation. That he had not entered any portion of any lands mentioned in section 3,494 of the Political Code (to wit, the unsold portion of the 500,000 acres granted to the state for school purposes, the sixteenth and thirty-sixth sections, and the lands selected in lieu thereof), which, together with that now sought to be purchased, exceeds 642.24 acres. \* \* \* That the township within which said land is situate was and had been surveyed and sectionized by the United States prior to the date upon which said affidavit was made or filed in said land office, and that said section 16 lies in one body in the form a square, and contains, according to said survey of the United States, 642 <sup>24</sup>/<sub>100</sub> acres, and had no legal subdivision of said section 16 contains less than 40 acres or more than 42 acres."

Section 3495 of the Political Code prescribes the method for the purchase of state school lands, and provides that "any person desiring to purchase any portion not less than the smallest legal subdivision of any of the lands mentioned in section thirty-four hundred and ninety-four, situated in any township which has been surveyed by the United States must make an affidavit" containing certain averments, among them, "whether the land is or is not suitable for cultivation," and if the land is not suitable for cultivation the affidavit must state "that the applicant has not entered any portion of such lands, which together with that now sought to be entered, exceeds six hundred and forty acres." The section further provides that, "Lands unsuitable for cultivation may be sold in quantities not exceeding *six hundred and forty* acres to any one person."

No question is raised that Warren acted in good faith, that his affidavit was true in every respect, and that it was in proper form, except that it called for an excess of 2.24 acres over the quantity of land that the statute provides can be sold to one person. It is the contention of the respondent that only one construction is possible of said section of the Political Code, and that contention places the limit of purchase at 640 acres, which cannot be exceeded in any case. The

logical conclusion of the contention would seem to be that Warren's application was and is nugatory and void, since it did not contain one of the important and essential elements required by the Code. It would follow that no patent could be legally issued to him or to his successors for any part of said land.

In *Hildebrand v. Stewart*, 41 Cal. 387, it is held that: "When the law, under which public lands are sold, requires certain acts to be performed as a prerequisite to the right to purchase, the courts cannot dispense with the performance of those acts by legalizing an entry made without complying with them." To the same effect are *Woods v. Sawtelle*, 46 Cal. 391; *Botsford v. Howell*, 52 Cal. 158; *Millidge v. Hyde*, 67 Cal. 5, 6 Pac. 852; and *McKenzie v. Brandon*, 71 Cal. 209, 12 Pac. 428.

The *Hildebrand Case* involved a contest between two claimants to the same land, arising before the Surveyor General, and transferred to the district court for adjudication, and it was held by the Supreme Court that the application to purchase by defendant was invalid and ineffectual to vest in him any right to the land by reason of the absence of the notice to the occupant or claimant of the house and corral then located upon said land, as required by the act under which defendant's attempted location was made.

In *Woods v. Sawtelle*, supra, at the time defendant made his application to purchase the land, plaintiff was in possession thereof, and he had been for more than three years. The defendant's application was approved by the Surveyor General, and a certificate of purchase was issued to him, and plaintiff's application made subsequently was rejected. The statute provided that if there was an adverse occupant for more than 60 days at the time an application to purchase was made the applicant must so state. There was an omission in that respect in defendant's said application, and the Supreme Court held that, by reason of his application being in proper form, plaintiff, who was the prior occupant, but the subsequent applicant, had the better right to make the purchase.

The contest in the *Botsford Case*, supra, was decided by the lower court in favor of plaintiff, but it was reversed by the Supreme Court, on the ground that the facts required by the statute must be stated in the application directly and positively; whereas plaintiff had stated them in the alternative form.

In *Millidge v. Hyde*, it was held that the demurrer to the complaint was properly sustained for the reason that plaintiff's application failed to state, as required by the statute, that: "There is no valid claim to such land other than that of the applicant; that he has not entered any land in part satisfaction of the unsold portion of the 500,000 acre grant, or of the grant in lieu of the sixteenth or thirty-sixth sections, which to-



gether with that now sought to be purchased exceeds 320 acres."

In *McKenzie v. Brandon*, supra, it was held that plaintiff stated in his affidavit what was not true, when he declared that there was no actual possession of the lands adverse to him, and it was decided that he had no claim to the title. These cases all involved contesting applicants, and it was rightly determined that the claimant complying with the requirements of the statute should be preferred to the one who was remiss.

It is undoubtedly true, also, as asserted by respondent, that "it has not been the policy of the state to sell large tracts of land, but rather, on the other hand, has it been the policy to encourage settlers to live on state lands, and to sell lands in small tracts." It is equally true, however, that the state should not assume the attitude of a wrongdoer, nor should the letter of the statute be applied in favor of injustice, where it is possible, by a liberal spirit of interpretation, to reach a righteous conclusion. The facts here, it may be said, are peculiar and persuasive in favor of the claim of petitioners. The application to purchase was made more than 25 years ago; the requisite portion of the purchase price was then paid, and for all these years the interest on the balance has been regularly tendered and accepted, and finally, on October 25, 1900, the balance of the purchase price was paid. The good faith of the transaction has not been questioned; there is no contesting applicant; no one has been wronged, and the excess of the land over 640 acres is so trifling, and of such little value, as to be scarcely worth considering.

When the application was made, and when it was approved by the Surveyor General, the agent of the state, and when he issued the certificate of purchase, it was probably considered by the purchaser and the seller that, under the peculiar circumstances, the "rule of approximation" should apply. This rule requires the acreage to conform, as nearly as practicable, to the maximum amount prescribed by the statute, but permits the claim, where the excess over the statutory amount is less than the deficiency would be, should a subdivision be excluded.

It is contended by appellants that the rule was adopted by the Land Department of the United States at an early date, and has been followed since. In *re H. P. Sayles*, 2 Land Dec. Dept. Int. 88, and other cases cited. It is pointed out that section 2304 of the Revised Statutes (U. S. Comp. St. 1901, p. 1413), relative to homesteads for soldiers and sailors, provides that "not exceeding 160 acres" shall be selected, but the rule of approximation is applied to that section (In *re Dotson*, 13 Land Dec. Dept. Int. p. 275); furthermore, a special act, relative to Nebraska lands, limits the amount of land for one individual

to 640 acres, but the said rule is applied to this also. Circular 34, Land Dec. Dept. Int. 546. It is therefore argued that: "This rule of approximation was well known at the time of the amendment to section 3495, supra, and it must be presumed that the legislators were familiar with it, and that it was a matter of common knowledge at the time of the passage of the amendment in 1885, and that therefore the amendment was enacted with the intention that it would be interpreted according to the existing decisions of the department. *U. S. v. Union Pac. R. R. Co.*, 91 U. S. 72 [23 L. Ed. 224]."

While not desiring to hold that the Surveyor General should be governed by this rule in all cases, nor even that he should give it effect at all in approving original applications for purchase, considering the equities involved herein, the small quantity of the excess over the statutory maximum, and the conduct of the state's officers through all these years, we think that justice requires the application of the rule here.

It is not necessary either to hold that the doctrine of equitable estoppel, growing out of the conduct of its officers, binds the state, as it does individuals under similar circumstances; but it must be apparent that justice and good conscience, which, Professor Pomeroy says, are the foundation of said doctrine, should not be laid out of view in interpreting the statute. If the contention here were between individuals, no court would hesitate to grant the petition, and we can see no reason why the said statute may not be construed in harmony with those equitable principles that are admittedly the basis of our jurisprudence, and which are recognized as controlling by all upright men.

The desire of respondent to require a strict observance of the statute is, of course, commendable, and if this were an application to purchase a different situation would be presented; but, in view of the facts already related, we think the patent should issue. The judgment is therefore reversed.

We concur: CHIPMAN, P. J.; HART, J.

IN RE DE VRIES' ESTATE. (Civ. 894.)  
(District Court of Appeal, Third District, California. Sept. 29, 1911.)

1. WILLS (§ 634\*)—ESTATE DEVISED—"VESTED" REMAINDER—"CONTINGENT."

The second clause of a will provided: "I give, devise, and bequeath all the property of which I may die seised and possessed \* \* \* to my beloved wife for her natural life, the remainder thereof to my sons hereinafter named in proportions, for the time and upon the conditions hereinafter expressed." The fourth clause provided that, upon the termination of the wife's life estate, "I give and devise unto my son M. all those certain lots. \* \* \* If my son M. should precede in death his wife and leave him no lawful issue surviving, and should

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

such death of my son M. occur before the property herein devised and bequeathed to him vests in him, then, all the interests herein devised and bequeathed to said M. shall pass to and vest in" his wife absolutely. Other provisions showed that testator clearly understood the legal significance of words of present devise unqualified by other language. Civ. Code, § 694, provides that a future interest is vested when there is a person in being who would have a right to immediate possession upon the ceasing of the precedent interest. Section 695 provided that a future interest is contingent while the person in whom or the event upon which it is limited to take effect remains uncertain; and section 1341 provides that devises and bequests are presumed to vest at testator's death. *Held*, that son M. took a vested remainder in the estate devised to him immediately upon testator's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1498; vol. 8, pp. 7302-7309, 7827.]

## 2. WILLS (§ 634\*)—ESTATE DEVISED—VESTED REMAINDER.

The intention of testator should control in determining whether a future interest devised is vested or contingent.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 634.\*]

## 3. WILLS (§ 634\*)—CONSTRUCTION—ESTATE DEVISED—VESTED REMAINDER.

In view of Civ. Code, § 1317, and the following sections, relating to the interpretation of wills, in determining whether a future interest is vested or contingent, testator's intention thereon must be gathered from the language of the will construed in view of established rules of construction.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

## 4. WILLS (§ 634\*)—ESTATE DEVISED—VESTED REMAINDER.

The test of whether a future estate devised is vested is whether there exists in an ascertained person a present fixed right of future enjoyment of the estate limited, which will take effect in possession immediately on the determination of the precedent estate, irrespective of any collateral event.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

## 5. WILLS (§ 629\*)—CONSTRUCTION—VESTED INTERESTS.

While testator's wishes will be effectuated, if possible, the law prefers to consider future estates as vested rather than contingent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.\*]

## 6. WILLS (§ 629\*)—ESTATE DEVISED—VESTED INTEREST.

The use of words of present gift in a will is construed as creating a vested interest, in the absence of other controlling circumstances.

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 629.\*]

## 7. WILLS (§ 634\*)—ESTATE DEVISED—VESTED REMAINDER.

A provision that "upon the termination of said life estate I give, devise and bequeath all those certain lots," etc., to testator's son, in the absence of other provision or conditions, gave such son a vested remainder in the lots.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

Appeal from Superior Court, San Joaquin County; Frank H. Smith, Judge.

In the matter of the estate of William H. De Vries, deceased. From an order denying

a petition for a decree of partial distribution, Marion De Vries appeals. Reversed.

Marion De Vries, in pro. per. Nutter & Orr, for respondent.

HART, J. The single question submitted on this appeal, which is prosecuted from an order or decree denying the petition of the appellant for a decree of partial distribution of the estate of William H. De Vries, deceased, is whether the remainder to said appellant, provided for by the fourth clause of the last will and testament of said deceased, is vested or contingent. The court below, two of the judges thereof presiding at the hearing and concurring in the conclusion therein reached, held the remainder so devised to the appellant, Marion De Vries, to be contingent. The decision of the question presented here must obviously rest on the intention of the testator, and, in turn, such intention must be gathered from an interpretation of the language of the last will and testament of the testator.

The language of said testament particularly pertinent to this inquiry reads:

"Second. I give, devise and bequeath all the property of which I may die seised and possessed, both real and personal, to my beloved wife, Mary Jane De Vries, for her natural life, *the remainder thereof to my sons hereinafter named* in proportions for the time and upon the conditions hereinafter expressed: \* \* \*

"Fourth. Upon the termination of the life estate hereby created in my wife, Mary Jane De Vries, I give and devise unto my son, Marion De Vries, all those certain lots, pieces and parcels of land, situate. \* \* \*

"If my son, Marion De Vries, should precede in death his wife, Minnie L. De Vries, and leave him no lawful issue surviving, and should such death of my son, Marion De Vries, occur before the property herein devised and bequeathed to him vests in him, then, all the interests herein and hereby devised and bequeathed to said Marion De Vries shall pass to and vest in and become the property of said Minnie L. De Vries, my son, Marion's wife, absolutely and forever."

The contention of the appellant is that, under the terms of said will, that portion of the estate so devised to him vested in him, by virtue of the provisions of section 694 of the Civil Code, immediately upon the death of the testator. Reproduced in the transcript on appeal is the written opinion of the learned trial judges, in which they set forth their reasons for the conclusion reached by them adversely to the contention of appellant, and from said opinion we gather that their position is planted principally on their interpretation of the language of the clause of the testament devising to appellant out of the life estate a certain interest in remainder. The argument appears to be that the words,

"Upon the termination of the life estate hereby created in my wife, Mary Jane De Vries, I give and devise to my son, Marion De Vries, all those certain lands," etc., clearly imply an intention on the part of the testator to fix "the time when said estate is to vest not only in interest but also in possession" as at the termination of the life estate. In other words, it is held by the court below that by use of the words "upon the termination of the life estate" the testator intended to say that the interest in remainder to Marion De Vries should not vest until after the determination of said life estate, and this construction of the testament, in so far as it affects the devise to the said Marion, is sustained, so the reasoning proceeds, by the provision for the wife of said Marion in the event that the latter should precede in death the former, leaving "him no lawful issue surviving."

[1] We are unable to assent to the construction thus given the instrument in question and the conclusion arrived at by the court below therefrom.

It is, of course, to be conceded that great difficulty often arises in determining whether a vested or contingent remainder was intended by the language of an instrument whose manifest purpose is to carve out of the same estate two or more separate and distinct interests—the one the right to the possession of which is to be enjoyed in present and the others in futuro. Indeed, it is manifestly a much more simple task to formulate, as the law writers and the Legislature have done, a general distinction between vested and contingent future interests than to apply, in many instances, a distinction to concrete cases.

[2, 3] The general definitions of vested and contingent remainders, as given by the law writers and our Code, are sufficiently clear and explicit, yet, after all, the real point of decision in all cases where the question is whether a future interest created by devise or otherwise is vested or contingent is as to the intention of the testator or grantor in that regard, and such intention, as before stated and as is obviously true, must, in cases where construction is necessary, be gathered from the language of the instrument viewed by the light of established and accepted canons of construction. Section 1317 et seq., Civil Code.

In the case at bar, however, we have, upon a careful scrutiny of the whole testament by the aid of the rules to which we have referred and the reflected light of the adjudicated cases, found much less difficulty in reaching a conclusion as to the intention of the testator with regard to the fourth clause of his will than a mere glance at the instrument seemed to indicate.

But, before proceeding to an examination of the instrument itself, we may, with propriety, state a few general rules which apply to inquiries of the nature of the one pre-

sented here. "A future interest is vested," says our Civil Code, § 694, "when there is a person in being who would have a right, defeasible or indefeasible, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest," and, continues the same Code, "a future interest is contingent, whilst the person in whom, or the event upon which, it is limited to take effect remains uncertain." Section 695.

[4] In the case of the Estate of Washburn, 11 Cal. App. 735, 741, 106 Pac. 415, 418, this court, through Chipman, P. J., approves the definition of a vested remainder as it is given in 24 Am. & Eng. Ency. of Law (2d Ed.) p. 389, as follows: "The true criterion of a vested remainder is the existence in an ascertained person of a present fixed right of future enjoyment of the estate limited in remainder, which right will take effect in possession immediately on the determination of the precedent estate, irrespective of any collateral event, provided the estate in remainder does not determine before the precedent estate." In *Haward et al. v. Peavey*, 128 Ill. 430, 21 N. E. 503, 15 Am. St. Rep. 120, the subject of remainders is thus spoken of: "A remainder is said to be vested when a present interest passes to a party, to be enjoyed in the future, so that the estate is invariably fixed in a determinate person after the particular estate terminates, while a contingent remainder is one limited to take effect, either to a dubious and uncertain person, or upon a dubious and uncertain event. 2 Blackstone's Commentaries, 168. \* \* \* But it does not necessarily follow that every estate in remainder which is subject to a contingency or condition is a contingent remainder. The condition may be precedent or subsequent. If the former, the remainder cannot vest until that which is contingent has happened, and thereby become certain. If the latter, the estate vests immediately, subject to be defeated by the happening of the condition"—citing cases. "It is," says Kent, 4 Commentaries, 202-206, "the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, that renders the remainder contingent." The foregoing formulas, as before stated, are, of course, clear and easy of apprehension, but the important and often the difficult question then arises whether a present fixed right of future enjoyment of the estate limited in remainder exists in "an ascertained person."

[5] While it will always seek to effectuate the wishes of the testator, "the law prefers to consider future estates as vested." Estate of Washburn, *supra*. As is said in *Farnum v. Farnum*, 53 Conn. 278, 2 Atl. 327; "That the courts will incline in doubtful cases to construe a devise or legacy as vested rather than contingent is a familiar and well-settled rule. In some instances courts seem to have gone so far as to say that they will if possible construe it as vested. It is

enough for our present purpose to say that we ought to give this will that construction if its language will fairly admit of it." After reviewing the decisions of the courts of many jurisdictions, 24 Am. & Eng. Ency. of Law (2d Ed.) p. 392, says: "The courts have always regarded contingent estates with disfavor, and from the earliest times have inclined towards that construction which holds a remainder vested rather than that which considers it contingent, when the question is doubtful. It has even been said that, if there is the least doubt, advantage is to be taken of the circumstance occasioning that doubt to hold that the remainder is vested, and not contingent." In *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394, our Supreme Court says: "The law favors the vesting of interests, and every interest will be presumed to vest, unless a contrary intention is clearly manifested." And, lastly upon this proposition, section 1341 of our Civil Code provides that "testamentary dispositions, including devises and bequests to a person on attaining majority, are presumed to vest at the testator's death." We have discovered no language anywhere in the testament before us that is inconsistent with the view that by the devise to Marion De Vries the testator intended to create in the former a vested future interest.

It will first be noted that the second clause of the testament under present consideration reads: "I give, devise and bequeath all the property of which I may die seised and possessed, both real and personal to my beloved wife, Mary Jane De Vries, for her natural life, the remainder thereof to my sons hereinafter named," etc. It is declared by the learned trial judges in their written opinion that, if the foregoing "were the only provision of the will relating to the disposition of the testator's property, the question would be free from doubt." It is, of course, to be conceded that, if the devises subsequently made by the testator are inconsistent with the language of the second clause of the testament just quoted, such devises must prevail. In other words, while the language of the second clause of the will clearly indicates an intention to create vested remainders over to the sons, yet, if the specific devises in remainder to the sons subsequently created out of the property from which the life estate is carved are made subject to such contingencies as to the right of enjoyment as to clearly disclose an intention to create contingent remainders, then the devises so made would, of course, control the general language of the second clause of the testament, and would therefore prevail. On the other hand, if we find no inconsistency between the general language of the second clause and the language in which the specific devises are declared, or if the language by which the specific devises are created is so ambiguous as to make

it uncertain whether therein and thereby the testator intended to create vested or contingent future interests, and there are no other circumstances arising from the testament itself to compel a contrary view, then the general language of the second clause of the testament to which we have referred becomes of signal and, indeed, controlling importance as an aid in the ascertainment of the intention of the testator with regard to the time of the vesting of the right of enjoyment of such future interests. But, apart from any consideration of the general language of the instrument, we think that, as before declared, from the language of the fourth clause itself, and through no strained or unnatural construction thereof, no serious difficulty need confront the court in reaching the conclusion that the intention of the testator as therein and thereby expressed was to create in his son, Marion, a vested remainder.

It will be observed that the fourth clause of the testament is divided into two paragraphs: The first involving the devise to Marion; the second, to the latter's wife. It will further be observed that the first paragraph uses words of present devise—that is, the language of the testator is: "I give and bequeath," etc. Thus far there could not arise any question but that the testator intended by the use of those words the vesting in Marion De Vries a present fixed right. But, as we have seen, the contention is that the language immediately preceding the quoted words, "Upon the termination of the life estate hereby created in my wife, Mary Jane De Vries," refers the vesting of the right to the time of the death of the life tenant or the termination by her death of the life estate, and that, therefore, the effect of said language is not only the postponement of the time of the actual enjoyment, but also of the time of the vesting of the right of enjoyment of the future interest thus created. But we think that where, as here, words of devise refer to the present or are in the present tense, the words, "upon the termination of the life estate" or "after" such termination, relate to the time of the possession or actual enjoyment of the interest so devised, and not to the time at which such interest shall vest or become in the donee a fixed right. It will not for a moment be questioned that words of present devise, such as are used here, are inconsistent with language which may be construed to postpone the immediate vesting of such right, and, as suggested, if the language immediately preceding the words of present devise in the fourth clause of the testament here may be held to be inconsistent with the present vesting of the interest, then at least a serious doubt arises as to what the testator actually intended should be the effect in legal contemplation of the devise to Marion. Therefore, whether we

may hold that the words of present devise as employed by the testator themselves irresistibly import an intention to create a vested remainder, or the language of the fourth clause, as a whole, is so uncertain and ambiguous as to leave in serious doubt what the testator's specific intention in that respect was, in either case, under the uniformly accepted rules of construction, the conclusion must be the same. But manifestly, if the construction contended for by the respondent and sustained by the court below be sound, the language, "I devise and bequeath," or "give and devise," is controlled entirely by the words immediately preceding it. We can perceive no reason for such construction, and, indeed, we are of the opinion, as before declared, that, when we consider the language of the clause in question in connection with other parts of the testament or with what appears clearly enough to us to be the general scheme of the testator, such construction would fall far short of discovering the intention of the deceased with respect to the devise to Marion. But we are not without eminently respectable authority for the foregoing views.

[6] The general rule as to the employment of words of present gift or devise, in immediate connection with the use of the prepositions "upon," "after," and "at," expressive of the time at which the intermediate estate must terminate, in instruments disposing of property, is laid down by 30 Am. & Eng. Ency. of Law (2d Ed.) p. 768, as follows: "The use of words of present gift, or language which has the same import or effect, is expressly recognized as operating, in the absence of other controlling circumstances, to create a vested interest in the beneficiary." Many cases may be found where that rule has been applied to a state of facts strikingly similar to the circumstances of the present case. We shall here notice a few of those cases.

In the *Matter of Elliott*, 27 Misc. Rep. 258, 58 N. Y. Supp. 603, the testator gave to his widow, during her life or until remarriage, his real and his residuary personal estate. Upon her death or remarriage the executors were directed by a codicil to sell and convey the realty, convert the personalty into money, and out of the proceeds pay a son \$1,500 and to one Alphrona Town, \$800, "which said amounts," so the testament read, "I do hereby give and bequeath unto them to be paid only as aforesaid." Alphrona Town died during the lifetime of the widow. The contention was that the bequest to Alphrona Town lapsed by reason of her death during the lifetime of the testator's widow. The referee sustained that contention, holding that said bequest was contingent, and that it could only become vested or effective by the legatee's surviving the happening of the death or remarriage of the widow. Revers-

ing the findings of the referee, the surrogate court said: "His (the referee's) decision is principally based upon the circumstance that the testator directed the conversion of the real estate at a future time and the payment of the legacy from the proceeds." The surrogate then refers to a number of cases by the light of which the referee construed the testament, and proceeds: "The rule declaring that, where the gift consists only in a direction to divide or pay at a future time, the vesting as well as the time of payment is postponed, which is referred to in the cases above cited, and which doubtless acquires greater pertinency and significance from the direction for conversion contained in the wills considered in some of them, has been repeatedly stated to be not an inflexible or arbitrary rule, but one readily yielding to the intention of the testator, and sometimes evidence of a very slight character has been resorted to by the courts, and taken as expressive or indicative of such intention. [Citing cases.] Almost invariably accompanying the declaration of the rule mentioned is found the statement of another rule or principle similarly formulated for the purpose of aiding in discovering the intention of the testator, and that is that where there is a direct or immediate gift, the subject of which cannot come into possession or enjoyment of the legatee until some future time, the gift is, nevertheless, to be regarded as indefeasibly vested. This latter rule seems to me to more fitly accord with the intention of the testator in the present case, and I think it should control its disposition. Words of present gift are here clearly used. The testator says: 'I do hereby give and bequeath.' The use of such language, or language of the same import, or effect, is expressly or impliedly recognized by the authorities as effective, in the absence of other controlling circumstances, to create a vested interest or estate in the beneficiary." Citing *Matter of Young*, 145 N. Y. 535, 40 N. E. 226; *Delaney v. McCormack*, 88 N. Y. 174; *Smith v. Edwards*, 88 N. Y. 92; *Shipman v. Rollins*, 98 N. Y. 311; *Goebel v. Wolf*, 113 N. Y. 405, 21 N. E. 388, 10 Am. St. Rep. 464; *Matter of Baer*, 147 N. Y. 354, 41 N. E. 702; *Delafield v. Shipman*, 103 N. Y. 468, 9 N. E. 184; *Miller v. Gilbert*, 144 N. Y. 68, 38 N. E. 979; *Ross v. Roberts*, 2 Hun (N. Y.) 90; affirmed, 63 N. Y. 652; *Matter of Mahan*, 98 N. Y. 372; *Gelsse v. Bunce*, 23 App. Div. 202, 48 N. Y. Supp. 249; *Warner v. Durant*, 76 N. Y. 136; *Loder v. Hatfield*, 71 N. Y. 99; *Wells v. Seeley*, 47 Hun (N. Y.) 109; *Matter of Gardner*, 140 N. Y. 122, 35 N. E. 439.

In the *Matter of Conger*, 81 App. Div. 493, 80 N. Y. Supp. 933, the will giving a life interest to the testator's wife and daughter provided that, "after the death of my said wife and daughter, I give, devise and bequeath unto," etc. Construing said will

and interpreting the language quoted for the purpose of discovering whether it was the intention of the testator that the remainder so created should operate to vest the right or title to such future interest in the remainderman upon the former's death, the court says: "If the testator had said, 'I give, devise and bequeath unto the legatees named certain shares of stock, such bequests to take effect in enjoyment after the death of my life tenants,' there could be no question about the meaning or validity of the clause. We think it requires no particular straining to hold that when he said, 'after the death' of said life tenants, 'I give, devise and bequeath' unto the same persons, he meant the same thing, namely, a present, immediate bequest and gift of the property, subject only to delay in payment and enjoyment until after the death of those who had a prior right to the enjoyment as life tenants. The vesting of title was to take effect immediately; the actual division and delivery of the certificates of stock was to occur in the future."

In *Farnam v. Farnam*, 53 Conn. 261, 2 Atl. 325, 5 Atl. 682, a testamentary trust was created, by the terms of which certain sums were to be paid by the trustees annually to the widow of the testator and to his children, and "at the decease of the last survivor of my said children, if my said wife shall not then be living, but if living, then upon her death, this trust shall cease; and I give, devise and bequeath all the estate which shall then be held in trust under this will to my grandchildren who shall then be living, to be equally divided among them per capita and not per stirpes, and to their heirs forever." It is then provided that if any grandchild of the testator shall have died, leaving a child or children surviving at the expiration of said trust, such child or children shall take the share that "his, her or their parent would have been entitled to if living," etc. The attack upon the testament was upon the ground that the fourth and fifth clauses (the latter the one just referred to) were inoperative for the reason that they were in violation of the Connecticut statute against perpetuities. The main question thereupon arising was whether the estate in the grandchildren was a vested or contingent remainder. The court held that the interest so created was a vested remainder, saying: "The words, 'I give, devise and bequeath' import a present interest unless other provisions in the will clearly manifest a different intention."

In the *Matter of Seaman*, 147 N. Y. 69, 41 N. E. 401, the sixth and seventh articles of the testament read as follows: "All the rest, residue and remainder of my estate, real and personal, I give, devise and bequeath to my executors, hereinafter named, in trust to apply and pay over the income of one equal undivided half part thereof to my said adopted daughter and niece, Elizabeth Seaman, during her natural life, and upon her decease

*I give, devise and bequeath said equal undivided one-half part of my estate so held in trust for my said adopted daughter and niece to the children of my nephew, George A. Seaman, living at the time of her death, share and share alike. Seventh. I direct and order my said executors hereinafter named to apply and pay over the income of the other equal undivided half part of my estate so held in trust by them to my said adopted son and nephew, George A. Seaman, during his natural life, and upon his decease, I give, devise and bequeath the said equal undivided half of my estate, so held in trust for my said adopted son and nephew, to the children of my said nephew, George A. Seaman, living at the time of his death, share and share alike."* The New York Court of Appeals held that the words, "I give, devise and bequeath," as thus used, were words of present gift and denoted a vested interest at the death of the testator, and, differentiating the case before it from other cases cited, among other things said: "Here there are words of present gift, for the phrase 'upon her decease,' like the expression 'from and after,' does not prevent the legacy from vesting"—citing *Nelson v. Russell*, 135 N. Y. 137, 31 N. E. 1008.

"In applying the rule which favors the construction of remainders as vested," it is said, in the second edition of 24 Am. & Eng. Ency. of Law, p. 395, "a distinction has been made between certain words as importing time and contingency respectively. Accordingly, the adverbs, 'when,' 'then,' 'after,' 'until,' 'from,' etc., in a devise of a remainder after a precedent estate determinable on an event which must necessarily happen, are construed to relate merely to the time of the enjoyment of the estate, and not to the time of the vesting in interest. Words denoting contingency, on the other hand, are 'if,' 'in the event,' and the like." See *Matter of Watts*, 68 App. Div. 357, 74 N. Y. Supp. 75; *Hersee v. Simpson*, 154 N. Y. 496, 48 N. E. 890; *McArthur v. Scott*, 113 U. S. 380, 5 Sup. Ct. 652, 28 L. Ed. 1015; *Cropley v. Cooper*, 19 Wall. 167, 22 L. Ed. 109—in each of which the rule of construction contended for by appellant here is applied. See, also, *Estate of Cavarly*, 119 Cal. 406, 51 Pac. 629; *Dunn v. Schell*, 122 Cal. 627, 55 Pac. 595; *Estate of Fair*, 132 Cal. 546, 60 Pac. 442, 64 Pac. 1000, 84 Am. St. Rep. 70; *Estate of Campbell*, 149 Cal. 717, 87 Pac. 573.

But, as we have seen, the conclusion of the court below, it is argued, is supported by the construction which respondent places upon the language of the second paragraph of the fourth clause, wherein and whereby the testator, for the benefit of the wife of Marion, guards against a contingency that might happen before the vesting in Marion of the interest devised to him. We are unable to see wherein said second paragraph or the contingent provision therein made for Marion's wife exercises any influence upon or in any

way limits or qualifies the interest devised to Marion. Indeed, we are of opinion that a careful examination of the language of said paragraph will disclose to the mind considerations which negative rather than sustain the conclusion to which the learned trial judges were persuaded as to the intention of the testator with respect to the devise to Marion. Said second paragraph of the fourth clause of the testament, it will be remembered, reads: "If my son, Marion De Vries, should precede in death his wife, Minnie L. De Vries, and leave him no lawful issue surviving, and should such death of my son, Marion De Vries, occur before the property herein *devised* and *bequeathed* to him vests in him, then all the interest herein and hereby *devised* and *bequeathed* to said Marion De Vries shall pass to and vest in and become the property of said Minnie L. De Vries, my son, Marion's wife, absolutely and forever."

It seems clear to our minds that the fourth clause of the testament, read together, means this: That the testator intended to and did devise to Marion De Vries a present interest in remainder in the property described in said clause; that, counting upon the certainty of death, but the uncertainty as to the time thereof, and therefore the possible contingency of Marion preceding his wife in death, he desired and intended that in the event that that contingency happened before the remainder to Marion vested in him—that is, before the death of the testator—then the estate so limited to Marion should go to the latter's wife. In other words, the testator devised to Marion a vested future interest and to his wife a contingent future interest in the same property. We think, as previously suggested, that this construction is fully sustained by these considerations deducible from the second paragraph itself: (1) Assuming, as is the contention, that the interest to Marion was not intended to vest until the determination of the life estate, if Marion should precede in death his wife, leaving lawful issue, before the termination of the life estate, the result in that case would not only be that Minnie L. De Vries would and could take nothing under the contingent devise to her upon the death of the life tenant, but that devise of the testament would absolutely fail and the interest devised necessarily be remitted to administration, for it will be noted that there is no provision as to whom the property devised to Marion should go in the event Marion died, leaving issue, prior to the death of his wife and before the remainder to him became a vested interest. We cannot persuade ourselves, in view of the evident care with which the whole testament was prepared and executed, disclosing a clear design to thus specifically dispose of all interests in his property, that the testator would have so arranged his disposal of one part of his estate, of which undoubtedly he sought to make

specific disposal, as to admit of a possible lapse thereof. We are of the opinion, rather, that the testator, having intended Marion's remainder should vest upon his (testator's) death, must have further had in mind that, in case Marion leaving lawful issue should precede both his wife and the testator in death, the latter would still have the opportunity and ability to make such disposition of the interest he intended for Marion as would accord with his (testator's) wishes with respect to Minnie L. De Vries and such issue. In any event, considering the fact that the testator displayed an unquestioned and unquestionable wish to provide for Minnie L. De Vries, in the event of the happening of the contingency upon which she was to take, we think it would be the more reasonable view to hold that he did not intend that any circumstances should arise, in the testamentary disposition of his estate, whereby it could happen that the interest which is the subject of the devise to Marion De Vries should go undisposed of by his last will.

The second proposition plainly deducible from the second paragraph of the fourth clause and which, we think, clearly confirms the position that the devise to Marion should operate as a vested remainder, arises from the language itself of said second paragraph. Therein, as we have seen, the testator provides that, upon the happening of the condition upon which Minnie L. De Vries shall take, "then all the interest herein and hereby devised and bequeathed to said Marion De Vries shall pass to and vest in and become the property of said Minnie L. De Vries," etc. Thus it will be noted that the words of action—"devise" and "bequeath," as used in the preceding paragraph of said clause—are used in the second paragraph in the past tense; that is, as denoting action already taken. In other words, to paraphrase the fourth clause in its entirety, the testator has therein declared: "I devise and bequeath to Marion De Vries the property herein described, the possession, however, to take effect on the determination of the estate for life in said property to my wife, Mary J. De Vries. But should my son, Marion, die, leaving no lawful issue, before the death of his wife, Minnie L. De Vries, and prior to the vesting in him of the estate or interest so devised to him, then the property which I have *already* devised and bequeathed to said Marion shall pass to and vest in and become the property of said Minnie L. De Vries," etc. In short, it appears reasonably clear to our minds that by the use of the language in the second paragraph "then all the interest herein and hereby *devised* and *bequeathed* to said Marion De Vries," etc., the testator intended to emphasize his intention as clearly implied from the employment of words of present devise in the first paragraph that the *right* of enjoyment of the interest devised to Marion should take effect or vest

upon and coincidently with the beginning of the life estate, or in other words, at the death of the testator.

That the testator had a clear conception of the legal significance of words of present devise, unqualified by other language or expressions, is indubitably shown, it appears to us, by the language of the devise to his son, Lee De Vries. Therein he likewise uses words of present devise, but qualifies the same with, "To have and to hold the same (the property) for and during all his natural life only, and thereafter to vest as hereinafter stated, or to be taken by him absolutely, dependent upon the following events and conditions." Then follows a provision that should Lee De Vries "die before I die, and leave him lawful issue surviving, then and upon the termination of the life estate herein created in my wife, if such lawful issue shall survive my said wife, then the said described real property hereby devised to my said son, Lee De Vries, shall vest absolutely in fee simple in such lawful issue of my said son, Lee De Vries." It is then provided that if the wife of Lee De Vries die before him, and Lee De Vries should "*survive me and my wife, then and in that event, and upon the termination of the life estate hereby created in my wife*, all of the said real property hereby devised to my son, said Lee De Vries, shall absolutely vest in my son, said Lee De Vries, unaffected by any life estate therein." It will be noticed that the initial language of the devise to Lee De Vries, like the devise to Marion, contains words of present devise; but the testator later qualifies or limits the effect of those words by annexing to said devise certain conditions upon which the interest therein created is to vest. Indeed, by express language the testator suspends the vesting of the fee in the interest devised to Lee De Vries, for he specifically provides as a condition upon which such interest to Lee shall vest that the latter must survive, not only the testator, but the life tenant. It will likewise be noticed that in providing for an interest in the issue of Lee De Vries, the testator postpones, by express words, the vesting of said interest in such issue until the termination of the life estate; that is, the provision is that the issue of Lee must survive the life tenant before the interest so devised shall vest in them. It will further be observed that in all the instances of the postponement of the vesting of the interest devised to Lee De Vries apt words of suspension, such as "then," "then and thereupon," "then and in that event," "immediately vest," and "absolutely vest" are used as indicative of an intention to suspend the vesting.

From the foregoing considerations, it is very manifest, we think, that the testator, in preparing and executing the testament before us, fully appreciated the necessity for the use of express language by which to make clear and unquestionable his intention

to postpone or suspend the vesting until the determination of the life estate in those instances where words of present devise are used but where he did not intend the creation of vested interests. It is, therefore, very plain to our minds that the testator employed words of present gift in the devise to Marion advisedly and with the express purpose of creating the nature of the interest, as to the time of the vesting of the right thereto, which those words naturally import; that, had he intended that the interest so devised should constitute a contingent remainder or vest only at the conclusion of the life estate by the death of the life tenant, he would then, as in the case of the devise to Lee, have so declared in express language or by words so clear and apposite as to have left no room for doubt upon that proposition.

[7] It may be remarked that it is extrajudicially declared in the brief of appellant that it was held by the court below that the provision of the testator's will for his son, William G. De Vries, vests his remainder in him on the death of the testator. In other words, the court below, as we understand counsel for appellant, has construed the devise to William G. to create a vested future interest. The devise to said son reads: "Unto my son, William Garland De Vries, upon the termination of said life estate, I give, devise and bequeath all those certain lots," etc. There is no other provision, conditional or otherwise, contained in the testament with respect to the interest thus devised to William G. De Vries, and clearly the court was right in holding that the interest so devised was a vested remainder. And, with the exception of the contingent provision for Marion's wife, there is, in practical effect, no ground of distinction between the devise to Marion and the devise to William G. The only difference, as will readily be observed, consists in the transposition of the words with which the two interests are devised. Manifestly, therefore, if the devise to William G. creates a vested interest, it must be true that the devise to Marion creates a like interest, unless it may be held that the contingent provision for Marion's wife exercises some such influence on or control of the language in which the devise to Marion is expressed as to make the interest so devised a contingent remainder, and this we have shown cannot reasonably be held to be the effect of that provision. While this part of the discussion is merely argumentum ad hominem, we notice the proposition that calls it forth because we have, after a careful examination of the principal question presented here, been curious yet unable to perceive the method of reasoning by which the learned court below has discerned the slightest distinction between the devise to Marion and that to William G. De Vries.

But we have pursued the discussion sufficiently. As stated, the only contingency



whatever that we have been able to find in the fourth clause of the testament relates solely to the provision for Minnie L. De Vries. As to the devise to Marion, we find here "the existence in an *ascertained person* of a *present fixed right*" of future enjoyment. In other words, we can here "point to a person who, if the life estate should cease, would eo instante et ipso facto have an immediate right of possession," and this, as the Court of Appeals of New York says, in *Moore v. Littel*, 41 N. Y. 80, "is a vested remainder, and, by necessary consequence, all the contingencies which may operate to defeat the right of possession are to operate, and only to operate, as conditions subsequent."

We are satisfied for the reasons herein given that the testator intended a vested interest in his son, Marion De Vries, and the order or decree appealed from is, therefore, reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

MISSOURI, O. & G. RY. CO. et al. v. STATE.

(Supreme Court of Oklahoma. Feb. 9, 1911.)

(Syllabus by the Court.)

1. RAILROADS (§ 6\*)—REGULATION BY CORPORATION COMMISSION—STATUTORY PROVISIONS.

The act of May 20, 1908 (Laws 1908, c. 18), does not extend the jurisdiction of the Corporation Commission beyond the metes and bounds fixed by article 9, § 18, of the Constitution, nor alter, amend, revise, or repeal sections of the Constitution from 18 to 34, inclusive, but is auxiliary and supplemental to said section 18, and provides a remedy for the enforcement and protection of certain rights thereby secured, and by legislative construction defines those rights so that their exact limits may be known.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 6.\*]

2. CONSTITUTIONAL LAW (§ 20\*)—CONSTRUCTION—LEGISLATIVE CONSTRUCTION—"PUBLIC FACILITIES"—"PUBLIC CONVENIENCES."

A clause in the Constitution and act passed by the first Legislature after the adoption of the Constitution, relating to the same subject, like statutes in pari materia, are to be construed together. And where such act impliedly construes "public facilities" or "public conveniences," as used in article 9, § 18, to include a union passenger depot, such contemporary interpretation is entitled to great weight, and in this instance, being correct, will not be disturbed.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 14, 15; Dec. Dig. § 20.\*]

For other definitions, see Words and Phrases, vol. 6, p. 5780; vol. 2, pp. 1556-1558; vol. 3, p. 2637.]

3. RAILROADS (§ 58\*)—REGULATION—UNION STATIONS.

The act of May 20, 1908 (Laws 1908, c. 18), requiring every railroad company operating a railroad in this state to make such physical connections, transfer, and switching facilities

at certain points as may be ordered by the Corporation Commission, and empowering said commission, on complaint or on its own motion, to require such companies to make such physical connections and establish and maintain union depots, etc., as the public interest may require, is a valid exercise of legislative power. And where it appears that appellant was incorporated and under the laws of this state, and thus acquired its right of way and station grounds at D., that the effect of the order would be to compel it to fail to comply with the conditions attached to a bonus of \$10,000 to be used in the construction of a depot upon said grounds and abandon its right of way, and, in order to extend its tracks to the union depot ordered operated at D., to deflect its main line of road and run through two elevators, grade an additional roadbed, and curve its track so acutely as to cause delay in handling its trains, all at a cost of about \$50,000, *held*, notwithstanding, that the act and the proceedings thereunder are valid either as a proper exercise of the police power of the state or as a reasonable exercise of the right reserved to the Legislature to amend, alter, or repeal the charter of appellant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 180-186; Dec. Dig. § 58.\*]

4. STATUTES (§ 185\*)—IMPLIED POWERS.

Where a power is given by statute, there is carried with it power to do everything reasonably necessary to make it effective.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 264; Dec. Dig. § 185.\*]

Appeal from the Corporation Commission.

Proceedings by the State against the Missouri, Oklahoma & Gulf Railway Company and others to compel operation of a joint depot. From an order of the Corporation Commission, requiring such a depot, the mentioned defendant appeals. Affirmed.

Alexander New, E. R. Jones, and Arthur Miller, for appellant. Chas. West, Atty. Gen., and E. G. Spilman, Asst. Atty. Gen., for the State.

TURNER, C. J. At the conclusion of the testimony taken on the hearing of the petition of several residents of Durant, a city of 5,300 inhabitants, theretofore filed before it, wherein they complain of the St. Louis & San Francisco Railroad Company, the Missouri, Kansas & Texas Railway Company, and the Missouri, Oklahoma & Gulf Railway Company, defendants, the Corporation Commission on August 10, 1910, found: "It is shown from the evidence that the Missouri, Kansas & Texas Railway and the Arkansas & Choctaw branch of the Frisco intersect at the town of Durant, and that said railway companies maintain a joint depot; that the Missouri, Oklahoma & Gulf has secured right of way through the town of Durant; that said right of way crosses the Missouri, Kansas & Texas Railway in the north part of the town and parallels the said railway from said crossing to the Arkansas & Choctaw branch of the Frisco, 470 feet east of the Missouri, Kansas & Texas and Frisco crossing; that the proposed site of the Missouri, Oklahoma & Gulf depot is south and

east of the main street in the town of Durant and 400 feet east of the north end of the joint depot used by the Missouri, Kansas & Texas and Frisco; that the Missouri, Kansas & Texas Railway has a double track through the town of Durant; that east of said track it has a switch track and also a merchandise track east of the main line, leading to grain elevators; that there is a great deal of switching done on those tracks by the Missouri, Kansas & Texas; that passengers arriving over the Missouri, Kansas & Texas and Frisco, desiring to take a Missouri, Oklahoma & Gulf train, would have to cross these two tracks in order to get to the proposed site of the Missouri, Oklahoma & Gulf depot, thereby incurring additional expense in transferring baggage, and making it very inconvenient and dangerous for the traveling public in crossing from one depot to another. It is further shown that the present depot of the Missouri, Kansas & Texas Railway and Frisco Railroad is very convenient to the business part of the town, being located one block off the main street; that this depot is equipped with ample facilities to take care of the business of the three roads in the town of Durant at the present time; that a union depot can be maintained at much less expense to the railroads than separate depots. It appears from the testimony of the engineer of the Missouri, Oklahoma & Gulf Railway that it would be very expensive for said railway to secure right of way and run a track to connect with the joint depot of the Missouri, Kansas & Texas and Frisco; that the Missouri, Kansas & Texas and Missouri, Oklahoma & Gulf are competitive roads, and that the passenger traffic would be greatly decreased over the Missouri, Oklahoma & Gulf owing to the fact that the agent would be employed by the Missouri, Kansas & Texas and would invariably send passengers over the Missouri, Kansas & Texas, instead of sending them over the Missouri, Oklahoma & Gulf. After a thorough investigation and careful consideration of the evidence, the commission is of the opinion that the greater number of citizens of Durant and the traveling public would be better accommodated by the maintenance of a union passenger depot than by separate depots in the town of Durant; that it would be dangerous for passengers transferring from one depot to another; and that the proper safety and accommodations of the traveling public and the people of the town of Durant require a passenger depot used jointly by the Frisco, Missouri, Kansas & Texas, and Missouri, Oklahoma & Gulf Railways in the said town." And ordered: " \* \* \* That the St. Louis & San Francisco Railroad Company, the Missouri, Kansas & Texas Railway Company, and the Missouri, Oklahoma & Gulf Railway operate a joint passenger depot in the town of Durant at the present site of the depot used by the St. Louis & San Francisco and Missouri,

Kansas & Texas Railway Companies in said town, suitable for the accommodation of the passenger traffic into and out of said town, and that said depot shall be used jointly by said companies on and after the 1st day of December, 1909, and maintained for such joint use until further orders of this commission." From which said order the Missouri, Oklahoma & Gulf Railway Company, alone appeals.

Assailing the order, appellant contends: That the commission was without jurisdiction to make it, because the same was based on the act of May 20, 1908, which, it is urged, extends that jurisdiction beyond the metes and bounds fixed by article 9, § 18, Const., which reads: "The commission shall have the power and authority and be charged with the duty of supervising, regulating, and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just. \* \* \* " And which said act having been passed prior to the time fixed in section 35 of the same article, which reads, "After the second Monday in January, nineteen hundred and nine, the Legislature may, by law, from time to time, alter, amend, revise, or repeal sections from eighteen to thirty-four inclusive, of this article, or any of them, or any amendments thereof: Provided, that no amendment made under authority of this section shall contravene the provisions of any part of this Constitution other than the said sections last above referred to or any such amendments thereof," is unconstitutional and void, and for that reason the order must fall. On the other hand, it is contended, in effect, that said act neither altered, amended, revised, nor repealed sections from 18 to 34, inclusive, but is ancillary and supplementary to said section 18 and provides a remedy for the enforcement and protection of certain rights thereby secured, and by legislative construction in a measure defines those rights so that their exact limits might be known. This latter contention is correct. Whether that part of said section authorizing the commission to require all transportation companies doing business in the state to establish and maintain all such public service facilities, and conveniences as may be reasonable and just is self-executing or not, it was proper for the Legislature acting subordinate to said provision, and in furtherance thereof, as it did, to pass the act complained of. A constitu-

tional provision not self-executing is said to exist by Mr. Cooley in his work on *Con. Lim.*, p. 221, "where it merely indicates principles without laying down rules by means of which those principles may be given the force of law." Speaking of when the power thus given is self-executing, on the next page, he says: "Perhaps even in such cases legislation may be desirable by way of providing convenient remedies for the protection of the right secured, or of regulating the claim of the right so that its exact limits may be known and understood; but all such legislation must be subordinate to the constitutional provision, and in furtherance of its purpose, and must not in any particular attempt to narrow or embarrass it." Quoting approvingly from *Reeves v. Anderson et al.*, 13 Wash. 17, 42 Pac. 625, Mr. Justice Williams, speaking for the court in *State ex rel. Reardon, etc., v. Scales, Mayor, et al.*, 21 Okl. 683, 97 Pac. 584, said: "In our opinion it was competent for the Legislature to supplement the constitutional provision by pointing out the manner in which the right conferred by the Constitution might be exercised, and by prescribing rules for the guidance of the city council in relation thereto."

Such was all that was done or intended by the act of May 20, 1908 (*Laws 1908*, p. 226, c. 18). Indicating what was meant in said section 18 by "public facilities" and "public conveniences," the Legislature passed said act entitled, "An act to extend the jurisdiction of the Corporation Commission over all matters of physical connection, union depots, and sufficient transfer and switching facilities of the different railroads in the state of Oklahoma, and requiring all railroad companies to make and maintain physical connections, transfers, switching facilities, and union depots in the state of Oklahoma," thereby impliedly declaring that it was the legislative construction of that part of section 18 that physical connections, transfers, switching facilities, and union depots were included in the terms "public facilities" and "public conveniences," and then proceeded in the act to provide a remedy for the enforcement and protection of those rights secured by that part of section 18 of the Constitution under consideration. Section 1 of said act provides, in effect, that every railroad company operating a railroad in this state shall make such physical connections, transfers, and switching facilities at all junction points and all incorporated towns where more than one railroad enters as may be ordered by the Corporation Commission, and that, when the interests of the public can be promoted, said commission is authorized to require physical connections between two or more lines of railway where practicable, regardless of whether the roads cross one another or not. Section 2 makes it the duty of said commission to investigate all complaints in reference to physical connections,

transfers, depots, and switching facilities at all such points, and thereupon, or upon its own motion, to require such companies to make such physical connection or to establish and maintain union depots, transfer and switching facilities as the public interest may require, provided, etc. Section 3 provides: "The expense incurred in the construction and maintenance of the physical connections, union depots, transfer and switching facilities mentioned in the preceding sections of this act shall be borne by the companies operating the different lines of railroad as such companies may agree and in case of disagreement the Corporation Commission shall determine the expense to be borne by each, from which order the railroad company or companies may appeal, as in other cases provided." With the legislative construction contained in the act that a union depot is a "public facility" or a "public convenience" within the purview of that part of said section of the Constitution we have no quarrel. 32 Cyc. 748, says: "The word 'public' has two proper meanings. A thing may be said to be public when owned by the public, and also when its uses are public. 27 Minn. 460." As to "facilities," 19 Cyc. 109, says: "Applied to railroads it means everything necessary for the convenience of passengers and the safety and prompt transportation of freight." Or, as stated by this court in the syllabus in *C. & P. Ry. Co. v. State*, 23 Okl. 94, 99 Pac. 901: "The phrase, 'such public service facilities and conveniences as may be reasonable and just,' as used in section 18, art. 9, of the Constitution (Bunn's Ed. § 222) means everything incident to the general, prompt, safe, and impartial performance of the duties to the public at large imposed by the state, in the proper exercise of its police power, upon transportation or transmission companies." And so, said act eliminated, we would have probably so held, and that a depot of that kind is such a "public facility" or "convenience," as the commission was authorized by said section alone to require appellant to establish and maintain jointly with the other two railroads in interest. Speaking to a similar situation, the court in *Cooper Mfg. Co., etc., v. Ferguson et al.*, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137, said: "As the clause in the Constitution and the act of the Legislature relate to the same subject, like statutes in *pari materia*, they are to be construed together. *Eskridge v. State*, 25 Ala. 30. The act was passed by the first Legislature that assembled after the adoption of the Constitution, and has been allowed to remain upon the statute book to the present time. It must therefore be considered as a contemporary interpretation, entitled to much weight. *Stuart v. Laird*, 1 Cranch, 299 [2 L. Ed. 115]; *Martin v. Hunter*, 1 Wheat. 304 [4 L. Ed. 97]; *Cohens v. Virginia*, 6 Wheat. 264 [5 L. Ed. 257]; *Adams v. Storey*, 1 Paine, 90 [Fed. Cas. No. 66]." We are

therefore of opinion that said act must stand unless unconstitutional on other grounds.

It is next contended that as the evidence discloses appellant was incorporated under the laws of the state prior to the passage of the act, and thus acquired its right of way and station grounds in Durant, that certain citizens of Durant have agreed to give it a bonus of \$10,000 to build to that point, which said bonus is to be used to construct there a passenger depot for the erection of which station grounds were purchased, that the order of the commission based on said act will compel it, in order to extend its tracks to the union depot, to abandon said right of way and station grounds and deflect its main line at a point in the north part of said town near Elm street, and run through two elevators, and grade an additional roadbed and curve its track so acutely as to cause delay in handling its trains, all at a cost to it of not less than \$50,000, that, " \* \* \* therefore, the act is in violation of article 5 of the Constitution of the United States and sections 23 and 24 of article 2 of the Constitution of the state of Oklahoma, which deny the right of any one to take private property for private or public use without just compensation, and that provision of the national Constitution (section 1 of article 14) which provides that no state shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the law." This was, in effect, the contention raised in *Mayor, etc., v. Norwich & Worcester Railroad Co. et al.*, 109 Mass. 103. In that case the mayor and aldermen in the city of Worcester, the Boston & Albany Railroad Company, the Worcester & Nassau Railroad Company, and the Boston, Barre & Gardner Railroad Company petitioned the Supreme Court to appoint commissioners to determine the location in the city of Worcester of a union passenger station provided for by St. 1871, c. 343, entitled: "An act to provide for a union passenger station and for the removal of railroad tracks from certain public ways and grounds in the city of Worcester." Section 1 of the act substantially provided that the Boston & Albany Railroad Company, the Worcester & Nassau Railroad Company, the Boston, Barre & Gardner Railroad Company, the Providence & Worcester Railroad Company, and the Norwich & Worcester Railroad Company might and should unite in a station in the city of Worcester for accommodations; that the Supreme Judicial Court on application of either of said corporations, or the mayor and aldermen of the city of Worcester, either in term time or vacation, after notice, should appoint three members who, after due notice to and hearing said parties, shall determine the precise location of said station within certain limits (describing them), the report of whom being returned to and accepted by the court should be binding on said parties, and the court shall enter all such orders and decrees as

might be necessary to carry the same into effect. Section 2 provided that said station should be erected and kept in repair at the sole expense of one of the companies and for the taking of the land by that corporation for the purpose. Section 3 provided for the use of the station by all of said companies, the others severally paying said company erecting said station a reasonable rent therefor, which, if not agreed upon, should be determined by the railroad commissioners on petition of either corporation. Section 7 directed, among other things, that, after the completion of the station, two of the companies should, respectively, discontinue their present location of their railroads in portions of the city of Worcester. It is unnecessary to further recite the provisions of said act. In affirming the report locating the union depot the court said: "Proof is offered that to extend the several railroads named to a union passenger station east of Grafton street would make it necessary for each of them to extend its tracks a great distance amounting in the aggregate to many thousand feet, and at a cost amounting in the aggregate to several hundred thousand dollars, and that these tracks must be laid through the heart of a populous city, and crossing over many highways, and lands must be taken now belonging to private persons. \* \* \* For these reasons and some others to be adverted to hereafter, both the validity of the act, and of the proceedings under it, are denied, and it is contended that the report ought not to be accepted. On the other hand, the petitioners contend that the act is valid under the provisions of Gen. St. c. 68, § 41, which are similar to prior statutes affecting all railroads that have been chartered since March 11, 1831, and subjecting them to alteration, amendment, or repeal at the pleasure of the Legislature, and that the proceedings under the act are valid." And sustained the latter contention. The syllabus reads: "St. 1871, c. 343, requiring certain railroad corporations to unite in a passenger station in the city of Worcester, at one of two specified places, to be determined by commissioners appointed by this court, to extend their tracks in that city to the union station, and, after the extension, to discontinue portions of their present locations, is constitutional and valid, being a reasonable exercise of the right reserved to the Legislature to amend, alter, or repeal the charters of those corporations."

The doctrine laid down in this case is cited with approval in *Northern Pac. Railroad v. Dustin*, 142 U. S. 492, 12 Sup. Ct. 283, 35 L. Ed. 1092. *S. A. & A. P. R. R. Co. v. State*, 79 Tex. 264, 14 S. W. 1063, was an appeal from a money judgment recovering a penalty against said railroad company for a failure to establish a depot at its crossing with the Galveston, Harrisburg & San Antonio Railroad as prescribed by an act approved May 8, 1889. The defense was that the act in

question was in violation of sections 1 and 2 of article 10 of the Constitution, the first of which provided that: "Every railroad company shall have a right with its road to enter, intersect, connect with, or cross another railroad; and it shall receive and transport each of the other's passengers, tonnage and cars, loaded or empty, without delay or discrimination, under such regulation as shall be prescribed by law." But the court, in effect, held that the regulation prescribed by law for the purpose of carrying out that section might very properly extend to just such matters as were embodied in the act in question, and that said act simply prescribed more fully than did former laws what accommodations shall be furnished at such places.

To the further contention that the act in question did not apply to appellant because it had constructed its depot in the town of Flatonla before the act was passed, that it owned the lot upon which its depot was established and that to remove said depot therefrom to the point of intersection or to erect an additional one there would materially damage the value of said lot, besides costing defendant at least \$300 or \$400, the court said: "The act does not require it to remove that depot, nor does it seek to impose any penalty because it was there erected and is there still maintained, nor does it provide a penalty for a failure to erect and maintain a depot at point of intersection prior to the time the act took effect. It matters not how many depots may have been erected and maintained by appellant at other points, for this cannot excuse it for not complying with the act in question; nor can it be said that the property of appellant or of any citizen of Flatonla, within the meaning of the Constitution, will be taken, damaged, or destroyed by the erection and maintenance of all the houses and accommodations at point of intersection which the act requires. There certainly never was a contract between appellant and the state that the former should not be required, whenever the Legislature deemed it necessary, to erect at the intersection of its road with another such buildings as were necessary for the convenience and comfort of those it serves as a public carrier of passengers." And affirmed the judgment of the trial court. And this for the reason we think, although the opinion does not so state, that the act was a valid exercise by the Legislature of the police power of the state. *State v. Kansas City, etc., Ry. Co.* (C. C.) 32 Fed. 722, was a suit to recover a penalty for the violation of an act passed by the Legislature of Missouri in 1881 (Laws 1881, p. 77), requiring every railroad company in the state engaged in the transportation of passengers or property at all crossings and intersections of other roads at the same grade to erect, build, and maintain, either jointly with the railroad company whose

road is crossed or separately by each railroad company, a depot, etc., under penalty of a forfeiture of a sum certain for failure so to do. On demurrer to each count of the petition, the court said that the first question to be determined was the constitutionality of the act; that such acts when sustainable were sustainable under the police power of the state; that the act in question was a valid exercise of that power, and that: "It is no longer doubted that the Legislature may require that trains shall stop at every railroad crossing. Public safety justifies, if it does not compel, this. If the Legislature may require a stop, why may it not require a stop of sufficient length to permit passengers to get on and off, and with that require suitable depot privileges? It will be noticed that the statute does not attempt to prescribe the size or expense of these depots. It leaves that to the discretion of the railroad companies, simply requiring that they shall be sufficient to comfortably accommodate passengers at that point. It would seem to be a reasonable exercise of the police power to compel railroad companies to furnish suitable accommodations for passengers at all places where they receive and discharge them from their trains. Public welfare, if not public safety, justifies this." And held the act to be constitutional and overruled the demurrer.

We think that the holding in *Mayor, etc., v. Norwich, etc., Railroad Co.*, supra, is a complete answer to appellant's next contention, which is "that it is not competent for any Legislature to compel a railroad to turn over its property to its competitors or what is the same thing, enter into a union depot arrangement with its competitors"; for the reason that in that case the Legislature compelled just such an arrangement and held the act constitutional on the ground, as stated, supra, in effect, that the same was a reasonable exercise of the right reserved to the Legislature to amend, alter, or repeal the charters of the corporations in interest. As a like reservation exists in this jurisdiction (Const. art. 9, § 47), we are of opinion the exercise of the power may be justified on a like ground or on the ground, as stated by Judge Brewer in *State v. Kansas City, etc., Ry. Co.*, supra, that the same is a valid exercise of the police power of the state. *Dewey v. Railroad*, 142 N. C. 392, 55 S. E. 292, is also squarely against appellant's contention. In that case the statute under construction was Revision 1905, § 1097, subsec. 3, which empowered and directed the Corporation Commission to require, when practicable, and when the necessity of the case and the judgment of the commission demanded it, any two or more railroads which then or might thereafter enter any city or town within the state to have a common or union passenger depot for the security, convenience, and accommodation of the traveling public, and to

unite in the joint expense of erecting, constructing, and maintaining said union passenger depot, etc. In passing on the act the court said: "The power of the Legislature to enact a statute of this character has been established by numerous and well-considered decisions of this and other courts of supreme jurisdiction, and is no longer open to question. *Industrial Siding Case*, 140 N. C. 239 [52 S. E. 941]; *Corporation Commission v. Railroad*, 139 N. C. 128 [51 S. E. 793], and authorities cited."

As near as we can catch the next contention, it is that as appellant, pursuant to the order, will "be compelled to enter into some sort of a contract with the Missouri, Kansas & Texas Railway Company relating to the joint use of its depot at Durant," and, as the act only provides, "in the event the railroads fail to agree, as to compensation to be paid for the construction and maintenance of the depot, the commission may fix that amount," said commission was without power to compel the Missouri, Kansas & Texas Railway Company to enter into such a contract, but, if given by the act, it would be unconstitutional on its face and constitute a taking of the property of said company without due process of law and without compensation. To this it is sufficient to say that the order is not a command to operate jointly the depot already there, but to operate a joint passenger depot on the present site of that depot, which would seem to contemplate that either a joint use of the old or the construction and maintenance of a new depot on that site would satisfy the order. That being the case, the question raised is purely hypothetical; but, should the necessity arise for a contract between appellant and the Missouri, Kansas & Texas Railway Company, relating to their joint use of the old depot, it seems, the commission being authorized by said act to make the order, there would be carried with it the power to do what is reasonably necessary to make the same effective. *Griffin v. Southern Ry. Co.*, 150 N. C. 312, 64 S. E. 16; *Haynes v. Mich.*, etc., *Ry. Co.*, 111 U. S. 228, 4 Sup. Ct. 369, 28 L. Ed. 410; *Dewey v. Railroad*, 142 N. C. 392, 55 S. E. 292.

Assailing the order which appellant concedes to be prima facie just and reasonable, it is equally untenable to insist: "There is another point in this matter which should not be overlooked. In the complaint of the complainants it will be observed they ask for a 'union' depot and the act of May 20, 1908, provides for a 'union' depot. There is nothing said in the complaint, nor is there anything said in the act of May 20, 1908, providing for a 'union passenger' depot. At the trial of this case evidence was introduced on the theory that a 'union' depot was desired, and had the plaintiff in error known that the commission was going to make an order requiring simply that a 'union passen-

ger' depot be required at Durant, Okl., it would and could have introduced testimony to the effect that such an order would be unreasonable and unjust, in that it would entail an extra expense upon the plaintiff in error."

For the reason that we can see no injustice or unreasonableness in an order resulting in the holding of the commission after a full hearing, in effect, that, although petitioners leveled their testimony at and attempted to show the necessity of a union depot for both freight and passengers at Durant (if they did), a union passenger depot only was necessary, it cannot be said that the order is unjust or unreasonable because petitioners got less than they called for. If appellant was surprised at the action of the commission in making the order for a union passenger depot when, in effect, a union freight and passenger depot was petitioned for, because of which it was prevented from showing the order as entered to be unjust and unreasonable "in that it would entail an extra expense upon" appellant, it should have followed the practice indicated in *St. L. & S. F. Ry. Co. v. Williams*, 25 Okl. 662, 107 Pac. 428, by filing a motion in due time before the commission setting forth facts sufficient to show surprise, that the order as made was unjust and unreasonable, in that it had not been given sufficient opportunity to meet the issue upon which said order was entered, that it could adduce testimony to that effect if given opportunity so to do, and have asked a continuance of the hearing. Failing in this, appellant has no just ground for complaint.

But what appellant contends to be the "most oppressive result" of this order is that the \$10,000 bonus subscribed by the people of Durant payable when the work is started on its proposed depot will be lost and never be payable unless the order is set aside. This loss is not wholly uncompensated for. It was testified by Mr. Durant, and undisputed: "I will state in this connection that a union depot can be maintained at less expense than you can maintain three depots. There is no railroad depot in the town of Durant that can be maintained with less than seven men. And by having a union depot it is economical for both of the roads. The Missouri, Oklahoma & Gulf proposes to build a \$10,000 depot in the town of Durant. I, as a citizen of the state, don't believe there is any necessity for any such expensive depot at that town at this time. It would be a useless expense on the part of the railroad that the public would have to pay for, and, unless there was some absolute necessity for it, I don't believe they ought to build it. \* \* \* Q. Your idea is that the depot that is there affords sufficient facilities for these three roads, and that you simply desire that they use at least for the time being, until conditions possibly change in some way—the depot that is there—the three

roads? A. Yes, sir; until that depot becomes inadequate, and then that question can be taken up later and passed on." From which it appears that the loss of the bonus would only have the effect of relieving appellant of the necessity of expending it on the erection and maintenance of a superfluous structure, and put it to the inconsiderable expense of maintaining a joint force in the joint depot already there, and of paying a reasonable rent for the use of one-third thereof. In view of all the testimony and especially that of R. P. Bowles, where, speaking to the safety of the public, he said, "Yesterday afternoon the Flyer, what is known as the Flyer, 'Katy Flyer,' same south and No. 2 going north and the Missouri, Oklahoma & Gulf passenger train, all three of them came in at the same time. While they were there, the local freight train was on the side track switching cars back and forth on this merchandise track. Now, had the Missouri, Oklahoma & Gulf a depot where they propose to build one, the passengers coming in on either one of these other trains it would be impossible for them to have gotten over to that had the schedule been so arranged that they would have departed as soon as these other trains got in. There was also a conglomerated mess of passenger trains there, and it would have been dangerous to have tried to have gotten to where they propose building the Missouri, Oklahoma & Gulf depot. Now, the principal business portion of the town is on the west side of the track, and, by having the depot on that side, you avoid the track crossings, and you eliminate a whole lot of trouble there. Quite frequently I have seen women come in there with perhaps four or five small children, and oftentimes come in there after night, and to have to go from where the depot is now to the one they propose to build would mean an exposure to trains, and it would be dangerous for them to undertake to go back and forth. A great many people in traveling are not thoroughly up on what to do. They feel timid in asking any one, especially women, and they will take chances quite frequently not knowing what the danger is rather than ask any one. I have seen a great many incidents of this kind. I saw one person killed because they didn't make any inquiry in trying to go across one track. Of course, those things may never happen, and they may happen the first day. In order to avoid that and for the future protection of our town, I believe it would be the best thing to have a union depot"—we believe the order complained of is just and reasonable, and for that reason the same is affirmed. See *Detroit & Ry. v. Osborn*, 189 U. S. 383, 23 Sup. Ct. 540, 47 L. Ed. 860; *Northern Pac. Ry. Co. v. Minn. ex rel.*, 208 U. S. 583, 28 Sup. Ct. 341, 52 L.

Ed. 630; *Wisconsin & Ry. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 45 L. Ed. 194; 8 Am. & Eng. En. of Law, 385; *R. R. Commissioners v. Portland & R. Co.*, 63 Me. 269, 18 Am. Rep. 208; *Fitchburg R. R. Co. v. Grand Junction R. & Co.*, 4 Allen (Mass.) 198.

All the Justices concur, except WILLIAMS, J., not participating.

CLEVELAND TRINIDAD PAVING CO. v. WOOD, County Treasurer.  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 19\*)—EXISTENCE OF CONTROVERSY—MOOT QUESTIONS.

The Supreme Court will not decide abstract or hypothetical cases disconnected from the granting of actual relief, or from the determination of which no practical relief can follow.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80; Dec. Dig. § 19.\*]

Error from Superior Court, Pittsburg County; P. D. Brewer, Judge.

Action by the Cleveland Trinidad Paving Company against J. I. Wood, County Treasurer. Judgment for defendant, and plaintiff brings error. Dismissed.

Fuller & Porter and D. C. Westenhaver, for plaintiff in error. Robert Tarter, Co. Atty., for defendant in error.

KANE, J. There are two questions presented and argued by counsel in the foregoing proceedings which may be stated as follows: (1) Is the date for sale of property delinquent September 1, 1910, for non-payment of special assessments, the month of November, 1910, or the month of November, 1911? (2) If such date is the month of November, 1910, can the county treasurer now that such date is passed be required by mandamus to select a new date and proceed to advertise and sell? The court below refused to issue the writ, and the plaintiff in error seeks to have this order reviewed by the Supreme Court. It seems to us that the questions involved have now become hypothetical, and no substantial benefit can accrue to either party by a decision by the Supreme Court. The time necessarily consumed in perfecting an appeal and presenting the case to this court has consumed the period between the dates contended for by the respective sides. It is conceded that the treasurer intends to sell in November, 1911, and, as that time is now upon us, it is apparent that the questions of law presented have become entirely academic. It has been held by this court in a great many cases, the latest of which is *Edwards et al. v. Welch*, 116 Pac. 791, that "the Supreme Court will not decide abstract or hypothetical cases disconnected from the granting of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

actual relief, or from the determination of which no practical relief can follow."

The appeal is dismissed. All the Justices concur, except DUNN, J., absent and not participating.

**BANK OF TAFT v. THOMPSON et al.**  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 773\*)—DISMISSAL—FAILURE TO FILE BRIEFS.**

Dismissed for failure to file briefs within the time limited by rule 7 of the Supreme Court (95 Pac. vi).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8104-3110; Dec. Dig. § 773.\*]

Error from District Court, Muskogee County; John H. King, Judge.

Action between the Bank of Taft and William Thompson and Walter Dilla. From the judgment, the Bank of Taft brings error. Dismissed.

Carl Pursel, for plaintiff in error. Benj. Martin, Jr., for defendants in error.

KANE, J. This cause comes on to be heard upon motion of the defendants in error to dismiss the appeal, for the reason that the plaintiff in error has failed to observe rule 7 of this court (95 Pac. vi) in not filing briefs within the required time. An examination of the record shows that the plaintiff in error is in default in regard to filing briefs, although the time for doing so has expired.

The motion to dismiss must be sustained. All the Justices concur, except WILLIAMS, J., absent.

**BRUCE et al. v. KETCHAM.**  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 773\*)—DISMISSAL—FAILURE TO FILE BRIEFS.**

Same as that in Leavitt et al. v. Commercial National Bank, 26 Okl. 164, 109 Pac. 71.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104, 3108-3110; Dec. Dig. § 773.\*]

Error from District Court, Muskogee County; J. H. King, Judge.

Action between A. M. Bruce and another and H. E. Ketcham. From the judgment, Bruce and another bring error. Dismissed.

George K. Powell and Howell H. Parks, for plaintiffs in error. W. F. Rampendahl, for defendant in error.

WILLIAMS, J. On December 1, 1910, petition in error, with case-made attached, was filed with the clerk of this court, and summons issued thereon. On September 11, 1911,

the defendant in error filed a motion, which shows service upon the attorneys for plaintiffs in error, asking that the appeal be dismissed on account of failure to comply with rule 7 of this court (20 Okl. viii, 95 Pac. vi), requiring the plaintiff in error to prepare and serve briefs upon the defendant in error within 40 days after filing the petition in error. This appears not to have been done.

The appeal is therefore dismissed. Leavitt et al. v. Commercial Nat. Bank, 26 Okl. 164, 109 Pac. 71. All the Justices concur.

**BRYAN v. SULLIVAN.**

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 19\*)—DISMISSAL—GROUND—WANT OF ACTUAL CONTROVERSY.**

Abstract or hypothetical cases, disconnected from the granting of actual relief, or from the determination of which no particular result can follow other than the awarding of the costs of the appeal, will not be decided by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80; Dec. Dig. § 19.\*]

Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by P. John Bryan against D. F. Sullivan. Judgment for defendant, and plaintiff brings error. Proceedings in error dismissed.

J. A. Diffendaffer, for plaintiff in error. Hudson & Whalin, for defendant in error.

WILLIAMS, J. On February 1, 1910, the plaintiff in error, as plaintiff, obtained the issuance of a temporary injunction out of the district court of Comanche county, which on the 7th day of February, 1910, was dissolved by order of said court. On March 8, 1910, a proceeding in error was begun in this court to review the order dissolving the same. On the 21st day of December, 1910, the action in which the temporary injunction was issued and dissolved was tried in said district court, and judgment rendered therein in favor of the defendant.

Defendant in error moves to dismiss this proceeding on the ground that only a moot question is now involved. The plaintiff in error has neither made any response to this motion nor in any way resisted the dismissal of this proceeding in error. The time in which the plaintiff was allowed to make and serve a case-made has expired, without any re-extension, and no case-made has been made and served. It further appears that no question which could be reviewed by transcript arises on said record. It follows that the only relief that could be awarded now by the de-



termination of this appeal would be in the way of costs.

It is a settled holding of this court that it will not decide abstract or hypothetical cases, disconnected from the granting of actual relief or from the determination of which no particular result can follow other than an adjudication as to who will pay the costs of the appeal.

The motion to dismiss is therefore sustained. All the Justices concur.

#### ARNOLD v. IDIKER.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 757\*)—AFFIRMANCE—FAILURE OF PLAINTIFF IN ERROR TO FILE ABSTRACT.

The plaintiff in error having failed to comply with rule 25 (95 Pac. viii), which provides that "the brief of the plaintiff in error in all cases except felonies shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court," but the defendant in error in his brief having made a counter abstract, no reply being made thereto by the plaintiff in error, under the abstract as made by the defendant in error no error being shown, the judgment of the lower court will be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. § 757.\*]

Error from Tulsa County Court; N. J. Gubser, Judge.

Action by E. M. Arnold against Henry Idiker. From the judgment, Arnold brings error. Affirmed.

Warren D. Abbott and George T. Brown, for plaintiff in error. Charles J. Wrightsman, Charles E. Bush, Victor O. Johnson, and L. W. Lee, for defendant in error.

WILLIAMS, J. Rule 25 (95 Pac. viii) of this court is in part as follows: "The brief of the plaintiff in error in all cases except felonies shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court." The brief of the plaintiff in error wholly fails to comply with this rule. Counsel for defendant in error do not make any objection to such deficiency or incompleteness, but set out a counter abstract. Under the facts as stated in the counter abstract, the instruction requested by the plaintiff in

error, presenting his theory of the case, was properly refused on the ground that there was no evidence upon which to predicate it.

Wherever the plaintiff in error fails to comply with the foregoing rule, and the defendant in error makes a counter abstract, which is not replied to by the plaintiff in error, and under such abstract as made by the defendant in error no prejudicial error is shown, the presumption being in favor of the trial court, the same will be affirmed.

The judgment of the lower court is accordingly affirmed. All the justices concur.

#### HUDSON v. LAPSLEY et al.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(*Syllabus by the Court.*)

APPEAL AND ERROR (§ 430\*)—DISMISSAL—ISSUANCE OF SUMMONS.

A petition in error will be dismissed on motion, even though the same is filed in this court within the year allowed under the statute, where no waiver of issuance and service of summons in error is had, and no præcipe for the same filed, and no summons issued or general appearance made, within such time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2173, 2174; Dec. Dig. § 430.\*]

Error from District Court, Garvin County; R. McMillan, Judge.

Action between T. J. Hudson and Wade Lapsley and another. From the judgment, Hudson brings error. Dismissed.

H. M. Carr, for plaintiff in error. J. B. Thompson, for defendants in error.

KANE, J. This cause comes on to be heard upon a motion to dismiss the petition in error and appeal herein, upon the ground that no summons in error or præcipe therefor, or waiver of issuance and service of same, were filed in this court until after the expiration of one year from the date of the rendition of the judgment in the court below. The record shows that the judgment was rendered below on the 2d day of November, 1909; that the petition in error, with case-made attached, was filed in this court on the 30th day of May, 1910; that no summons in error was ever issued, and no præcipe therefor filed; that on the 31st day of March, 1911, a waiver of issuance and service of summons in error, signed by counsel for defendants in error, was filed.

The appeal must be dismissed. The rule is that "a petition in error will be dismissed, on motion, even though the same is filed in this court within the year allowed under the statute, where no waiver of issuance and service of summons in error is had, and no præcipe for the same filed, and no summons issued or general appearance made, within such time." *McMurty v. Byrd et al.*, 23

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Okl. 597, 101 Pac. 1117; Court of Honor v. Wallace, 23 Okl. 784, 102 Pac. 111. C., R. I. & P. Ry. Co. v. Bradham, 24 Okl. 250, 103 Pac. 591; Coleman v. Eaton, 26 Okl. 858, 110 Pac. 672.

The appeal is therefore dismissed. All the justices concur.

ST. LOUIS & S. F. R. CO. v. LANGER et al. (Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

RAILROADS (§ 227\*)—STOPPING INTERSTATE TRAIN AT JUNCTION.

Where an order of the Corporation Commission, requiring an interstate train to be stopped on flag at a junction point or station, appears to be desirable for the public and necessary for the public conveniences, and proper and adequate facilities are not otherwise afforded for such point, its size and importance being considered, in connection with the service required on account of its being a junction point, the same will not be disturbed on appeal.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 227.\*]

Dunn, J., dissenting.

Appeal from Order of Corporation Commission.

Petition of A. J. Langer and others before Corporation Commission for requiring the St. Louis & San Francisco Railroad Company to stop at a certain flag station. From the order of the Corporation Commission, the railroad company appeals. Affirmed.

W. F. Evans and R. A. Kleinschmidt, for appellant. C. J. Davenport, for appellees.

WILLIAMS, J. A petition was filed by the appellees before the Corporation Commission, praying that the appellant be required to stop on flag at Davenport station certain trains, to wit, Nos. 407 and 408. After the hearing, said trains were ordered to be stopped as prayed for.

The Atchison, Topeka & Santa Fé Railway line intersects that of appellant at said station, which has a population of about 800 people. The order of the Commission should not be disturbed by this court, unless it is unjust and unreasonable. M., K. & T. R. R. Co. v. State, 24 Okl. 331, 108 Pac. 613; C., R. I. & P. R. R. Co. et al. v. State et al., 24 Okl. 370, 103 Pac. 617, 24 L. R. A. (N. S.) 393; A., T. & S. F. Ry. Co. v. State et al., 23 Okl. 210, 100 Pac. 11, 21 L. R. A. (N. S.) 908; Id., 23 Okl. 510, 101 Pac. 262; K. C., M. & O. Ry. Co. v. State, 25 Okl. 715, 107 Pac. 912; Ft. Smith & W. v. State, 25 Okl. 866, 108 Pac. 407. It does not appear that the stopping of said trains on flag for the putting off or taking on of passengers would result in severe detriment and hindrance to interstate traffic. It is insisted, however, that if the appellant is required to stop trains at this junction it may be requir-

ed to stop the same at like or similar points, eventually resulting in hindering interstate traffic.

Under the exercise of the police power, the appellant may be required to afford adequate facilities for the local or intrastate passengers. The Commission found that at such junction point the trains that are stopped by appellants for the purpose of putting off and taking on passengers do not afford adequate facilities for such purpose. Such finding comes to this court with the presumption of being correct, just, and reasonable, and we are not permitted to disturb the same until the contrary affirmatively appears.

We do not understand that the Commission required said trains to be stopped solely because it is a junction point. To arbitrarily require interstate trains to stop at a junction point, solely because it was such, or at all junction points within the state, would be such an interference with interstate commerce as is not permitted under the decisions of the Supreme Court of the United States, which are controlling on this court. Herndon v. C., R. I. & P. R. R. Co., 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970.

It must be understood that we do not affirm the order of the Commission solely on the ground that this interstate train is required to stop at a junction, but we take into consideration the fact of its being a junction point, the size of the place, and the reasonable requirement of facilities for the intrastate traffic. The Corporation Commission having made the order requiring the stopping of such trains, and it being prima facie, or presumed to be, correct, just, and reasonable, such presumption has not been affirmatively overcome in this court, and, under such finding and presumption, we reach the conclusion that the order should be affirmed.

The order is affirmed. All the Justices concur, except DUNN, J., who dissents.

REINHARDT v. WHITMIRE et al.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 349\*)—APPEAL BY INFANT—STATUTORY PERIOD.

"In a case where an infant is plaintiff in error, and the statutory period of one year provided for in section 6082, Compiled Laws of Oklahoma 1909, has expired before the commencement of his proceeding in error, which occurs during the period of his disability, the one year referred to in said statute, relating to infants, begins to run as to him after the removal of his disability, and is not an additional period granted to him during its existence."

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1905-1912; Dec. Dig. § 349.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Error from District Court, Craig County; T. L. Brown, Judge.

Action by Alma Fay Reinhardt, by her next friend, Mary A. Reinhardt, against Albert Whitnire and others. Judgment for defendants, and plaintiff brings error. Dismissed.

James L. Allen, for plaintiff in error. W. H. Kornegay, for defendants in error.

**WILLIAMS, J.** The defendant in error has moved to dismiss this proceeding in error, on the ground that it was not commenced within one year after the rendition of the judgment. Counsel for the plaintiff in error insists that, as she is a minor, she may, at any time during her minority and up to the expiration of one year after she attains her majority, prosecute this proceeding in error, relying upon section 6082, Compiled Laws of Oklahoma 1909.

In Birdie Holland, a Minor, by Noah S. Holland, Her Legal Guardian, v. Eliza Beaver, 116 Pac. 766, this question has been determined adversely to the plaintiff in error. Paragraph 2 of the syllabus is as follows: "In a case where an infant is plaintiff in error, and the statutory period of one year provided for in section 6082, Compiled Laws of Oklahoma 1909, has expired before the commencement of his proceeding, which occurs during the period of his disability, the one year referred to in said statute, relating to infants, begins to run as to him after the removal of his disability, and is not an additional period granted to him during its existence."

The motion to dismiss is therefore sustained. All the Justices concur, except DUNN, J., absent and not participating.

#### LUGRAND et al. v. HARRIS.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

#### APPEAL AND ERROR (§ 773\*)—DISMISSAL—FAILURE TO FILE BRIEF.

Same as that in Leavitt et al. v. Commercial National Bank, 26 Okl. 164, 109 Pac. 71.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104-3110; Dec. Dig. § 773.\*]

Error from District Court, Okfuskee County; John Caruthers, Judge.

Action by Annie Harris, by her guardian, Crittenden Smith, against E. L. Lugrand and others. From the judgment, Lugrand and others bring error. Dismissed.

C. T. Huddleston, for plaintiffs in error. W. W. Wood, for defendants in error.

**WILLIAMS, J.** On August 30, 1910, petition in error, with transcript attached, was filed with the clerk of this court. On Sep-

tember 21, 1911, defendants in error filed a motion, which shows service upon attorney for plaintiffs in error, praying that the appeal be dismissed on account of failure to comply with rule 7 of this court (20 Okl. viii, 95 Pac. vi), requiring plaintiff in error to prepare and serve brief on defendant in error within 40 days after the filing of the petition in error. This appears not to have been done.

The appeal is therefore dismissed. All the Justices concur.

#### OVERHOLSER et al. v. OKLAHOMA INTERURBAN TRACTION CO.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

#### 1. STREET RAILROADS (§ 18\*)—POWER—STATUTORY PROVISIONS.

A corporation formed under the general laws of the state, in pursuance to section 1408, Compiled Laws of Oklahoma 1909, with the power to use electricity for the propulsion of its cars and rolling stock, in addition to the powers exercised by railroad corporations generally, may, with the consent of the authorities of any city or town in the state of Oklahoma located upon or along its lines, construct a system of street railways upon such streets, and upon such terms and conditions as may be agreed upon between such corporations and such city or town, and may also accept lighting contracts with such cities or towns, to supply the said cities or towns or the inhabitants thereof with light or electric current for power; or such railways or such corporation may also acquire, by purchase or consolidation, plants, franchises, contracts, good will, and other property of any existing street railway or lighting company, as provided by section 1409, Compiled Laws of Oklahoma 1909.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 39-41; Dec. Dig. § 18.\*]

#### 2. CORPORATIONS (§ 370\*)—POWERS—DETERMINATION.

The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511-1515; Dec. Dig. § 370.\*]

#### 3. MUNICIPAL CORPORATIONS (§§ 680, 681\*)—USE OF STREETS—POWER TO GRANT FRANCHISES.

Section 5a, art. 18, of the Constitution, which provides: "No municipal corporation shall ever grant, extend, or renew a franchise, without the approval of a majority of the qualified electors residing within its corporate limits, who shall vote thereon at a general or special election; and the legislative body of any such corporation may submit any such matter for approval or disapproval to such electors at any general municipal election, or call a special election for such purpose at any time upon thirty days' notice; and no franchise shall be granted, extended, or renewed for a longer term than twenty-five years"—applies to an original franchise, or to a renewal or extension of the period for which a grant has been made, and does not apply to a mere extension or enlargement of the facilities which the franchise holder employs in exercising a power previously granted.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. §§ 680, 681.\*]

**4. MUNICIPAL CORPORATIONS (§ 682\*)—USE OF STREETS—POWER TO GRANT FRANCHISES.**

The amendment of a section of an ordinance granting a franchise, passed by the city council of a city of the first class, by providing that an electric street railway may extend its tracks generally throughout the city, and use the streets thereof for that purpose, notwithstanding the original franchise named certain streets which might be used for that purpose, is not repugnant to that part of section 5a, art. 18, of the Constitution, which provides that "no franchise shall be granted, extended or renewed for a longer term than twenty-five years."

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 682.\*]

**5. EMINENT DOMAIN (§ 275\*)—PAYMENT BEFORE TAKING—INJUNCTION.**

Persons owning lots abutting upon the streets of a city of the first class, upon which an electric street railway company is about to lay its tracks with the consent of the city, are not entitled to a writ of injunction to restrain the progress of such work, upon the ground that the consequential damages accruing to said lot owners by the additional servitude laid upon the street have not been first ascertained and paid.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 769-773; Dec. Dig. § 275.\*]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Suit by W. L. Overholser and others against the Oklahoma Interurban Traction Company. Judgment for defendant, and plaintiffs brings error. Affirmed.

Henry E. Asp, Devereux & Hildreth, and Snyder, Owen & Lybrand, for plaintiffs in error. J. H. Wright, H. A. Kroeger, and W. A. Ledbetter, for defendant in error.

KANE, J. The plaintiffs in error, who hereafter will be referred to as plaintiffs, commenced this suit in the court below against the defendant in error, which hereafter will be referred to as defendant, to enjoin it from constructing its street railway lines along and upon certain streets of the city of Oklahoma City. The plaintiffs alleged, in substance: That they are the owners of residence property abutting on Robinson and other streets of said city, owning their lots and the streets in front of them, in fee simple, subject to the right of the public in the streets. (1) That the defendant was about to use said streets for the purpose of constructing, operating, and maintaining an electric street railway system thereon, without authority of law, thereby committing a nuisance, and, (2) if authority exists, without first ascertaining and compensating them for the injury done to their property by said user. The relief prayed for was denied by the court below, and to reverse the judgment this proceeding in error was commenced.

[1] The principal ground upon which they deny the right of the defendant to use and occupy said street for such purpose is that, under its articles of association and organization, it is authorized to construct, operate, and maintain only and solely inter-

urban street railways, and not a street railway system, as that term is generally understood, operating throughout the city. The original articles of association were issued in May, 1905, and, among other things, provided: "That the purposes for which this corporation is formed are to build, equip, run and operate an electric street railroad from some accessible point in Oklahoma City to and through Capitol Hill, and through and around Oklahoma City, and to Lexington, O. T., and vicinity, to own and operate trolley poles, power plants, houses and any other modern appliances therefor. To exercise the rights and powers of railroad corporations, and may, with the consent of the towns or cities along said line, construct, supply and furnish electric lights to same and to the citizens thereof, as well as electric currents. To acquire by purchase or otherwise the franchise, contracts, plants, good will and other rights or property of any other electric street railroads or lighting companies that may be located within any of the cities or towns along said line. To own or acquire by lease or otherwise all other appliances, either real or personal, that may be deemed necessary to the full enjoyments of the rights and privileges herein obtained. The place from and to which this railroad is to be constructed, is in and upon some accessible street or streets in the city of Oklahoma, and thence to and through such street and streets in the town of Capitol Hill as it may desire to use, and to and through Lexington, to Cleveland county, the estimated distance thereof being about forty miles, same extends into and through Oklahoma and Cleveland counties, O. T."

Afterwards, during the year 1907, amended articles of association were issued, which, among other things, provided: "That the purposes for which this corporation is formed are to build, equip, run and operate an electric street railroad from some accessible point in Oklahoma City to and through Capitol Hill, and through and around Oklahoma City and to and through El Reno, O. T., and vicinity; to own, run and operate trolley poles, power plants, houses and any other modern appliances therefor; to exercise the right and powers of railroad corporations, and may with the consent of the towns or cities along said line, construct, supply and furnish electric lights to same and to the citizens thereof, as well as electric currents; to acquire by purchase or otherwise the franchise, contracts, plants, good will and other rights or property of any other electric street railroads or lighting companies that may be located within any of the cities or towns along said line; to own or acquire by lease or otherwise all other appliances either real or personal that may be deemed necessary to the full enjoyment

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the rights and privileges herein obtained. The place from and to which this railroad is to be constructed is in and upon some accessible street or streets in the city of Oklahoma, and hence to and through such street and streets of the town of Capitol Hill as it may desire to use, and to and through El Reno, Canadian county, the estimated distance thereof being about forty-four miles, same extends into and through Oklahoma and Canadian counties, Oklahoma Territory."

It is obvious that the defendant corporation was organized in pursuance to section 1 of the Session Laws of 1903, p. 141, which corresponds with section 1408, Compiled Laws of Oklahoma 1909, relating to electric railways, which provides that corporations may be formed under the general railway laws of the territory of Oklahoma, who shall have the power to use electricity for the propulsion of their cars and rolling stock, etc. Section 2 of said act, which corresponds with section 1409 of the Compiled Laws of Oklahoma, 1909, provides that: "Such corporations in addition to the powers exercised by railroad corporations generally, may, with the consent of the authorities of any city or town in the territory of Oklahoma, located along or upon its lines, construct a system of street railways upon such streets and upon such terms and conditions as may be agreed upon between such corporation and such city or town."

[2] A careful consideration of the original and amended articles of association in connection with the general laws in relation to corporations possessing the power to use electricity for the propulsion of its cars and rolling stock, and the statute conferring additional powers thereon, leaves no doubt in the mind of the court that, if the defendant obtained the consent of the authorities of the city, as provided by section 2, supra, its articles of incorporation are sufficiently broad to authorize it to construct a system of street railways upon the streets thereof upon such terms and conditions as may be agreed upon between such corporation and the city. This is not a departure from the general rule contended for by counsel, that a corporation is circumscribed within what they call its primary power—that is, the power conferred upon it by its articles of incorporation—but the application of another well-settled rule, to the effect that: "The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond those powers will not sustain an action against the corporation. But, whatever under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created is not to be taken as prohibited." *Green Bay & M. Ry. Co. v. Union Steam Boat Co.*, 107 U. S. 98, 2 Sup. Ct. 221, 27 L. Ed. 413; *Derr v. Fisher*, 22

Okl. 126, 98 Pac. 978; *Oklahoma Portland Cement Co. v. Anderson*, 115 Pac. 787.

The record shows that Ordinance No. 549, which became a law of the city on the 5th day of November, 1905, grants to the defendant the right to establish, construct, and maintain its railway upon certain streets of the city, the streets upon which the property of the plaintiffs is situated not being included; and further provides that: "Said railway company will not build its line upon any other streets than the one designated herein without the consent of the city council of Oklahoma City." The defendant constructed and is maintaining street railway tracks upon the streets named in section 1 of said ordinance, without any objections being made thereto, as far as the court is informed. Ordinance No. 549 took effect prior to statehood, and at that time the only way to pass an ordinance or give the consent required by section 1 of that ordinance was by the action of the city council. When, subsequent to statehood, the defendant desired permission to extend its lines generally throughout the city, it caused an initiative petition to be circulated, signed, and filed, submitting the question to a vote of the people for their rejection or approval. At the election held thereunder, the proposition submitted carried, and afterwards was enacted into an ordinance by the legislative body of the city. The initiated measure purported to amend section 1 of Ordinance No. 549, and is in words and figures as follows: "Section 1. The right is hereby granted to the Oklahoma Interurban Traction Company, of Oklahoma City, its successors and assigns, hereinafter referred to as said railway company, to establish, construct and maintain in the streets, avenues and alleys of the city of Oklahoma City, as now existing or hereafter extended, a system of electric railroads consisting of either single or double tracks, with trolleys, trolley wires, and all necessary and convenient fixtures and appurtenances useful in the construction and operation of such railroad, and have the right to construct for the purpose of transmitting the power for the propulsion of its cars, overhead trolley systems suspended on poles placed along the curb lines in the center of such street or streets when necessary, provided that this grant shall be subject to all the restrictions and regulations of Ordinance No. 549, of the city of Oklahoma City as herein amended." Several of the propositions of law revolve around this action by the electors and the city council, and involve the general question, Did the foregoing proceedings vest in the defendant corporation power to construct a system of railways upon the streets of the city? In other words, were the initiative proceedings and the action of the city council, or either of them, sufficient to grant the "consent" required by section 2, supra?

[3] On the propositions growing out of this

question, the plaintiffs contend: (1) That there was no law in force in the state, authorizing the submission of the initiative measure to a vote of the qualified electors; (2) that if there was a law authorizing such election the election was void, because it was held at the same time other measures were being voted upon in said city, and therefore was not a special election; and (3) that if the ordinance was legally enacted in the foregoing respects it was void, because it sought to confer a perpetual franchise upon the defendant, in violation of section 5a, art. 18, of the Constitution, which prohibits the granting, extension, or renewal of franchises for a period longer than 25 years. None of these contentions can be sustained. They are all based upon the theory that it was necessary to invoke section 5a, art. 18, of the Constitution, to procure the consent of the city to construct and operate a street railway system upon the streets of the city, other than those specially mentioned in section 1 of Ordinance No. 549, which theory, to our mind, is untenable. Section 5a, supra, provides: "No municipal corporation shall ever grant, extend, or renew a franchise, without the approval of a majority of the qualified electors residing within its corporate limits, who shall vote thereon at a general or special election; and the legislative body of any such corporation may submit any such matter for approval or disapproval to such electors at any general municipal election, or call a special election for such purpose at any time upon thirty days' notice; and no franchise shall be granted, extended, or renewed for a longer term than twenty-five years."

[4] We are of the opinion that the amendment to section 1 of Ordinance 549 was not an attempt to grant, extend, or renew a franchise, and hence does not fall within the purview of the foregoing section of the Constitution. Ordinance No. 549, as its title states, was "An ordinance authorizing the Oklahoma Interurban Traction Company of Oklahoma City, its successors and assigns to construct and maintain an electric railway system in the streets and alleys of Oklahoma City." In its entirety it constitutes a complete code, governing the construction and maintenance of an electric street railway system. After granting the right to use certain streets for that purpose, section 2 provides how wires shall be suspended from the trolley poles; and that all the work and improvements shall be constructed under the supervision of the city engineer and public improvements committee of the city council. Section 3 requires the company in the construction of its railway system to comply with the grades established by the city for its streets. Section 4 prescribes the duty of the company when it traverses any streets upon which pavements are constructed, etc. Sections 5, 6, 7, 8, and 9 provide a system of rules to insure the safety and convenience

of patrons of the road, provide that the charge for transportation of passengers to be exacted shall not exceed the sum of 5 cents for continuous passage over the company's lines, and that tickets for the use of school children shall be furnished good for one continuous passage, in quantities not less than 20 rides, at the rate of 2½ cents each, and children under the age of 5 years, when accompanied by parents or guardian, shall be carried free, etc. Then follow sections providing for the participating by the city in the profits of the company, and the grant of other powers and the reservation of other privileges incident to the conduct of a street railway corporation. We think it is quite apparent that it was the intention of the city council, by the enactment of Ordinance No. 549, to grant to the defendant a franchise to construct an electric street railway system within the city, and also to preserve its reserve power to regulate the defendant's use of the streets, and preserve to the people using the public utility many valuable privileges.

To hold that it is not within the power of a city to grant a street railway franchise in the manner here attempted, and that every permission for the extension of its tracks on to other streets or alleys amounts to a new franchise, or the extension or renewal of the old, requiring submission to a popular vote as upon an original grant, would hamper one of the ordinary function of municipal corporation, and the progress and usefulness of transportation corporations, by an unreasonable restriction, and tend to a multiplication of petty franchises, from which a confusion of claims, with resultant burdensome litigation, would be sure to arise, to the detriment of public interests. *Thurston v. Huston et al.*, 123 Iowa, 157, 98 N. W. 637; *Wood et al. v. City of Seattle et al.*, 23 Wash. 1, 62 Pac. 135, 52 L. R. A. 369; *Cleveland Electric Railway Company v. City of Cleveland (C. C.)* 137 Fed. 111; *Sims v. Street Railroad Company*, 37 Ohio St. 556; *Blair v. City of Chicago et al.*, 201 U. S. 400, 26 Sup. Ct. 427, 50 L. Ed. 801; *Cleveland Elec. Ry. Co. v. City of Cleveland*, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399. If, then, as we conclude, the amendment to section 1 of Ordinance No. 549 was not the grant, extension, or renewal of a franchise, but simply an exercise of the power of the city to regulate the company's use of its streets reserved to the original grant, then the provision of section 5a, art. 18, of the Constitution, is not applicable. In our opinion, that provision is applicable only to the grant of an original franchise, or to a renewal or extension of the period for which a grant has been made, and does not apply to a mere extension or enlargement of the facilities which the franchise holder employs in exercising the power originally granted. *Thurston v. Huston et al.*, supra. Section 4c of article 18 of the Constitution provides a means of submitting such questions to a vote

of the people, as follows: "When such petition demands the enactment of an ordinance or other legal act other than the grant, extension, or renewal of a franchise, the chief executive officer shall present the same to the legislative body of such corporation at its next meeting, and unless the said petition shall be granted more than thirty days before the next election at which any city officers are to be elected, the chief executive officer shall submit the said ordinance or act so petitioned for to the qualified electors at said election; and if a majority of said electors voting thereon shall vote for the same, it shall thereupon become in full force and effect." As the foregoing provision was not followed in the present case, the initiative proceedings were merely advisory, and amount to no more than a formal, though quite unnecessary, approval of the action of the city council. Of course, it follows that if the amendment of section 1, Ordinance No. 549, did not operate to grant, extend, or renew the franchise formerly granted, the contention of counsel that it had the effect of granting a perpetual franchise, in contravention of that part of section 5a, supra, which provides that "no franchise shall be granted, extended, or renewed for a longer term than twenty-five years," must fail.

[5] One more question remains to be noticed. Were the plaintiffs entitled to injunctive relief to restrain the defendant from using the streets upon which their property abutted, until the resulting damages are ascertained and compensation therefor paid? Counsel contend that this right is guaranteed by section 24, art. 2, of the Constitution, which provides: "Private property shall not be taken or damaged for public use without just compensation. Such compensation, irrespective of any benefit from any improvements proposed, shall be ascertained by a board of commissioners of not less than three freeholders, in such manner as may be prescribed by law. The commissioners shall not be appointed by any judge or court without reasonable notice having been served upon all parties in interest. The commissioners shall be selected from the regular jury list of names prepared and made as the Legislature shall provide. Any party aggrieved shall have the right of appeal, without bond, and trial by jury in a court of record. Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. When possession is taken of property condemned for any public use, the owner shall be entitled to the immediate receipt of the compensation awarded, without prejudice to the right of either party to prosecute further proceedings for the judicial determination of the sufficiency or insufficiency of such compensation. The fee of land taken by common carriers for right of way, with-

out the consent of the owner, shall remain in such owner subject only to the use for which it is taken. In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question." Granting, without deciding, that the construction of a street railway in the streets of a city imposes an additional burden or servitude upon the street, it does not follow that the plaintiffs, under the circumstances of this case, are entitled to have the injury inflicted by the invasion of such right ascertained and compensated for before the street is occupied for street railway purposes. That, in effect, was the view entertained by this court in *Edwards v. Thrash*, 26 Okl. 472, 109 Pac. 832, 138 Am. St. Rep. 975. It is true that in the *Thrash Case* the damages alleged were occasioned by changing the grade of a street by municipal agencies, and the question as to whether the same rule ought to be extended to cases where consequential damages are occasioned, other than through municipal agencies, was left open; but there is small difference in principle between the two cases, and the decision in the *Thrash Case* leads logically to the conclusion reached herein. The following from the opinion of Justice Williams, who delivered the opinion for the court in the *Thrash Case*, is entirely applicable to the facts disclosed by this record, and correctly states the principle involved:

"Whilst the first clause of section 24, art. 2, supra, provides that private property shall not be taken or damaged without just compensation, an accompanying clause in the same section provides that, until compensation shall be paid to the owner or into court for the owner, the property of the owner shall not be disturbed or the proprietary rights of the owner divested. Does this latter clause require compensation to be paid to the owner, or into court for the owner, where the damages are merely consequential? The word 'disturb,' according to Mr. Webster, means, 'to interrupt a settled state of,' and according to the same authority 'proprietary' means 'belonging or pertaining to a proprietor, considered as property, owned,' and the words 'the property shall not be disturbed or the proprietary rights of the owner divested' seem to mean possession thereof shall not be taken, nor his property taken, nor the title thereof be divested, until compensation therefor has been first paid to the owner, or into the court for the owner. This was the controlling construction of the state of Missouri at the time of the adoption of this clause in the Oklahoma Constitution, and, when there was no such provision in force in any other state, where a contrary construction prevailed, that of the highest court of Missouri should be especially persuasive. All the courts seem to hold that, under such constitutional

provisions, consequential damages arising from the change of the established grade may be recovered by the abutting owner. See, also, section 1, art. 1, c. 10, Sess. Laws 1907-08, and section 443, Wilson's Rev. & Ann. St. 1903. The only difference seems to be as to whether same shall be ascertained in an eminent domain proceeding, or in an action at law for damages. The majority of the courts having passed on the question appear to hold the latter. The first Legislature of the state after its erection passed an act entitled 'An act amending section 28 of article 9 of chapter 17, of the Statutes of Oklahoma, 1893, and regulating the method of procedure in the condemnation of private property for both public and private use.' Sess. Laws 1907-08, art. 1, c. 20, pp. 258, 261. Neither the eminent domain act as brought over from the territory of Oklahoma, nor as thus amended, provides for the assessment of consequential damages in the case of public improvements made by a municipality. This evident legislative construction of section 24 of article 2 accords with that placed on the similar provision of the Missouri Constitution by the Supreme Court of the state. Consequential damages would be difficult to ascertain before the improvements had been made. This is one of the reasons given by many of the courts as to why it was not intended by the Constitution and statute makers that provisions, providing for compensation first to be made for the taking or damaging of property by virtue of eminent domain proceedings, did not include consequential damages, and we agree with the Supreme Court of Missouri, in *Clemens v. Insurance Company*, supra [184 Mo. 46, 82 S. W. 1, 67 L. R. A. 362, 105 Am. St. Rep. 526], in holding that, where the property of the citizen is not taken and his proprietary right not disturbed, but the damage to his property is purely consequential, he is not entitled to have same ascertained and paid before the proposed public work is done, and is not entitled to have the work done in pursuance of valid municipal and legislative authority enjoined; but his remedy is one at law for damages."

In addition to this, Justice Williams quoted with approval from *D. & S. F. Ry. Co. v. Domke et al.*, 11 Colo. 247, 17 Pac. 777; *McMahon & Perrin v. St. Louis, Ark. & Tex. R. Co.*, 41 La. Ann. 827, 6 South. 640; *Spencer v. Point Pleasant & Ohio R. R. Co. et al.*, 23 W. Va. 406, in all of which the consequential damages were inflicted by public service corporations.

A question involving the right of these plaintiffs to maintain this action has been raised and argued, but, as the result would be the same, no matter what conclusion we reached on the question of procedure, we will leave it open, except in so far as the same may be settled by the decisions of this court in *McKay v. City of Enid et al.*, 26 Okl.

275, 109 Pac. 520, 30 L. R. A. (N. S.) 1021, and other cases.

The judgment of the lower court is affirmed. All the Justices concur.

### BOARD OF COM'RS OF MUSKOGEE COUNTY v. HART.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

OFFICERS (§ 100\*)—DEPUTIES—"TERM OF OFFICE"—COMPENSATION.

A deputy, appointed by an officer to hold during the pleasure of such principal, does not hold for a term, within the meaning of section 10, art. 23, of the Constitution of this state, prohibiting the change of the salary or emoluments of any public officer after his election or appointment, or during his "term of office," except by operation of law, enacted prior to such election or appointment.

[Ed. Note.—For other cases, see *Officers*, Dec. Dig. § 100.\*

For other definitions, see *Words and Phrases*, vol. 8, pp. 6920, 6921.]

Error from Superior Court, Muskogee County; Farrar L. McCain, Judge.

Action between the Board of Commissioners of Muskogee County and Charles E. Hart. From the judgment, the Board of Commissioners brings error. Affirmed.

W. E. Disney, for plaintiff in error.  
Charles A. Moon, for defendant in error.

WILLIAMS, J. This proceeding in error is to review the judgment of the trial court, holding that section 16, c. 69, Session Laws 1910, as amended by section 1, c. 56, Session Laws 1911, entitled "An act amending section 16 of an act entitled 'An act relating to certain county and district officers,' chapter 69, of Session Laws 1910, repealing all laws in conflict," wherein the compensation of certain deputies was increased, applied to deputies then in office who held, not for any specified time or defined term, and that it was not repugnant to section 10 of article 23 of the Constitution, which is in hæc verba: "Except wherein otherwise provided in this Constitution, in no case shall the salary or emoluments of any public official be changed after his election or appointment, or during his term of office, unless by operation of law enacted prior to such election or appointment; nor shall the term of any public official be extended beyond the period for which he was elected or appointed: Provided, That all officers within this state shall continue to perform the duties of their offices until their successors shall be duly qualified."

Section 3, art. 12, of the Constitution of South Dakota (1889) provides: "The Legislature shall never grant any extra compensation to any public officer, employé, agent or contractor after the services shall have

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



been rendered or the contract entered into, nor authorize the payment, of any claims or part thereof created against the state, under any agreement or contract made without express authority of law, and all such unauthorized agreements or contracts shall be null and void; nor shall the compensation of any public officer be increased or diminished during his term of office; Provided, however, that the Legislature may make appropriations for expenditures incurred in suppressing or repelling invasion."

In *Somers v. State*, 5 S. D. 321, 58 N. W. 804, 1d., 5 S. D. 585, 59 N. W. 963, it was held: "A deputy, appointed by an officer to hold during the pleasure of such principal, does not hold for a 'term,' within the meaning of section 3, art. 12, of the Constitution, prohibiting any change in the compensation of any public officer 'during his term of office.'"

Section 8, art. 14, of the Constitution of Missouri (1875) provides: "The compensation or fees of no state, county or municipal officer shall be increased during his term of office; nor shall the term of any office be extended for a longer period than that for which such officer was elected or appointed."

In *State ex rel. Kane v. Johnson*, Comptroller (Mo.) 25 S. W. 855, section 1 of the syllabus is as follows: "A municipal officer, subject to removal at the pleasure of the council, is not an officer, within Const. art. 14, § 8, prohibiting an increase in the salary of any officer during his term of office." In the opinion it is said: "Counsel for the relator concede in their brief that he is a public officer, within the meaning of the general definition of a public officer, and that he performs public duties, and offices and functions of a public character; but they contend that he is not an officer, within the meaning of the section of the Constitution quoted. It will be observed that this section of the Constitution only embraces within its provisions officers who are elected or appointed for some specific or definite time, and that it has no application whatever to the case in hand, when the relator's term of office is not fixed by any law or ordinance, and when he simply holds at the pleasure of the appointing power. This is manifest from the fact that it also provides that the term of office shall not be extended for a longer period than that for which such officer was elected or appointed. The relator was not elected, nor was he appointed, for any definite time." On a rehearing, the court adhered to its former decision. *State ex rel. Kane v. Johnson*, 123 Mo. 43, 27 S. W. 339.

Article 4, section 7, par. 11, of the Constitution of New Jersey (1844) provides: "The Legislature shall not pass private, local or special laws in any of the following enumerated cases; that is to say: \* \* \* Creating, increasing or decreasing the percentage or allowance of public officers during the

term for which said officers were elected or appointed."

In *Gibbs v. Morgan*, 39 N. J. Eq. 126, it is said: "By the act of 1874, entitled 'An act to regulate the salary of the clerk of the county of Camden' (P. L. of 1874, p. 280), it was provided that the clerk of Camden county shall receive from the county, in lieu of fees, for his services as clerk of the criminal and civil courts of the county a salary of \$4,000 per annum; his fees to go to the county. The act was to take effect at the expiration of the term of office of the then clerk. By the act of 1876, entitled 'An act concerning clerks of counties in this state' (P. L. of 1876, p. 289), it was enacted that the clerk of each of the counties of this state might appoint an assistant in his office, to be known and denominated as his 'deputy clerk,' and gave to such deputy power, during the absence or inability of the clerk, to exercise all his powers and perform all his duties. But it was thereby provided, also, that 'no additional compensation shall be paid to the deputy by the county.' The before-mentioned act of 1882 [P. L. 1882, p. 195], which is entitled a supplement to the last-mentioned act, if valid, in effect partially repeals the provision of the act of 1876, that deputy clerks shall receive 'no additional compensation from the county,' and gives to the deputy clerks of counties where the clerk is paid by annual salary a salary of \$2,000 per annum from the county. It is an act giving a salary out of the county treasury to a certain deputy clerk or certain deputy clerks, as the case may be, and the only question to be considered is whether it is a special or local law. Deputy clerks are public officers, but they have no term, in the sense in which the expression is used in the paragraph above quoted [referring to paragraph 11, supra]. They are employés of the county clerks, and their employment is a matter of mere private contract. The law merely constitutes them public officers, and gives them certain powers. It does not establish any particular period of service for them. That is left to private agreement. Since they have no term, in the sense in which the word is used in the Constitution, it follows that the constitutional prohibition, when applied to legislation to create or increase their compensation, is unqualified. It must be by general law, and cannot be by local or special enactment."

Section 9, art. 11, Constitution of California (1879) provides: "The compensation of any county, city, town or municipal officer shall not be increased after his election or during his term of office; nor shall the term of any such officer be extended beyond the period for which he is elected or appointed."

In *Tulare County v. May*, 118 Cal. 303, 50 Pac. 427, it was held that said provision did not apply to deputy county officers who had no fixed term.

*Henderson v. Board of Com'rs of Boulder County* (Colo.) 117 Pac. 997, construing section 30, art. 5, Constitution (1876) of Colorado, is not in conflict with the foregoing authorities; for there the statute, fixing the county judge's salary, provided that the compensation for his clerk should be paid by him out of his fixed salary.

The deputy clerk here is without any "term," as the same is used in section 10, art. 23, *supra*. It follows that that portion of the provision which prohibits the change of the salary or emoluments of a public officer during his term of office does not apply to the defendant in error.

The question further arises, Does that part which prohibits the changing of such salary or emoluments after his election or appointment apply? Article 24 of the Constitution of Connecticut (1818), as adopted by amendment in October, 1877, provides: "Neither the General Assembly nor any county, city, borough, town, or school district shall have power to pay or grant any extra compensation to any public officer, employé, agent or servant, or increase the compensation of any public officer or employé, to take effect during the continuance in office of any person whose salary might be increased thereby, or increase the pay or compensation of any public contractor above the amount specified in the contract."

The Connecticut provision does not depend upon the public officers having a fixed term, and it includes deputies. The Oklahoma provision prohibits the changing, either increasing or decreasing, of the salary or emoluments of a public officer after his election or appointment, or during his term of office. If this provision is to be construed to mean that after an officer has received his appointment or been elected his salary or emoluments shall not be changed, either increased or decreased, then why the necessity of adding the clause "or during his term of office?" It is a rule of construction that, if reasonably practical, effect is to be given to the entire provision, and no part shall be nullified. If this section be construed to mean that after an officer has been elected or appointed, and prior to the time that his term begins, no change, either by increasing or decreasing, shall be made in his salary or emoluments, and, further, after his term has begun, during such term no change shall be made, either by increasing or decreasing such salary or emoluments, then effect is given to all of this provision. But it may be urged that then the clause "or during his term of office" was unnecessary; and that the clause "after his election or appointment" would have covered, not only the period prior to his being installed in office and beginning his term, but also subsequent thereto to the end of this term. That may be true; but some framers of provisions pre-

fer to use specific language, and cover the entire ground in specific detail, rather than in general terms, and it is not for us to determine which is preferable. Then, again, mark the language, "after his election or appointment, or during his term of office." "During his term of office," construed with what goes before, indicates that it was intended that this provision applied to public officials that had a term of office, and the defendant in error has no term of office. He serves at the pleasure of his principal.

We conclude that the judgment of the lower court should be affirmed. All the Justices concur.

#### FORTUNE v. PARKS et al.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 612\*)—TRANSCRIPT—SUFFICIENCY.

Same as that in *Wade et al. v. Mitchell*, 14 Okl. 168, 79 Pac. 95.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694-2701; Dec. Dig. § 612.\*]

Error from District Court, Caddo County: G. A. Brown, Judge.

Action between C. O. Fortune and E. W. Parks and others. From the judgment, Fortune brings error. Dismissed.

C. H. Carswell, for plaintiff in error. A. J. Morris, for defendants in error.

**WILLIAMS, J.** The plaintiff in error seeks to review the judgment of the lower court upon a transcript. The certificate of the clerk is as follows: "I, Clyde C. Leech, clerk of the district court in and for Caddo county, Oklahoma, hereby certify the foregoing to be true, complete and correct copy of amended petition, amended answer, motion for judgment on pleadings, motion for new trial, J. E. on motion, motion for second trial, J. E. on motion, in cause #978. Parks et al. v. Fortune, as the same appears on file and of record in said court. In testimony whereof I have hereunto set my hand and affixed the seal of said court this 4th day of Sept., 1909. Clyde C. Leech, Clerk, by Sally Sorenson, Deputy. [Seal.]"

Counsel for defendants in error insist that, where a transcript on appeal fails to show affirmatively that it contains "a full, true and correct transcript of the record," the appellate court will not review the alleged errors; that it must appear from the certificate of the clerk that it is a complete transcript. That was the holding of the Supreme Court of Oklahoma Territory in *Wade et al. v. Mitchell*, 14 Okl. 168, 79 Pac. 95, following *Whitney v. Harris*, 21 Kan. 96; *Eckert v. McBee*, 25 Kan. 706; *State v. Ricker*, 40 Kan. 14, 19 Pac. 357; *Nelswender*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

v. James, 41 Kan. 463, 21 Pac. 573; Westbrook v. Schmaus, 51 Kan. 214, 32 Pac. 892.

Section 5939, Compiled Laws of Oklahoma 1909 (section 4308, Statutes of Oklahoma Territory 1893) provides: "The record shall be made up from the petition, the process, return, the pleadings subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court; but if the items of account or the copies of papers attached to the pleadings, be voluminous, the court may order the record to be made by abbreviating the same, or inserting a pertinent description thereof, or by omitting them entirely. Evidence must not be recorded."

Rule 16 of this court (20 Okl. xi, 95 Pac. vii) prescribes the form for certification of the transcript by the clerk, the body of which is as follows: I, \_\_\_\_\_, clerk of the district court for said county, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause."

The brief of the defendants in error, raising the question as to the insufficiency of the record and the verification and certification thereof by the clerk, was filed in this court on August 1, 1910, but counsel for plaintiff in error has taken no steps toward having a complete record brought up.

It follows that the proceeding in error must be dismissed. All the Justices concur.

#### BARRETT v. EFFENBERG.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

#### ALTERATION OF INSTRUMENTS (§§ 12, 13\*)— CONSENT—EVIDENCE.

It is not necessary that the consent to, or ratification of, an alteration of a written instrument shall be in writing, nor even that it be in express terms. If there was sufficient evidence to justify a jury in finding that the alteration was impliedly agreed to, their verdict will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Alteration of Instruments*, Cent. Dig. §§ 77-111; Dec. Dig. §§ 12, 13.\*]

Error from Muskogee County Court; W. M. Jackson, Judge.

Action between J. J. Barrett and Fred Effenberg. From the judgment, Barrett brings error. Affirmed.

Stewart & Stewart, for plaintiff in error.

KANE, J. As stated by counsel for plaintiff in error in their brief, the only question to be decided in this case is, Did the changing of the figure "7" to a figure "8" in the date line of a promissory note, by the payee, thereby making the same become due November 10, 1906, instead of 1907, constitute such a material alteration thereof as will defeat recovery thereon? Counsel for plain-

tiff in error say in their brief: "The defendant in error says that he changed the note himself. He says that he erased the figure '7' and wrote a figure '8' instead, thereby making the note become due November 10, 1906, instead of November 10, 1907, as it was originally drawn. Mr. Effenberg says that when the note was delivered to him it was '07, instead of '06, and that he erased the 7 and wrote the 8 there instead." If the evidence justified the statement of facts made by counsel, their contention would have to be sustained; but we do not entirely agree with their analysis thereof. The note was given to secure a part of the purchase price of a house and lot sold by the payee to the maker, and it is clear that the parties intended that the note should fall due in November, 1906, instead of November, 1907, as drafted by the maker. After making out the note and signing the same, the maker left it at Ashton's store for the payee, who called for and received it the same day it was signed. The next morning the payee discovered that the maker in drawing the note made it read November, 1907, instead of November, 1906, and called his attention to the mistake, and the maker said he knew of the mistake, but intended to pay it at the time it was due according to their understanding. On November 10, 1906, the payee presented the note for payment, and the maker said he knew the note was due, and if it had been presented two days earlier he had the money and would have paid it, but at the time of presentment he was out of funds. It is true there is no direct evidence that the payee told the maker in so many words that he changed the date to accord with their understanding at the time it should fall due, or that the maker consented to the alteration; but that question was presented to a jury, under proper instructions, and we are of the opinion that there was sufficient evidence to justify the jury in finding that the maker impliedly agreed that the change might be made in conformity to the original intention of the parties.

It seems to be well settled that if the parties agree upon a change in the terms of a contract the contract is not invalidated because one of them, without the knowledge of the other, notes the alteration on the instrument. *Martin v. Whites & Cox*, 128 Mo. App. 117, 106 S. W. 608; *Phillips v. Crips*, 108 Iowa, 605, 79 N. W. 373; *Wardlow v. List*, 41 Ohio St. 414; *Kane v. Herman*, 109 Wis. 33, 85 N. W. 140. It has also been held that it is not necessary that the consent to, or ratification of, the alteration be in writing, nor even that it be in express terms. *Stewart v. Port Huron First Nat. Bank*, 40 Mich. 348; *Kilkelly v. Martin*, 34 Wis. 525; *Prouty v. Wilson*, 123 Mass. 297. The question of whether an alteration in an instrument was made with the consent of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

parties is one of fact for the jury. *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Am. & Eng. Enc. of Law*, p. 269; *Benedict v. Miner*, 53 Ill. 19; *Richmond Mfg. Co. v. Davis*, 7 Blackf. (Ind.) 412; *Cochran v. Nebeker*, 48 Ind. 459; *Stout v. Cloud*, 5 Litt. 205; *Belfast Nat. Bank v. Harriman*, 68 Me. 522; *Jacobs v. Gilreath*, 41 S. C. 143, 19 S. E. 308, 310. In the case at bar, the court left the question of alteration to the jury, and they decided that the parties consented to it, and rendered a verdict in favor of the defendant in error. It is well settled that this court will not disturb the verdict of a jury on a question of fact of this nature, which is properly determinable by them, when there is any evidence reasonably tending to support it.

The judgment of the court below is affirmed. All the Justices concur, except DUNN, J., absent, and not participating.

#### MYERS v. STATE.

(Criminal Court of Appeals of Oklahoma. Dec. 4, 1911.)

(Syllabus by the Court.)

#### 1. RAPE (§ 13\*)—ELEMENTS OF OFFENSE—DEGREE.

An act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under the age of 16 years, is rape in the second degree, whether such act is accomplished by means of force or with consent.

[Ed. Note.—For other cases, see *Rape*, Cent. Dig. § 12; Dec. Dig. § 18.\*]

#### 2. INDICTMENT AND INFORMATION (§ 125\*)—DUPLICITY—CHARGE OF RAPE.

The information alleged that the defendant did "commit the crime of rape by then and there unlawfully, willfully, and feloniously rape, ravish, and carnally know" and have sexual intercourse with a female under the age of 16 years, to wit, the age of 15 years. *Held*, not duplicitous, as it only charges rape in the second degree.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

#### 3. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

On a trial for statutory rape, where the female is under the age of consent, evidence of similar prior acts of sexual intercourse within the year preceding the time alleged in the information was properly admitted for the purpose of showing the intimate relations of the parties, and as corroborative of the evidence of the particular act relied upon for a conviction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

#### 4. CRIMINAL LAW (§ 369\*)—EVIDENCE—OTHER OFFENSES.

Evidence was admitted of the pregnancy of the prosecutrix and the defendant's treatment of her by giving her medicine, and his abduction of her for the purpose of concealing her pregnancy. *Held*, not error to permit the prosecution to introduce evidence which is competent and relevant as tending to establish the defendant's guilt of the crime charged, because

it also tends to establish his guilt of another and different offense.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 822-824; Dec. Dig. § 369.\*]

(Additional Syllabus by Editorial Staff.)

#### 5. CRIMINAL LAW (§ 1117\*)—WRIT OF ERROR—RECORD—QUESTIONS PRESENTED FOR REVIEW.

Where persons who gave affidavit in support of an application for change of venue in a criminal prosecution were called, sworn, and examined on the hearing of the application, but the case-made does not contain a transcript of their testimony so taken, the Criminal Court of Appeals will not review the action of the trial court in denying the application.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 2925; Dec. Dig. § 1117.\*]

#### 6. CRIMINAL LAW (§ 1032\*)—WRIT OF ERROR—PRESENTATION OF QUESTIONS IN TRIAL COURT—INFORMATION.

The objection to an information that it states that the defendant waived a preliminary examination before a justice of the peace, and was by the justice held to answer, will not be considered by the Criminal Court of Appeals where it was not presented to the trial court by a plea in abatement, nor a motion to quash or set aside the information before the jury was sworn, but only by objection to the reading of the information to the jury.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2627-2653; Dec. Dig. § 1032.\*]

Appeal from District Court, Caddo County; G. A. Brown, Judge.

James Myers was convicted of statutory rape, and appeals. Affirmed.

McKnight & Heskett, for plaintiff in error. Charles West, Atty. Gen., and Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

DOYLE, J. The plaintiff in error, James Myers (hereinafter designated the defendant), was convicted in the district court of Caddo county of the crime of rape in the second degree, and sentenced to be imprisoned in the state penitentiary at hard labor for a term of 10 years. The judgment and sentence was pronounced and entered March 18, 1910. He has appealed from this judgment and the orders of the court denying his motions for a new trial and in arrest of judgment.

The assignments of error will be considered in the order presented in the defendant's brief. The information upon which the defendant was tried and convicted, omitting the title, verification, and indorsements, reads as follows: "Now, at the February term of the district court of the Fifteenth judicial district of the state of Oklahoma sitting within and for the county of Caddo, in said state, begun and held at Anadarko, in said county and state, on the 1st day of February, in the year of our Lord one thousand nine hundred and nine, comes Theodore Pruett, county attorney, and gives the court to know and be informed that on the — day of October, in the year of our Lord

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

one thousand nine hundred and eight, at and within said county, one James Myers, then and there being, did then and there commit the crime of rape by then and there unlawfully, willfully, and feloniously rape, ravish, and carnally know and have sexual intercourse with one Ada White, a female person under the age of sixteen years, to wit, of the age of fifteen years, and he, the said James Myers, being then and there a male person, and not the husband of her the said Ada White; that the said James Myers waived a preliminary examination for the above offense before P. L. Jorgenson, justice of the peace in and for the city of Anadarko, Caddo county, Oklahoma, on the 20th day of January, 1909, and was by the said P. L. Jorgenson held to answer the same. Contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Oklahoma." The defendant filed a demurrer to the information upon the grounds: "That said information is not direct and certain as to the offense charged, in this: That it merely charges the defendant with the offense of rape, and is not sufficient to show the defendant whether he is being prosecuted for rape in the first degree, or rape in the second degree."

[1,2] The judgment of the court overruling the demurrer was excepted to and is here assigned as error. Counsel contend that the allegation "rape, ravish, and carnally know" charges force, violence, and want of consent, which under our statute is rape in the first degree; that, eliminating this clause from the information, it charges rape in the second degree, thus charging two degrees of rape in one count; that for this reason the information is bad for duplicity. As we view it, the contention is without merit. Rape and its degrees is defined (section 2353, Snyder's Sts.) as follows: "Rape is an act of sexual intercourse accomplished with a female, not the wife of the perpetrator, under either of the following circumstances: 1st. Where the female is under the age of sixteen years. \* \* \* 4th. Where she resists but her resistance is overcome by force and violence." Section 2356: "Rape committed upon a female under the age of fourteen years, or incapable, through lunacy or any other unsoundness of mind, of giving legal consent, or accomplished by means of force overcoming her resistance, is rape in the first degree." Section 2357: "In all other cases rape is of the second degree." The information simply charges the crime of rape in the second degree under the first subdivision of the statute. The allegation, "rape, ravish, and carnally know," would be fully sustained by proof of carnal intercourse with a female under the age of 16 years. Whether the act is accomplished by means of force or with consent is immaterial. Therefore this clause did not extend, limit, or modify the crime charged, and

might have been omitted. However, it is not inconsistent, and, at most, it may be treated as mere redundancy. The demurrer was properly overruled.

[5] The overruling of the defendant's application for a change of venue is assigned as error. The verified application of the defendant was supported by the affidavits of nine other affiants. The record shows that six of said supporting affiants were called, sworn, and examined upon the hearing of the application, but the case-made does not contain a transcript of their testimony so taken. In the absence of this testimony, this court will not review the action of the trial court thereon. The presumption is that the court properly denied the change of venue.

The overruling of the defendant's challenge for cause to the juror W. M. Haslett is assigned as error. There was no error in the ruling of the court upon the qualifications of this juror. His examination did not show him to be disqualified within the statute and previous rulings of this court. *Turner v. State*, 4 Okl. Cr. 164, 111 Pac. 988.

[8] The next assignment of error is that the court erred in overruling defendant's objection to the reading of the information to the jury. The record shows that after the jury was sworn to try the case the following objection was interposed: "The defendant now objects to the reading of the information in this case to the jury for the reason that the information contains allegations and surplusage prejudicial to the defendant." It is here insisted that the following statement in the information was prejudicial: "That said James Myers waived a preliminary examination for the above offense before P. L. Jorgenson, justice of the peace in and for the city of Anadarko, Caddo county, Oklahoma, on the 20th day of January, 1909, and was by the said P. L. Jorgenson held to answer the same." If this objection had been properly made by plea in abatement, or motion to quash or set aside the information filed before the jury was sworn, any right the defendant might have would be preserved and reviewed upon appeal, but, where an objection to an information for a defect of form apparent on the face thereof is raised for the first time by an objection to the reading of the information to the jury, it comes too late, and will not be considered. However, it might be well to state that the following instruction was given by the court: "You are instructed that the information in this case is no evidence of the defendant's guilt. It is merely the charge upon which he is placed on trial, and no juror should allow himself to be influenced in any degree against the defendant on account of the charge therein."

Three assignments of error are based on the rulings of the court in the admission of and in refusing to strike out certain evidence. Under these assignments, it becomes

necessary to make a brief statement of the evidence.

It is undisputed that at the time in question Ada White was fifteen years of age. Ada White testified that she had known the defendant about five years; that at the time in question she was living with her parents on the defendant's ranch in Caddo county; that in the month of October, 1908, on returning from school, the defendant was at her home, and asked her mother if she could go with him to drive up some horses from the pasture; that her mother consented, and she went with him, and while in the pasture he had intercourse with her; that she was not the wife of the defendant; that the defendant had had sexual intercourse with her before that time; that in the spring of 1907 while she was at his ranch house he put his arms around her, had her sit on his lap, and laid her on a bed, and tried to have intercourse with her; that he tried several times thereafter to have intercourse with her; that in the fall of 1907, when she was herding his cattle, he rode up to her, and lifted her off of her horse, and succeeded in having intercourse with her by using vaseline; that this was the first time; that during that winter she helped to herd his cows, and he would often go with her, and have intercourse with her; that the defendant had sexual intercourse with her off and on from the first time until the time alleged in the information, relating the time, place, and occasion of several such acts; that her "courses stopped" in July, 1908, and the defendant gave her three bottles of medicine and two boxes of some kind of pills to take, and her mamma gave her "Lida Pinkerton Medicine"; that the defendant told her not to take her mother's medicine, but to pour out just as much as she was supposed to take; that as a result of sexual intercourse with the defendant she became pregnant, and on March 24, 1909, a child was born to her; that the child died when it was 9½ months old; that on January 1, 1909, the defendant met her in the hay field, and took her in a buggy to Lawton, and from there to a place nine or ten miles below Chattanooga where the defendant had another ranch; that he told her he was taking her away so that her mother would not find out her condition; that while they were there he was arrested, and she only saw him once afterwards, that was at Oklahoma City when he tried to come into their house, and her mother shot him; that she was acquainted with the defendant's handwriting and identified a letter which was handed to her on the train while coming to the trial as his handwriting. The letter reads as follows: "Oklahoma City, 2/15/09. Dear Ada: The bearer of this must have a talk with you; he will tell you some things that I want you to know. I am afraid that your mother and father will force you to testify in their case against me and ruin the best friend they have in the

world. You must get very sick on your way up tomorrow and remain so until the trial will have to await over for another court. Now, Ada, try this for once to be brave and save your best friend on earth. My God, can you forget what we used to talk so much about. It will be suicide for the old man. If you testify I will just have to kill myself; no pen for J. Myers." On cross-examination it was shown that Myers frequently gave her money, and that in the fall of 1908 he gave her a pony.

Mrs. Azalia White testified: That she was the mother of Ada White. That they lived on and near the defendant's ranch in the years 1907 and 1908. That the defendant frequently stopped at their house, and early in October, 1909, he came there and said that he wanted to change teams, and, when the girls came home from school, Ada went with him to drive the horses up from the pasture. That on January 1, 1909, they missed Ada. A few days later her brother brought her home. That later they went to live at Oklahoma City, and the defendant came to their home and rapped, and said: "This is Jim Myers, and I want to see Ada." I said, "You are not my friend. You will go to hell and burn forever for what you have done." And he said: "I know it," and I said: "How dare you come to my house and demand entrance after you have wrecked and ruined my family." That she then shot him, and he ran away.

J. L. Jackson testified that he was acquainted with the defendant; that on January 2, 1909, as deputy sheriff of Commanche county, he arrested him on a warrant issued on a charge of kidnapping Ada White at the defendant's ranch on Deep Red, 35 miles south of Lawton; that Ada White was then with him, and, when he first saw them, the girl was in a tent; that he turned the girl over to her brother at Chattanooga; that the defendant volunteered the statement that "he would not have harmed the girl; that he was just trying to show her a friendly favor that the family would not do, and, if the girl had not been tired and worn out, they would not have got her; that he would have had her on the Ft. Worth and Denver train that day."

W. P. Smith testified that as an officer he took charge of the defendant at Lawton on a warrant of arrest for rape, and while bringing him to Caddo county he voluntarily stated that: "He had a nice place prepared for her in California where she would be well cared for, and, if Mr. White had kept still, he would have taken her there, and the girl would have been back here soon, and nobody would have known anything about it, and he was doing it for the interest of the girl and the sympathy he had for her."

There was no evidence offered on the part of the defendant.

The evidence relating to the pregnancy of the prosecutrix and the birth and death of

the child, and the evidence relating to the medicine which prosecutrix testified was furnished her by the defendant, was introduced over the defendant's objections thereto as being incompetent and irrelevant, and a motion was also made to withdraw this evidence from the consideration of the jury for the same reason.

In support of this assignment, counsel cite the case of *People v. Soto*, 11 Cal. App. 431, 105 Pac. 420, and quote from the opinion the following language: "While proof of pregnancy of a child under the age of consent has been held to be evidence that the statutory crime of rape has been committed, it has never been held admissible, so far as we are aware, except it tends to prove the corpus delicti." On the undisputed facts in the case at bar it would be a sufficient answer to this contention to further quote the concluding language of the opinion in the *Soto* Case, which is as follows: "While under our system of pleading one particular act or some special time is required to be selected for the purpose of a conviction in cases of this character, the records in this court disclose that this offense, the debauching of a child, is frequently accompanied by a series of acts of sexual intercourse, and the punishment for this most infamous crime ought not to be made to hang upon a technical application of the rules of pleading and evidence, where the only question is which one of innumerable acts was selected by the district attorney as the basis of the prosecution."

[3] There are several reasons why the rulings of the trial court should be sustained. The prosecutrix had testified without objection to numerous acts of sexual intercourse, and the state had not been asked to elect which of these it would rely upon for a conviction. It appears, however, that the case was tried with reference to the act committed in October, 1908, as charged in the information, and no testimony was offered or admitted as to any subsequent act of intercourse. While there is a direct conflict of authority on the admissibility of evidence of subsequent acts of sexual intercourse, the rule is almost uniform that in a prosecution for statutory rape of one under the age of consent evidence of acts anterior to the commission of the act charged is admissible, not primarily to prove other offenses, but for the purpose of showing the intimate relations of the prosecutrix and the defendant, and as corroborative of the evidence of the particular act charged.

[4] It logically follows that the correlative facts of the pregnancy of the prosecutrix and the defendant's treatment of her by giving her medicine, and his abduction of her for the purpose of concealing her pregnancy, and the birth and death of her child, being so intimately and inseparably connected with the circumstances of the specific offense charged,

that this evidence was competent and relevant for the purpose of showing the relations of the parties, and as corroborative circumstances to be considered by the jury in determining whether or not the defendant committed the specific offense charged.

The assignments of error based upon the instructions of the court, and the refusal of the court to give the single requested instruction to direct a verdict of not guilty, are as devoid of merit as the subsequent assignment that the verdict is contrary to law, and is not sustained by sufficient evidence.

The motion for a new trial and in arrest of judgment presents no questions that have not been considered. The defendant on the evidence adduced is beyond a possible doubt guilty of one of the most heinous crimes that can be committed, alike against society and the law, and he has been adjudged to suffer the maximum punishment of the law. However, there is no adequate punishment for such a crime as his. The anomalous provision in the Penal Code that makes this offense rape in the second degree is well worthy of the consideration of the Legislature, and it is to be hoped that it will amend the provision defining rape in the first degree to read under the age of 18 years, or at least 16 years, instead of 14 years, as it is now.

The judgment of the district court of Caddo county is in all things affirmed. Mandate to issue forthwith.

FURMAN, P. J., and ARMSTRONG, J., concur.

#### CHAPPELL v. STATE.

(Criminal Court of Appeals of Oklahoma. Dec. 4, 1911.)

#### (Syllabus by the Court.)

#### 1. CRIMINAL LAW (§§ 757, 780\*)—INSTRUCTIONS—ACCOMPLICES.

(a) Where the state relies upon the testimony of an accomplice to secure a conviction, the court may instruct the jury that the witness upon whose testimony the state so relies is an accomplice.

(b) Where the court submits the question to the jury as to whether or not a witness for the state is an accomplice, then the court, if requested by the defendant, should go further and instruct the jury what in law constitutes an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1775, 1859-1863; Dec. Dig. §§ 757, 780.\*]

#### 2. CRIMINAL LAW (§ 942\*)—NEW TRIAL—PERJURED EVIDENCE.

Where, subsequent to a conviction, a witness who testified for the state upon the trial of the case makes an affidavit, stating that the testimony given by such witness for the state was false, and where the testimony for the state, excluding such admittedly false testimony is not conclusive as to the guilt of the defendant, a new trial should be granted.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 942.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from District Court, Pontotoc County; A. T. West, Judge.

M. D. Chappell was convicted of arson, and appeals. Reversed.

In the trial of this case, the following testimony was admitted:

Testimony of Mrs. A. C. Inge, for the state:

"When I am at home, I live at Henryetta; that's where my daughter lives. Know defendant. Before July 12, 1908, I had been staying with Mr. Chappell part of the time, and with my daughter part of the time, and I think we were at McGee in 1908, I believe; I don't know. Know when the store was burned out here. I went to Henryetta in November, two or three months just before the time the store was burned. I was staying with Mr. Chappell. He was living out at Blackburn's gin, I reckon they call it. He was in the mercantile business; he had a country store. Part of the time he lived in the store, in a shedroom at the store. At the time the store was burned, he was living in a house on Mr. Davis' place, not a great ways from the store; reckon it is about 150 yards, or 200, from the store, but I don't believe it is that far. It was a log house; had been occupied by a man by the name of Moore; had only one room. We had been there about three weeks—it might have been near on to four, but I think it was about three weeks—before the store burned. I burned the store. I had never talked to anybody myself, but Mr. Chappell had talked to me about it. He told me that he had worked hard all of his life, and that he had tried to save up some money, and that he had left home when he was a boy on account of his brother younger than him. Said that he had lived with his mother and his sister and his brother younger than him. He just said that he was going to get back some of the money that he had lost in his time; that he had always worked hard, and made a good deal of money, but he didn't have none now, and he was going to get back some of it. I asked him how he was going to do it. He said he was going to burn the store; that he had it insured for \$720 and some cents; and then he told me he was going to town, and that he intended to burn it Saturday or Sunday night, and he came to town on Saturday, and Friday night he told me he was going Friday night. He told me he was going to burn it Saturday night, and that he wanted to take out what goods he could out of there, and went on, until Saturday morning he told me he was going to town, and Friday night, when he was talking to me, he told me that he was going to burn it. I says: 'Well, all right; you can do it if you want to.' And he said: 'I don't want you to tell it.' I said, 'I am not in the habit of running around telling news,' is the answer I gave him. Saturday morning he said he was going to town, and I

had to burn that store that night or the next night; but he said it would be better to burn it Sunday night; there would be fewer people around. I told him I would not do it; I was afraid to do it; I wouldn't jeopardize myself doing anything of that kind, and he had better let it alone. He told me I had it to do; that my life was in danger if I didn't do it. I was nervous and sick, and taken sick up until the house was burned, and I was nervous and afraid. I never agreed to do it, but he told me I had to do it; and I was afraid not to do it, because I was afraid he would kill me. That is just all there was of it. And then he come off to town, and said he would be back Saturday night, and I said to him when he started, 'Mack, will you be back?' he said, 'Yes,' but then he told me before that he would not. I asked him if he would be back, and he said he would, and then he told me that he would be at home Saturday night, and I said, 'If you are not going to be at home, I will go get Bonnie Sanders to stay with me.' He said: 'No. I don't want Bonnie Sanders—to stay by myself; he would be home. He didn't come home that night. I stayed by myself. He just told me that he wanted the goods moved, and I had to move all I could, and he moved some of them there before he ever left there—some of them to the house. He took some pants, and he carried his trunk to the house, but there wasn't anything in the trunk; but he carried some pants and some other things, like shoe strings and such. I don't believe he carried any there. He carried some shoe strings; he carried a load of pepper and a load of coal oil—two gallon cans of coal oil—and there was a two-gallon jug of coal oil. Then he carried some vinegar to the house, and all of the meat there was there in the store; but then there wasn't much of that; there wasn't much meat; there wasn't much groceries to amount to anything. He carried some nails and a few nails, and some horseshoe nails. I can't hardly remember all that he did carry there, and what he did carry; it has been so long. John Foster and everybody in that neighborhood—as near as I recollect, John Foster went to High Hill, or some place, to church or singing, or somewhere, and he came home, and somebody else; I don't know who it was. They came in there after I had— Yes. I was at home Saturday night. Then there was a man by the name of Burge, I believe; he came about 9 o'clock in the night. I never done nothing Saturday night, but have a big hard chill; that is all I done that night. I was sick all day Sunday, but Sunday night I carried part of the things out of the store, and put them in the house and in his trunk. I put some coffee in the trunk, in a new trunk that he had bought. He had bought a new trunk, and had it taken out there about a month or so before the burn-



ing. I carried some snuff up there and put it away, and salmon. I carried some canned goods of one kind and another, and I don't know what all I did carry; it has been so long. Some of the pants I put in the trunk, and coffee I put in the trunk, and some of the pants I put in under the mattress on the bedsprings. Well, John Foster he come home, and I was standing in the store, and I stayed there in the store; stayed there until he turned his horse loose, and they came over there close to the store, and I stayed in the store there, where I could see into Foster's house. Moonlight; it was as light as it is now, just as bright as day almost. I reckon I must have stayed there an hour and a half, or maybe two hours, after I saw John Foster come home. I was staying there, waiting for him to get his light put out. Then I carried some more things up to the house and put them away, for I was afraid not to do it; I was afraid of him; afraid not to do it. After I got everything done, and everything taken out that I intended to take out, and I could take out, I just gathered up and went to the house, and fixed everything there just ready to go back to the store; and I went back to the store, and Mr. Chappell had split a lot of boxes, one type and another, of lighting matter, and put under the counter, and he told me to leave all of the big boxes that set up at the top of the house, to leave them all there; leave all of the bulky things, like oatmeal and breakfast food and such things, leave them in there. We didn't have any flour or meat to amount to anything; he had left his stock run down, so he wouldn't lose anything to amount to anything in that line, and for me to put out the report that he would have a lot of goods and groceries and things there about Monday. I just put the report out; then I just turned in and took some matches and started a fire. He told me to start a slow fire; that I had to do it, and if I didn't do it he would settle with me for it; and told me then that he had left that kindling there, and there was oil in gallon cans under the counter, and I had better set the whole thing afire about where the scales were, and not to put any blinds or anything on the windows, and leave everything in shape there just like it was all of the time, and that somebody might pass in the night and put it out. And I found out you can't start a slow fire with coal oil and kindling; I have done found that out. I just lit a match and poured coal oil, fresh coal oil—there was already coal oil on the pieces—and I just poured fresh coal oil on it, and touched a match to it. I locked the doors; the west door was barred. I locked the door as I left. I then went home. Before I went to bed, I took a big dose of laudanum. Mr. Sanders came over Sunday, and I was sick. I told him I was sick, and made the remark that I wished people would buy their nails and tobacco

on Saturday. I didn't want to have to stay in the store all day through the week and Sunday. A young man came and wanted some candy, and I never went; I couldn't go. The next time I saw Mr. Chappell after the burning was Monday morning, when I sent after him. I sent a man named Huddleston, that lived at Mr. Herring's. He came past my house, and I told him to come on to town and round Mr. Chappell up, and tell him to come home. He came home about 10 or 11 o'clock, about 10, I reckon. He didn't come to the house until he went down and examined where the house had been burned, and stayed down there a while, and after a while he came to the house, and Mrs. Sanders came up to the house before he did. Old lady Sanders come over to my house while he was down there, and she says, 'Who is the man down there?' I believe Bonnie Sanders was there; Bonnie Sanders was there; I believe she was there; I won't say positive; I believe she was there. I never had any conversation with him at that time until after he went back; he came here to town, and he went back. After he went back, along in the afternoon, he said to me that it seemed like there was a good many things saved up. That was after he first came out there. I sent for him. He went out there, and he got his insurance back; that is, he got his invoice book. He invoiced his material in the store. He got that book, and brought it here to town. He came back. He got that book and come to town here, and that evening he went back home. That time he stayed until the next day, and then he told me. That night I believe he ate supper at home; I don't remember. He slept at home that night. That day he spent going around collecting bills. That night he stayed at home. Tuesday we came here to town the next day. He put a lock and key to the house before. He fixed a chain and a padlock to it. He had the key. When I came here, I went to Mr. Dismuke's. I stayed there until in the evening; we got in here in the morning. Mr. Jared—I don't know what his name is; it wasn't Joe Jared. It was a red-complected Jared. Chappell came to town in a wagon. That evening I went to Mr. Jack Brundidge's. I got there along, I reckon it was, 4 or 5 o'clock in the evening. I stayed at Dismuke's until it got late; it was very warm. When I got to Brundidge's, there was Mrs. Hendrix, Mrs. Frank Hendrix, and his wife, were all staying there, living in the house with Jack. Mrs. Lillie Brundidge was also there. Next I saw Chappell out at the reunion. He came to Jack Brundidge's. Jack Brundidge and his wife, Lillie, were there when he came. He asked me for a piece of paper; did not say what he wanted with it. I said to him, 'Mack, I haven't got any paper.' Lillie and Jack were out on the porch. I says, 'Lillie, you come in here and get a piece of paper for Mack,' and she

came and looked. As near as I can recollect, she didn't find any. He just said: 'I will get a piece of paper; I have got a piece of paper'—and he went to the table, and sat down and wrote on a paper. He took the paper; have not seen it since. He wrote on the paper, and told me that the things had been found, and said that the only thing and the only way that he knew to get out of it was to just say he did not know anything about it; that I didn't know anything about it; and that was all of the way he seen to get out of it; and says, 'The things have been found.' And then he wrote on the paper—says, 'You may be arrested; there is probability of your being arrested.' Said there was some men up in town talking about arresting me, and when he said that I just looked at him, and I said, 'Traitor,' and he turned right around and rode off, so Pete told me. He didn't say anything particular about why he wrote. I couldn't hear a common conversation in a low tone of voice to save my life. There were three rooms and two other rooms in Jack Brundidge's house. Jack and his wife were out on the porch; that was about eight or ten days after the fire. I don't say positively it was that; but it was about eight. The burning took place in Pontotoc county, Oklahoma. The trunk was left in the house. I had a great big large trunk there; don't know what became of that trunk. He only had one trunk, and I had one."

Cross-examination: "I am 66 years old. Two of my husbands are dead, and one of them is divorced. Have been acquainted with Mr. Chappell nine or ten years, or longer. When he got mad at me, he would beat me up. That was at Sulphur, in a boarding house, where I was running a boarding house for him. It was in the dining room. Before the fire, I went out there on the 15th of March, last March. It will be two years this coming March since I went down there, and the fire was in July. He had a very fair stock of general merchandise. He made some money; don't know how much. He ordered goods every now and then. He didn't have any goods in there for two or three weeks before the fire."

Ernest Landrith, on behalf of the state: "Live two miles west of Sulphur. I lived in Pontotoc county in July, 1908. Know where Blackburn's gin was; lived in about 150 yards of the gin. Remember the occasion of the store being burned out there. Am acquainted with Mr. Chappell. Saw him on Saturday before the store was burned. He was there around the store part of the time, and at the house. Saw him go from the store to the house. I noticed that him and the Burgess boy, John Burgess, were carrying a trunk from the store to the house. It is a great big—it was a new trunk, and a great big one. Didn't know at the time what was in the trunk. Next saw the trunk the day that I helped bring the

things up here. Me and Bud Blackburn brought the things up here to Ada that evening. Chappell was arrested the same evening that we brought the things up here. Got the things out of the little log house where Mr. Chappell lived. I was in company with the sheriff."

Testimony of Jamerson, for the state: "I was with Mr. Shook when he went out here to the house that the defendant, Chappell, is said to have lived in. Mr. Shook had a search warrant. I saw it. Don't know what it called for."

Ernest Landrith, recalled: "There was some coffee in this trunk, about half full of coffee. There was several coffee cups in the trunk. There was some sardines in the house. There was some pants between the mattresses on the bed. Saw Mr. Chappell during the week after the fire, on Sunday evening. He came back up there to that house—him and a fellow in a buggy—and got this lady that was there, and came back to town, and I don't remember seeing them any more then. The house was locked with a chain and lock. I never noticed a lock on it; I never went out there." Cross-examination: "Found some goods after this house burned, where Mr. Chappell lived. Found them west of the house about 200 yards, out in the woods or bushes. There were just a few things out there. There was some twist tobacco and snuff. I lived there in about 50 yards of the house; I seen the house burn."

J. C. Jamerson, for the state: "I lived in Oklahoma City. Am state agent for a fire insurance company. Was in the same business in July, 1908; represented the Palestine and Commercial Union, two companies. Had a policy on a stock of goods for M. D. Chappell out here at Blackburn's gin. We were duly notified of the fire. Came to Ada between the 20th and 25th. Saw defendant on that trip; had a conversation with him. He claimed a total loss under his policy of \$700; \$100 on furniture and fixtures, the \$700 stock. He submitted his books and papers as evidence of claim. I asked him if he had any saved goods. He said he didn't. I drove out to the scene of the fire, and there wasn't enough debris out there to indicate the stock of goods, to indicate a stock of goods of that size. There wasn't enough debris left after the fire to indicate the stock of goods of the size that he had claimed; in other words, it didn't stock up with his inventory. I was with Mr. Duncan when he got this affidavit. Don't know where Mr. Duncan is now. Don't know the name of the officer who went out there to execute this search warrant. I have heard since; understood it was Mr. Shook. Came to town when the Confederate reunion was going on. Found, I think, 85 pairs of pants there in the house, in the bed, between the clothing. Found quite a quantity of canned goods and some tobacco, cigars, and snuff, two or three

pound pails of cottolene, and a number of other articles, and a bulk lot of coffee; think that was in the bottom of the trunk. Mr. Chappell furnished a statement to me—an inventory of what he had lost. That statement covered these articles. Mr. Chappell made claim for the same property that I found in this house. After I made this discovery, I didn't discuss the loss any further; never talked to Mr. Chappell after that with reference to his claim. He also made a claim for some furniture and fixtures that was also claimed by Mr. Foster. He said he didn't know how the fire occurred. He said he had been in Ada since the fire. He stated he was away from there the night of the fire."

John Foster, for the state: "It is admitted that this witness owned the building that burned. Mr. Chappell and I are good friends; never had any trouble before."

Lillie Brundidge, for the state: "I lived on Thirteenth street here in Ada. Lived on Fifteenth street in 1908. Know defendant and old lady Inge; have known her about five years. She was at my house in 1908, in the month of July. She was there during the reunion picnic. Know Mr. Chappell when I see him. Defendant was at my house several times along about the reunion. He was there the day she came up there, was the only time. The day he was there, he asked me for a piece of paper. Did not give it to him. He never got any from me. He had a little old piece of paper; it looked more like a laundry sheet to me than anything else. He and the old lady did not do anything that I saw while they were there. They were in the front room. He came in, and said he wanted to say something to grandma, and didn't care about the whole town hearing it, and wanted a piece of paper. He had done that several times before that I knowed of."

Bud Taylor, for defendant: "I lived 7 miles east of town in the summer of 1908, about a mile from Blackburn's gin. Knew the store building where Mr. Chappell had a store out there. I was in the store very frequently. I was in the store Saturday evening before it burned that night. Think I purchased something. Did not see Mr. Chappell there. Grandma Inge was tending to the store. I thing I purchased some coal oil. I didn't notice any difference between the size of the stock that evening and any other time; was in there just a short time, probably 15 or 20 minutes."

Frank Williams, for defendant: "I lived on Henry Lovelady's place in the summer of 1908. It was a mile and a half east of the Blackburn gin, and about a mile and a half south. Knew where Mr. Chappell's store was. I was there every few days. I was there on Saturday evening; stopped there as I went home from town. Think I got a bottle of snuff in the store. The old lady waited on me in the store. Mr.

Chappell was not there. I didn't notice any change in the stock. I wasn't in there but a few minutes; never noticed any change at all in the goods that was in there."

W. N. McClure, for defendant: "I live eight miles south of Ada. I was a sheriff in Arkansas. Got acquainted with Mr. Chappell in 1880, in Murfreesboro, Ark. Am acquainted with his general reputation in the community where he resides for truth and morality. It has always been good. Never knew him to be in trouble in my life before." Cross-examination: "Never have seen any of the people from this Blackburn gin community; was never out in that community."

Clint Palmer, for defendant: "I live northwest of this place about three miles and a half. Am acquainted with defendant. Heard about his store being burned. I saw him here in town on the Saturday evening, and he went out with me and took supper, and we went to a speaking at Egypt on Saturday night, and Sunday morning he said he was going to Egypt. Left my house Sunday morning. Saw him again about sundown, or a little after, Sunday evening. He was resting right at my house right about sundown. There was a singing at my house Sunday night. Monday morning he said he was going to town and go home. He left my house afoot. He rode in a wagon with me on Saturday. Learned on Tuesday morning that his store was burned, when I came to town. I have known Mr. Chappell ten years or more. The biggest part of that time I think his occupation has been school teaching. I think I am acquainted with his general reputation in the community where he resides for honesty and integrity and a law-abiding citizen. It is good. (Witness Jamerson, the insurance agent, is brought before the witness.) I think I met him right along about east of Haynes. He asked me—Pete Duncan first introduced me to him—and he asked me if he was out at my place, and I told him that he was on them particular nights, and he asked me how long I had knew him. I told him eight or nine years, quite a while. He asked me how was he for truth and veracity. I told him it was pretty good. It was pretty good before that. He said, 'That's one of the rottenest things I have run up against.' He says, 'We have got plenty of money, and we will put him where he belongs.'"

J. R. Floyd, for defendant: "I live about five miles northwest of here. I am township trustee. As trustee, it is among my duties to assess property in the township in which I live. I performed that duty in 1908. I visited Mack Chappell's place out there. Somewheres about the 1st of July I assessed his stock of goods for taxes. As well as I remember, that day we went over his invoice; took the figures from his invoice. Don't remember the date of the burning of the store. Remember the occasion when it occurred. If

I am not mistaken, I think defendant was at my house on the Sunday before, on Sunday morning, if I remember right. I let him have a horse to ride up the country some place, maybe to Mr. Bailey's, on Sunday morning, and he got back with him in the afternoon somewhere. If I am not mistaken, that was the Sunday before the burning. Have known defendant some three or four years; that is, personally; I knew of him for quite a while. He was raised in an adjoining county where I was. I knew of him as a boy, but we have been away from there for quite a while. Only known him in the last three or four years. From what I know, I don't know anything to the contrary that his reputation in the community where he resides is good."

Viola Bailey, for defendant: "I lived at Bebee in 1908. Remember of hearing of the burning of Mr. Chappell's store. I saw defendant at my home on the Sunday night of which the store is said to have been burned. It was about 1 o'clock in the afternoon. He stayed until I guess between 5 and 6. He had been over there several times, about three times."

John Martin, for defendant: "Know Mr. Chappell. Heard about the time the store was burned. I saw him Saturday and also Sunday night before the burning. Seen him Saturday evening; me and Mr. Palmer and some more parties was going over to a speaking at Egypt, and I seen him Sunday night at a singing at Palmer's. It was along late in the evening, between sundown and dark."

J. R. Floyd, recalled for defendant: (State objected to introduction of tax assessment sheet for property owned by the defendant on the 1st of July, and objection sustained.)

M. D. Chappell, on his own behalf: "I am 39 years old. Raised in Arkansas. I was a farmer there. Lived in Arkansas about 12 years ago, 12 or 15. My business and occupation in this country has been teaching principally and working in a store. Started business down here in this store that burned up in December, 1907, and ran up until July, 1908, when I burned out. Bought John Foster out when I went into that store. Took an invoice of the goods about the 1st of June some time. I had taken insurance was the cause. I had taken out a policy; had \$700 insurance. I owned the fixtures. Got a receipt in full from John Foster. I have the receipt. This is an inventory that I got of my goods on June 9th; that is my handwriting. This invoice was correct at the time I made it. Didn't keep much track of it before that until I took the inventory. After this inventory, I kept the amount of goods I bought after that by entering the invoice from the time I took the inventory; after that I would put it down on the book and get the bill. I kept the bills. Suppose the bills burned. I didn't see them any more. After June 9th, I kept a record of my cash sales; was running the store on a cash sys-

tem. This is the list of my cash sales. From June 9th until July 10th, it amounts to \$116.43; that list is correct. [Defendant offers in evidence list, and marks it 'Exhibit A'; invoice introduced, and marked 'Exhibit B'.] I was still buying groceries along as I needed them from June 9th until July 10. Didn't have any conversation with the old lady about that store that morning. I believe I told her I would be back Sunday, some time Sunday. I came to town early in the morning, and went out with Mr. Palmer in the afternoon, and spent the night with him, and went to Mr. Floyd's the next morning, and went on over to Mr. Bailey's, and came back to Mr. Palmer's something near sundown, and stayed all night, and left town early the next morning. It was not an unusual occurrence for me to leave on Saturday morning and return Monday. I left frequently. The condition of my trade was not very different Saturday from any other day, very little. First learned of the fire about 9 o'clock Monday morning. I got a horse from the stable, and rode out there. Did not carry any goods out of the store before I left it on Saturday morning. That new trunk was a trunk I had bought at a sale here. Bought it to put my clothes in it, and the gentleman brought it out for me, and left it at the store, and I got a boy to help me take it to the house. The boy's name was John Burgess. When I carried it up there, it was empty. That was Saturday morning before the fire Sunday night. Don't know anything about how those pants got up there in the house. I was out there in that neighborhood from Monday afternoon until Wednesday morning. Tried to get those accounts straightened up, goods that I had sold on a ticket; and Wednesday morning I came to town, and was here the balance of the time. The old lady lived out there; she stayed there. The reason why I put a lock on there was because it was in such a shape; it was just on the inside of the fence, and the floor was right on the ground. Looked like there would have to be something to keep the stock out of it; no other way to fasten it. We were both aiming to leave there, and did leave. I did not carry the goods there and put them in the bed; do not know who did it; did not tell anybody to do it. Did not have any conversation with this old lady about burning this house up before it was burned; didn't tell her anything in regard to the burning. Did not carry four gallons of oil to the house. Had something like 40 to 50 gallons of oil in the store. Didn't put any pants in this new trunk at any time. On Wednesday morning after the fire Sunday, the old lady and I left there, and came to town. About a week after that, I think, I was arrested. I stayed here in town at Dismuke's. Saw the old lady over at Mr. Blackburn's. She telephoned me two or three times from Mr. Pete Duncan's. She said she wanted some money that I owed her; that I had been

owing her for four or five years; and I went over there to see her to see what it was for, and why she claimed the debt. I called for a piece of paper. I wrote on the paper. I just asked her to make out a statement to make out her account, so I would know what it was for, and when she didn't make any reply much to it I went away. I didn't stay there but a few minutes. She did not holler, 'Traitor,' at me while I was there. She claimed I borrowed the money; but I don't know when it was. I submitted my papers to Mr. Duncan, the insurance man, and also the adjuster, together; they were both together. I submitted them myself. The policy was in the papers in the inventory or ledger; don't know where the policy is. I have asked them for the policy—the agent, Pete Duncan—and I didn't get it. I didn't know of any other way to get it. Have been trying to get that policy to bring suit on it, and they wouldn't turn it over. I got the goods back; received this letter through the mail, unsigned. (Letter attached to record, and marked 'Exhibit C'; state objected to introduction of letter, and letter sustained.) Never struck the old lady in my life. (Tax receipts offered in evidence, and state objected, and objection sustained. Copy of tax receipts are attached to the record, marked 'Exhibit E.')

Cross-examination: "Have known Mrs. Inge about 10 years. She has been with me part of the time since I have known her. She first lived with me in the Choctaw Nation, in 1905, I believe. Been living with me off and on ever since, keeping house for me. Lived with her people—her children, son-in-law, and daughter—at Henryetta. She lived with my mother and brother and me at Sulphur. We had been living together off and on ever since 1905. Next met her at Oakman. It has been about 10 years ago, I suppose; met her first at Henryetta. The day I was arrested, went before Squire Nettles to make a complaint against the old lady for burning this place, because I had heard of remarks she made to the people in town. Mrs. Hendrix told me that Mrs. Morgan had told her. (Defendant introduces record to show that the case against this woman has been dismissed on yesterday.)"

George Harrison, for defendant: "Am acquainted with defendant. Have known him about 11 years. Know his reputation for being an honest, law-abiding citizen in the community where he has resided and is known. It is good. In the last 7 years have been character witness for defendants about 15 or 20 times, as much as for the other side."

C. A. Galbraith and Crawford & Bolen, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. (after stating the facts as above). [1] First. Upon the trial of this cause, the judge instructed the jury as follows: "A conviction cannot be had on the testimony of an accomplice, unless he be

corroborated by such other evidence as tends to connect the defendant with the commission of the offense. The corroboration is not sufficient if it merely shows the commission of the offense, and the circumstances thereof. That is to say, if you believe that the witness Mrs. A. C. Inge was an accomplice, then you cannot convict the defendant upon her testimony alone, unless you find it corroborated in some material point which tends to connect the defendant with the commission of the offense." The defendant excepted to this instruction when given, upon the ground that the court should either have instructed the jury positively that Mrs. A. C. Inge was an accomplice, and therefore defendant could not be convicted upon her testimony, unless it was corroborated by other evidence which tended to connect the defendant with the commission of the offense, or that, if the court submitted to the jury the question as to whether or not Mrs. Inge was an accomplice, then the court should have gone further, and instructed the jury as to what in law would constitute an accomplice. Defendant's special instructions numbered 3 and 6 attempted to secure instructions from the court upon these two points.

The special requested instruction No. 3 was as follows: "You are instructed that the witness Mrs. A. C. Inge is what is termed in law an accomplice, and that you cannot convict the defendant upon the testimony of the witness Mrs. Inge, unless the same is corroborated by other evidence which tends to connect the defendant with the commission of the alleged burning, and convinces your minds, beyond a reasonable doubt, of the guilt of the defendant; and I further charge you that the testimony of other witnesses, proving the burning of the store building in the manner and at the time as described by the witness Mrs. Inge, is not such corroboration as will warrant a verdict of guilty."

The special instruction No. 6 is as follows: "You are instructed that you cannot convict the defendant upon the testimony of an accomplice—that is, a party connected in the commission of the crime—notwithstanding you believe all of it, and believe from it that he is guilty."

The court did not err in refusing to give requested instruction No. 3, because it went too far, and was liable to create the impression upon the minds of the jurors that they could not convict upon the testimony of Mrs. Inge, unless it was connected by other evidence, which convinced the jury, beyond a reasonable doubt, of the guilt of the defendant. This is not the law. It is only necessary to authorize a jury to convict upon the testimony of an accomplice that such testimony is corroborated by other evidence, which tends to connect the defendant with the commission of the offense. The court did not err in refusing to give the sixth instruction requested by the defendant, be-

cause it would practically have destroyed the testimony of the accomplice, although it might have been corroborated by other evidence tending to connect the appellant with the commission of the offense. While these two instructions, as requested, are erroneous, and were properly refused by the trial court, yet each of them attempted to state a correct principle of law. The court should have modified the requested instructions, and have omitted the incorrect portions thereof, and have given the portions which were correct. Under the evidence in this case the court would have been entirely justified in instructing the jury that Mrs. Inge was an accomplice, but, as the court did not do so, and submitted that question to the jury, the court should have gone further, and instructed the jury what it took to constitute an accomplice.

Second. In his motion for a new trial, appellant set up the fact that, subsequent to the rendition of the verdict in this case, Mrs. A. C. Inge, the witness on whose testimony he had been convicted, had voluntarily and of her own free will and accord made a sworn statement that she had testified falsely at the trial of said cause, and that the defendant was entirely innocent of the offense charged against him, and of which he had been convicted. He attached to this motion the following affidavit of said witness Mrs. Inge:

"Henryetta, Okla., March 5, 1910. I make the following statement of my own accord for my conscience has not let me rest one moment since I testified against M. D. Chapel of Ada, Okla. I now raise my hand towards high heaven and solemnly swear that he is innocent of the crime as he is of the murder of President Garfield. He did not know that his store would be burned when he left home. Rich Sanders and myself entered into a conspiracy to rob the store and then burn it, so on Sat. night his girl Bonnie Sanders stayed all night with me. Sunday night Mr. Sanders said he would keep her at home, she might tell something, so Mr. Sanders and I went to work Sunday night to take the goods out of the store; we put them in the bushes west of the store but after Mr. Chapel and I went to Ada Mr. Sanders and I got uneasy and Mr. Sanders put them in the little cabin where the sheriff found them. I gave Mr. Sanders a key to the house before I left to go to Ada as that was the agreement to put them in the house where Chapel lived. If we got uneasy for we knew that would shift the suspicion from us to Chapel because he had insured on the goods. Mr. Sanders said after the arrest was made that he would run away. I came to Chapel's store to work against his will, he never did want me to stay around him when he was in the mercantile business, but I went for I knew his disposition was such that he would not say a word and because he never did mistreat me in any way,

he did not like me, and he did not want me to stay with him at all, he never did want me around him but I took advantage of his kindness and easy disposition and stayed with him anyhow. I received through the mail fifty dollars in bills the only things that was in the letter was this give old Chapel the devil when you get on the witness stand its the only way out don't make any difference whether he is guilty or not, it keeps you out of the pen so take fifty and it will save us six hundred and fifty. Peat Duncan told me he did not intend to let the company pay Chapel's policy for he had worked a trick on him and got the policy in his possession he also said that he offered to see that he got the money all right if he would bring the books up to his office that he would have fixed it so they would pay it, but Chapel got offended because I made the proposition so I hope he will go to the pen. I make this statement of my own accord voluntarily and without fear or influence of any person, but that an innocent man might not be wrongfully punished for a crime he did not commit. Mrs. A. C. Inge.

"Subscribed and sworn to before me this 17th day of May, 1910. Hallie Whitaker, Notary Public. [Seal.]"

[2] This affidavit is not in any manner assailed by the state. The contention of the Attorney General in his argument was that under the facts and circumstances in this case the jury would have been impelled by duty to return a verdict of guilty against appellant, although the evidence of Mrs. Inge had been excluded; and, further, that it would be a dangerous rule to hold that where a witness had testified for the state that he could be permitted subsequently to file an affidavit that his or her testimony, given on the trial in chief, was false, and that such a rule would place a premium upon perjury and be an incentive for wholesale bribery of witnesses. Cases might arise in which the argument of the Attorney General might have great force; but in the case at bar a number of reputable witnesses testified on the trial that appellant had always borne the reputation of being an honest and law-abiding citizen. This evidence was not in any manner questioned by any testimony of the state, except the testimony of Mrs. Inge, and testimony as to some facts which, with the testimony of Mrs. Inge excluded, would not be conclusive as to the guilt of the appellant. Under these circumstances, we think that it would be a perversion of justice to allow a citizen, of previous irreproachable character, to be sent to the penitentiary upon the testimony of a self-confessed perjurer. It should never be forgotten that the supreme purpose of the law is to secure the enforcement of justice. We think that the proper way to protect the state against perjury in such cases is to prosecute the party who commits it. In fact, if there were

more prosecutions for perjury instituted in the courts of the state of Oklahoma, it would be much better for the administration of justice. A witness has no more right to commit perjury in the prosecution of a case than in the defense of a case. A false statement, sworn to for the prosecution, is just as much perjury, and should be just as vigorously prosecuted, as though it was sworn for the defense. In view of the evidence in this case and the self-confessed perjury of the main witness of the state, we think that a new trial should be granted upon both of the grounds herein discussed.

The judgment of the lower court is therefore reversed, and the cause is remanded for a new trial.

ARMSTRONG and DOYLE, JJ., concur.

PACIFIC LIVE STOCK CO. v. DAVIS et al.  
(Supreme Court of Oregon. Dec. 5, 1911.)

1. WATERS AND WATER COURSES (§ 49\*)—RIPARIAN OWNERSHIP.

Where defendants had made no appropriation of the water in controversy, and all the parties based their rights thereto as riparian owners, the decree will be predicated upon that ground, since L. O. L. § 6595, recognizes the doctrine of riparian ownership.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 49.\*]

2. LIMITATION OF ACTIONS (§ 78\*)—PERMANENT STREAM.

Where through a natural obstruction part of the water of a stream was diverted and flowed in a given manner for a time longer than that fixed by the statute of limitations, the water diverted was a permanent stream.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 67-69; Dec. Dig. § 78.\*]

Appeal from Circuit Court, Harney County; George E. Davis, Judge.

Action by the Pacific Live Stock Company against Jasper Davis and others. From a decree for plaintiff, defendants appeal. Modified and affirmed.

This suit was instituted May 10, 1905, by the Pacific Live Stock Company, a corporation, against Jasper Davis, J. W. Shown, J. P. Withers, Joseph Clark, Fred Haines, Nancy Roper, E. L. Wyatt, F. L. Wyatt, Leora Martin, Belle Tregaskis, and Jennie Curtis, to enjoin interference with the flow of water, the right to which is predicated on plaintiff's ownership of riparian lands. The defendants Davis, Withers, Clark, and Haines jointly and severally answered, admitting the alleged riparian proprietorship, and setting forth their respective rights to the use of water. Nancy Roper separately answered, but the suit was dismissed as to her. Leora Martin, not having been served with process, made no appearance. The remaining defendants, though served with sum-

mons, did not appear or answer. A reply having put in issue the allegations of new matter in the joint answer, the cause was referred, and from the testimony taken the court made findings of fact and of law, awarding to plaintiff four-ninths of the water in dispute, to be measured where the stream divides, forming branches in the nature of a delta. From this decree an appeal is taken by the defendants, who jointly and severally answered.

L. R. Webster (Emmons & Webster, on the brief), for appellants. A. A. Smith (John L. Rand, on the brief), for respondent.

MOORE, J. (after stating the facts as above). [1] It is maintained by defendants' counsel that, as the townships in which are situated the lands owned by the respective parties hereto were not surveyed until after March 3, 1877, no title to such premises could have been secured prior to the passage of the desert land act, and that the principle announced in *Hough v. Porter*, 51 Or. 818, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, controls, preventing plaintiff from asserting a right to any of the waters involved herein under the claim of riparian ownership. This suit was commenced before the decision was rendered in the case to which attention is called, and as neither of the defendants herein allege an appropriation of any water, but rely upon respective claims of riparian proprietorship, the decree to be rendered will be predicated on that ground, since the statute recognizes the existence of such right. L. O. L. § 6595.

Considering the case on its merits, the evidence discloses that Rattlesnake creek rises in the northern part of Harney county and flows southerly to the N. E.  $\frac{1}{4}$  of section 19 in township 22 S. of range 32 $\frac{1}{2}$  E., where the stream divides, and a branch flowing from it to the left is known as "East Fork." About a quarter of a mile below such separation the creek again divides, and a branch flowing from it to the right is called "West Fork"; the center stream being designated at that place and below as the "Middle Fork." Rattlesnake creek being thus diverged, each of its three branches flows southerly about two miles or more across nearly level land, over which, during freshets, the water spreads and finally disappears, probably becoming visible farther south as a part of Malheur Lake. The channel of West fork from the place of its diversion extends southerly across lands owned by the defendants Shown and Clark, in the section named, and thence over lots 1 and 2 of section 30 in the township and range referred to, which tracts of land are respectively owned by the defendants Davis and Haines. The channel of the West fork then crosses the township line and continues southerly across the east sides of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

sections 25 and 36 in township 22 S. of range 32 E., which latter section is owned by plaintiff. The water, caused by melting snow, originally flowed in the West fork to plaintiff's premises, where, diffusing over and standing for some time on the surface of the easterly half of its land, it prevented the growth of sage brush and greasewood, and produced natural grass, affording pasturage and hay, and facilitating the raising of stock, in which business plaintiff is engaged. The flow continued in the several branches to their respective basins or sinks until about June 1st of each year, when no water could be found, except such as was afforded by a few springs in or near the channel of the East fork. The flow in the West fork seems gradually to have diminished each year for some time, owing to the deepening of the channels of the Middle and East forks, the waters from both of which have been used by the defendants to subirrigate their lands, by putting dams in the streams, causing the moisture to percolate the soil. A slight ridge extending southeasterly across plaintiff's land divides it, and the westerly half is moistened by the waters of Coffeepot creek, a stream flowing southeasterly across its premises, the easterly half of which has been overflowed by waters from the West fork. Davis straightened the channel of West fork across his premises, filling the deep places, plowing the land, and raising grain on what, at one time, had been parts of the bed of the stream. The waters of Middle and East forks have been used by the defendants to subirrigate their respective tracts, in the cultivation of which the quantity required each year has increased as the area of the tillable lands has been augmented.

The water in Rattlesnake creek in the year 1904 was less than it had previously been, and by reason thereof, and in consequence of the diversions, the hay crop that season on plaintiff's land was almost a failure. In order to prevent a scarcity of water during the next year, this suit was instituted, based on the modern doctrine that as a riparian proprietor plaintiff was entitled to a reasonable quantity of the water of West fork for irrigation, and that interference with the flow in the channel of that stream by the defendants constituted an infringement of right. The answer of Davis and others admitted the riparian ownership, but alleged that not more than two-ninths of the water of Rattlesnake creek ever passed into the West fork, which quantity flowed in the channel of that stream to plaintiff's premises. The trial court found, however, that four-ninths was the measure of plaintiff's right and gave a decree in accordance therewith.

We have carefully examined the evidence which has been brought up, and are unable to agree with the conclusion thus reached.

In the year 1870, when a knowledge of the condition of these streams seems first to have been acquired by white men, it is quite probable that Middle and West forks were the only branches, and that the latter contained the greater quantity of water. The land through which these streams flow is very level, and East fork was evidently formed by some obstruction in the bed of Rattlesnake creek, whereby a part of the current was diverted to the left, but when this occurred cannot be determined from the evidence. C. M. Foster, as plaintiff's witness, was interrogated as to the head of East fork as follows: "What is there in the main channel of Rattlesnake creek at that point to divide the water, if anything?" He answered: "There is floatwood, and I think a log, and willows have grown up, and seemingly that floatwood and log has spread the waters of the creek. It has that appearance." The witness first saw that stream in the year 1900, and, as we understand his testimony, East fork was then, and for several years prior thereto had been, an existing channel.

[2] When that branch separated from Rattlesnake creek cannot be ascertained, though it seems that in the early settlement of the country the East fork consisted of waters flowing in a gulch, and it then had no connection with the parent stream. East fork has undoubtedly flowed in the manner indicated for a longer period than that fixed by the statute of limitations and has become a permanent stream. *Cottel v. Berry*, 42 Or. 593, 72 Pac. 584; *Harrington v. Demaris*, 46 Or. 111, 77 Pac. 603, 82 Pac. 14, 1 L. R. A. (N. S.) 756.

The evidence tends to show that plaintiff's predecessors in interest had for many years annually cut hay from section 36 in township 22 S. of range 32 E., but that neither they nor its agents had ever made any effort to remove from the channel of Rattlesnake creek the driftwood and log, which, naturally floating therein during a flood, had lodged, without the help of either of the defendants, causing sediment to be deposited, willows to be propagated at that place, and water to be diverted, forming the East fork.

Various estimates of the relative quantities of water annually flowing in the East, Middle, and West forks were made by witnesses who appeared for the parties; but the uncertainty of the testimony on this subject is apparent from a perusal of the transcript. This obscurity induces the conclusion that each branch, except possibly the West fork, had for a period of more than ten years prior to the commencement of this suit carried an equal quantity of water, and that in decreeing to plaintiff a flow in the West fork of more than one-third of the volume of Rattlesnake creek above the place of either diversion an error was committed.

The decree will therefore be modified as



here indicated; the defendants to recover their costs and disbursements in this court, and each party to pay its and his own costs and disbursements in the court below.

### PURDY v. VANKEUREN.

(Supreme Court of Oregon. Dec. 5, 1911.)

#### 1. ACCORD AND SATISFACTION (§ 25\*)—PLEADING—REQUISITES.

An answer, in an action for services rendered under a contract, which denies the material allegations of the complaint, except as alleged in the further and separate answer, which states a different contract and an accord and satisfaction, is insufficient, for defendant can plead the general issue and an accord and satisfaction by an absolute denial of the contract, coupled with a plea of accord and satisfaction of plaintiff's demand.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 151-161; Dec. Dig. § 25.\*]

#### 2. CONTRACTS (§ 346\*)—ACTIONS FOR SERVICES—PLEADINGS—ISSUES.

A defendant, in an action for services rendered under a contract, may not, under a general denial, show that the services sued for were rendered gratuitously, but that defense must be specially pleaded.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1718-1753; Dec. Dig. § 346.\*]

#### 8. APPEAL AND ERROR (§ 1001\*)—VERDICT—CONCLUSIVENESS.

Under Const. art. 7, § 3, as amended November 8, 1910 (Laws 1911, p. 7), a verdict sustained by evidence cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3934; Dec. Dig. § 1001.\*]

Appeal from Circuit Court, Grant County; Geo. E. Davis, Judge.

Action by Jesse T. Purdy against Judson H. Vankeuren. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action to recover for labor and services. The complaint alleges, in substance, that, on or about January 14, 1907, plaintiff performed labor and services for defendant in Grant county, Or., and that defendant promised to pay therefor \$200, and has not paid the same, nor any part thereof, and concludes with a prayer for judgment for \$200, with interest at 6 per cent. from January 14, 1907. The answer denies each and every material allegation of the complaint, except as alleged in the further and separate answer, which states that in 1906 and 1907 plaintiff, defendant, and Jay A. Higbee were residents of Idaho; that plaintiff was engaged in business as a timber locator in Grant county, Or., and elsewhere; that in July, 1906, plaintiff agreed with defendant and Higbee that, in consideration of their sending to him persons who desired to enter timber lands in Grant county, he would pay to them \$100 for each person so sent to him, and by him located; that defendant and Higbee sent five persons to

him, all of whom plaintiff located on timber lands in Grant county, prior to January 14, 1907, and that plaintiff thereby became indebted to defendant and Higbee in the sum of \$500, or \$250 each; that, on or about January 14, 1907, plaintiff located the defendant on a timber claim in Grant county, Or., and his labor and services in doing so are those mentioned in the complaint, and were rendered and performed by plaintiff for defendant in full payment for the services performed by defendant for plaintiff in procuring the five persons to enter and locate timber lands, as above set forth; that plaintiff then and there accepted the services and labor of defendant for his services; that defendant accepted the services and labor of plaintiff for defendant's services. The reply denied the accord and satisfaction pleaded in the answer, admitted that plaintiff located defendant on a timber claim in Grant county, as alleged, and admitted that his services in so locating plaintiff were the labor and services referred to in the complaint. A jury trial was had, and there was a verdict and judgment for plaintiff. Defendant appeals.

Hicks & Marks, for appellant. Cattanach & Wood, for respondent.

McBRIDE, J. (after stating the facts as above). [1, 2] The validity of defendant's objections to the ruling of the court excluding certain portions of his evidence hinges upon a single proposition. Could he, after pleading an accord and satisfaction, as is done here, introduce evidence tending to show that plaintiff's services were rendered gratuitously? It will be seen that defendant does not positively deny any specific allegation of the complaint. He denies only such as he deems material, and these only in so far as they are not referred to in the answer. In other words, he says: "The contract was not as plaintiff states it, but as I state it." Conceding that defendant had the right to plead the general issue, and also an accord and satisfaction of the claim, he could only do this by an absolute denial of the contract, coupled with a plea of accord and satisfaction of the plaintiff's demand. The pleading in the case at bar falls short of this. The defendant could not in any event, under a general denial, introduce evidence that plaintiff's services were rendered gratuitously. The law presumes that services performed by one at the request of another are performed for hire, and implies a promise to pay for them. Lawson on Contracts, § 43. To overcome this presumption, and to fairly apprise plaintiff of the defense he intended to interpose, defendant should have pleaded specially that the services were performed gratuitously.

[3] The brief of defendant contains a dis-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cussion of the evidence submitted, and it must be confessed that the evidence is exceedingly contradictory and unsatisfactory; but there was evidence, sufficient to submit to a jury, which sustained plaintiff's theory, and the jury having found in his favor we are prohibited by section 3, art. 7, of the Constitution, as amended November 8, 1910 (Laws 1911, p. 7), from disturbing their verdict.

The judgment of the lower court is affirmed.

### MOUNTZ v. APT.

(Supreme Court of Colorado. June 5, 1911.)

#### 1. CONTINUANCE (§ 7\*)—APPEAL AND ERROR (§ 966\*)—DISCRETION OF COURT—REVIEW.

Refusal to grant a continuance rests in the discretion of the trial court, and is reversible only for a manifest abuse of discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 17, 18; Dec. Dig. § 7;\* Appeal and Error, Cent. Dig. § 3837; Dec. Dig. § 966.\*]

#### 2. CONTINUANCE (§ 26\*)—GROUNDS—ABSENCE OF WITNESS—DILIGENCE—APPLICATION.

A party knew two days before the order setting the case for trial two weeks later that a witness had left the state to visit his father, who was sick. The party did not learn of the whereabouts of the witness until six days before the date set for trial, but he made no application for a continuance until the date fixed for trial, and he offered no excuse why the application was not presented earlier. *Held*, that the denial of the application was within the court's discretion under the rule that, where a party fails to exercise reasonable diligence in presenting an application for a continuance after becoming aware of the facts, it should be denied.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 74-93; Dec. Dig. § 26.\*]

#### 3. EVIDENCE (§ 543\*)—OPINION EVIDENCE—VALUE OF FARM LAND—COMPETENCY OF WITNESSES.

An experienced farmer who visited a farm and made an investigation of its condition and value, and a surveyor who knew from observation what character of land would produce crops and what would not, and who had made an examination of the farm, were competent to testify to its value.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2357; Dec. Dig. § 543.\*]

#### 4. EVIDENCE (§ 543\*)—OPINION EVIDENCE—VALUE OF FARM LAND—COMPETENCY OF WITNESSES.

A farmer who had lived in the vicinity of a tract of land for several years, and who had platted and sold land in the neighborhood, was competent to testify to the value of the tract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2357; Dec. Dig. § 543.\*]

#### 5. APPEAL AND ERROR (§ 1056\*)—REVIEW—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Where, in an action for fraud in inducing an exchange of lands, the evidence clearly showed that defendant grossly misrepresented the character and value of the land which he conveyed in exchange for plaintiff's land, and the overwhelming evidence showed that defendant's land was practically worthless, the error in preventing defendant from testifying

as to the value of the lands of the parties was not prejudicial because the testimony would not have changed the result.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193; Dec. Dig. § 1056.\*]

#### 6. APPEAL AND ERROR (§ 1050\*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The error, if any, in allowing a witness to state his conclusions not relating to the important issues in the case, is not reversible.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.\*]

#### 7. EXCHANGE OF PROPERTY (§ 8\*)—FRAUDULENT REPRESENTATIONS—DAMAGES.

Where an action for fraud in inducing an exchange of real estate was tried on the theory set forth in the complaint that the damages sustained by plaintiff were the difference in the market values of the respective tracts, and defendant accepted such theory, without objection, the court in charging on the measure of damages properly adopted such theory.

[Ed. Note.—For other cases, see Exchange of Property, Cent. Dig. § 18; Dec. Dig. § 8.\*]

#### 8. APPEAL AND ERROR (§ 832\*)—REVIEW—ESTOPPEL TO ALLEGE ERROR—THEORY OF CASE.

Where a cause is submitted to the jury on a theory adopted and acquiesced in by both parties, neither will be heard to complain that it was error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3596; Dec. Dig. § 832.\*]

#### 9. TRIAL (§ 256\*)—INSTRUCTIONS—REQUESTS—NECESSITY.

Error cannot be predicated on an instruction not sufficiently full or explicit, in the absence of a request for a proper instruction supplying the omissions.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 628; Dec. Dig. § 256.\*]

#### 10. APPEAL AND ERROR (§ 1047\*)—REVIEW—HARMLESS ERROR—RULINGS AS TO EVIDENCE.

A party has the right to require the trial court to observe the usual rules of evidence in the trial of a case, whether the facts are in slight or serious dispute.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4146-4152; Dec. Dig. § 1047.\*]

Appeal from District Court, Otero County; C. S. Essex, Judge.

Action by Henry A. Apt against L. J. Mountz. From a judgment for plaintiff, defendant appeals. Affirmed.

O. G. Hess, for appellant. H. M. Minor and Paul M. North, for appellee.

GABBERT, J. The parties to this appeal exchanged real estate. The tract which appellee owned is located at Rocky Ford, in this state, while the land—a quarter section—which appellant exchanged therefor, is located in the state of Kansas, about 32 miles southeast of Dodge City. The appellee did not see the Kansas property, neither did he know anything regarding its value or character, and relied upon the representations of the appellant with respect to its value and the character of its soil. Some

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

time after the trade was consummated, the appellee learned that the Kansas land was not as represented, and brought suit for damages against the appellant. The trial resulted in a verdict and judgment for the plaintiff, in the sum of \$1,800, from which the defendant has appealed.

[1] The first point made by his counsel is that the court erred in refusing an application for a continuance. The ruling complained of was not erroneous. The action of a trial court in refusing an application for continuance is a matter of discretion with that tribunal, and is reversible only in case of manifest abuse of such discretion. *Eyers v. McPhee*, 4 Colo. 204; *Banker M. & M. Co. v. Allen*, 20 Colo. App. 351, 78 Pac. 1070; *Keegan v. Donnelly*, 11 Colo. App. 81, 52 Pac. 292; *Michael v. Mills*, 22 Colo. 439, 45 Pac. 429.

[2] From the record and affidavit filed in support of the motion for a continuance, it appears that on January 6, 1908, the cause was set for trial for a day two weeks from that date. The ground for the continuance was on account of the absence of a witness. Two days before the order setting the case for trial, the defendant knew that the witness had departed from the state and had gone to Ohio, where his father was ill. He states in his affidavit that he did not know his whereabouts until January 14th, when he was informed that the date when the witness would return was uncertain on account of the condition of his father. With full knowledge of all these facts, application for a continuance was not made until the day the case was set for trial, namely, January 20th. No excuse is offered why the application was not presented at an earlier date. Where a party fails to exercise reasonable diligence in presenting an application for continuance after he is aware of the facts upon which his application is based, it should be denied. *Michael v. Mills*, supra; 9 Cyc. 134.

[3] The next point made is that the court erred in permitting plaintiff and a witness in his behalf to testify as to the value of the Kansas land, without showing that they were qualified to give such testimony. According to the claim of plaintiff, the defendant had represented the Kansas tract to be worth \$12.50 per acre; that it was a rich, sandy loam soil, covered by a solid mat of buffalo grass; and that it would produce, if cultivated, large and profitable crops of corn, alfalfa, wheat, and other grains. Plaintiff, after the trade was consummated, visited the land with a surveyor who lived at Dodge City. The latter is the witness above referred to. Plaintiff testified that the land consisted principally of sandhills; that there were about five or six acres of level land; that there were places where the sand was drifted five or six feet in depth; that there was very little, if anything, growing on the

land that stock would eat; and that, on account of its sandy character, it could not be cultivated with profit. Plaintiff was an experienced farmer. The surveyor testified that the soil was sand and sandhills, with a few little valleys between; that there were probably five or ten acres of level land; that the land would produce nothing; that, if broken up, the wind would drift the sand and cover the crops. He had lived in that locality for about four years, and knew from observation what character of land would produce crops, and what would not. The testimony of both the plaintiff and the surveyor was further to the effect that the land was practically valueless, or not worth more than the government price, \$1.25, per acre. A witness having personal knowledge of the character of a piece of land, and who, from experience or observation, knows what character of land will produce crops, and what will not, is competent to form an intelligent estimate as to its value for agricultural purposes. Applying this rule, we think it is clear that the witnesses were qualified to give an opinion regarding the value of the Kansas tract.

[4] It is also urged that a witness for plaintiff was permitted to testify to the value of the Rocky Ford land without being qualified. It appears that this witness was a farmer; that he had lived in the vicinity of Rocky Ford for several years, and had platted and sold land in that neighborhood. We think this disclosed sufficient qualification to permit him to give his testimony.

[5] The defendant was asked if he knew what the Kansas land was worth at the time he traded it to the plaintiff. He was also asked if he knew what the Rocky Ford land was worth at that time. Objections were interposed to each of these questions, and sustained. We think the defendant should have been allowed to answer these questions; but the record affirmatively shows that, if he had, the result of the trial would not have been different from what it was. The testimony with respect to the value and character of the Kansas land was overwhelmingly to the effect that it was practically valueless. Aside from this, when we consider the real issue of fact upon which the value of this land depended, it is apparent that the ruling of the court in not permitting the defendant to give his estimate of its value in dollars could not have prejudiced him. The testimony and circumstances are such that there can be no doubt but that defendant grossly misrepresented its character and value. Certainly plaintiff would not have knowingly traded his land, well worth \$2,000, for a quarter section of sandhills. He claimed the defendant had represented to him that the soil of the Kansas tract was a good, rich, and sandy loam, and would produce good crops. In addition to the testimony of plain-

tiff and the surveyor as to the character of this land, there was the testimony of another witness, who had visited it, whose evidence, from the description given, tended even more strongly to establish its worthless character. Defendant had been upon the land and testified as to its character and soil. Its value for agricultural purposes (and it is not claimed that it was valuable for any other) depended principally upon whether crops could be raised thereon, or whether it consisted of sandhills and drifting sand. If of the latter character, it was patent to any one that it was of little value. Necessarily, from the verdict returned, the jury resolved the question of fact with respect to the character of the soil in favor of plaintiff, and we might add from the testimony could not have found otherwise; so that it is apparent the defendant was not precluded from giving any testimony which could have changed the result or have assisted the jury in determining its value. The testimony with respect to the Rocky Ford land, as stated by several witnesses, was to the effect that it was fully worth the sum which the defendant had represented the Kansas tract to be worth; so that whatever answer the defendant might have made to the questions objected to could not possibly have changed the result. Error without prejudice will not work a reversal.

[8] A witness for plaintiff testified to the conversation between the parties at the time the trade was made, and also to the terms and conditions upon which it was closed. It is contended that the court required or permitted the witness to state his conclusions with respect to this conversation. This might be a serious question were it not for the fact that the important issues between the parties were the value and character of the Kansas land, and the representations of the defendant on that subject. The error complained of did not relate to either of these questions.

[7] The final question urged is that the court did not correctly instruct the jury as to the measure of damages. On this subject the court instructed the jury to the effect that, if they found the issues in favor of the plaintiff, then, in determining his damages, they should take into consideration the reasonable market value of the respective tracts of land. This, it is claimed, was erroneous, for the reason that the measure of damages was the difference between the value of the Kansas land at the date of the trade and its value as represented to be. The pleadings did not present this question. The complaint was framed upon the theory that the damages sustained by plaintiff was the difference in the market values of the respective tracts. The defendant by his answer, without objection, accepted this theory of the complaint. Both parties tried

the case upon this theory. At no time did the defendant object to it as not being correct; and very properly the court instructed the jury on the theory of the case as outlined by the pleadings and upon which it was tried.

[8] Where a cause is submitted to a jury upon the theory adopted and acquiesced in by the parties, neither will be heard to complain that it was erroneous. *De St. Aubin v. Marshal Field & Co.*, 27 Colo. 414, 62 Pac. 199.

[9] It is also claimed that the instruction under consideration was not sufficiently explicit, and that the other instructions were faulty, because the court should have instructed the jury on the law governing an action for deceit. Error cannot be predicated on the instruction on the subject of damages for the reasons given. It is not claimed that the other instructions were erroneous. If any of them were not sufficiently full or explicit, or if further instructions were desired on the law of deceit, the defendant should have made requests covering these omissions. He did not. We have repeatedly decided that mere nondirection is not error, unless the proper instruction was tendered and refused. *Sandberg v. Borstadt*, 48 Colo. 97, 109 Pac. 419; *Donley v. Bailey*, 48 Colo. 373, 110 Pac. 65.

The judgment of the district court is affirmed. In affirming the judgment, however, we must not be understood as holding that errors in the trial of a cause can be committed with impunity.

[10] A party has a right to have the trial court observe the usual rules of evidence, whether the facts are in slight or serious dispute. *Colo. Midland Ry. Co. v. McGarry*, 41 Colo. 398, 92 Pac. 915. Captious objections to the introduction of testimony frequently compel the reversal of meritorious cases; but where, as in the case at bar, it is clear beyond question that errors committed at the trial did not prejudice the rights of the complaining party, and that the verdict and judgment are, without doubt, correct, they will be disregarded on review.

Judgment affirmed.

CAMPBELL, C. J., and HILL, J., concur.

#### COLUMBIA SAVINGS & LOAN ASS'N v. CAMBRON.

(Supreme Court of Colorado. Oct. 2, 1911.)

APPEAL AND ERROR (§ 1001\*)—VERDICT—CONCLUSIVENESS.

A judgment sustained by sufficient evidence will not be disturbed, where the errors assigned involve only the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1001.\*]

Error to Pueblo County Court; Frank G. Mirick, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action between the Columbia Savings & Loan Association and C. H. Cambron. There was a judgment for the latter, and the former brings error. Affirmed.

J. Norman, Harry E. Kelly, and Charles H. Haines, for plaintiff in error. James A. Park, for defendant in error.

**PER CURIAM.** The errors assigned involve only the evidence, and a discussion of that would but result in an affirmance. We are satisfied that there is sufficient in the evidence to sustain the judgment, and it is therefore affirmed.

Judgment affirmed.

# EPLEY v. PEOPLE.

(Supreme Court of Colorado. Nov. 6, 1911.)

## 1. CRIMINAL LAW (§§ 586, 1151\*)—CONTINUANCE—DISCRETION OF COURT.

Rulings on applications for a continuance rest in the discretion of the trial court, and will not be disturbed, unless there has been an abuse of discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1311, 3045-3049; Dec. Dig. §§ 586, 1151.\*]

## 2. CRIMINAL LAW (§ 598\*)—CONTINUANCE—DISCRETION OF COURT.

Denial of a continuance on the ground that accused's counsel was engaged in another court, and had not had an opportunity to prepare for the trial, was within the court's discretion, where it did not appear why accused did not procure counsel at the county seat, or in adjoining cities, or other counsel than the one selected, the choice having been made with knowledge that he was engaged in such other court, and where the offense charged was not grave.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1335; Dec. Dig. § 598.\*]

## 3. CRIMINAL LAW (§ 1114\*)—EVIDENCE—OBJECTIONS—REVIEW.

Where the printed abstract of the record fails to show any objections to evidence, the admission thereof is not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2931; Dec. Dig. § 1114.\*]

## 4. INTOXICATING LIQUORS (§ 239\*)—EVIDENCE—INSTRUCTIONS.

Where, on a trial for selling liquor in antisaloon territory, the evidence showed only sales on three days after the territory had become antisaloon territory, and before the filing of the information, and not barred by limitations, and the court charged that the prosecution must prove a sale on or about the date charged, a charge, authorizing a conviction if defendant sold liquor, and that the date of the sale was not material, was not objectionable as allowing a conviction for an offense barred by limitations, or for a sale made prior to the time the territory became antisaloon territory, or after the filing of the information, though such an instruction should limit the act as occurring within the period of limitations, and before the date of the filing of the information.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 831-847; Dec. Dig. § 239.\*]

## 5. CRIMINAL LAW (§ 822\*)—INSTRUCTIONS—CONSTRUCTION.

Instructions must be considered as a whole in determining their correctness.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1990; Dec. Dig. § 822.\*]

## 6. CRIMINAL LAW (§ 857\*)—TESTIMONY OF ACCUSED—WEIGHT.

The jury, in determining the weight of the testimony of accused, may consider his demeanor on the stand.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 857.\*]

Error to Larimer County Court; Fred W. Stover, Judge.

Austin Epley was convicted of selling intoxicating liquors in antisaloon territory, and he brings error. Affirmed.

Stark & Martin, for plaintiff in error. John T. Barnett, Atty. Gen. (Elmer L. Brock, of counsel), for the People.

**HILL, J.** The plaintiff in error was convicted of selling intoxicating liquors in antisaloon territory. He brings the case here for review upon error.

It is urged that the court erred in refusing to grant a continuance for the purposes of allowing the defendant to secure counsel and prepare for trial. He was arrested on September 3, 1909, arraigned upon the same day, pleaded not guilty, and his trial was set for September 8th following. While the record brought up does not disclose the fact, he was evidently admitted to bail, or allowed to go upon his own recognizance; for his affidavit shows that he was in Denver between that date and September 8th, the date on which his case was set for trial. On the morning of the 8th, when his case was called for trial, he appeared in person and by counsel, and filed his motion for a continuance, which stated, as reasons therefor, that he was not served with the information until the 3d day of September, 1909; that he had not had sufficient time within which to prepare for his defense; that he had not been served with a copy of the information, and was wholly unprepared to proceed with the trial; that by reason of the fact that he had not been served with a copy of the information, he did not know its contents, so as to intelligently acquaint his counsel with the crime with which he was charged; that since the time of his arrest until the date set for trial two legal holidays had intervened, and upon account thereof he was unable to employ counsel until the afternoon of Tuesday, September 7th; that his counsel was engaged in a hearing before the United States Circuit Court of Appeals on said 8th day of September; that his counsel had not been able to receive a copy of said information, and was wholly unprepared to proceed with the trial of the cause. This motion was supported by an affidavit of the attorney, a resident of the city of Denver, also one by the defendant.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

These affidavits were practically a repetition of the statements in the motion, with no further details or reasons set forth in either.

[1] The matter of granting a continuance is largely in the discretion of the trial court, depending upon the showing made, including the gravity of the offense, and other matters necessary to be considered, and, unless there is an abuse of such discretion, its rulings will not furnish grounds for reversal. *Byers v. McPhee et al.*, 4 Colo. 204; *Roberts v. People*, 9 Colo. 458, 13 Pac. 630; *Jarvis v. Shacklock*, 60 Ill. 378; *Graff v. Brown*, 85 Ill. 89; *Baumberger v. Arff*, 96 Cal. 261, 31 Pac. 53.

[2] It is very questionable whether this motion presents any reason why the defendant should have been allowed any continuance at all, other than to suit the convenience of certain counsel whom he desired to have represent him. There are no facts given why the defendant was entitled to the services of any particular counsel, or why his case could not have been defended by any counsel of ordinary ability. There are no facts presented why the defendant could not have secured counsel in his home city of Ft. Collins, the county seat of a large county, a city of considerable population, and unquestionably possessed of a very able bar of considerable number; likewise the adjoining cities of Longmont, Loveland, Greeley, and Boulder, all of which, it is common knowledge, have a great many excellent attorneys; and we must assume, in the absence of a showing to the contrary, that in the exercise of ordinary diligence during the length of time allowed that the services of many excellent attorneys could have been secured. We do not mean by this that a defendant is not entitled, ordinarily, to the counsel of his choice, and district attorneys, as well as the courts, in the exercise of a sound discretion, should try to arrange cases so that counsel, as far as consistent, can be accommodated in this respect; but we cannot say that there was an abuse of discretion upon the refusal of the court to grant him a continuance for this reason, without any showing why he should have done so, when his own statements are to the effect that he left his home city, and many others intervening, and came to the city of Denver, and procured the services of one counsel only, who, it appears, upon the day set for trial in Ft. Collins was engaged in the trial of another cause in the federal courts in the city of Denver, and that he knew he would be thus engaged when he employed him, and without any showing to the trial court as to why he should have been entitled to the services of this particular counsel, or in what manner his rights would not have been protected by securing the services of other counsel, who could have appeared at that time. There is no showing that he attempted to secure other counsel, even in Denver, other than the one who, it appears, was employed for the purpose of presenting his motion for a continuance, and

who the record shows continued in the case thereafter, and conducted the defense. It will be observed that the counsel desired had not theretofore been retained and relied upon to conduct the defense, and the case, as the record shows, was not of a complicated character, involving extraordinary skill or ability upon behalf of counsel. The offense charged is not grave, and there is no showing of any fact in the motion for rehearing, wherein the defendant's rights were in any manner prejudiced, jeopardized, or neglected by failure to grant this continuance. To the contrary, the record discloses that the counsel who did appear and defend appears to have been perfectly able and competent to present and take care of the defendant's side of this contention, and we are unable to believe that the defendant's rights were neglected in this respect.

[3] The second contention urged pertains to the admission of the testimony to establish that the city of Ft. Collins was antislaloon territory. It is stated in the brief of the plaintiff in error that this testimony was admitted, over the objections of the defendant. The Attorney General contends that no proper or competent objections were made to any of this testimony. The printed abstract of the record fails to show that any objections were made to it. The question, therefore, is not properly before us for consideration.

[4, 5] Complaint is made to the giving of instruction No. 4. It reads: "The exact date of the sale, if any, is not material, and need not be proven as alleged; the gist of the offense being the unlawful sale, and not the day when it was made. If you find and believe from the whole evidence in the case that the material allegations have been proven beyond a reasonable doubt, you should convict the defendant in such case, and if you do not so find and believe from the evidence, beyond a reasonable doubt, you should give the defendant the benefit of the doubt and acquit him." It is contended that no provision was made in this instruction protecting the rights of the defendant under the statute of limitations, nor in the event that the sale was made prior to the time that Ft. Collins became antislaloon territory; that under this instruction the jury was justified in finding the defendant guilty, though the sale was made years before the time alleged in the information; also that the defendant could have been found guilty, if the sale was made after the filing of the information. We cannot agree with any of these contentions. The instructions must be considered as a whole. Instruction No. 3 advises the jury as to the material allegations in the information which must be proved, as mentioned in instruction No. 4. No. 3, in part, reads as follows: "The material allegations which the people must prove beyond a reasonable doubt are that the defendant, on or about the 17th day of last August, within this city, county, and state, did unlawfully sell, \* \* \* and also that

the city of Ft. Collins was then and there antisaloon territory." The jury were further told that no one instruction covers all the law; also that they must find from the evidence beyond a reasonable doubt.

The only evidence of any sale by the defendant was as to sales made on August 17th and 23d or 24th, so that the jury could not have been misled as to the sales referred to; no other was attempted to be established by the evidence. Hence, under the instructions, the jury could not have found the defendant guilty of making a sale at a date barred by the statute of limitations, or prior to the time that Ft. Collins became antisaloon territory, or subsequent to the filing of the information, for the reason that there was no evidence before them upon which such a verdict could have been reached. While it is true that instructions of this kind, which advise that the time is immaterial, should limit it within the period of the statute of limitations on the one side, and the date of the filing of the information on the other, and that in certain cases it would be prejudicial error by a failure so to do, yet we do not think the defendant was in any manner prejudiced by the court's failure to do so. In addition, had he desired to have the question of time more specifically defined, it was his privilege to have offered instructions upon that subject; not having done so, and being in no way prejudiced upon account of this instruction (even though it was technically erroneous), he has no reason to complain concerning it. Our views concerning the effect of this instruction under the facts of this case are, in substance, approved in the following cases: *Phillips v. State* (Tex. Cr. App.) 45 S. W. 700; *Commonwealth v. Cobb & Another*, 14 Gray (Mass.) 57; *Ferguson v. State*, 52 Neb. 432, 72 N. W. 500, 66 Am. St. Rep. 512; *State v. Fry et al.*, 67 Iowa, 475, 25 N. W. 738; *State v. Williams*, 13 Wash. 335, 43 Pac. 15; *State v. Thompson*, 10 Mont. 549, 27 Pac. 349; *State v. Harp*, 31 Kan. 496, 3 Pac. 432.

[6] Complaint is also made to the giving of instruction No. 8, which refers to the fact that the defendant had testified as a witness in his own behalf, and that in determining the weight to be given his testimony the jury had the right to take that fact and his demeanor upon the stand, etc., into consideration. The cases of *Banks v. State*, 2 Okl. Cr. 339, 101 Pac. 610, and *Mitchell v. State*, 2 Okl. Cr. 442, 101 Pac. 1100, are cited to sustain the defendant's position. Whatever may be the ruling in other jurisdictions, the substance of this instruction was approved by this court in the case of *Boykin v. People*,

22 Colo. 496, 45 Pac. 419, where this matter was thoroughly gone into, and the entire question discussed. We find no prejudicial error in this respect.

The judgment is affirmed.

Affirmed.

MUSSER and GARRIGUES, JJ., concur.

# EPLEY v. PEOPLE.

(Supreme Court of Colorado. Nov. 6, 1911.)

Error to Larimer County Court; Fred W. Stover, Judge.

J. A. Epley was convicted of selling intoxicating liquors in antisaloon territory, and he brings error. Affirmed.

Stark & Martin, for plaintiff in error. John T. Barnett, Atty. Gen. (Elmer L. Brock, of counsel), for the People.

HILL, J. The plaintiff in error was convicted of selling intoxicating liquors in antisaloon territory. He brings the case here for review upon error.

It is agreed between counsel that the facts and the assignments of error in this case are practically identical with those in case No. 6,987, entitled *Austin Epley, Plaintiff in Error, v. People of the State of Colorado, Defendant in Error*, 119 Pac. 153, decided at this term. The cases were argued together.

For the reasons stated in the case above referred to, the judgment in this case is affirmed. Affirmed.

MUSSER and GARRIGUES, JJ., concur.

# EPLEY v. PEOPLE.

(Supreme Court of Colorado. Nov. 6, 1911.)

Error to Larimer County Court; Fred W. Stover, Judge.

C. L. Epley was convicted of selling intoxicating liquors in antisaloon territory, and he brings error. Affirmed.

Stark & Martin, for plaintiff in error. John T. Barnett, Atty. Gen. (Elmer L. Brock, of counsel), for the People.

HILL, J. The plaintiff in error was convicted of selling intoxicating liquors in antisaloon territory. He brings the case here for review upon error.

It is agreed between counsel that the facts and the assignments of error in this case are practically identical with those in case No. 6,987, entitled *Austin Epley, Plaintiff in Error, v. People of the State of Colorado, Defendant in Error*, 119 Pac. 153, decided at this term. The cases were argued together.

For the reasons stated in the case above referred to, the judgment in this case is affirmed. Affirmed.

MUSSER and GARRIGUES, JJ., concur.

**BULL et al. v. DOSS BROS. ELECTRIC  
CONST. CO.**

(Supreme Court of Colorado. Nov. 6, 1911.)

**APPEAL AND ERROR (§ 781\*)—PAYMENT OF  
JUDGMENT—VOLUNTARY PAYMENT—DIS-  
MISSAL.**

Where a defendant, who sued out a writ of error to review an adverse judgment docketed by plaintiff, as authorized by Code Civ. Proc. § 251, secured a supersedeas staying execution, and plaintiff took no steps to collect the judgment, a payment by defendant of the judgment was voluntary, though made to make it more convenient to carry on his business, and the writ must be dismissed on plaintiff's plea in bar.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 781.\*]

Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by the Doss Bros. Electric Construction Company against Cora F. Bull and another. There was a judgment for plaintiff, and defendants bring error. Writ dismissed.

W. W. Dale, for plaintiffs in error. Murray & Ingersoll and H. Wendell Stephens, for defendant in error.

WHITE, J. March 21, 1910, the defendant in error, as plaintiff below, recovered a judgment against plaintiffs in error, and two days thereafter, in order to make the same a lien upon the real property of the judgment debtors, caused a transcript of the docket entry of such judgment to be filed with the recorder of the city and county of Denver, as provided by section 251, Code Civ. Proc. (R. S. 1908). April 18, 1910, the judgment debtors, plaintiffs in error, brought the cause here for review, applied for, and secured, a supersedeas, staying the execution of the judgment. Thereafter, on August 22, 1910, plaintiffs in error paid the judgment, and had the same satisfied of record.

Defendant in error has filed a plea in bar, and moves to dismiss the writ, for the reason that plaintiffs in error voluntarily paid, satisfied, and discharged the judgment. Plaintiffs in error maintain that the payment and satisfaction of the judgment was under duress or compulsion, and therefore constitutes no bar to the prosecution of the writ of error. We are unable to concur in this view of the matter. Defendant in error did nothing except that which the Legislature authorized it to do. It made no illegal exactions of plaintiffs in error; indeed, no demand whatever. At the time no execution could have issued upon the judgment. The supersedeas stayed all proceedings to collect, so the judgment lien, though existing, was nonenforceable. It was no more incumbent upon plaintiffs in error to at that time satisfy the judgment than to liquidate an incumbrance before it became due, voluntarily placed upon their property. In either

event, it might be to their interest or convenience to so do. They were engaged in buying and selling real estate, and negotiating loans thereon, and, in order to more conveniently carry on that particular business, saw fit to satisfy the judgment, and remove the lien created thereby. This did not constitute duress.

The facts of this case bring it clearly within the principle announced in Hawthorne, Trustee in Bankruptcy, v. Hendrie & Bolthoff Mfg. & Sup. Co., 50 Colo. 342, 116 Pac. 122; Burns v. Natl. M., T. & L. Co., 47 Colo. 557, 106 Pac. 330; Knowles v. Harrington, 45 Colo. 346, 101 Pac. 403; Floyd v. Cochran, 24 Colo. 489, 52 Pac. 676; Atkinson v. Tabor, 7 Colo. 195, 197, 8 Pac. 64.

The plea in bar is therefore sustained, and the writ of error dismissed.

Writ dismissed.

MUSSER and HILL, JJ., concur.

**LONDONER v. CITY AND COUNTY OF  
DENVER et al.**

(Supreme Court of Colorado. Nov. 22, 1911.)

**1. MUNICIPAL CORPORATIONS (§ 223\*)—ACQUISITION OF PARKS—CONSTITUTIONAL AUTHORITY.**

Under Const. art. 20, relating to the city and county of Denver, and conferring on the people thereof every power possessed by the Legislature in the making of a charter, the people of the city and county of Denver may adopt a charter containing provisions for the purchase or condemnation of lands for parks and parkways, and the payment therefor in whole or in part by assessments made on property within districts specially benefited, notwithstanding the provision in section 1 empowering the municipality to construct, condemn, and purchase waterworks, light plants, power plants, transportation systems, and other public utilities, the provision not measuring the extent and limitation of the power to acquire lands for other public purposes.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 616-622; Dec. Dig. § 223.\*]

**2. MUNICIPAL CORPORATIONS (§ 64\*)—LEGISLATIVE AUTHORITY.**

The legislative authority over municipal corporations is plenary, except as limited by the federal or state Constitutions.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 156, 157; Dec. Dig. § 64.\*]

**3. EMINENT DOMAIN (§ 7\*)—RIGHT TO EXERCISE POWER TO CONDEMN PROPERTY.**

The right to appropriate private property to public uses lies dormant until legislative action is had, pointing out the occasions, modes, conditions, and agencies for its appropriations.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 24-28; Dec. Dig. § 7.\*]

**4. EMINENT DOMAIN (§ 41\*)—PUBLIC PURPOSES—PARKS.**

The acquisition of lands for parks is for a public purpose, and a municipal corporation may be empowered to condemn land for such

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes



purpose at the cost of property within districts specially benefited by the improvements.

[Ed. Note.—For other cases, see *Eminent Domain*, Dec. Dig. § 41.\*]

**5. APPEAL AND ERROR (§ 790\*)—QUESTIONS REVIEWABLE—IMMATERIAL QUESTIONS.**

A suit to restrain the city council of the city and county of Denver from passing an ordinance for the acquisition of lands for parks and parkways was dismissed after denial of an injunction. Pending a writ of error the city council in good faith passed the ordinance. No application was made to the Supreme Court for a stay, and no stay was issued against the council pending the determination of the writ. *Held*, that the Supreme Court must dismiss the writ of error on the facts being brought to its attention by a plea in bar, since it could not nullify the legislative action of the council, and since a reversal could accomplish nothing.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 47, 3132, 4383, 4384; Dec. Dig. § 790.\*]

Musser and Gabbert, JJ., dissenting in part.

En Banc. Error to District Court, City and County of Denver; Greeley W. Whitford, Judge.

Action by Wolfe Londoner against the City and County of Denver and others. There was a judgment of dismissal, and plaintiff brings error. Plea in bar sustained, and writ of error dismissed.

O. N. Hilton and C. V. Mead, for plaintiff in error. Henry A. Lindsley, G. Q. Richmond, and F. W. Sanborn, for defendants in error.

**WHITE, J.** The city and county of Denver is a municipal corporation created by and under the provisions of article 20 of the state Constitution. March 29, 1904, it adopted a charter which divides its territory into four park districts, and places them under the control of a park commission composed of five commissioners. It authorizes the park commission, with the approval of the mayor, upon certain conditions hereinafter stated, to select and acquire by purchase or condemnation proceedings, in the name of the city and county, for the use of any such park district, lands therein for parks and parkways, to be paid for, either in whole or in part, by special assessments upon the real estate, excepts parks, parkways, and streets, comprising such district. Sections 92, 324, 325, 326, 327, and 328. By section 327 of the charter the park commission, before acquiring any such real estate or issuing bonds for park purposes, is required to prepare a map of the district, and apportion the estimated cost of the proposed improvement on the assessable real estate situate therein, in proportion to the benefits accruing thereto in consequence of the establishment of such parks or parkways in such district, in accordance with rules therefor adopted by the park commission, as it may seem just and reasonable; and to give published notice for 10 days "to the owners

of the real estate to be assessed of the proposed purchase or condemnation, with a description of the lands to be acquired, the estimated cost, the number of installments and time in which the assessments will be payable, the rate of interest on unpaid installments, the rules adopted by the commission for apportioning the benefits, as aforesaid, and the time, not less than ninety days after the first publication, when the question of the proposed purchase or condemnation will be considered by the commission; that said map and all proceedings of the commission are on file and can be seen and examined by any person interested during business hours, within said period of ninety days, at the office of the secretary of said commission, and that all complaints and objections that may be made in writing by owners of any real estate to be assessed will be heard and determined by the commission before final action of the commission in the premises." The section further provides that "the commission shall, at the time specified or thereafter, consider all such complaints and objections, and may modify or confirm their apportionments, and shall finally determine whether said lands shall be acquired for said purpose; but if, within the time above specified, a remonstrance shall be filed with the secretary of said commission, subscribed by owners of twenty-five per cent. in area of the real estate which is to be assessed, then the proposed purchase or condemnation shall not be made, and the proceedings shall not be renewed for one year thereafter." The section also provides that "the finding of the council by ordinance that such notice was duly given, or that such remonstrance was or was not filed, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal." Certain sections of the charter make it incumbent upon the park commission, when the cost of any park site or parkway is definitely determined, to file with the city clerk a certified statement showing the cost of the improvements, the apportionment thereof upon each lot or tract of land to be assessed; and requires the clerk thereupon, by advertisement for 10 days in some newspaper of general circulation published in the municipality, to notify the owners of the real estate to be assessed that the improvements have been or are about to be completed and accepted, specifying the whole cost of the improvements and the share apportioned to each lot or tract of land; and that any complaints or objections that may be made in writing by such owners and filed with the clerk within 60 days from the first publication of such notice will be heard and determined by the proper municipal authorities at a time des-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

igned in the notice and before the passage by the city council of any ordinance assessing the cost of such improvements. Sections 298, 299, 300, 328.

Under these provisions of the charter, proceedings were initiated to acquire lands for parks and parkways, in that portion of the municipality known as the "East Denver Park District." The park commission complied with section 327, and published the preliminary notice required thereby. Thereupon certain protests against the improvements from property owners within the district were filed, including one by plaintiff in error. The park commission on the day designated in the notice therefor heard and considered the protests and complaints filed, and found, among other things, that sufficient remonstrances had not been made and filed as provided by the charter to defeat the park improvements proposed, and thereupon finally determined to acquire the lands described in the notice for the purposes designated. The park commission thereafter certified to the council of the municipality the protests and complaints aforesaid and the proceedings and findings relating thereto for such action as might be incumbent upon the council to do and perform in the premises. Thereupon plaintiff in error, for himself and all others similarly situated, brought an action to restrain the city council from passing an ordinance, which it was alleged it was about to do, making findings that the notice to the property owners as required by section 327 of the charter had been duly given; that remonstrances subscribed by the owners of 25 per cent. in area of the real estate proposed to be assessed for the cost of acquiring the designated lands for parks and parkways had not been filed with the secretary of the park commission within the time specified in the notice, or at all. Plaintiff also sought in the action to restrain all the defendants in error from proceeding further in the premises.

The complaint sets forth some of the provisions of the charter, the notice given by the park commission as provided by section 327, and charges that the rules therein adopted by the park commission for apportioning the benefits to the real estate within the district, and the apportionment made under said rules of the estimated cost of the proposed improvements, are inequitable and unjust, and that irregularities and inaccuracies exist in the notice given, and in connection with the giving of the same, alleges the filing of protests and remonstrances by property owners sufficient, if rightly counted, to defeat the improvements, the wrongful permission by the park commission to property owners to withdraw therefrom, and the inclusion of certain alleged nonassessable lands within the district in determining the area of the real estate included in the protests to the area to be assessed for the im-

provements, and other irregularities in the proceedings of the park commission upon its determination of the matters raised by the notice, the protests, remonstrances, and withdrawals filed thereunder, and that the city and county of Denver has no power to acquire lands for parks or parkways by condemnation proceedings, or to acquire the same by purchase, except by a vote of the taxpaying electors first approving and ordering a bond issue therefor, and that the charter provisions apparently vesting such power in the municipality are in violation of the Constitution. A demurrer was interposed to the complaint, sustained by the court, and the cause dismissed. The plaintiff brings the case here on error, and seeks a reversal of the judgment. The important propositions presented, the only ones we deem necessary to consider, will be disposed of in the order we deem most convenient.

[1] 1. Plaintiff's contention, as to the lack of power in the municipality to acquire lands for parks or parkways by condemnation proceedings, or by purchase, except upon a vote of the taxpaying electors therein approving and ordering a bond issue therefor, is based upon the assumption that section 1 of article 20 of the Constitution measures the extent and limitation of the power of the city and county of Denver in acquiring lands for parks and parkways. We are of the opinion that the assumption is not well based. In *Denver v. Hallett*, 34 Colo. 393, 416, 83 Pac. 1066, we expressly held that the limited grant of power contained in section 1 of article 20 of the Constitution is not the only power possessed by the municipality. We therein, on pages 398 and 399 of 34 Colo., on page 1068 of 83 Pac., said: "The statement contained in the first section was not intended to be an enumeration of powers conferred, but simply the expression of a few of the more prominent powers which municipal corporations are frequently granted. The purpose of the twentieth article was to grant home rule to Denver and the other municipalities of the state, and it was intended to enlarge the powers beyond those usually granted by the Legislature; and so it was declared in the article that until the adoption of the new charter by the people that the charter as it then existed should be the charter of the municipality, and, further, that the people of Denver shall always have the exclusive power of making, altering, revising, or amending their charter, and, further, that the charter, when adopted by the people, should be the organic law of the municipality and should supersede all other charters. It was intended to confer, not only the powers specially mentioned, but to bestow upon the people of Denver every power possessed by the Legislature in the making of a charter for Denver." By that decision we determined that the powers enumerated in section 1 of article 20 of the Constitution do not constitute a limitation of the powers

conferred on the municipality; and, moreover, the article conferred upon such people "every power possessed by the Legislature in the making of a charter for Denver." It is equally certain the article neither enumerates nor withholds the power to purchase land, or to exercise the right of eminent domain by the municipality in acquiring the same for parks and parkways, and the payment therefor by collections based upon assessments upon the lands specially benefited by the public improvement. There being no constitutional limitation on the exercise of these powers by the municipality, it necessarily follows that the people of the city and county of Denver, on whom was "conferred every power possessed by the Legislature in the making of a charter for Denver," could therein grant or withhold such powers.

[2] It is elementary that, except as limited by the federal or state Constitution, the legislative authority over municipal corporations is supreme or plenary. It is "a legislative function to determine what power shall be granted, what withheld, and what restrictions shall be imposed in the exercise of the powers granted." *Denver v. Hallett*, supra; *Dillon on Munc. Corp.* §§ 9, 44.

[3] It is equally certain that "the right to appropriate private property to public uses lies dormant in the state, until legislative action is had, pointing out the occasions, the modes, conditions, and agencies for its appropriations. Private property can only be taken pursuant to law; but a legislative act declaring the necessity, being the customary mode in which that fact is determined, must be held for this purpose, 'the law of the land,' and no further finding or adjudication can be essential, unless the Constitution of the state has expressly required it." *Cooley's Const. Lim.* pp. 759, 760.

[4] The acquisition of lands for parks is unquestionably for a public purpose, and is so conceded. Likewise, "it is now the generally accepted rule that a public park is a special benefit to the locality or part of the city in which it is established; and its cost, to the extent of such special benefits, may be assessed against the property specially benefited. \* \* \* The propriety of apportioning the tax according to the special benefits received is unquestionable." *Hamilton on the Law of Spec. Assess.* §§ 256, 257; *Page & Jones on Tax. by Assess.* §§ 307, 356, 357. We therefore conclude that the people of the city and county of Denver, when making a charter for the municipality, had the power to write therein provisions for the purchase of lands, or for the exercise of the power of eminent domain in acquiring lands for parks and parkways, and the payment therefor, in whole or in part, by collections arising from assessments made upon the property within the districts specially benefited by the improvements, and that the charter provisions in that respect are constitutional.

2. The charter provisions authorize the board of park commissioners to initiate the public improvements in question, and to finally determine whether the lands, necessary therefor, shall be acquired, subject, however, to the will of the owners of a certain percentage in area of the real estate to be assessed for the cost thereof, to annul that authority by expressing their disapproval of the proposed improvements within a designated time. It therefore follows that, until the property owners have by their nonaction approved or by their action disapproved the proposed improvements, the power to proceed lies in abeyance. However, as the matters upon which the findings here sought to be restrained pertain to questions preliminary in their nature, they do not affect the constitutional rights of any party in interest. They might have been dispensed with by the lawmaking power, and full authority vested in the park commission, or other city authorities, to acquire the lands and make the proposed improvement without any preliminary proceedings whatever. As said in *Londoner v. Denver*, 210 U. S. 373, 379, 28 Sup. Ct. 708, 711 (52 L. Ed. 1103): "The Legislature might have authorized the making of improvements by the city council without any petition." It is ordinarily a legislative function to create special taxing districts and to charge the cost of a local improvement therein in whole or in part on the property benefited in proportion to the benefits thereto. *Webster v. Fargo*, 181 U. S. 394, 21 Sup. Ct. 623, 45 L. Ed. 912. And the charter of the city and county of Denver, adopted in obedience to an express mandate of the Constitution of the state, with respect to municipal matters, including the creation of taxing districts for local improvements and special assessments for the cost of the latter, has all the force and effect of an act of the Legislature. The East Denver Park District was so created and the proposed improvement authorized. Under these circumstances, the only constitutional right possessed by the property owner as to the making of the proposed improvement is to a hearing upon the question of what is termed the "apportionment" of the tax; i. e., the amount of the tax which he is to pay. *Voigt v. Detroit*, 184 U. S. 115, 22 Sup. Ct. 337, 46 L. Ed. 459; *Goodrich v. Detroit*, 184 U. S. 432, 22 Sup. Ct. 397, 46 L. Ed. 627. This constitutional right is fully protected by the notice which Charter, §§ 299, 328, "requires shall be given by the city clerk and the proceedings in accordance therewith, afford the owners full opportunity to be heard on the question of assessments against their property." *Denver v. Dumars*, 33 Colo. 94, 101, 80 Pac. 114. Therefore, since the right to a preliminary notice of the intention of the municipal authorities to acquire the lands necessary for, and to make the public improvement, and likewise the right of the property owners to stop the

proposed improvement by remonstrances filed within a designated time, is purely statutory, and could have been dispensed with by the lawmaking power, authority existed in the latter to designate, in the charter adopted, the sole body or tribunal authorized to conclusively determine whether the required notice "was duly given, or that such a remonstrance was or was not filed, or was or was not subscribed by the required number of owners." Page & Jones on Tax. by Assess. §§ 779, 811; *Olds v. Erie City*, 79 Pa. 380, 383. It is well established that as to all statutory proceedings or acts essential to the validity of local improvements, excepting those that are necessary to constitute due process of law or to comply with other constitutional prerequisites, "the same power (legislative) which prescribes them is competent to declare that their nonobservance shall not be fatal to the validity of the tax and that no inquiry may be made concerning them." *Chase v. Trout*, 146 Cal. 350, 359, 80 Pac. 81; In the Matter of Kiernan, 62 N. Y. 457. In *Scranton v. Jermyn*, 156 Pa. 107, 110, 111, 27 Atl. 66, the law under consideration authorized city councils by ordinance to direct the paving of streets, etc., but, if the cost thereof was to be paid by the abutting property owners, certain conditions were attached to the manner of the exercise of the municipal authority, one of which was that the paving, etc., shall be petitioned for by a majority of the owners, or the owners of the majority of the feet front on the street. A section of the same law provided that, where the paving had been petitioned for, "the passage by councils of any ordinance directing the paving, \* \* \* shall be held to be conclusive of the fact" that the necessary majority of owners have petitioned for it. It was said: "Under these provisions of the statute the only defense upon this point open to a property holder against a municipal claim for paving is that there was no petition. The affidavit of appellant does not set up any such defense. On the contrary, it expressly avers that there was a petition, but it was not signed by a majority. That fact was not open to dispute. The argument of appellant on this branch of the case is really an argument against the policy of such a provision. With that we have nothing to do. The language of the act is perfectly plain, and can have but one interpretation." "The Legislature (in this instance the people of the municipality) has the authority, so long as constitutional rights are not invaded, to provide in special proceedings what questions may be tried by the courts, and what not." *Denver v. Dumars*, supra. To the same effect is *Page & Jones on Taxation by Assessment*, § 795. Analogous in principle, and announcing the like doctrine, is *Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117, which was carried to the Supreme Court of the United States, where in *Lon-*

*doner v. Denver*, supra, it is said: "The Legislature might have authorized the making of improvements by the city council without any petition. If it chose to exact a petition as a security for wise and just action, it could, \* \* \* accompany that petition with a provision that the council, with or without notice, should determine finally whether it had been performed. In the same opinion we find the following: "It is contended, however, that there was wanting an essential condition of the jurisdiction of the board, namely, such a petition from the owners as the law requires. The trial court found this contention to be true. But, as has been seen, the charter gave the city council authority to determine conclusively that the improvements were duly ordered by the board after due notice and a proper petition. In the exercise of this authority the city council, in the ordinance directing the improvement to be made, adjudged, in effect, that a proper petition had been filed." The rule stated in *Willcox v. Engbretsen et al.*, a recent decision of the Supreme Court of California, 116 Pac. 750, 751, is as follows: "Where a statute requires such a petition to be filed as a condition precedent to the making of such order (for a public improvement), the board or council has no power to make the order until a sufficient petition has been filed. This is settled by the cases of *Turill v. Grattan*, 52 Cal. 97, *Dyer v. Miller*, supra (58 Cal. 585), *Mulligan v. Smith*, supra (59 Cal. 206), and *Kahn v. Board*, supra (79 Cal. 388, 396, 21 Pac. 849), and as to that point there is no dispute. But the necessity for such petition is the creature of the statute. It is not required by any constitutional guaranty. From this it follows that the statute may dispense with such requirement, or it may provide that the decision of the board or council as to its sufficiency, or any subsequent act depending upon it, such as the issuance of the bonds, shall be conclusive evidence of the fact that a sufficient petition has been filed. Such provisions will be upheld as valid"—citing *Chase v. Trout*, supra.

3. Plaintiff, however, contends that the charter, though declaring the effect of the findings of the city council, does not make it the duty of that body to pass upon the matters of which complaint is made, and that, therefore, the council is not the tribunal designated to ascertain the facts involved. We are unable to ascribe such meaning to the charter provisions. The declaration therein as to the effect the findings of the council by ordinance shall have necessarily implies that the council is invested with the power to determine, and that the duty so to do rests upon that body. That which is implied in the statute is as much a part thereof as what is expressed therein. *Paulsen v. Portland*, 149 U. S. 30, 39, 13 Sup. Ct. 750, 37 L. Ed. 637. The rule is stated in 23 Cyc. 1023, as follows: "If the municipal

authorities are empowered, either expressly or by fair implication, to determine whether the requisite number of property owners have assented to an improvement, their action in ordering the improvement is a conclusive determination of that question; but, where this duty is not conferred, the courts may inquire whether the requisite number have so assented." In *Spaulding v. North San Francisco Homestead, etc.*, 87 Cal. 40, 45, 24 Pac. 600, upon a matter involving a like question, the court said: "In exercising the jurisdiction thus obtained, and in granting the petition, the board of supervisors must necessarily have found that the petitioner was the owner of a majority of the frontage to be affected by the proposed improvement. Even if, as seemingly suggested by counsel for appellant, the act referred to does not provide, in express terms, for any determination of the matter of a petition, clearly, where a board is empowered to receive a petition, and is invested with discretion in regard to the subject-matter, it has the implied power to determine whether it shall be granted or not." The charter provisions by necessary implication provide for two adjudications of the facts as to the sufficiency of the notice given and the remonstrances filed: One, a direct hearing before the board of park commissioners upon written complaints and remonstrances after notice given. The other, in the nature of a review of that hearing by the city council. Under the rule announced the two tribunals are necessarily exclusive, and the latter is in specific terms made conclusive. It is with the board of park commissioners alone that the property owner may file a remonstrance, and it is before that tribunal that he may have a full and complete hearing. It is likewise the duty of that body to consider all complaints and objections of the property owners, and to "finally determine whether said land shall be acquired for said purpose." The general jurisdiction to make the public improvement is vested in the board of park commissioners. To exercise the power, certain conditions are imposed. One, that a notice be given; another, that a certain percentage of the property owners do not object to the proposed improvement. It is therefore clear that whether in any particular instance the park commission has the power to proceed depends on facts which are to be ascertained before the determination to proceed. The power being vested in the park commission to finally determine whether they will acquire the lands for the proposed improvement, and it being with that body the property owners may file remonstrances, it necessarily follows that it is that tribunal which must, in the first instance, ascertain and settle, by its decision, the existence or nonexistence of such facts. The case is clearly within the rule announced in *Cyc.*, *supra*. It would seem

that the action of the board of park commissioners, in finally determining "that said land shall be acquired for said purpose," would, if it were not for other provisions of the charter, be a conclusive determination that the property owners assented to the improvement. But, be that as it may, as the charter expressly declares that the finding of the council by ordinance as to such facts "shall be conclusive in every court or other tribunal," the duty to determine, as well as the conclusive effect of the determination of the city council, is fixed beyond doubt. *Freeman on Judgments*, §§ 522, 523, 524. In section 531 of the last-cited authority, it is said: "A large number of persons and of tribunals, not ordinarily spoken of as 'judges,' nor as 'courts,' are nevertheless authorized to investigate and determine certain questions. Their authority in this respect is judicial," and the legislative pronouncement measures the extent and effect of their acts.

The people of the municipality, having full and unrestricted power over the matters involved, vested in the city council the power to pass upon and make conclusive findings as to the existence or nonexistence of certain things which might have been dispensed with entirely by the legislative power. Nor did such people see fit to provide any mode of review of the acts of that tribunal, but declared that its findings thereon "shall be conclusive in every court or other tribunal." We think the jurisdiction conferred upon the park commission, in the first instance, and in the city council finally, to pass upon and determine the existence or nonexistence of the alleged jurisdictional facts, is absolute and exclusive. "The rule is well settled that, where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to that subject, the jurisdiction thus conferred is exclusive, unless otherwise expressed or clearly manifested." *Hendreschke v. Harvard H. S. Dist.*, 35 Neb. 400, 401, 53 N. W. 204. In *Dudley v. Mayhew*, 3 Coms. 9, the question was as to the jurisdiction of the state courts to restrain the infringement of a patent right, and it was held that, when a person is confined to a statutory remedy on a statute right, the party must take it as conferred; that, where the enforcing tribunal is specified, the designation forms a part of the remedy and all others are excluded. In *Reed v. Omnibus R. R. Co.*, 33 Cal. 212, 217, it is said: "When the statute creating the new right and prescribing the particular remedy for violation thereof provides that the remedy must be pursued in a particular court, the rule we are considering excludes all other jurisdictions. The forum named in the statute is an element in the method of redress, and that method is at once integral to the remedy and to the right." In *Armstrong et al. v. Mayer et al.*, 60 Neb. 423, 83 N. W. 401,

It is held, quoting from the syllabus: "Where a right is given by statute and a specific remedy is provided, designating the tribunal for the enforcement thereof, the jurisdiction of such tribunal is exclusive, unless the law otherwise provides."

Applying the rule as stated, we have here a statute, the charter, upon a particular subject, the acquiring of lands for, and the making of certain kind of public improvements. That charter has provided special tribunals, to wit, the board of park commissioners in the first instance, and in the way of review the city council for the determination of questions pertaining to that subject. The jurisdiction thus conferred is exclusive, for it is not "otherwise expressed or clearly manifested." The same principle is announced and applied in *Spaulding v. North San Francisco Homestead, etc.*, supra, wherein and to the particular point *Jennings v. Le Breton*, 80 Cal. 9, 21 Pac. 1127, is cited. Moreover, if the jurisdiction conferred upon the board of park commissioners and the city council be not exclusive, as well as conclusive, an anomalous condition of things might arise. Suppose proceedings were instituted to acquire by condemnation a particular lot, and therein the defendant pleaded, and the court found, that a sufficient remonstrance to defeat the proposed improvement had been filed with the board of park commissioners; it would necessarily follow that the condemnation suit would be dismissed. Then suppose that in other condemnation suits seeking to acquire lands for the same improvement no such defense were interposed, or suppose that other lands for the improvement were acquired by purchase, and subsequently, after the improvement was fully completed, or before, the city council should find that the alleged remonstrances were insufficient; the legislative authority declared that the finding of the council should be conclusive "in every court or other tribunal," whereas the court in the supposed case, made that portion of the law a nullity. While it may be true, as plaintiff contends, that the finding by the council upon the matters involved is not a necessary act to the validity of the proceedings, we think it quite probable that, until such finding, condemnation and other proceedings of the park commission for the acquirement of lands for the purposes proposed could be stayed. It will be observed that Charter, § 327, containing the conditions upon which the board of park commissioners may act, likewise embodies therein the clause relative to the conclusive nature of the findings of the council as to the notice, remonstrance, and other preliminary proceedings, whereas it is, in another section of the charter, and after completion of the work, or, at least, ascertainment of the full cost thereof, and after another report to the council, from the board of park commissioners, covering all such matters, that the council is authorized to make the

final assessment. From this it would seem that the charter intended that all matters not going to the constitutional rights of the parties interested should be finally determined before the work shall in fact be commenced. Such a requirement would be reasonable and wise. The question as to whether the required percentage of property owners to defeat the proposed improvement have subscribed a remonstrance is necessarily one of fact not always easy of ascertainment. Property lines may be uncertain or undetermined, titles may be in dispute, corporations may assume to sign without authority from their respective boards of directors, lots may be in course of transfer, and the owner to-day when one petitioner signs may not be the owner to-morrow when the petition is presented.

4. Plaintiff concedes that we have frequently held that should a property owner defer action until the city council has, by ordinance, determined the matters committed to it, such findings are conclusive, and the property owner is precluded from questioning the same. He, however, insists that upon principle we have held that prior to such finding by the city council any person whose property is to be assessed for the cost of the improvement may invoke the powers of a court of equity to inquire into the existence or nonexistence of such facts. The contention is based upon certain language in *Londoner v. Denver*, supra, to the effect that where a city charter authorizes the board of public works to order the grading, curbing, and paving of streets, provided the owners of a majority of the frontage of the lots to be assessed for the cost thereof, shall petition therefor, and authorizes the city council to create a local improvement district and apportion and finally assess the cost of the improvement against the property benefited, the presentation to the board of public works of the petition designated is jurisdictional, and until the city council determines, as provided by ordinance, that the necessary petition subscribed by such owners has been presented to the board of public works, the latter could be enjoined from presenting any recommendation to the city council. A consideration of that case shows that the question under discussion, in which the language was used, was not necessary to a decision of the controversy. The point was not involved in the case. Moreover, in that opinion there is no holding, expression, or intimation that the city council could be enjoined from acting in the premises, and especially after it had assumed jurisdiction of the matters involved. On the contrary, the holding to which that language applies is confined to the right to enjoin the board of public works from making any recommendation to the council. In that case the board of public works had ordered the improvement, had prepared specifications therefor, reported its acts in that respect to the city

council, and the latter body had determined that certain preliminary steps, which the law required to be taken by the board of public works, had been performed, and thereupon, before the injunction suit was brought, created the improvement district. In the case at bar the charter itself created the improvement district, the board of park commissioners initiated the improvements proposed, assumed to comply with all the provisions of the charter, and finally determined to make the improvements, and made report of its acts in that respect to the city council before the injunction suit was filed. Thus the board of park commissioners had already done the very thing which in that case it is said the board of public works might be enjoined from doing, to wit, made its report to the city council. Moreover, the latter body had assumed jurisdiction of the matter, and were about to do the very thing the charter authorized them to do.

[5] However, were we to assume that prior to the conclusive findings, which the city council are authorized to make, any person, whose property is to be assessed for the cost of the improvement, may invoke the powers of a court of equity to inquire into the existence or nonexistence of such facts, it would be of no avail to plaintiff. Since the filing of this suit, which is a writ of error, and therefore a new suit, an event has transpired that is conclusive upon us of all the facts involved. The facts of that event have been brought to our attention by a plea in bar. After the injunction sought to be obtained had been denied by the court below, the case dismissed, and the writ of error from this court sued out to review the judgment of the lower court, the city council duly made the findings, and passed the ordinance sought to be restrained. The mayor approved the same, and it was duly published. No application was made to this court for a restraining order or stay of any kind, and none was issued against the council or the defendants herein pending the determination of the writ of error. The city council in the exercise of the power vested in it by the charter, and unrestrained by any authority, duly enacted an ordinance declaring the existence of the essential facts. This ordinance has the effect of a statute; and the mandate of the people of the municipality, expressed through their charter, is that such findings shall be conclusive upon every court or other tribunal. The city council, possessing the power to make such findings, assumed jurisdiction, before that of this court, or the court below, was sought to be invoked. Under these circumstances, we certainly do not have the power to nullify the legislative mandate that the finding of the council shall be conclusive upon every court or other tribunal, and declare that it is not conclusive upon us. Moreover, a reversal now would accomplish nothing, for that which was sought to be restrained has been

done. The rule is that where, pending a review of the action of a lower court, an event occurs without fault of the successful party below, which of necessity renders any judgment that may be pronounced ineffectual, the proceedings on review will be dismissed. Plaintiff concedes the rule, but argues that matters that arise solely through the action of the successful party below must necessarily arise and be brought about through his fault. We do not think so. As we understand the words in the sense in which they are used, they imply some wrongful or illegal act which constitutes the fault. *Bull et al. v. Doss Bros. Const. Co.*, 119 Pac. 156, decided at this term. In the case at bar the city council did nothing, except that which the Legislature authorized it to do, and in the manner prescribed thereby.

5. Assuming, but not deciding, that in this character of suit we can inquire into the matter of fraud, one question remains which we will consider. The plaintiff contends that the action of the board of park commissioners to acquire the lands and make the public improvement was based upon fraud, and should be set aside, and the council restrained from passing upon the matter, because of the alleged fraudulent acts of the park commission. The complaint in no wise charges fraud against the city council, or that that body has been or will be wrongfully influenced, or that it will proceed in any manner other than the law requires. The allegations of wrongdoing apply solely to the acts of the board of park commissioners. Moreover, the alleged wrongdoing upon the part of that tribunal does not, as will presently be seen, constitute fraud, or even bad faith, but mounts no higher than an allegation of an honest mistake in judgment. The allegations are, in substance, that the rules which the park commission adopted for apportioning the special benefits to the real estate are unfair; that, while the notice of intention to acquire the lands stated that the total area liable for assessment for the improvement was 65,720.41 lots of the dimensions of 25 by 125 feet, the park commission, for the purpose of fixing a basis for calculating the sufficiency of the remonstrances, made a revised computation of the area within the district so liable for assessment, and fixed and determined the area as equivalent to 72,255.68 lots of the dimensions aforesaid; that the park commission in order "to arrive at such result included in its calculation property within said district belonging to the United States of America, to the state of Colorado, to the city and county of Denver, school property and church property and cemetery property not liable for any assessment for such purposes and that cannot legally be subjected to the payment thereof," stating the designated number of nonassessable lots so included, but without a description of the lots or segregation of ownership thereof. The notice

given is set forth in the complaint, and the exact number of lots included within the district is not stated therein. On the contrary, after each subdivision of the improvement district, arranged as the proposed plan of assessment, a statement follows that it contains "approximately" a designated number of lots. The charter does not require the enumeration in the preliminary notice of the lot area to be assessed, except as it may be, and in this case was, included in the rules adopted for the proposed apportionment of the cost of the improvement. Neither the rules adopted, nor the proposed apportionment by the board of park commissioners, or the latter's estimate of the area within the district, or the inclusion or exclusion of alleged nonassessable lands, is binding upon the city council. That tribunal has the power to change or modify such rules; to ascertain the area within the improvement district; to compare it with the area covered by the protests; to consider and pass upon the validity of the signatures to remonstrances, the ownership of the lots, and all other matters essential to a valid assessment. Moreover, the claim is not made that there is not within the park district an area equivalent to that claimed, but only that certain lands within the district alleged to be nonassessable were included in ascertaining that area, and in determining the sufficiency or nonsufficiency of the remonstrances. Under these circumstances, and in view of the fact that the charter expressly requires that the special assessments for the cost of the improvement shall be levied upon "the real estate, except parks, parkways and streets, comprising such district," and the further fact of the uncertainty of the law as to what public property may or may not be assessed for the cost of the improvement under the charter, we cannot say that the inclusion of such lots by the board of park commissioners was, if error at all, more than an honest mistake. It is very certain that public property other than that owned by the United States may be taxed or exempted for local improvements at the discretion of the Legislature, and this may extend to and include lands belonging to the state itself. *Page & Jones on Tax.* by Assess. §§ 579, 580, 581, 582, 583, 584, 586. The allegation, as to the inclusion of nonassessable property, covers not only lands belonging to the United States, to the state, to the city and county, but school, church, and cemetery property as well. The exemption of property from general taxation does not exempt it from local assessments for public improvements. *City of Beatrice v. Brethren Church of Beatrice*, 41 Neb. 358, 59 N. W. 932; *Sheehan v. Good Samaritan Hosp.*, 50 Mo. 155, 11 Am. Rep. 412; *Roosevelt Hosp. v. Mayor, Aldermen, etc.*, 84 N. Y. 108. We are fully persuaded that upon the record as here presented a court of eq-

uity can grant no relief to plaintiff in error.

In the views herein expressed Mr. Justice GARRIGUES and Mr. Justice BAILEY fully concur. Mr. Justice HILL concurs therein as to the power of the city and county of Denver to acquire lands for parks and parkways by purchase or condemnation, as in the charter provided, and also that the plea in bar to the writ of error should be sustained. Mr. Justice MUSSER and Mr. Justice GABBERT likewise concur as to the power of the city and county of Denver to so acquire lands for parks and parkways, but dissent as to all other matters. Chief Justice CAMPBELL does not participate in the opinion.

The plea in bar is accordingly sustained, and the writ of error dismissed.

Writ dismissed.

HILL, J. (specially concurring). I concur in that portion of the opinion wherein it sustains the power of city and county of Denver to acquire parks and parkways and to make the necessary assessments therefor, conditional that the provisions of the charter are complied with in so doing. But I cannot agree with the conclusion that the charter has designated the city council as the exclusive body at all times to finally determine whether a proper remonstrance has been filed with the park board, and that its right to pass upon that question, after the findings of the park board, is at all times exclusive, as well as conclusive after having been made. The language of section 327 of the charter does not so state. It appears to me that to so hold is to read into the charter, by judicial legislation, a state of facts not placed there by its framers and never intended to be in there by them or the people when they adopted it. This, it seems to me, we cannot and ought not to do. We ought not to give it a construction not supported expressly or by necessary implication by the instrument itself. It is not incumbent upon us to amend the charter. That privilege belongs to the people.

In placing a construction upon an act (and especially so when it is silent upon matters which it is urged should be presumed or inferred), it is elementary that there should be taken into consideration the purposes and objects sought to be accomplished, the law as it existed prior to the adoption of the act, and the evils, inconveniences, or uncertainties, if any theretofore existing, which it is sought to remedy. In considering the laws pertaining to this line of improvements prior to the adoption of this and other similar charters, we find as a general rule, where the act provides that a petition shall be signed by a certain number in order to initiate the proceedings, or that a remonstrance signed by a certain number shall defeat further proceedings, that both have been held jurisdictional, and that a taxpayer could raise



the question concerning either at any time thereafter when his rights were involved. *Zeigler v. Hopkins*, 117 U. S. 683, 6 Sup. Ct. 919, 29 L. Ed. 1019; *Armstrong v. Ogden City*, 12 Utah, 476, 43 Pac. 119; *Mulligan v. Smith*, 59 Cal. 206; *Collins v. Township of Grand Rapids*, 108 Mich. 675, 66 N. W. 586; *Fruin-Bambrick Construction Co. v. Gelst*, 87 Mo. App. 509; *Knopff v. Roofing & Paving Co.*, 92 Mo. App. 279; *Keifer v. Bridgeport*, 68 Conn. 401, 36 Atl. 801; *Miller v. City of Amsterdam*, 149 N. Y. 288, 43 N. E. 632. Viewed in this light, when the charter is considered as a whole, it appears to me it was intended in order to have these matters conclusively set at rest, after the findings of the park board had been made, that the council could approve its actions and thus make a finding on these matters which, when made, should thereafter be conclusive; the object being, if the council so desired, that they could have those questions set at rest once for all, and not leave them open to further attack. Many reasons exist why it is wise to do so. The purchaser of the bonds always desires to know that the question has been settled and is not thereafter open to attack. By having it settled, a better price can be secured for the bonds, and it is thus to the advantage of the district in disposing of them. Contractors in making their arrangements and all others connected therewith want to know that these questions are settled. This will avoid such supposed proceedings as suggested where suits might be instituted to condemn property, etc., after the matter has been passed upon by the council; so that, as I view it, this language was used to accomplish this result. The context so indicates. That portion of section 327 involved reads: "The commission shall, at the time specified or thereafter, consider all such complaints and objections, and may modify or confirm their apportionments, and shall finally determine whether said lands shall be acquired for said purposes; but if, within the time above specified, a remonstrance shall be filed with the secretary of said commission, subscribed by the owners of 25 per cent. in area of the real estate which is to be assessed, then the proposed purchase or condemnation shall not be made, and the proceedings shall not be renewed for one year thereafter, and the finding of the council by ordinance that such notice was duly given, or that such remonstrance was or was not filed, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal." In my opinion this portion referring to the council was intended more in the way of a statute of limitations, and means that, after the findings of the park board have been confirmed and approved by the council and nothing has intervened, the result of the findings of the council shall then be conclusive, rather than to assume that it was the intention to make the city council at

all times the exclusive judge of these matters.

This position is further strengthened when we come to consider section 332 in this same article of the charter (this entire article No. 11 pertains to public improvements). Section 332, as I read it, seeks to place a limitation within which actions shall be brought concerning certain matters, or proceedings had, done, or performed under all other sections of this article. It reads in part as follows: "No action or proceeding, at law or in equity, to review any acts or proceedings, or to question the validity or enjoin the performance of any act, or the issue or collection of any bonds, or the levy or collection of any assessments, authorized by this article, or for any other relief against any acts or proceedings done or had under this article \* \* \* whether based upon irregularities or jurisdictional defects, shall be maintained, unless commenced within ninety days after the performance of the act or the passage of the resolution or ordinance complained of, or else be thereafter perpetually barred." To my mind, it is just as consistent to argue that section 332 (when a suit is brought within the time therein named) makes nugatory the provisions of section 327 which says that the actions of the council are conclusive as it is to contend that section 327 nullifies the provisions of section 332. Neither position is tenable. The sections should be construed together, each as qualifying the other, and, when so done, the apparent conflict between them ceases to exist.

Many other reasons lead to the conclusion that it was never intended that the council should at all times be the exclusive body to pass upon this question. First, the charter does not state that the council shall pass upon it at all; second, it does not state that it shall be the exclusive tribunal to enter into this question; third, it makes no provision for any mode of procedure or the manner as to when, or how it shall determine these facts; fourth, it does not provide that the park board shall transmit to the council the remonstrances or any other papers in connection therewith, or any data upon which the council may act; and, fifth, it makes no arrangement for notice or protest or for a hearing in any manner before the council by the taxpayers. True, it is stated that the charter could have provided that these improvements could be ordered by the park board without any of these preliminary matters. All could have been dispensed with. Authorities are cited so holding, but I cannot see where they are applicable. The question here is not what could have been done, but what was done in the adoption of this charter, and I cannot lead myself to believe that the citizens of the city of Denver ever adopted, or intended to adopt, a charter wherein it provided that a remonstrance signed by 25 per cent. of the taxpayers should defeat the improvement,

wisely I think as a check or safeguard upon that question, and then provide that the actions of a park board should become final pertaining to that important question upon its approval by the council, without any right of protest, hearing or trial, or data, being presented to the council, upon which it is to act. The actions or nonactions of the taxpayers are made a part of these proceedings covering public improvements, and, when complied with, are entitled to the same force and effect as that of the park board. No discretion is vested in its members if the necessary remonstrance is filed. This provision providing for a remonstrance being for the protection of the taxpayers must be strictly followed. *Hopkins v. Mason*, 42 How. Prac. (N. Y.) 115; *Merritt v. Portchester*, 71 N. Y. 309, 27 Am. Rep. 47; *Michigan Cent. R. Co. v. Huehn* (C. C.) 59 Fed. 335. It is said that, inasmuch as the charter makes no provisions for a hearing before the council, the taxpayer is entitled to none. That is true, but to my mind that is one of the strongest points why it was intended that the taxpayer should have the right, prior to the time the council pass upon it, to have it passed upon in the courts, and, if he was correct in his contention that the remonstrance had been filed by the proper number for that reason, he could prevent the park board from further acting as the charter states, thereby leaving nothing for the council to pass upon, just the same as if nothing had been certified to them at all. The conclusion stated in the opinion for all practical purposes makes the findings of the park board conclusive, but I cannot believe that it was the intention of the framers of this charter to clothe the park board with this high governmental prerogative, thereby placing the right to issue bonds for millions of dollars in their hands and in a manner so that the property owner who acts in time, regardless of that fact, is forever and in every forum shut out from the right of contesting the regularity of such proceedings, or that such a charter would have ever been adopted, if it was understood that the question of whether the check or safeguard provided for by a 25 per cent. protest had been filed could not be judicially ascertained if steps were taken in apt time to have the result so determined, and especially so where facts of fraud are alleged against the park board, and I have been unable to find any case (concerning any charter similar to this) so holding, where the action was brought to set aside these proceedings prior to the findings by the council.

The cases relied upon to sustain the contrary view, as I read them, were all instituted long after the passage of the ordinance by the council, and were for the purpose usually to restrain the collection of the tax, or to challenge its validity as a lien against the property, or as conveying title through tax sales thereon; etc., in which cases it was

properly held, I think, that they were precluded from at that time raising the question. This court has so held, but in the case of *City of Denver v. Londoner*, 33 Colo. 104, 80 Pac. 117, we expressed the views, in substance, when the act did not exist essential to give a public board jurisdiction, that no doubt in such cases up to the time when the city council acts upon its recommendation as to the creation of a paving district, and determines that the necessary petition subscribed by the owners has been presented to the board, that it could be enjoined from presenting any recommendation to the city council, but that there was a stage in the proceedings when the question of the sufficiency of the petition and the number of owners subscribing it is no longer open, and while it may be true, as stated, that this statement was unnecessary in the determination of that case, it appears to have had the sanction of the entire membership of this court as then constituted, and, in my opinion, is not only sound, but is applicable to the facts under consideration, and especially so where, as I view it, in this action charges of fraud are alleged pertaining to the action of the board of park commissioners. This statement in the *Londoner* Case, supra, does not stand alone upon this question. In the case of *Mansfield v. City of Lockport et al.*, 24 Misc. Rep. 25, 52 N. Y. Supp. 571, where the Lockport city charter (section 203) provided that the determination of the city council whether or not a petition for a street improvement is signed by the number of persons required by the charter as a condition to authorize the same shall be final and conclusive. It was held that the council's determination that the required number had signed, if made in good faith, could not, after an improvement had been made and paid for by the city, be attacked collaterally in a suit in equity to vacate the assessment. But in that case it was further stated that such a determination could be reviewed in a direct proceeding where any error or mistake could be corrected, the determination reversed, and the council placed at liberty to proceed anew. It was further said that even the action of the city council in ordering the assessment for a street improvement may be annulled by a suit in equity for fraud on the part of its members. It will be noted that the section of the Lockport charter is quite similar to that of the city of Denver. The part pertinent reads as follows: "The decision of the common council as to whether any petition or petitions for a local improvement is or are signed by persons owning at least one third of the frontage of the lands to be assessed for such improvement shall be final and conclusive, and not subject to question or appeal, but it shall not base its action on signatures on more than one petition if such petitions ask for different improvement; said decision shall be by resolution wherein the vote shall be taken by yeas and

nays, and entered in the minutes, and it shall require an affirmative vote of two thirds of the aldermen in office to make such decision, or to pass any ordinance for a local improvement, except as herein otherwise provided." In addition to the foregoing, I think that the language used in some of the cases relied upon to sustain the contrary view is directly in harmony with the views herein expressed. The case of *Scranton v. Jermyn*, 156 Pa. 107, 27 Atl. 66, was an action to resist the payment of the tax brought after the improvement had been made. The ordinance there provided that the paving, etc., shall be petitioned for by a majority of the owners. By another section it provided that where the paving had been petitioned for the passage by council of any ordinance directing the pavement shall be held to be conclusive of the fact that the necessary majority of owners had petitioned for it. It was held that under these provisions, where an owner let all this go by, that the only defense thereafter left open to him against a municipal claim for paving is that there was no petition, and that as he averred that there was a petition, but it was not signed by a majority, that fact was not open to dispute. But we find nothing in that case which would lead one to believe that, had the taxpayer made a sufficient attack upon that question prior to the findings by the council, it would not have received proper consideration. The court, in passing upon the question, used the following language: "The Legislature, wisely as it seems to us, has provided that the council shall determine this fact finally before the work is begun and the passage of the ordinance shall close the question for all parties." I think that was the object sought to be accomplished here that it was intended, if the taxpayer let this time go by and allowed the council to determine the fact, it should close the question for all parties, and, when section 327 is considered and construed in connection with section 332, it was intended that suits could be brought questioning the correctness of the findings of the park board, and especially so in a case where fraud is alleged in the making of such findings, and that the city council could properly and justly be restrained from proceeding or making any findings concerning the question until the court had passed upon the actions of the park board in this respect, and, in case the court found differently, it could compel them to withdraw from the city council and have returned to them any matters which had theretofore been certified, and thus leave the council without anything to pass upon the same as though the park board had decided that a sufficient remonstrance had been filed, and for that reason they would do nothing farther as the charter provides. I am of opinion that the demurrer should have been overruled and the defendants have been required

to answer concerning the sufficiency of the remonstrance.

I concur in the conclusion that the writ of error should be dismissed for the reason that the plea in bar precludes the plaintiffs in error from having any further consideration of this matter. As stated, the original suit was dismissed in the trial court. Thereafter a writ of error was sued out of this court to review the judgment. This was the institution of a new suit. No application was made to this court for a restraining order or stay of any kind against the council or the other defendants herein in order to prevent further action by them pending the determination of the writ of error. No fraud is alleged against the city council. It thereafter, in due season, proceeded to pass upon the question of whether a remonstrance in the proper number and form had been filed with the park board, and thereafter, by ordinance, duly enacted, found, and declared to the contrary, and also to the effect that all essential facts necessary for the park board to continue in this matter had been complied with. Under this state of facts, I am of opinion that this precludes any further attack upon these questions. Were the rule otherwise, it might work serious injuries, greatly retard, and in some cases practically prohibit, public improvements, as the result would be that dissatisfied taxpayers could file their suits asking for injunctions, allow them to lie dormant, and, in case the park board and city council did not make findings in harmony with their views, to thereafter press the matter in the courts in order to secure a decision to the contrary, and thereby have the benefit of an adjudication by two tribunals, instead of one. According to my views, the duty of the plaintiffs was to have had the council temporarily restrained from acting at all, until the action of the park board was passed upon by the court, and, if in their favor, the council, by further action of the court, could have been prevented from passing upon the question at all. To hold that they are entitled to this relief without having this done or attempting to have it done by this court would be to entirely ignore the provisions of the charter. It would also make the proceedings involving public improvements uncertain for an unreasonable length of time. A party has three years after the decision of the trial court within which to sue out a writ of error, and in a case of this kind, where the council had not been restrained from acting at all, the result might be that at any time during this three years a writ of error would be sued out. It might take a year or more to have the case disposed of in this court. If the result of the action was in favor of the taxpayer, it would then revert back to and cover the matters acted upon by the park board as well as the findings of the council thereon. The result would be during

this entire period to make uncertain the validity of the proceedings pertaining to any public improvement. I cannot believe that this was contemplated by the framers of the charter, and for that reason I agree the council having acted at a time when there was nothing to prevent them from acting, that their actions, as stated in the charter, thereafter are conclusive upon all courts, and are not subject to further attack. Otherwise, any taxpayer who felt aggrieved at the ruling of the park board could by suit, even if unsuccessful in the lower court, have the matter placed in uncertainty for a long period of time by suing out a writ of error any time during the three years. If such were the law, this might be done repeatedly, as common experience in such affairs leads to the conclusion that there are scarcely ever any public improvements of any magnitude promulgated and carried into effect without dissatisfaction and opposition from some number of taxpayers whose properties are to be affected.

GABBERT, J. (dissenting). I cannot agree with the conclusion in the opinion by Mr. Justice WHITE, to the effect that the trial court was without jurisdiction to inquire into the averments of the complaint that as a matter of fact a remonstrance against the proposed improvement was filed with the park commission by the owners of 25 per cent. in area of the real estate in the district. At the outset it should be borne in mind that the case is essentially different from the Dumars and Londoner Cases, in that in those cases the preliminary steps which the city council by ordinance had determined had been complied with were attempted to be questioned in actions to annul assessments, while in the case at bar the action of the park commission in finding that the required remonstrance was not filed is challenged at the very first opportunity which those remonstrating could take advantage of. The main purpose in providing that a finding by a designated municipal authority that certain preliminary steps necessary to initiate proceedings to construct municipal improvements should be conclusive upon the courts was to prevent the validity of such proceedings being attacked, upon the ground that such steps had not been taken after the improvements had been ordered and completed; but it by no means follows that these preliminary steps which are intended to afford property owners protection and insure wise and just action on the part of the municipal authorities are meaningless, and can be entirely ignored if the failure to observe them is raised in apt time. It is true that the provision in the charter permitting a remonstrance to be filed could have been dispensed with and the constitutional rights of property owners would not have been invaded; but, as the charter has

made such provision, the rights thus given must be protected. It is unnecessary to cite authorities to support the assertion that, if the required remonstrance was filed, it was the express duty of the park commission to proceed no further, and that such remonstrance proprio vigore ousted the commission of all authority in the premises, except to drop the proceedings, since the charter provisions on the subject, in effect, so declare. Having assumed a jurisdiction which, according to the allegations of the complaint, they do not possess, can a court of equity grant relief?

With the provisions in the charter under consideration, is it not clear that, if they have not been observed, there must be a remedy and a tribunal where relief from a failure to observe them can be obtained, provided, of course, that parties aggrieved by their nonobservance move in apt time? In the opinion of Mr. Justice WHITE it is held that a court of equity cannot grant relief in such circumstances, for the reason that by the charter the city council is made the exclusive tribunal to determine whether or not the required remonstrance was filed, and that its finding on this question is conclusive upon the courts. If the charter is susceptible of the construction that the city council is made the exclusive tribunal for this purpose, then it must be conceded that the holding to the effect that the courts cannot be resorted to by aggrieved parties is undoubtedly correct; but I cannot give the charter the construction which leads to this result. The charter does provide for notice to property owners by the commission, and that all complaints and objections made in writing and filed within a specified time touching apportionments on the property to be assessed will be heard and determined by that body before final action in the premises. If the requisite remonstrances have been filed, the proceedings shall be dropped. If not, the commission shall modify or confirm the apportionment, and shall then determine whether the land for the proposed improvement shall be acquired. It is true that, as remonstrances are to be filed with the commission, the latter passes upon them in the first instance, but that judgment is in no sense final, as the city council appears to be vested with some functions and authority in the premises.

What steps shall next be taken by the commission if it determines to proceed with the improvement do not appear to be designated; at least, no provision on that subject has been cited. It appears to be conceded that a recommendation is then made to the council by the commission, and that the council may pass an ordinance, which completes the preliminary steps, or at least an ordinance finding that the notice required to be given was duly given, and that the required remonstrance was not filed.

Authority for this action is found in the latter part of the section defining the duties of the commission with respect to complaints, objections, and remonstrances, and reads as follows: "And the finding of the council by ordinance that such notice was duly given, or that such remonstrance was or was not filed, or was or was not subscribed by the required number of owners aforesaid, shall be conclusive in every court or other tribunal." It is upon this provision that Mr. Justice WHITE bases the conclusion that the council is the exclusive tribunal to pass upon the facts there mentioned after the commission has passed upon them. If that was the object, would there not have been provisions requiring notice to parties filing remonstrances with the commission, or provision made, if dissatisfied with the action of that body on remonstrances, to appeal to the council, and in apt terms an opportunity been afforded them to appear before the council and be heard? In brief, would there not have been provisions clothing it with the dignity and attributes of a tribunal to hear those who had filed remonstrances with the commission before passing judgment? None exist. In my opinion this provision was intended to set at rest the facts therein specified, when parties, after the action of the commission, had not taken steps to annul its action before final action by the municipal authorities in the way of ordering and completing the improvements. Otherwise, provision would have been made for a hearing before the council of those claiming to have been aggrieved by the action of the commission, if it had been the purpose to make it the exclusive tribunal for the determination of these questions when raised by persons dissatisfied with the judgment of the commission. So the conclusion is inevitable that if the park commission acts without jurisdiction, the only remedy is for the aggrieved parties to resort to the courts. Certainly the latter should not refuse to assume jurisdiction and give relief if those whose rights have been infringed by the action of the commission act in apt time. In the *Londoner Case* and in *City of Denver v. Campbell*, 33 Colo. 162, 80 Pac. 142, and *Spalding v. City of Denver*, 33 Colo. 172, 80 Pac. 126, it was said, in substance, that the provision permitting the council to make *ex parte* findings to the effect that preliminary steps necessary to follow in initiating public improvements, or where certain steps had been taken by the board of public works which the law did not justify, were intended to prevent parties who had the required notice of the proposed improvements from remaining silent, and then, although their property was benefited, defeat the levy of an assessment because of such irregularities, and that, if they intended to take advantage of such conditions, they must do so in apt time. In these cases

it is intimated that, if they did, they would be heard. Perhaps this statement was obiter dictum, but from the facts alleged in the complaint in the case at bar it appears to be necessary to so hold, otherwise the provisions of the charter which the park commission are required to observe are rendered a nullity, and aggrieved parties are deprived of all opportunity to be heard on questions touching the regularity and validity of the action of the commission after that body has passed upon them. Without a forum having been designated by the charter, where parties dissatisfied with the action of the park commission can be heard, the action of the latter not being final, it must necessarily follow that such parties, where the jurisdiction and judgment of the commission is challenged, may resort to the courts if they do so before the proceedings by action of the municipal authorities are conclusive upon them. The writer cannot take any other view, and be consistent with what was said in the public improvement cases above referred to.

Neither do I agree with the conclusion of the majority that the plea in bar should be sustained. It should be borne in mind that the action of the council upon which this plea is based was taken after the case was brought here for review on error. This fact presents an entirely different case from one where the council might have acted after judgment of the lower court, and before the case was brought here for review. The suit below was to annul the action of the park commission in overruling the remonstrances. There is no question but that the council had notice of the proceedings here, the purpose of which was to review the judgment of the lower court. With this notice it acted at its peril in assuming to act upon the judgment of the commission which might be declared a nullity, the very purpose of the action instituted below. In such circumstances the action of the council which is made the basis of the plea was wrongful. I cannot subscribe to the doctrine that, when an action is brought the purpose of which is to restrain a defendant from committing a specified act, with notice of the pendency of such an action he can commit the act sought to be restrained, and then plead that, because of such action, there is nothing for the court to pass upon.

But there is an additional and more potent reason why the plea in bar should not be sustained. It is true the charter provides that the finding of the council that the required notice was given and the required remonstrance was not filed shall be conclusive upon the courts; but the reason for this provision, as previously suggested, was to prevent the validity of proceedings to construct public improvements being attacked after the expense of the improvement had been incurred upon the ground that the req-

quisite preliminary steps had not been taken. When, however, the reason for the enforcement of the charter provision under consideration does not exist, it is not applicable. In the case at bar the owners have acted promptly, before rights have attached, so that, in my opinion, in the circumstances of this case, even the action of the city council in making the finding upon which the plea in bar is predicated is open to question in the courts. If this is not the rule which should be applied to the facts before us, then the provisions of the charter which are intended to give property owners a voice in the construction of public improvements are rendered absolutely nugatory, for the very obvious reason that the park commission could arbitrarily overrule remonstrances, and immediately, and before an action could be instituted by owners remonstrating, the council could act, and owners would thus be deprived of the right to have the charter provisions enforced which are intended to afford them protection against the action of the municipal authorities in making public improvements.

In my opinion, the plea in bar should be overruled, and the judgment of the district court reversed and the cause remanded with directions to overrule the demurrer, for the reason that a remonstrance by the owners of 25 per cent. in area of real estate in the district which the complaint charges was filed by the very terms of the charter compelled the commission to drop the proceedings. Should the city authorities take issue on this question of fact, it should be determined by the court. If determined in favor of those remonstrating, the action of the commission and council should be annulled. The prime object of permitting a remonstrance to be filed was to give those whose property would be affected by a proposed public improvement an opportunity to express their disapproval of the action of the commission in taking the preliminary steps to make it. If the requisite remonstrance

is filed and those remonstrating seek in apt time to review the action overruling it, as in the case at bar, the courts are open to hear their grievances. Sustaining the plea in bar in the circumstances of this case erroneously deprives those who filed remonstrances of this right. In brief, on the facts presented, my views are that inasmuch as the charter provides (section 327) that the park commission, before acquiring real estate for park purposes, shall give notice by publication to the owners of the real estate to be assessed for the expense thus incurred of specified matters, which notice shall inform such owners that, not less than 90 days after its first publication, the question of the proposed purchase or condemnation of the land to be used for the proposed park will be considered by the commission, and that all complaints and objections that may be made in writing by owners of real estate to be assessed for such proposed park will be heard and determined by the commission before final action, and further provides that "if, within the time above specified, a remonstrance shall be filed with the secretary of said commission, subscribed by the owners of 25 per cent. in area of the real estate which is to be assessed, then the proposed purchase or condemnation shall not be made, and the proceedings shall not be renewed for one year thereafter," that, if the requisite remonstrance is filed within the time specified, which the complaint in this case alleges was the fact, then the action of the commission in overruling such remonstrance, or the finding of the council to the effect that the requisite remonstrance was not filed, may be determined in the courts in an action instituted by any one or more of those remonstrating if commenced before the expense for the proposed park is incurred. In such circumstances, if the court should find that the requisite remonstrance was filed, the proceedings should be annulled.

I am authorized to state that Mr. Justice MUSSER concurs in this opinion.

**KELLY v. CITY OF BUTTE.**

(Supreme Court of Montana. Nov. 11, 1911.)

**1. MUNICIPAL CORPORATIONS (§ 845\*)—INJURIES TO PROPERTY—NOTICE OF INJURY—"DEFECT."**

Where plaintiff sued defendant city for flooding his mine, by reason of a defective plan adopted for the construction of a sewer, the cause of the injury was not a "defect," within Rev. Codes, § 3289, providing that notice of claim for injuries must be given before the city shall be liable for damages for any defect in a bridge, street, public work, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1796; Dec. Dig. § 845.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1931-1933.]

**2. MUNICIPAL CORPORATIONS (§ 741\*)—INJURIES TO PROPERTY—NOTICE—STATUTES.**

Rev. Codes, § 3289, providing that notice of claim for injuries must be given to a city or town before it shall be liable for damages caused by any defect in any bridge, street, public work, etc., having been enacted under a title "An act relating to actions against cities and towns for damages to persons injured on streets and other public grounds by reason of the negligence of any public officer, agent, or employee in any city or town in Montana" (Laws 1903, c. 93), such section applied only to injuries to persons, as distinguished from injuries to property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1562; Dec. Dig. § 741.\*]

**3. MUNICIPAL CORPORATIONS (§ 845\*)—INJURIES TO PROPERTY—ACTIONS—QUESTION FOR JURY.**

In an action against a city for the flooding of plaintiff's mine during the progress of work in the construction of a sewer, whether such flooding resulted from the city's negligence in carrying out a general plan of excavation for the extension of its sewer, without providing an efficient method to protect the ground from waters flowing down a gulch from above the excavation, *held* for the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1800; Dec. Dig. § 845.\*]

**4. MUNICIPAL CORPORATIONS (§ 845\*)—INJURIES TO PROPERTY—ACTIONS—DAMAGES—MEASURE.**

In an action against a city for flooding plaintiff's mine, the measure of plaintiff's damages was such an amount as it would cost to put the mine in the same condition it was in before it was flooded, with interest in the discretion of the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1802; Dec. Dig. § 845.\*]

**5. APPEAL AND ERROR (§ 232\*)—RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW—OBJECTIONS TO INSTRUCTIONS.—SUFFICIENCY.**

Where, in a suit for flooding plaintiff's mine, plaintiff sought to recover the cost of repairing the damage, and the court charged that he was entitled to recover his necessary and reasonable expenditures in that behalf, an objection that it was not shown that the expenditures were reasonable was special, and could not be considered on appeal, where the only objection at the trial was that certain items included in

the amount sued for were not proved to be reasonable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1368, 1430; Dec. Dig. § 232;\* Trial, Cent. Dig. §§ 213, 692.]

**6. APPEAL AND ERROR (§ 1067\*)—REVIEW—HARMLESS ERROR—INSTRUCTIONS.**

Where, in an action against a city for flooding plaintiff's mine, it appeared that the jury must have deducted from plaintiff's damages the amount of the necessary damages reimbursed to plaintiff from D., the owner of an undivided half interest in the mine, defendant was not prejudiced by the refusal of an instruction that in no event could plaintiff recover the amount so received.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

**7. COSTS (§ 178\*)—DISBURSEMENTS—MAP.**

Where a map of the premises in question is reasonably necessary to explain the situation, the reasonable cost of making the map may be taxed as a disbursement, as authorized by Rev. Codes, § 7169.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 708-711; Dec. Dig. § 178.\*]

**8. COSTS (§ 207\*)—DISBURSEMENTS—MAP—EVIDENCE AS TO EXPENDITURE.**

An original verified memorandum of the cost of a map, made to explain the situation, is *prima facie* evidence that the amount charged was necessarily expended; and the burden is on the party objecting to the taxation thereof to overcome the same.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 781-787; Dec. Dig. § 207.\*]

Appeal from District Court, Silver Bow County; J. B. McClernan, Judge.

Action by R. P. Kelly against the City of Butte. Judgment for plaintiff, and defendant appeals. Affirmed.

H. Lowndes Maury, John A. Smith, and N. A. Rotering, for appellant. Nolan & Donovan, for respondent.

SMITH, J. The complaint in this action sets forth that on the 25th day of September, 1905, plaintiff was the owner of a leasehold interest in the Ophir quartz lode mining claim, situated in the city of Butte, together with a shaft thereon 16 feet east of a natural water course which passed over said mining claim. Defendant entered upon the construction of a public sewer over such mining claim and along the natural water course. Plaintiff had a water-tight wooden flume, which he used for conducting the water across his claim. Defendant removed the flume, dammed the waters so as to conduct them across the claim by means of a trough, and dug an excavation in the bed of the water course, in which to lay the sewer. "On the 22d day of September, 1905, and after the excavation for its sewer had been made by the defendant across said claim, it negligently permitted the dam to be washed out and the troughs to be carried away, and did negligently permit the water to run in said excavation or ditch without flume or sewer to prevent it from seeping into and flooding plaintiff's mine and underground workings.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On September 25, 1905, owing to the negligence of the defendant, the waters broke into and flooded plaintiff's mine," causing injury, etc. It is also alleged that plaintiff gave defendant *verbal* notice of the time when and the place where said injury occurred, and on February 7, 1906, presented an itemized claim for damages. The cause was tried to the district court, sitting with a jury. A verdict for \$1,000 was returned in favor of plaintiff, and from a judgment on the verdict, and an order denying a motion for a new trial, defendant has appealed.

[1] 1. It is contended that the notice given to the city was insufficient. No notice was necessary. Section 3289, Revised Codes, providing that notice of claim for injuries must be given to a city or town before it shall be liable for damages, refers, in terms, to any "defect" in any bridge, street, public works, etc. Neither the complaint nor the evidence in this case discloses any defect in the public works then being prosecuted by the defendant. The injuries resulted from the manner in which the work was conducted in accordance with the plan adopted by the city. Under such circumstances, no notice was necessary. See, as an analogous case, *Pye v. City of Mankato*, 38 Minn. 536, 38 N. W. 621, where the court said: "There is nothing suggesting that this language was intended to embrace injuries resulting to adjacent property from conditions which do not render the street or highway defective as such."

[2] 2. There is another reason why no notice was necessary. The statute in question was not intended to apply to cases of injury to property. In the case of *Butte Machinery Co. v. City of Butte*, 43 Mont. 351, 116 Pac. 357, we held that it did so apply, following the decision of the Supreme Court of Minnesota, in *Nichols v. City of Minneapolis*, 30 Minn. 545, 16 N. W. 410, which clearly appears to have been correctly decided, in view of the phraseology of the statutory provision there in question. But counsel for respondent in the instant case have called our attention to the fact that our statute, as enacted, bore the title, "An act relating to actions against cities and towns for damages to persons injured on streets and other public grounds by reason of the negligence of any public officer, agent or employé in any city or town of Montana." (Italics ours.) Laws 1903, c. 93. This title clearly limits the scope of the act. It is our duty to hold the act constitutional, if possible, and that can only be done by limiting the effect of its general language, so as to conform to its title. This point was not called to our attention when the case of *Butte Machinery Co. v. City of Butte*, supra, was decided. That case is overruled.

[3] 3. It appears from the testimony of Kelly, the plaintiff, that when he took possession of the Ophir workings, there was a box flume, extending from the end of the

Buffalo gulch sewer, as completed, on, a distance of about 65 feet, down the gulch. This flume was in the bed of the gulch, and was amply sufficient to carry off the water. When the city began the work of extending the sewer, its officers and employes took up the old flume and laid it to one side, for the purpose of excavating in the bed of the gulch where the flume had formerly been laid. They then dammed up the mouth of the storm sewer, so that the water rose therein to a height of three feet, and "put in a V-shaped trough to carry the water off the top of the ground, so that they could work under it." Subsequently an excess of water came down the sewer, carrying away the dam and trough, and running thence into the excavation made for the extension of the sewer. This extension was then about three feet deep. The water so ran from Sunday to Wednesday, at which time the plaintiff informed the city engineer of the existing conditions, and was told that "he couldn't help it just then; that it had to be that way." After the water soaked through the surface, it eventually broke into the Ophir shaft, thus causing the damage of which complaint is made. Prior to this, however, and while the water was still running in the bed of the gulch, plaintiff informed the street commissioner of the fact, and "that I expected it would break in, in the course of time." Mr. Farmer, the street commissioner, said "he couldn't help it; they hadn't got the timber there to put in the boxes they intended to put in, and he would have to let it go until such time as he got things in shape to put in the sewer."

It is urged that the evidence is insufficient to support the judgment, for the reason "that there is no evidence showing or tending to show that the water flowed through the trench for a sufficient length of time after the trough was carried away to have enabled the city employes to remedy the same." This contention is based upon a conclusion of counsel, drawn from other testimony in the case, that the water flowed into the excavation for a period of less than 24 hours. There are two answers to counsel's contention, viz.: (1) The jury was justified in believing the testimony of Kelly, just quoted; and (2) his evidence tends to show that the injury to his property was occasioned by the negligence of the defendant in carrying out its general plan of excavation for the extension of the sewer without providing any efficient method of protecting the ground from the waters flowing down the gulch from above the excavation. Whether or not this was negligence was, we think, a question for the jury to determine. The old flume carried off the water, and the jury was justified in finding, as it seems to us, that the city, in the exercise of ordinary care, should have provided, in lieu thereof, a new method, which would be equally, or at least substantially, as effective.



4. Kelly also testified that after he "got the water out" he again began to crosscut, and "the jar and blasting, I presume, caused this dirt to give way and let the water all in on me again." It is argued that there is not anything to show that the second flooding was caused by any act of the city of Butte; but we are satisfied from the evidence that both "floodings" may fairly and reasonably be attributed to the same act of negligence.

5. We think there is testimony in the record to justify a finding that the extension of the Buffalo gulch sewer was within the limits of the city of Butte.

[4, 5] 6. The court gave the following instruction: "(9) In assessing plaintiff's damages, if you find he is entitled to recover, you shall take into consideration the amount of his necessary and reasonable expenditures, made by him to put the property in the same condition in which it was before flooded, and you shall assess his damages in such amount, not to exceed, however, \$1,726, and in your discretion you may allow interest at the rate of 8 per cent. per annum from the 25th day of December, 1905, to this date." As this instruction was originally framed by the court, it read "\$1,760," but, on objection by defendant, the amount was changed to \$1,726. Defendant objected to the instruction, for the reason "that certain items included in the amount were not proved to be the reasonable expenditures in such cases, and for the further reason that the jury, by this instruction, is permitted to assess in plaintiff's favor the damages sustained by his partner, Dockstader." It is now urged: "Plaintiff testified that he paid Martin Ryan the sum of \$76, to Thomas Slatery, \$74, to Jerry Shea, \$48, to Ed. Ryan, \$52, and to Harvey Sullivan, \$44; the total being \$294. No evidence was offered that these sums were reasonable, or the going or reasonable wages for similar work, and there is nothing to show that this sum of \$294 is not included in the verdict." We think the instruction as given states a correct rule of law. The objection now urged is special, and should have been made in the court below. The objection made, that "certain items included in this amount were not proved to be reasonable," did not call the trial court's attention to the particular items to which objection is now made.

[6] 7. The defendant tendered the following instruction, which was refused: Instruction No. 10: "In no event can you give plaintiff Kelly a verdict for the sum of \$740, received by him from Dockstader in the payment of part of the damages sustained by the premises in question." The testimony shows that one Flores had a lease for a year upon the Ophir ground. He agreed in writing to convey an undivided one-half interest therein to Kelly and Dockstader, in consideration of their agreement to sink the shaft to an additional depth of 30 feet and

make a crosscut upon the property. After the sinking was completed and the crosscut partially made, the mine was flooded. Dockstader does not appear to have taken any interest in the matter, and Kelly paid out a large sum of his own money to put the mine in shape to continue his contract work. He testified that it was necessary to clean out the shaft and the crosscut, in order to save his rights under the contract and obtain a one-half interest in the lease. Dockstader paid no part of the expense of cleaning out the mine, but after the work of sinking and crosscutting was completed he conveyed his interest in the lease to Kelly in settlement of the amount which they agreed upon as his share of the expense incurred by reason of the flood, to wit, \$742. It is contended, in support of the claim that instruction No. 10 should have been given: "Before Kelly can recover the damages sustained by his partner, Dockstader, he must plead, as well as prove, an assignment of Dockstader's interest to him." We do not, however, understand that the action was brought or prosecuted on the theory that plaintiff was suing as assignee of Dockstader's interest. As we read his testimony, his claim is that he made all the expenditures out of his own resources, in order to save or preserve his individual interest in the lease, which would otherwise have been forfeited for failure to complete the crosscut. At any rate, the matter becomes practically immaterial when the record is carefully examined. We are not able to ascertain how the court arrived at the amount, \$1,760, or counsel at the smaller amount, \$1,726. Kelly testified that he expended the sum of \$210 for rent of boilers and engines and moving the same, \$200 for fittings and lumber, \$406 for labor, \$468 for fuel, \$18 for a pump section, and that his own labor was reasonably worth \$450. The sum of these amounts is \$1,752. He afterwards said, on cross-examination, that the amount testified to as having been paid out for labor was too large by \$8, thus leaving \$1,744 as the full amount of his claim. His testimony was not in itself contradictory or unreasonable, and the jury evidently believed it. No attempt was made to disprove or discredit it by other witnesses. The amount of the verdict was \$1,000, as heretofore stated. Plaintiff was entitled to recover the entire amount paid out by him, if entitled to recover at all, unless Dockstader's interest was to be deducted; and, although the court refused to direct the jury to deduct the \$742 allowed to the latter, they evidently did so without such instruction. Deducting Dockstader's portion, or \$742, the balance due Kelly was \$1,002, or \$2 more than the amount of the verdict. Of this defendant cannot complain. Neither can it complain that instruction No. 10 was not given, for the reason that it was not prejudiced by the refusal of the court to give it.

[7, 8] 8. Plaintiff filed his duly verified memorandum of costs and disbursements, in which the following item appears: "Frank Donahoe, for reasonable expense for making a map required and necessary to be used on trial of cause, \$20." Thereafter defendant filed a motion to tax the costs and reduce this item to \$5. This motion was supported by the following affidavit: "R. R. Vail, being first duly sworn, deposes and says: That he is and has been a civil and mining engineer for the past fifteen years; that as such he is familiar with and knows the reasonable cost and expense of making and preparing maps; that he saw the map offered by the plaintiff and introduced in evidence on the trial of the above-entitled action. That the reasonable cost of making said map offered in evidence by the plaintiff and used upon the trial of the case was not more than five (5) dollars. Deponent further says that this does not include any examination that said Frank Donahoe may have made of the premises in question and does not include any survey that the said Donahoe may have made nor the collection of any data, but simply the reasonable expense for making the said map. R. R. Vail." The court refused to reduce the amount. We find no error in this action of the court. The reasonable expenses for making a map, if required or necessary to be used, are properly taxable by virtue of section 7169, Revised Codes. The question of fact raised by the affidavit just quoted was for the district court to decide. The original memorandum, verified as it was, was prima facie evidence that the amounts named therein were necessarily expended. The burden of overcoming such showing was on the defendant. The district court found that the burden had not been sustained, and we are not disposed to interfere with the finding. See *Isman v. Altenbrand*, 42 Mont. 188, 111 Pac. 849; *Brande v. Babcock Hardware Co.*, 35 Mont. 256, 88 Pac. 949, 119 Am. St. Rep. 858; and *King v. Allen*, 29 Mont. 5, 73 Pac. 1107.

The judgment and order are affirmed.  
Affirmed.

BRANTLY, O. J., and HOLLOWAY, J.,  
concur.

STATE ex rel. GROGAN et al. v. DISTRICT COURT OF THE NINTH JUDICIAL DIST. IN AND FOR THE COUNTY OF GALLATIN et al.

(Supreme Court of Montana. Nov. 8, 1911.)

1. JUDGES (§ 51\*)—DISQUALIFICATION—PROCEDURE.

Under Rev. Codes, § 6315, disqualifying a judge on filing of an affidavit imputing bias and prejudice to him, the imputation may be made in the language of the statute, and proof

of facts showing actual bias and prejudice is not required nor permitted.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 227; Dec. Dig. § 51.\*]

2. JUDGES (§ 51\*)—DISQUALIFICATION—AFFIDAVIT—SUFFICIENCY.

An affidavit that defendant has reason to believe that he cannot have a fair trial before "Millard Smith," described as judge of the Ninth district, is sufficient to disqualify "J. Miller Smith," judge of the First district, called to preside in a cause pending in the Ninth district, because of the disqualification of W. R. C. Stewart, the regular judge of such district.

[Ed. Note.—For other cases, see Judges, Cent. Dig. § 227; Dec. Dig. § 51.\*]

3. MANDAMUS (§ 164\*)—PETITION FOR SUPERVISORY CONTROL—ANSWER—NECESSITY.

Matters controverting the petition or supplemental affidavits on application for a writ of supervisory control to set aside a judgment should be raised by a formal answer.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 344-360; Dec. Dig. § 164.\*]

4. MANDAMUS (§ 168\*)—APPLICATION FOR WRIT OF SUPERVISORY CONTROL—RELATOR'S FINANCIAL ABILITY—EVIDENCE—WEIGHT.

On application for writ of supervisory control to set aside a judgment, evidence held insufficient to show that relators were prevented from instituting appropriate proceedings earlier on account of pecuniary inability to pay the necessary filing fees.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. § 168.\*]

5. MANDAMUS (§§ 3, 4\*)—APPLICATION FOR WRIT OF SUPERVISORY CONTROL—RIGHT TO RELIEF—OTHER REMEDY.

Application does not lie for a writ of supervisory control to set aside a judgment, if relator has neglected his remedy by appeal from the judgment, or by motion, under Rev. Codes, § 6589, to set aside the judgment.

[Ed. Note.—For other cases, see Mandamus, Dec. Dig. §§ 3, 4\*]

Application by the State of Montana, on the relation of Darius F. Grogan and others, against the District Court of the Ninth Judicial District of the State of Montana, in and for Gallatin county, and another, for a writ of supervisory control to set aside a judgment. Proceeding dismissed.

Jesse B. Roote, for relators. George D. Pease, for respondents.

BRANTLY, C. J. This is an original application for a writ of supervisory control to set aside a final judgment rendered and entered in the case of *Cline v. Darius F. Grogan et al.*, the relators herein, by the district court of the Ninth district in and for Gallatin county. The action was commenced on November 16, 1909, by Carrie Cline to recover from the relators the amount of a promissory note for \$1,478.77, executed by them to Victor E. Cline on January 28, 1901, and thereafter transferred by him to Carrie Cline. The issues were made up by the reply of the plaintiff, Cline, filed February 5, 1910. Thereafter the cause was set for trial on June 18th. On June 16th the re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lators filed their affidavit alleging that they could not have a fair and impartial trial by reason of the bias and prejudice of Hon. W. R. C. Stewart, the judge of that district. Accordingly Judge Stewart postponed the trial until June 20th and called in Hon. J. Miller Smith, of the First district, to sit in his place. Counsel who had theretofore acted for relators had withdrawn from the cause, and it seems that relators were then without counsel. Immediately after the announcement that Judge Smith would preside at the trial, Darius F. Grogan made and caused to be filed with the clerk the following affidavit: "D. F. Grogan, being first duly sworn, deposes and says: That he is one of the defendants in the foregoing named action; that he has reason to believe that the defendants cannot have a fair trial of said action before the Honorable *Millard* Smith, judge of the said district court for the trial of said action, on request of the Honorable W. R. C. Stewart, the disqualified judge of the said court in said action, because of the bias and prejudice of the said Judge *Millard* Smith." When court convened on June 20th, the relators were not present, nor were they represented by counsel. Judge Smith, being of the opinion that the affidavit was not sufficient to disqualify him, because of the error in the statement of his name therein, proceeded with the trial, which resulted in a verdict and judgment in favor of plaintiff for the amount of the note and costs.

It does not appear from the petition when the relators first received notice of the entry of judgment; but it does appear that on October 10, 1910, they procured counsel to prepare, and who did prepare, the petition filed in support of the present application. Thereafter they took no further steps until September 21st of this year, when the petition was filed in this court. The petition recites the facts above narrated, and is accompanied by the affidavits of Darius F. Grogan and both of counsel for relators, the purpose of which is to supplement the petition by showing that relators did not apply promptly to this court for relief because, when the judgment was entered against them, they were, and since have remained, financially unable to pay the necessary filing fees. Upon the filing of the petition this court issued an order to show cause. At the hearing the defendants filed and submitted certified copies of affidavits theretofore filed by Darius F. Grogan in other proceedings to which he was a party in the district court of Gallatin county, and also original affidavits of other persons controverting the matters alleged in the affidavits accompanying the petition, and submitted a motion to set aside the order and dismiss the proceedings upon several grounds, all of which are included in the general statement that the facts alleged in the petition do not warrant the relief demanded.

[1, 2] It cannot, we think, be controverted that the affidavit filed in the district court was sufficient to work a disqualification of Judge Smith and deprive him of jurisdiction of the case of *Cline v. Grogan et al.* Under the statute (Rev. Codes, § 8315) a disqualification is wrought by the filing of an affidavit imputing bias and prejudice to the presiding judge at any time before the day fixed for the hearing. The imputation may be made in the language of the statute, and proof of facts showing actual bias and prejudice is not required nor permitted. *State ex rel. Carleton v. District Court*, 33 Mont. 141, 82 Pac. 789. The error in the given name of Judge Smith might, in the absence of descriptive words identifying the particular person against whom it was directed, have rendered the affidavit abortive; but, since it shows by its recitals that it was the intention of the affiant to disqualify the Judge Smith who had been called by Judge Stewart to try the cause, it was sufficient to work the disqualification, notwithstanding the judge's given name was not correctly stated. It thus appears that Judge Smith was without jurisdiction to sit and try the cause. It is on this ground that this court is asked to exercise its supervisory power to set the judgment aside.

[3, 4] If it be assumed that the financial disability of a litigant is sufficient under any circumstances to justify or excuse delay in his effort to secure relief from an adverse judgment, the showing made to excuse the delay of relators in instituting this proceeding does not entitle them to any indulgence. It is true that, if the defendants wished to controvert any facts stated in the petition or the supplemental affidavits, they should have done so by a formal answer. But, treating the affidavits and copies filed by them as an answer, they furnish substantial ground for the conclusion that the representations by the relators as to their financial condition are not based upon the facts as they have actually existed. It appears that early in January of this year Darius F. Grogan was possessed of real estate which he was able to hypothecate to obtain money for a trip to West Virginia. As shown by copies of his affidavits filed in the district court of Gallatin county, this had a value of several thousand dollars, and, for aught that appears, he owned this property at the time the judgment was rendered against him, and was financially able to institute appropriate proceedings at once to have it set aside.

[5] But, accepting the representations as to the financial condition of relators as true, there is another reason which concludes them from having any relief in this court. When the judgment was rendered against them, they had two statutory remedies, either of which would have been both expeditious and adequate to furnish them relief. They had an appeal directly from the judgment. By bill of exceptions they could have brought

into the record the proceedings incident to the disqualification of Judge Smith, and their appeal would have been effective. In lieu of this course they could have moved the district court to set aside the judgment, and their motion would have been effective upon a showing of the facts. Rev. Codes, § 6589. The lack of jurisdiction in Judge Smith to render the judgment, and hence its invalidity, could have been made to appear. In case their motion was denied, they could have appealed from the order denying it, as from a special order after final judgment. Section 7098. This appeal would likewise have been effective. But, having omitted to avail themselves of these remedies, they are not entitled to invoke the power of this court, which was given it to enable it to grant relief, not generally, but only under extraordinary circumstances in cases in the inferior court, in which error has intervened and there is no appeal or adequate remedy.

The supervisory power of this court was examined, and its functions tentatively defined, in *State ex rel. Whiteside v. District Court*, 24 Mont. 539, 63 Pac. 395. It has been invoked in many cases since that decision was rendered, but has always been confined in its use to exigencies arising during the progress of litigation in inferior courts, to remedy manifest wrongs which cannot otherwise be righted, and which will result in irreparable damage unless relief is granted. The following are illustrative cases: *State ex rel. Moore v. District Court*, 25 Mont. 31, 63 Pac. 686; *State ex rel. Sutton v. District Court*, 27 Mont. 128, 69 Pac. 988; *State ex rel. Harris v. District Court*, 27 Mont. 280, 70 Pac. 981; *State ex rel. Shores*

*v. District Court*, 27 Mont. 349, 71 Pac. 159; *State ex rel. Clark v. District Court*, 30 Mont. 442, 76 Pac. 1005; *State ex rel. Heinze v. District Court*, 32 Mont. 579, 81 Pac. 345; *State ex rel. Butte L. I. Co. v. District Court*, 37 Mont. 226, 95 Pac. 843; *State ex rel. Hepner v. District Court*, 40 Mont. 17, 104 Pac. 872; *Bailey v. Examining and Trial Board*, 42 Mont. 216, 112 Pac. 69. If we should grant the writ in the instant case, we should not only use our power for another purpose than that for which it was granted, viz., for the purpose of review as on an ordinary appeal and after the time for appeal has expired, but should also grant relief to a litigant whose only claim to it is that he has neglected, without excuse, to avail himself of the ordinary remedies provided by statute for cases such as his. This we may not do.

It was suggested during the argument that the relators may still resort to an action in equity to have the judgment set aside. This may be so (*State ex rel. Happel v. District Court*, 38 Mont. 166, 99 Pac. 291, 129 Am. St. Rep. 636); but, if it is so, there is thus apparent still another reason why this court should not interfere to perform an office which primarily appertains to the district court. The relief granted by this court would be exactly that which should be sought through the original equity jurisdiction of the district court.

The order to show cause is therefore set aside, and the proceeding is dismissed.

Dismissed.

SMITH and HOLLOWAY, JJ., concur.

**ARCHITECTURAL DECORATING CO. v.  
NICKLASON et al.**

(Supreme Court of Washington. Dec. 8, 1911.)

**1. MECHANICS' LIENS (§ 118\*)—"MATERIAL-MAN"—CONTRACTOR WITH AGENT OF OWNER.**

One contracting with the agent of the owner erecting a building for decorative plaster work, supplying both labor and material, is not a materialman within Rem. & Bal. Code, § 1133, requiring a materialman to send to the owner a duplicate statement of the materials furnished to the contractor, which only covers a situation where three persons are involved, and where the owner has no contractual relation with the one furnishing materials.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 161; Dec. Dig. § 118.\*]

For other definitions, see *Words and Phrases*, vol. 5, p. 4409; vol. 8, p. 7718.]

**2. MECHANICS' LIENS (§ 118\*)—LIENS OF MATERIALMEN — DUPLICATE STATEMENT FOR OWNER.**

A materialman who delivers materials to the owner under a contract with him through his agent need not send to the owner the duplicate statement required by Rem. & Bal. Code, § 1133.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 161; Dec. Dig. § 118.\*]

**3. APPEAL AND ERROR (§ 907\*)—FINDINGS—PRESUMPTIONS.**

The court on appeal on a short record, containing only the findings of fact, conclusions of law, decree, and exhibits, must accept the findings as true in the absence of any exceptions to them, and can only determine the correctness of the decree based on the findings.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 907.\*]

Department 2. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by the Architectural Decorating Company against Gustaf Nicklason and another. From a judgment denying relief, plaintiff appeals. Reversed and remanded.

Roberts, Battle, Hulbert & Tennant, and George R. Biddle, for appellant. F. E. Anderson and E. J. Adams, for respondents.

MORRIS, J. Appeal from a decree denying appellant a foreclosure of a mechanic's lien. The case is before us upon a short record, containing only the findings of fact, conclusions of law, decree, and two exhibits. The court finds that the respondents are indebted to appellant in the sum of \$646 for materials furnished and labor performed in the construction of the building; that it had filed its lien in due time, but was not entitled to a foreclosure for failure to comply with section 1133, Rem. & Bal. Code, providing that a materialman must send to the owner of any building to which materials are furnished for construction, alteration, or repair a duplicate statement of all materials so furnished to any person or contractor; otherwise the lien shall be unenforceable. The

court finds no such duplicate statement was delivered to the owner, and for this reason holds the lien is not entitled to be foreclosed.

In our judgment the findings do not support the decree for two reasons:

[1] (1) The appellant is not a materialman. It contracted with the agent of the owner to do the decorative plaster work, supplying both labor and material. It was furnishing labor to the same extent as any mechanic who worked on the building. The fact that it furnished its own material and put it in place does not make it a materialman. Its contract was direct with the owner through the owner's agent. The statute covers a situation where three persons are involved—the one who furnished material, the one to whom the material is furnished, and the owner of the building for which they are furnished. The owner has no contractual relation with the first person, and has no means of knowing what materials may be furnished to the second person upon the faith and credit of the building, except as he receives notice through his duplicate bills. Upon receipt of these the owner is in a position to protect himself against his contractor and the materialman by checking up the contractor and the materials claimed to be furnished. This is the plain purpose of the statute. Where the owner contracts directly for material, he requires no notice outside of his contract to protect himself. The findings make appellant a contractor, and not a materialman, dealing with the owner. The contract was of itself a statement of the materials furnished, and none other was necessary.

[2] (2) Even if we should concede appellant to be a materialman, having delivered his materials to the owner under a contract with the owner through his agent, he was not required to send the duplicate statement required by the statute when the materials are delivered to a contractor or person other than the owner. *Rieflin v. Grafton*, 115 Pac. 851.

[3] Respondent contends the findings do not correctly speak the facts, and that they are manifestly incomplete, and we should therefore assume the evidence supports the decree. The trouble with this contention is that the findings are the only facts before us, and we are bound by them. There is no evidence of incompleteness or insufficiency upon their face. No exceptions have been taken to them.

They find every fact essential to be found in a foreclosure case, and we must accept them as they are, and determine only the correctness of the decree based upon them; and being persuaded that the decree is erroneous in its dismissal, and that appellant was entitled to a foreclosure of its lien, the decree is reversed and the cause remanded,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 119 P.—12

with instructions to enter a decree of foreclosure in favor of appellant.

DUNBAR, C. J., and ELLIS, CROW, and CHADWICK, JJ., concur.

**RIPPEY et ux. v. HARRISON et ux.**

(Supreme Court of Washington. Dec. 2, 1911.)

**1. BOUNDARIES (§ 53\*)—ESTABLISHMENT—ORIGINAL MONUMENTS.**

Where there are no original monuments discovered, the object of a survey of a disputed line is to determine, not where the original location should have been, but where it actually was, as a purchaser has a right to be protected in the land which he purchases with reference to the original monuments or locations, whether right or wrong.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 53.\*]

**2. BOUNDARIES (§ 47\*)—ESTABLISHMENT—ES-TOPPEL.**

While a person is not compelled to fence in all of his land, where an owner builds a fence on a line laid out by surveyors, it is in a sense a monument, which is held out as the true line, and which will estop the builders from denying the right of innocent purchasers obtaining land to regard it as such after its establishment for many years.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 227-231; Dec. Dig. § 47.\*]

**3. QUIETING TITLE (§ 44\*)—ACTION—BURDEN OF PROOF.**

In an action to quiet title to a strip of land in dispute, the burden is on plaintiffs to establish their claim thereto.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 89-92; Dec. Dig. § 44.\*]

**4. BOUNDARIES (§ 37\*)—ACTION—SUFFICIENCY OF EVIDENCE.**

In an action to quiet title to a strip of land, evidence held insufficient to establish the line contended for by plaintiffs.

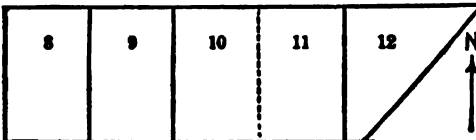
[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.\*]

Department 1. Appeal from Superior Court, Kitsap County; John B. Yakey, Judge.

Action by T. Y. Rippey and wife against Benjamin F. Harrison and wife. From a judgment for plaintiffs, defendants appeal. Reversed, with directions.

Bryan & Ingle, for appellants. Jas. W. Carr, for respondents.

DUNBAR, C. J. The respondents brought this action to quiet title to a certain strip of land in dispute. The following map will show substantially the location of the land:



There is some contention by the respondents that this plat does not show the true line between lots 11 and 12, but with the view we take of the case this is not ma-

terial. The respondents were the owners of lots 8, 9, and 10, and the appellants of lots 11 and 12. The matter in dispute is the correct line between lots 10 and 11. The respondents purchased the land on March 4, 1898, and had a contract to purchase prior to said date. Respondents, soon after purchasing the property, and 13 years preceding the time of the trial in the court below, took possession of said property, and built a line fence on what they then believed to be the east boundary line of lot 10. That fence has stood there since, and is still standing as originally located. This fence is 2.44 feet west of what respondents now contend is the true east boundary of said lot 10. The appellants' contention is that the fence is on the correct boundary line, and they base their claim upon the propositions: (1) That the fence was constructed upon the original survey stakes, and according to the first survey made, and that the first survey governs, regardless of the same being correct or incorrect; and (2) that they are entitled to said strip by reason of adverse possession of same for a period greater than 10 years. The trial court held that the true line was as contended for by respondents, and the prayer of the respondents was granted, and judgment entered, quieting the title to the same.

[1] We are unable to agree with the conclusion reached by the trial court, although the case is not without difficulty by reason of the indefinite and unsatisfactory character of the testimony. We may admit the general rule that monuments control courses and distances; but there are no original monuments discovered in this case, and the object of a survey when a line is in dispute is, not to determine where the original location ought to have been, but where it actually was, because a purchaser has a right to be protected in the land which he buys with reference to the original monuments or locations, whether they were right or wrong. The court, in reviewing the testimony, said: "There is nothing to show that there were any stakes to mark the line when Mr. Eriksen and Mr. Rippey made this fence." It is true that neither Mr. Eriksen nor Mr. Rippey stated that there were any stakes to mark the line, although they both stated that they thought they were building the fence on the line; but Mr. Jensen, the grantor of the appellants, who was the owner of lots 11 and 12 from 1893 to the date of the deed from him to Harrison, and who purchased the lots from Bremer, the respondents' grantor, testified that he had found a stake on the west boundary of lot 11, and a hub in the alley on the east side, before the building of the fence, and that he knew that the stakes were surveyor's stakes; and further testified as follows: "Q. Now, with reference

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

to the fence that was built later, how did that correspond with the west boundary of lot 11 according to these stakes? A. The stakes were there at the time the post holes were dug. Q. Then the holes were made and the fence built on the line? A. Yes. Q. You never had any talk after that about the fence being on the line? A. No. Q. That was the line according to the stakes? A. That was always the line. \* \* \* Q. Mr. Jensen, did you at the time you bought the lots get any abstract? A. Yes; I did." And it appears from the testimony that the abstract which Jensen got, and which was transferred to the appellants, showed the line to be as contended for by the appellants. Mr. Jensen also testified that he measured the distance with a tape, and that the line as indicated by the fence was pointed out to him as the line by Bremer, the common grantor.

[2-4] The testimony of the surveyors failed to throw any light upon the merits of the case; but it appears from the record that 13 years prior to the purchase of these lots by the appellants respondents had established the line between lots 10 and 11, which they thought to be the true line, and which, according to the testimony of Jensen, followed the line of the surveyor's stakes by the erection of a fence. This in a sense was a monument, which they recognized, and which they held out as the true line; and, while a man is not compelled to fence in all his land, yet, under the circumstances shown by the testimony, their action led the appellants to believe that the fence was the line, and they bought with that understanding, and respondents should be estopped from now dispossessing innocent purchasers, even though they have proved—which they have not to our satisfaction—that the true line is as they claim it to be. They testify that during all these years they never had made any claim to this small strip of land to Mr. Jensen, who owned the land adjoining them. If their theory is correct, according to the testimony they have 2.44 feet more of land than they thought they were purchasing. The burden is upon the respondents, the plaintiffs in the case, to establish their claim, and we think they have not done so.

The judgment will be reversed, with instructions to dismiss the action.

GOSE, MOUNT, and FULLERTON, JJ., concur.

PARKER, J. I concur in the result but do not concur in the view that respondents are estopped by any acts amounting to a practical location upon the ground of the line between lots 10 and 11. Having the burden of proof, they have simply failed to prove the true location of that line and for that reason they cannot dispossess appellants.

# STATE v. McKINNEY.

(Supreme Court of Washington. Dec. 6, 1911.)

## CRIMINAL LAW (§ 260\*)—COMPLAINT—AMENDMENT AFTER TRIAL ON APPEAL.

Complaint was filed against defendant before a justice for assault in the second degree, and, the case being called for trial on defendant's plea of not guilty, the complaint was amended to show defendant's true name on agreement that he should be tried for assault in the third degree. He having appealed from a conviction before the justice and again in the superior court, that court ordered an amendment of the complaint to make the record conform to the actual proceeding, so as to charge defendant with the offense for which he had been tried before the justice. *Held*, that such amendment was matter of form rather than substance, and did not deprive the superior court of jurisdiction.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 260.\*]

Department 2. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

C. E. McKinney was convicted of assault in the third degree, and he appeals. Affirmed.

R. S. Lambert and Brown, White & Perring, for appellant. Bixby & Thompson, for the State.

CHADWICK, J. Defendant was convicted in the court below, on December 28, 1910, of assault in the third degree. On July 5, 1911, the court, reciting that "this order is made in lieu of and to correct an erroneous order as drawn on the 27th day of December, 1910, said order so drawn not being signed by the court," made and entered an order purporting to amend the complaint theretofore filed in the justice court and from which an appeal had been taken from a judgment of conviction. The material parts of the order follow: "Strike the words 'and feloniously' and insert the word 'and' between the words 'willfully' and 'unlawfully.' After the word 'assault' in the same line insert the words 'and beat.' Strike the word 'with' and insert in lieu thereof the following, 'by then and there striking and beating him with his hands and'; also by striking the words, 'to wit, a police club'; also striking the words 'the said police club being then and there a thing likely to produce bodily harm,' and inserting in lieu thereof 'and a more particular description of which weapon is to this complainant unknown.' It is therefore ordered that the said motion to amend the said complaint herein, or affidavit for arrest, by interlineation is granted and said amendment is made." Defendant had been charged in the justice court with the crime of assault in the second degree. The transcript of the justice court which is made a part of the record recites that defendant, upon being brought to bar and informed of the charge, entered a plea

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of not guilty, and that later, the case being called for trial, defendant being then present, "by agreement complaint is amended to show defts. true name, C. E. McKinney, and deft. is to be tried on a charge of assault in the third degree." It is now contended that, under the rule announced in the case of *State v. Van Cleve*, 5 Wash. 642, 32 Pac. 461, which was followed in the case of *State v. Hamshaw*, 61 Wash. 390, 112 Pac. 379, because of the order of the superior court allowing an amendment to the complaint, the court lost jurisdiction to proceed, and the defendant is entitled to be discharged.

The rule upon which the two cases cited is founded is well sustained in reason and is supported by the greater weight of authority and, but for the prior proceeding, would control this case; for the form of the order as quoted is in itself an unanswerable argument in favor of certain and orderly procedure in courts of record. But, as intimated, we think that the objection here goes to matters of form rather than of substance. The amendment was not made in support of a new or different charge, but to make the record conform to the actual proceeding in and the charge upon which defendant had in fact been tried in the justice court. The order of December 27th, as evidenced by the order of July 5th, was a useless thing, for defendant was actually tried upon the same charge as in the court below. Furthermore, although we do not now decide it to be so, it is likely that the vice sought to be overcome in the *Van Cleve* and *Hamshaw* Cases—that is, the deprivation of the right to make formal plea to a new or amended charge—would not in any event be held to have occurred in the case at bar, for the record shows that defendant pleaded not guilty after the so-called amendment. It is our judgment that defendant has been deprived of no substantial right, and that the judgment of the lower court should be affirmed.

Judgment affirmed.

DUNBAR, C. J., and ELLIS, CROW, and MORRIS, JJ., concur.

#### KING v. PAGE LUMBER CO.

(Supreme Court of Washington. Dec. 2, 1911.)

#### 1. MASTER AND SERVANT (§§ 286, 289, 288\*)—INJURIES TO SAWMILL EMPLOYÉ—JURY QUESTIONS.

In an action for injury to a sawmill employé caused by unexpected movement of a saw carriage, held, under the evidence, jury questions whether defendant was negligent, and whether plaintiff was guilty of contributory negligence or assumed the risk.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1017, 1106, 1070; Dec. Dig. §§ 286, 289, 288.\*]

#### 2. TRIAL (§ 178\*)—QUESTIONS FOR JURY.

In determining, on motion for directed verdict, whether issues should be submitted to the jury, the evidence must be construed most favorably to the party introducing it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 401-403; Dec. Dig. § 178.\*]

#### 3. MASTER AND SERVANT (§ 185\*)—FELLOW SERVANTS—WHO ARE—SAWMILL EMPLOYÉS.

A sawyer in starting a saw carriage without warning an employé engaged in adjusting a log thereon was a vice principal, and not a fellow servant of such employé, as affecting the employer's liability for resulting injury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

#### 4. MASTER AND SERVANT (§ 185\*)—FELLOW SERVANTS—SAWMILL EMPLOYÉS—DUTY OF EMPLOYER.

While a sawmill employé was engaged in adjusting a log on a sawmill carriage pursuant to directions from the sawyer, the employer owed him the duty not to subject him to unnecessary danger by suddenly starting the carriage; and such duty could not be delegated to a fellow servant.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 385-421; Dec. Dig. § 185.\*]

#### 5. DAMAGES (§ 182\*)—PERSONAL INJURY—EXCESSIVENESS.

Four thousand, five hundred dollars is not excessive recovery for injury to a 20-year old sawmill employé, resulting in loss of the first three fingers of his right hand, and severe injury to the fourth.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 384; Dec. Dig. § 132.\*]

Department 2. Appeal from Superior Court, Pierce County; C. M. Easterday, Judge.

Action by Gilbert King against the Page Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

James B. Murphy, for appellant. H. G. & Dix H. Rowland and Davis & Neal, for respondent.

CROW, J. Action by Gilbert King, a minor, by Mary King, his guardian ad litem, against the Page Lumber Company, a corporation, to recover damages for personal injuries. From a verdict and judgment in plaintiff's favor, the defendant has appealed.

[1, 2] Appellant contends the trial judge erred in denying its motions for nonsuit and a directed verdict. In presenting its motions appellant contended no negligence upon its part had been shown; that respondent was guilty of contributory negligence; that he assumed the risk; and that, if any negligence on the part of any person other than respondent was shown, such negligence was that of respondent's fellow servant. On July 28, 1910, appellant owned and operated a sawmill equipped with machinery, including a saw carriage about 40 feet in length and 10 feet in width, upon which logs were placed for sawing. Upon this carriage were three blocks against which the logs rested when about to be sawed. In connection with

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



each block was a dog, a mechanical appliance designed to fasten and securely hold the log against the blocks. This dogging apparatus consisted of an upright iron bar about 3½ feet long, 1 inch thick, and 3 inches wide, which curved back towards the east side of the carriage and away from the west side where the saw was operated and the sawyer stood. In the upright bar were holes in which the dog, an appliance used for holding the log, could be adjusted. In connection with each bar and dog was a lever by which the dog could be drawn down and firmly set into the log. This dogging apparatus was operated by an employé known as a "dogger," who controlled the dog with one hand and the lever with the other. While performing his work the dogger stood on the east side of the carriage opposite the sawyer, who with a lever operated and controlled the carriage. When a log had been securely dogged, the sawyer caused the carriage to move forward so that the log could be cut by a band saw which, in plain view, passed over certain pulleys. The respondent, a young man 19 years and 6 months of age, had for some time been employed as a laborer in and about the mill, had never worked on or about the saw carriage, and had no experience as a dogger. About half past 7 on the morning of the accident the foreman of the mill, without giving him any instructions, directed him to go upon the carriage and work as dogger. Respondent informed the foreman he had no experience in that work. One Grant, the sawyer, gave him no instructions other than to inform him the work was a hurry-up job. About 11 o'clock of the same morning a small cedar log was placed on the carriage. Respondent set and secured the rear dog, but caused it to extend too far across the log. When the log had been sawed to within about four or five feet of the dog, the sawyer noticed the saw would strike the dog. Thereupon he reversed the carriage, and, with a motion of his hand, directed the respondent to take out and reset the dog. Respondent did so, but again placed it too far across the log toward the line of the saw. Again the sawyer stopped the carriage and by the same motion impatiently ordered respondent to take out the dog. The sawyer testified he also leaned over and told respondent, then about four feet away, to take out the dog and leave it out. Respondent testified he did not hear this order. Thereupon respondent removed the dog, and the sawyer immediately started the carriage. Respondent, thinking he was again directed to reset the dog, continued to do so, but, just as he brought the dog down upon the log, the saw struck and injured him. The sawyer noticed respondent's last movement in time to stop the carriage, and prevent the dog from breaking the saw, but not in time to prevent respondent's injury.

Respondent's allegations of negligence in substance were (1) that appellant did not in-

struct him or warn him of the dangers incident to his employment; (2) that the sawyer, who at the time was acting as appellant's vice principal, suddenly and without warning or notice to respondent started the carriage towards the saw.

We have carefully examined the evidence, and conclude the issues of appellant's alleged negligence, respondent's alleged contributory negligence, and assumption of risk were for the consideration of the jury, and that the motions were properly denied. Appellant's counsel have presented their contentions in a thorough and able manner in their brief, and also on oral argument. They seem impressed with the idea that the evidence utterly fails to show negligence on appellant's part, but that it does show respondent's negligence. The question before us is not whether the weight and convincing force of the evidence was with appellant, but whether there was evidence sufficient to require a submission of the issues of fact to the jury and sustain their verdict. In determining this question, it is the duty of an appellate court to regard and construe the evidence most favorably to respondent. In *Newcomb v. Puget Sound, etc., Boiler Works*, 54 Wash. 419, 103 Pac. 456, this court in passing on the appellant's motions for a nonsuit and a directed verdict said: "The appellant's brief shows its positive conviction that the evidence overwhelmingly preponderates in its favor. \* \* \* The appellant's mistake on this appeal is that it fails to appreciate the force of the evidence given by the respondent, which of itself is sufficient to sustain the verdict. The jury were entitled to credit him. \* \* \* The most that can be said on behalf of appellant is that the evidence was conflicting; the respondent's statement being denied by other witnesses." The evidence, although disputed, was unquestionably sufficient to show respondent was inexperienced; that he had worked as dogger only a few hours; that he received no instructions other than to be told his work was a hurry-up job; that the setter who worked on the carriage found it necessary to aid him, and did so; that the log being sawed at the time of the accident was somewhat rotten and difficult to dog; that, after respondent had improperly set the dog the first time, the sawyer with a motion of his hand directed him to remove and reset it; that respondent did so, but replaced the dog too far across the log; that the sawyer again stopped the carriage; that respondent was then only about four feet from the saw; that with considerable impatience the sawyer repeated his former signal made with his hand; that respondent removed the dog; that the sawyer immediately started the carriage; that respondent was then standing with his back towards the saw, engaged in the supposed discharge of his duties; that he again attempted to set the dog, and was struck by the saw.

The sawyer and other witnesses on behalf of appellant testified appellant had no code of signals to the dogger for use by the sawyer. The only signals which appear to have been given by the witnesses upon the trial in the presence of the jury are not shown, and manifestly cannot appear in the record. The sawyer testified he leaned over the saw when giving his last order, and told respondent to take the dog out and leave it out. Two other witnesses, not quite so close to the sawyer as was respondent, testified that the sawyer spoke to respondent, and in their examination in chief testify to what he said, but upon their cross-examination they seem rather to have noticed him speaking, and to have known what he would say, and probably did say, by reason of their experience, and their previous observation of proper methods under such conditions. The carriage was stopped, but it is conceded the mill was running so noisily that it was practically impossible to understand spoken words, and that, by reason of this fact motions and signals were generally used. Respondent positively testified he did not hear any oral order given by the sawyer.

Taking all the evidence into consideration, it was for the jury to determine whether appellant was negligent as claimed, whether respondent was properly instructed and warned, whether he understood his duties and the dangers attending his employment, whether he assumed the risk, and whether he was guilty of contributory negligence. Respondent was young and inexperienced. He had made two mistakes in placing the dog. He made a third trial, and, had he completed his efforts, would probably have failed again. The sawyer started the carriage before he had replaced the dog. He testified he had told respondent to take the dog out and keep it out; that he did take it out; that he stepped back on the carriage a foot or two; that he seemed to be out of danger; and that he, the sawyer, believed respondent understood the verbal order. It is nevertheless apparent that the sawyer immediately started the carriage, and that within a moment or two the respondent, who said his back was toward the saw, was injured while trying to reset the dog.

[3, 4] Appellant further contends the sawyer was not its vice principal, but the fellow servant of respondent, as they were jointly engaged in the common undertaking of sawing logs. A sawyer and dogger under certain conditions may be fellow servants, but this court had repeatedly announced the rule that the sawyer, when charged with a non-delegable duty of his master, becomes and is a vice principal. *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Dossett v. St. Paul, etc., Lumber Co.*, 40 Wash. 276, 82 Pac. 273; *Eidner v. Three Lakes Lumber Co.*, 45 Wash. 323, 88 Pac. 326; *Maloney v. Stetson & Post Mill Co.*, 46 Wash. 645, 90 Pac. 1046; *St. John v. Cascade, etc., Lum-*

*ber Co.*, 53 Wash. 193, 101 Pac. 833. There was evidence that the carriage moved about five miles an hour during the process of sawing; that, when the sawyer suddenly and unexpectedly started the carriage, respondent was about four feet from the saw; that with his back towards the saw he was about to replace, reset, and fasten the dog; that the sawyer with a motion of his hands had repeated the identical signal he had theretofore given for withdrawing and resetting the dog; that, while respondent was thus engaged, he was in a position of safety as long as the carriage remained stationary; that the sawyer started the carriage without notice or warning; and that respondent was thereby exposed to sudden and unexpected danger and was injured. While respondent was thus employed, a nondelegable duty was imposed upon the master not to utilize any agency which would subject him to unnecessary danger. When the sawyer did place such an agency in operation, he was not acting as respondent's fellow servant, but as vice principal of the master, and his failure to then and there perform the nondelegable duty of the master was the negligence of the latter. "We have held that where a master employs a number of servants to work with a dangerous agency, and gives to one servant exclusive control of the agency with power to direct where the other servants shall work and the manner in which they shall work, the one given control is the representative of the master, that his negligence is the negligence of the master, and any one injured by reason of such negligence, not contributed to by him, has a cause of action against the master for the injury so suffered." *Dyer v. Union Iron Works*, 117 Pac. 387. See, also, *Comrade v. Atlas Lumber, etc., Co.*, 44 Wash. 470, 87 Pac. 517; *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765.

Appellant contends instructions given by the court constituted prejudicial error, in that no evidence was admitted on which they could be predicated, and that an immaterial issue was thereby submitted, tending to confuse the jury in reaching their verdict. We find no error in this regard. Appellant seems to have fallen into error in its understanding of the evidence. In any event, we are satisfied the instructions given, when considered as a whole, fairly stated the law, and were free from prejudicial error.

[5] The jury returned a verdict for \$6,900, which the trial judge in passing upon appellant's motion for a new trial reduced to \$4,500. Judgment, with respondent's assent, was entered for the latter sum. Appellant now contends the damages are still excessive. Respondent at the time of his injury was not quite 20 years of age. He lost all of the first three fingers of his right hand, and the fourth finger was so severely injured as to render it practically useless. The trial judge made a material reduction. He understood the nature, extent, and permanent results of

the injury, and we cannot conclude the judgment is so excessive as to require a further reduction by this court.

The judgment is affirmed.

DUNBAR, C. J., and CHADWICK, ELLIS, and MORRIS, JJ., concur.

# BLUM et ux. v. SMITH et ux.

(Supreme Court of Washington. Dec. 6, 1911.)

## 1. EXCHANGE OF PROPERTY (§ 3\*)—CONTRACTS—CONSIDERATION.

A contract required plaintiff to convey real estate to defendant and required defendant to transfer to plaintiff a lease of an apartment house and to procure an extension of the lease and to transfer by a bill of sale to plaintiff the furnishings and good will of the apartment house. Defendant did not make any effective transfer of the lease nor secure an extension thereof, and he was unable to do so. *Held* to show a failure of consideration for plaintiff's conveyance of his real estate, sufficient to support an action to set it aside.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 3.\*]

## 2. EXCHANGE OF PROPERTY (§ 5\*)—RESCISION.

Plaintiff contracted to convey real estate to defendant, who agreed to execute to plaintiff a bill of sale of the furnishings of an apartment house and to transfer a lease thereof and to procure an extension of the lease from the owner. Defendant failed to properly transfer the lease or to secure an extension thereof, and, after plaintiff had conveyed his real estate, he informed defendant that he would attend to the lease himself and that he cared little for it. Plaintiff at that time had discovered that the value of the business had been grossly misrepresented by defendant. *Held*, that plaintiff was not estopped from rescinding the contract of exchange.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 5.\*]

## 3. FRAUD (§ 9\*)—MISREPRESENTATIONS.

A false representation by a party to a contract to transfer a lease on an apartment house and to procure an extension thereof in consideration of a conveyance of real estate by the other party to the contract, that he owned the lease, could transfer it, could procure the owner's consent thereto, and could procure an extension, is actionable fraud, and when relied on by the other party he may sue for the fraud.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 8; Dec. Dig. § 9.\*]

## 4. HUSBAND AND WIFE (§ 262\*)—CONVEYANCES—PRESUMPTIONS.

Under Rem. & Bal. Code, § 5917, empowering the husband to manage and control the community property, a bill of sale of personalty executed by a wife alone is a nullity, in the absence of evidence that the property was her separate property; the presumption being that it was community property.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 262.\*]

## 5. EXCHANGE OF PROPERTY (§ 3\*)—VALIDITY—RELIANCE ON FRAUDULENT REPRESENTATIONS.

A party to a contract to convey his real estate to the adverse party in consideration of his executing a bill of sale of the furnishings of an apartment house and transferring a lease on the house and procuring an extension thereof

may rely on the representations as to the income from the apartment house and that the tenants therein were of a desirable class, especially when active steps are taken to throw the party off his guard.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 3.\*]

Department 2. Appeal from Superior Court, King County; King Dykeman, Judge.

Action by M. P. Blum and his wife against William J. Smith and his wife. From a judgment for plaintiffs, defendants appeal. Affirmed.

Emmerson H. Carrico, for appellants. J. W. Brown, for respondents.

ELLIS, J. The respondents brought this action to rescind a contract for an exchange of real estate for a lease and the furniture of an apartment house in the city of Seattle, and to set aside a deed of certain real estate made by them to the appellants on the ground of fraud and deceit claimed to have been practiced by the appellants to induce the exchange, and also on the ground of alleged failure of the appellants to perform the contract on their part. The cause was tried to the court without a jury. From a decree rescinding the contract and setting aside the deed, the defendants have appealed.

The agreement for the exchange was verbal, and the evidence as to what the agreement actually was is extremely conflicting. The court found, and we think the finding was supported by a preponderance of the evidence, that it was agreed that the defendants, appellants here, should transfer by bill of sale to the plaintiffs, respondents here, an apartment house known as the "Metropolitan Hotel," consisting of the furnishings, good will of the business, all advanced rents, the books of the business, a lease of the premises with a written consent from the landlord consenting to the transfer and extending the lease for two years, and reducing the rental from \$450 per month to \$375 per month; that in exchange for these things the plaintiffs were to convey by deed to the defendants the lots and acreage described in the complaint. It is admitted that on May 10, 1910, the respondents delivered a deed of the real estate to the appellants, and the appellant Loretta Smith delivered to the respondents a bill of sale of the furniture and furnishings in the apartment house on its face purporting to be her separate instrument. It was not signed by her husband, nor was he referred to therein. The respondent Blum testified that he accepted this bill of sale upon the assurance of Mrs. Smith and the agents who negotiated the exchange that her husband's signature was not necessary. There was, however, no evidence tending to show that this property was the separate property of Mrs. Smith. She claimed that the failure of her husband to join in the bill

of sale was a mere oversight. Upon receiving the bill of sale, respondents assumed possession of the premises. It appears that on the same day Mr. Blum, Mrs. Smith, and her agent, a Mr. Wilson, called upon West & Wheeler, agents for the owner of the hotel building, and sought to secure their consent to the transfer and an extension of the lease; but these agents refused to accept the respondents as tenants without further investigation. The respondent Blum gave them certain references and went away. A day or two later Mrs. Smith delivered to the respondent Blum the lease with an assignment executed by herself and husband. The lease by its terms could not be assigned without the written consent of the owner of the premises. Mrs. Smith claims that she then suggested that they go again to the property agents and secure their consent to the transfer; that Blum then stated that he could not go at that time, but that he would see to the matter himself; that he said he cared nothing about the lease and expressed dissatisfaction with the number of vacant rooms in the house, but at that time he gave her a written agreement to furnish abstracts of title to the real estate which he had conveyed to the appellants. Mrs. Smith then paid to the respondents about \$32, which she claimed was the amount of advanced rents collected by her. Blum testified that he again called upon the property agents, and they again refused to consent to the transfer of the lease and never at any time recognized him as a tenant. It appears that at about this time the respondents determined to bring suit for a rescission and made no further effort to secure recognition as tenants. The evidence shows that the lease had been formerly assigned by the Smiths to one Jarnigan, but that they still retained possession of it, and, so far as the evidence shows, Jarnigan made no claim upon the property.

Both respondents testified in effect that, during the negotiations leading up to the exchange, Mrs. Smith represented that the rooms of the hotel were nearly all occupied by desirable tenants, and that the business was producing a monthly income of over \$700, and represented the monthly operating expenses at about \$400; that, when she exhibited the rooms for their inspection, all but 13 of the 80 rooms showed evidence of tenancy, such as clothing, valises, and the remains of food and drink upon the tables; that she told them 63 of the rooms were occupied by desirable and good paying tenants and that she was receiving for each of the rented rooms and apartments much more than she was actually receiving; that soon after they took possession the fact developed that only about 25 of the rooms were occupied, and these for the most part by immoral people given to fighting and other disorderly conduct. All of the foregoing testimony of the respondents was vehemently contradicted by Mrs. Smith, who testified to the effect that

respondents were accorded every opportunity to investigate for themselves; that she told them that a great many of the rooms were vacant and that she made no representations as to what the monthly income and expense would be, but did tell them that business was then dull. The agents who negotiated the exchange also testified that they told the respondent Blum that many of the rooms were vacant. On the other hand, the respondents produced a paper showing figures which they claimed were made by Mrs. Smith in demonstrating the income and expenses of the business, which corroborate their testimony as to her representations. Mrs. Smith did not deny that she made the figures, nor did she offer any satisfactory explanation of them. It also developed that the current taxes upon the furniture were unpaid. One Lavenberg testified that the respondent Blum, shortly before this action was commenced, told him that he was going to sue to recover the property conveyed because there had been found trace of coal upon a certain 20-acre tract, and that if he could recover this tract he could make a good sale of it. The testimony of this witness was not convincing, and, in any event, we consider it of little materiality in view of the entire record. It was proven by a number of witnesses that the lots and acreage conveyed to the appellants by the respondents had a value of about \$3,500.

On May 26, 1910, the respondents instituted this action, and, both parties denying ownership, a receiver was appointed by the court to take charge of the furniture, which was finally sold by the receiver under the direction of the court, for \$700, which, with rents collected, remains in the registry of the court subject to the expenses of the receivership.

The foregoing analysis of the evidence makes it plain that the judgment of the trial court should be affirmed.

[1] It is manifest that the agreement of exchange was never performed by the appellants. There was a failure of consideration for the respondents' conveyance of their lots and land. The appellants did not make any effective transfer of the lease nor secure an extension thereof, and the evidence makes it reasonably clear that they could not do so. In fact, Mrs. Smith stated that the appellants did not own the lease, and was finally driven to the position that all they attempted to sell was the furniture, a position contrary to the overwhelming weight of the evidence and utterly inconsistent with her own act in attempting to transfer the lease.

[2] While there was evidence to the effect that Blum said he would attend to the lease himself and cared little for it anyway, that was after he had parted with his deed, and it is apparent, also, that was after he had discovered that the value of the business had been grossly misrepresented. The evidence was not sufficient to estop him from claiming the right to rescind.

[3] There can be little doubt that the appellants represented that they owned the lease, could transfer it, could procure the owner's consent thereto, and could procure an extension. These representations, under the evidence, constituted actionable fraud. *Janowsky v. Slade*, 60 Wash. 591, 111 Pac. 773.

[4] The respondents also had the right to a valid bill of sale. They never received one, and none was ever tendered. In the total absence of evidence that the hotel furniture was the separate property of the wife, there is a presumption that it was community property of herself and her husband. The statute (Rem. & Bal. Code, § 5917) declares: "The husband shall have the management and control of community personal property, with like power of disposition as he has of his separate personal property, except he shall not devise by will more than one-half thereof."

On the record before us, had the bill of sale been executed by the husband and wife, or by the husband alone, it would have been sufficient. Having been executed by the wife alone, it was a nullity. Under the evidence adduced the respondents were entitled to a rescission for failure of performance by the appellants. 17 Cyc. p. 886 et seq.

[5] Moreover, the evidence sustains the court's finding that the appellants were guilty of fraud and deceit. A careful examination of the evidence convinces us that Mrs. Smith represented the monthly income from the business much in excess of the reality. She also represented that the tenants were of a desirable class. The evidence indicates that they were not. These were matters peculiarly within the knowledge of the appellants and unknown to the respondents. The respondents made an inspection of the premises; but neither of these things would be disclosed by an inspection, and there is evidence that vacant rooms were so arranged as to appear tenanted. The respondents had the right to rely upon these representations, especially when active steps were taken to throw them off their guard. That they did so rely can hardly be questioned. *Johnson v. Ryan*, 62 Wash. 60, 112 Pac. 1114; *Woody v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. Rep. 1102; *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55; *Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 Pac. 55; *Simons v. Cissna*, 52 Wash. 115, 100 Pac. 200; *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 85 Pac. 346, 5 L. R. A. (N. S.) 799; *McMillen et al. v. Hillman* (just decided) 118 Pac. 903; 14 A. & E. Encycl. of Law (2d Ed.) p. 123; *Bigelow on Fraud*, p. 524.

The trial court's findings of fraud and failure of performance on the appellants' part were sustained by the more convincing evidence. The court committed no error in en-

tering the decree appealed from. It is affirmed.

DUNBAR, C. J., and CROW, MORRIS, and CHADWICK, JJ., concur.

# MAUK v. LEE et ux.

(Supreme Court of Washington. Dec. 6, 1911.)

## 1. PRINCIPAL AND AGENT (§ 97\*)—AUTHORITY OF AGENT—CONSTRUCTION OF POWER OF ATTORNEY.

A power of attorney which, after appointing the attorney for the transaction of business of a firm to which the principal belonged, and mentioning what business of the firm was to be performed, recited that the appointee was to be the personal representative of the principal in any and all matters with reference to the firm or its business, "or any matters that might arise during my absence demanding my personal attention," construed in connection with the dealing by the plaintiff with the appointee as agent with reference to a contract of sale of land by the principal to plaintiff, except in a single instance when the appointee referred plaintiff to a firm of attorneys, does not limit the agent's authority to matters connected with transactions of the firm referred to, but authorizes him to deal with the personal business of the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 344-376; Dec. Dig. § 97.\*]

## 2. VENDOR AND PURCHASER (§ 116\*)—RESCISSI-ON BY PURCHASER—DEMAND.

A purchaser of land on the day named in the contract for the final payment of the purchase money went to the office of the vendor, and demanded the deed and abstract from the brother of the vendor who had charge of the office during the vendor's absence from the state. The brother denied any knowledge of the transaction, and referred the purchaser to a firm of attorneys. The only member of the firm of attorneys present in their office stated to the purchaser that he had no knowledge of the transaction, and told him that he would see his partner about the matter. On the next day the purchaser returned to the office of the brother, and again demanded the deed and abstract, and made a tender of the balance due on the purchase price, the brother still insisting that he had no knowledge of the transaction, and the demand and tender being refused the purchaser declared his intention to rescind. *Held*, that the rescission was effective, though the purchaser did not go to the office of the attorneys a second time.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 205-208; Dec. Dig. § 116.\*]

## 3. VENDOR AND PURCHASER (§ 140\*)—PER-FORMANCE OF CONTRACT—FURNISHING AB-STRACT OF TITLE.

A contract of sale of real property providing that an abstract of title shall be furnished and a deed given at a certain date, and that time is of the essence of the contract, requires the abstract of title at least to accompany the deed on that date; the exercise of all possible diligence after demand therefor on that date not being sufficient.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 262-264; Dec. Dig. § 140.\*]

## 4. VENDOR AND PURCHASER (§ 214\*)—ASSIGN-MENT OF CONTRACT—RIGHT TO RESCIND.

The failure of the assignee of a contract for the purchase of land to record the assign-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment does not affect his right to rescind the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 442-443; Dec. Dig. § 214.\*]

**5. VENDOR AND PURCHASER (§ 116\*)—RESCISSION OF CONTRACT—RIGHT TO RESCIND.**

The failure of the purchaser of land to tender a quitclaim deed at the time of an attempted rescission of the contract did not affect the validity of the rescission.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 205-208; Dec. Dig. § 116.\*]

Department 2. Appeal from Superior Court, Whatcom County; Ed. E. Hardin, Judge.

Action by Edwin T. Mauk against P. P. Lee and wife. From a judgment for defendants, plaintiff appeals. Reversed, with instructions.

Solon T. Williams and William H. Heaton, for appellant. C. A. Schwartz and Hans Bugge, for respondents.

**DUNBAR, C. J.** This is an action brought by the appellant, Edwin T. Mauk, against P. P. Lee and wife, respondents, for the purpose of recovering the sum of \$800 and interest, paid as part payment on the purchase of certain lots in the city of Bellingham, and is based on an alleged rescission of the contract of purchase. The respondents denied both the fact of the alleged rescission and the appellant's right to rescind, and asked for judgment in accordance with the written contract. The appellant demanded a jury, which was denied by the court, and the cause was tried to the court, resulting in findings, conclusions, and decree in favor of the respondents, the defendants below. The contract was entered into between P. P. Lee and wife and one Hilda Hansen, whereby respondents agreed to sell to said Hilda Hansen or her assigns, and said Hilda Hansen agreed to buy, certain real estate located in the city of Bellingham for the sum of \$3,800. Under this contract, Hilda Hansen paid to the defendants at the time of its execution the sum of \$800, and agreed to pay the balance on the 10th day of August, 1910, and the respondents agreed to deliver to said Hilda Hansen on said day a warranty deed to said land, with an abstract showing good title in respondents, and time was specifically made of the essence of the contract. A few days after the execution of the contract, it was assigned by Hilda Hansen to the plaintiff in this action, the appellant here, who ever since has been and now is the holder of the same. Shortly after entering into the contract, the respondents left for an extended trip through Europe, leaving their business in charge of one C. P. Lee, a brother of respondent P. P. Lee. On the 10th day of August, 1910, appellant, accompanied by his attorney, W.

H. Heaton, went to the office of the respondent P. P. Lee, made inquiries concerning the deed which he was to receive and an abstract of title to said land, and was referred to C. P. Lee as the agent for said P. P. Lee. He saw C. P. Lee, and made a demand for the deed and abstract. He was informed by Mr. Lee that the papers were at the office of Messrs. Bugge & Schwartz, who were attorneys for P. P. Lee. He and his attorney accompanied Mr. Lee to the office of Bugge & Schwartz, where the appellant again demanded the deed and the abstract, and, according to his testimony, tendered the purchase price. The tendering of the purchase price is denied by the respondents, but it is admitted that he demanded the deed and abstract, and we think it is not too much to say that, under all the testimony, it was understood that he was ready to pay the amount due on the contract. He was there told by one of the firm of lawyers—Mr. Schwartz—that he knew nothing about the abstract; that he would try to get into communication with his partner Mr. Bugge, and ascertain its whereabouts, and, if it had not been made, he would immediately order the abstract made. The appellant was then prevailed upon to wait until the following morning to see if the abstract could be obtained, but it was distinctly understood, and this is admitted, that there was no advantage to be obtained by delay. The next morning he called at the office of Mr. C. P. Lee, and again demanded the deed and abstract, and made a tender of the money due. Mr. Lee informed him that he knew nothing more about the matter than he did the day before, and asked him to go down to the office of Bugge & Schwartz again with him, which the appellant declined to do. Appellant then made tender of the money, and, upon the deed and abstract not being forthcoming, elected to rescind the contract, and notified Mr. Lee that he would and had rescinded it, and demanded the money paid on the contract; and in due time this action was brought for the recovery of the amount paid, with interest on the same.

We are not able to reach the same conclusion that the trial judge did as to the equities of this case. There is unfortunately a very sharp conflict in the testimony; but we think that there is sufficient uncontradicted testimony to establish the right of the appellant to a rescission of the contract and the recovery of the money claimed. The court found the facts practically as we have set them forth in the statement, but found that the office of Bugge & Schwartz was the proper place in which to transact business, and that plaintiff had notice of that fact. It also found that at the time of the attempted rescission by plaintiff he did not in any manner tender to defendants any reconveyance of said premises to place them in statu

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

quo; that it was the duty of the plaintiff, and a condition precedent to rescission, to, at his own expense, record the assignment to him from Hilda Hansen, and to execute and record, or offer to record, his own reconveyance to defendants; that the plaintiff did not record said assignment until after he had received written notice from defendants that they were ready and willing to perform as to all matters about which the plaintiff complained; that no reconveyance was offered, nor any notice of such offer or tender given defendants or their attorneys until after the trial of the cause; and that the quitclaim tendered at the trial was not executed until after the commencement of the action. The court further found that the defendants procured such abstract of title with all possible diligence after demand therefor on the 10th day of August, 1910, and that plaintiff received notice in writing of defendants' readiness and ability to perform according to the tenor of such written contract prior to the time plaintiff caused his assignment from Hilda Hansen to be recorded, prior to any tender or offer of reconveyance to remove the cloud from defendants' title, and prior to his having placed the defendants in default under said contract.

[1] The court concluded that the defendants were entitled to recover their costs and disbursements, found that C. P. Lee prior to the defendants' departure for Europe was given a power of attorney in writing to act for P. P. Lee, but that such power related only to transactions of the firm of P. P. Lee & Co., and did not include authority to act with reference to the transactions involved in this case, except to deliver the papers to Bugge & Schwartz, who were said defendants' agents for such purpose. This finding of the court, which is an important finding, we think is not sustained by the record; at least, not by the construction that we place upon the power of attorney which is an exhibit in the case, and on letters written by the respondent P. P. Lee which we will notice hereafter. The power of attorney is too long to be set out in detail, but, after appointing C. P. Lee attorney for the transaction of business of the firm to which P. P. Lee belonged, and mentioning what business of the firm was to be performed, the instrument continues, "to be my personal representative in any and all matters or transactions with reference to said firm or said business, or any other matters that may arise during my absence demanding my personal attention," with limitations prescribed, expressly negating the idea that the appointment was made and authority conferred with reference only to the firm business, and showing conclusively that the said C. P. Lee was authorized to transact other business than the firm business. That that was the construction placed upon this power of attorney by the parties themselves is shown by the cor-

respondence between them. C. P. Lee testifies that he had frequent conversations with Mr. Mauk, the appellant, concerning this business; that at one time Mauk asked him to write to his brother, and ask him if he could get an extension of time, stating that he, Mauk, would pay for the cablegram if his brother would answer immediately. In none of these prior conversations was Mr. Mauk referred to the firm of Bugge & Schwartz, but it seemed to be a mutual understanding that C. P. Lee was the authorized agent as far as this land business was concerned. Mr. Lee did write to his brother, as he says, in accordance with the request of Mauk, but, meeting Mauk a few days afterwards, he informed him that, while the brother had not answered his communication in respect to the application for time because not sufficient time had elapsed, yet he was satisfied from what his brother had written to him concerning other matters and concerning the expenditure of his money that he would not grant the extension, and wanted the money promptly paid. This is denied by the appellant, Mauk, but, conceding it to be true, it is difficult to see in what way it would reflect on Mauk's interest in this matter. It would rather tend to the view that, after Mauk had been informed that he could not get the extension, he set himself to work to raise the money to meet the requirements of the contract. However, in a letter from Norway, dated July 27, 1910, written by the respondent to his brother C. P. Lee, in referring to this transaction, he said, "You must get the \$3,000 from Mauk, and then I want you to take \$3,000 more to pay the smallest one," referring to some notes he owed. Again, he said: "If Mauk has not paid the contract, I want same advertised and foreclosed at once." And there were other excerpts from letters bearing on this question tending to show conclusively that C. P. Lee, and not the attorneys Bugge & Schwartz, was the agent of P. P. Lee in relation to this matter, and that Bugge & Schwartz were employed only to do the legal part of the business, viz., to prepare the deed, and see that the papers were properly executed.

[2] There was a great deal of immaterial testimony in the case, which provoked some heated discussion between the parties, as to whether or not tender was made at the time of the meeting in the office of Bugge & Schwartz, or whether tender of the money to C. P. Lee was made at the first call at the office of the respondent. But, whatever may be said of those contentions, it is undisputed that a tender was made to C. P. Lee at his office on the 11th day of August, and a demand made for the deed and abstract. It was the duty of the respondent P. P. Lee, when he left the country leaving behind him an obligation of this kind, to appoint an agent and to notify the other party to the obligation who the agent was, so that he

could pay the money according to the contract. The appellant went where he naturally would be expected to go—to the office of the respondent, and made his demand on the agent, as we understand the record; and he was under no obligations to go a second time to the office of the attorneys, or to wait any longer for the abstract of title.

[3] The contract provides that an abstract of title shall be furnished, and, of course, the contract must be construed to mean that the abstract of title would accompany the deed, or that it should be furnished before the time expired for a forfeiture of the contract, so that it could be examined. The court finds that the defendants procured such abstract of title with all possible diligence after demand therefor on the 10th day of August, 1910, but the abstract should have been ready to accompany the deed which it was the duty of the respondents to make or to deliver at that time. It will not avail parties who enter into such contracts as this to allow the time to expire, and then excuse themselves by saying that they would thereafter do with all possible diligence what should have been done at that time. If the appellant had failed to make the payment when it was due by the terms of this contract or for four days after that date, there can be no doubt that the payment made could have been forfeited at the option of the respondents; and if the land, instead of declining, had sharply enhanced in value, there is little doubt that such election would have been made. The terms of the contract were definite and time was expressly made the essence of the contract. Under the contract, it was plainly the duty of each party to comply with its terms, and a failure to do so on the part of either, whether purposely or by neglect or misfortune, conferred the right of rescission on the other. The object of entering into the contract was to definitely determine and fix the rights of the parties to it. There is no contention in this case that the abstract would have been ready even if the appellant had gone again to the office of attorneys Bugge & Schwartz. In fact, it appears that it was not ready, and the first showing of respondents being ready to deliver it was a letter written by Bugge & Schwartz to appellant on the 14th day of August, four days after the demand was made, that the abstract had been completed, and that the respondents were ready to carry out the terms of the agreement. Mr. Bugge candidly admitted that the abstract had not been prepared on time through a misunderstanding between him and C. P. Lee.

[4] The other matters, in relation to the recording of the assignment and the tender of the quitclaim deed, are not controlling. It is true the assignment was not recorded before the demand was made, but the re-

spondents and their agent had actual notice of the assignment. They knew that Mauk was the owner of this contract, as shown by the testimony of the agent and the correspondence of the respondent P. P. Lee himself.

[5] The tender of the quitclaim deed was a matter which really did not reach the merits of the case, and it was not upon this issue that the defense to the action was based. This was a matter which the court, if he deemed it necessary, would order to be attended to at any time in the trial of the cause before judgment issued in favor of the appellant.

The case was tried and contested upon the theory that the appellant had not made his demand for the deed and the abstract, and had not made a tender to the agent of the respondents, and upon the further theory that the abstract was really furnished within a reasonable time.

Having found against the respondents upon these controlling propositions, we are compelled to reverse the order of the lower court, who is instructed to enter a judgment for the plaintiff for the relief demanded.

ELLIS, CROW, and MORRIS, JJ., concur.

#### KRUTZ v. DODGE et al.

(Supreme Court of Washington. Dec. 6, 1911.)

RECORDS (§ 9\*)—REGISTRATION OF TITLE TO LAND—JURISDICTION—DISMISSAL—"TERMS." Rem. & Bal. Code, §§ 8909, 8813, 8823, 8834, authorizing the registration of land title on application to the superior court, and providing that the court finding that the applicant has not proper title shall dismiss the application, and declaring that the applicant may dismiss his application at any time before final decree on terms, limits the jurisdiction of the superior court and reserves to an applicant the absolute right to dismissal on terms before final decree, and an applicant may complain of the denial of absolute dismissal, though not prejudiced thereby; the word "terms" meaning such penalty as the court may impose, so as to save the opposing party harmless from loss, and which can be satisfied by the payment of a fixed sum of money.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 9.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6922, 6923.]

Department 2. Appeal from Superior Court, King County; A. W. Frater, Judge.

Proceedings by Harry Krutz against F. L. Dodge and another to register his title under the Torrens law, in which J. J. Humphrey and others intervene. From a conditional order of dismissal, plaintiff appeals. Reversed and remanded.

Frank C. Park and H. D. Moore, for appellant. John S. Jurey and Peterson & Macbride, for respondents.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



CHADWICK, J. Plaintiff instituted a proceeding to register his title to certain property under the Torrens law (Rem. & Bal. Code, §§ 8806-8906). Defendants Humphrey and wife and Anna F. Doran intervened, claiming that a certain strip of ground, 10 feet wide, and a part of the land declared by plaintiff to be his own, had become by common user and implied dedication a public thoroughfare, and that the remainder of the block, in which the property of all the parties hereto except the city of Seattle was situate, had been conveyed by the common grantor with reference to the 10-foot strip, which he had intended to be an alley; and they made prayer accordingly. The defendant city answered, setting up certain local assessments upon the land in controversy, and asking that they be declared liens upon it. Issue being joined and trial had, the case was taken under advisement, and, the trial judge having intimated that he would find for the interveners, plaintiff moved a dismissal of this proceeding, which was granted. Thereafter interveners moved a vacation of the order of dismissal, upon the ground that no notice had been given of the previous order. Thereafter plaintiff moved that the court make an order, registering his title to all the land described. This motion was denied; whereupon plaintiff moved for a dismissal of his proceeding without prejudice, and with costs to the interveners. This being denied, the court, upon interveners' motion, dismissed the proceeding, finding, however, that the 10-foot strip was in fact an alley, and as to it the order of dismissal was with prejudice. From this order an appeal is prosecuted.

Whether appellant was entitled to have his title registered we will not now inquire, as an order denying his application was not appealed from, but was followed by a motion to dismiss generally. Appellant has thus fixed his status, and the only question left open is whether the court could qualify its judgment of dismissal by barring a further proceeding at law or in equity as to the 10-foot strip. The Torrens act makes provision for a special proceeding, and, while there can be no doubt of the position taken by respondents that the superior court is one of general jurisdiction, and that its judgments, duly rendered upon matters properly before it, are conclusive, it does not follow, as is contended by them, that the court is given full power and jurisdiction to hear and determine all matters which may arise upon an application for registry of land titles under the Torrens law. It is true, as stated, that the act provides (Rem. & Bal. Code, § 8813) that the application shall be made to the superior court of the state of Washington. But the court is not thus given power to go beyond the terms or necessary intendments of the act it is called upon to administer. In a special proceeding, it being within the power of the Legisla-

ture to limit the jurisdiction of the court, the bounds of the court's jurisdiction are to be found in the limitations of the act under which its jurisdiction is invoked. The Legislature might have provided for a determination of conflicting interests if it had been so inclined. But it did not do so. On the contrary, after providing an elaborate procedure, it is provided: "If, in any case, after hearing, the court finds that the applicant has not title proper for registration, a decree shall be entered dismissing the application, and such decree may be ordered to be without prejudice. The applicant may dismiss his application at any time, before the final decree, upon such terms as may be fixed by the court, and upon motion to dismiss duly made by the court." Rem. & Bal. Code, § 8834. It would seem that this statute needs no construction. It says that the court shall, if for any reason the title is not a proper one for registration, dismiss the proceeding; and also gives an absolute right to the appellant to dismiss upon terms. What may be a title proper for certification is made plain by reference to sections 8809 and 8823, Rem. & Bal. Code, both of which tend to show that it was the intent of the act to provide for the registration of only such titles as were found to be in the applicant, with such liens or outstanding interests as he was willing to admit; and if there was a hostile or conflicting interest the title would not be certified forthwith, although the appellant could proceed at his peril, and upon the hearing show that the apparently adverse interests were not in fact real; or he might take his discharge and clear his title in an independent action. It is clear that the Legislature did not intend that existing remedies at law and equity should be superseded. Otherwise the section quoted or referred to and a provision for discharge are but idle formulæ.

Under a statute identical in terms, the Supreme Court of Colorado held that no affirmative relief would be granted to a defendant in a proceeding under the Torrens act: "The further contention is that the act is not due process of law, in that it fails to provide for an affirmative judgment in favor of a defendant, the only decree permissible being one of dismissal in case the court, after hearing, finds that the applicant has not title proper for registration. The act does accord to all persons equal rights and privileges. Any one desiring to avail himself of its terms can do so by filing his application, and can obtain the registration of his title by complying with the requirements of the statute. Although the Legislature has seen fit to allow affirmative relief only to the applicant who initiates the proceeding, this does not render the proceeding objectionable for the reason assigned. The right to a particular remedy is not a vested right. Every state has complete control over the remedies which it offers to suitors in its

courts. *Cooley's Const. Lim.* 515." *People ex rel. Smith v. Crissman*, 41 Colo. 450, 92 Pac. 949.

So, in *McQuesten v. Attorney General*, 198 Mass. 172, 83 N. E. 1087, it was held: "It is plain that in this enactment [Id. § 8834, Rem. & Bal. Code] the Legislature did not adopt or intend to adopt either the rule of the common law, or that which obtains in equity. \* \* \* The view taken of an application for registration and confirmation of title \* \* \* which led to an absolute right of withdrawal before final decree \* \* \* appears to be this: Such an application is not, primarily at any rate, the beginning of a controversy between party and party. If such an application is filed, a controversy may and in many cases will result. But the primary object of such an application is to get a certificate of title to the petitioner's land which has the attributes in substance, for practical purposes, of a certificate of title to a share in the capital stock of a corporation. And, treating the application as an application to bring the locus within the new system, if, at any time before the land has been brought within the operation of it, the petitioner changes his mind, and on the whole concludes that he prefers to leave his title as it was before the Torrens system was adopted, he shall be at liberty to do so." See, also, *Foss v. Atkins*, 201 Mass. 158, 87 N. E. 189; *Id.*, 204 Mass. 337, 90 N. E. 578.

But it is said that under the Massachusetts law the title is not determined by a court of general jurisdiction, but by a land board, exercising no juridical functions. This may be admitted, but it does not destroy the reasoning upon which the decisions are made to rest; that is, that the procedure is a voluntary one, and its limitations, as well as the power of the tribunal administering it, are to be found in the act itself, and not by reference to the general rules of law. Nor can we agree with the contention that the provision of the law providing for a dismissal without prejudice implies that it may be with prejudice, when a motion for voluntary dismissal is made, nor that the right to impose terms implies a right to fix a condition. By the last clause of the statute (section 8834), the absolute right of dismissal is reserved to the applicant. Had it been the intent of the lawmakers to provide for a voluntary dismissal, with or without prejudice, we may assume that, having used the word with reference to dismissal by the court, the Legislature would have done likewise when providing for a dismissal on motion of the party. It did not do so, but used the word "terms." This word has a meaning which is generally accepted, when used in connection with judgments and judicial proceedings. It is that the court may impose such penalty as will save the opposing party

harmless from pecuniary loss, and which can be satisfied by the payment of a fixed sum of money.

Finally, it is contended that no prejudice has resulted to appellant, because the decree as entered does not deny appellant's title in the alley. This may be technically true, but appellant is entitled to an order of dismissal under the statute, and is not to be compelled to take a measure of relief less than it affords, which is a dismissal as to all the land described. It is not merely a question of dismissal, but a question of power in the court. There is more or less difference in the Torrens acts as adopted in the several states. Where, as in Illinois, no provision is made for a voluntary dismissal, but the court is put to a final determination of the issue, it has been held that the court may grant relief as to such portion of land as the evidence shows the title in fee to be in the applicant, and deny it as to the remainder. *Glos v. Holberg*, 220 Ill. 167, 77 N. E. 80. But our law was drawn upon a different theory.

For these reasons, the judgment of the lower court is reversed, and the cause remanded, with instructions to enter an order of dismissal.

DUNBAR, C. J., and ELLIS, CROW, and MORRIS, JJ., concur.

#### SAKAI v. KEELBY.

(Supreme Court of Washington. Dec. 6, 1911.)

##### 1. JUDGMENT (§ 158\*)—DEFAULT JUDGMENT—SETTING ASIDE—NECESSITY FOR AFFIDAVIT OF MERITS.

A motion to vacate a judgment, void for want of jurisdiction over the person, need not be supported by an affidavit of merits.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 311; Dec. Dig. § 158.\*]

##### 2. APPEAL AND ERROR (§ 554\*)—RECORD—SCOPE AND CONTENTS—AFFIDAVITS.

On appeal from an order denying a motion to open a default judgment, where there is no statement of facts settled or certified by the trial court, though it appears affirmatively that the trial judge heard and considered the evidence of the respective parties, the appeal will be dismissed, though the appellant's affidavit of merits is attached to his motion to open the judgment, and is referred to in the motion and made a part thereof, where there is at least one counter affidavit which is not made a part of the record.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2472-2479; Dec. Dig. § 554.\*]

##### 3. APPEAL AND ERROR (§ 635\*)—RECORD—SCOPE AND CONTENTS—AFFIDAVITS.

Where a motion to open a default judgment was denied for want of an affidavit of merits, with leave to file another motion, together with affidavit of merits, that the judge, on the second motion accompanied by the affidavit of merits, after reciting that the cause was tried and the evidence heard, ordered that the motion be denied for the reason that the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

matters therein had been theretofore adjudicated, does not prevent the dismissal of an appeal from the order, where the affidavits were not properly brought into the record.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 635.\*]

Department 2. Appeal from Superior Court, King County; Ben Sheeks, Judge.

Action by G. Y. Sakai against H. G. Keeley. From an order denying a motion to set aside a default judgment for plaintiff, defendant appeals. Appeal dismissed.

H. L. Smith and R. B. Brown, for appellant. Hamlin & Meier, for respondent.

CHADWICK, J. A default judgment was entered against the defendant, H. G. Keeley, on the 26th day of February, 1910. This came to his notice on July 25, 1910. On December 10, 1910, defendant appeared specially, and moved that the order of default be set aside, and that the judgment be vacated, because entered without service of process, and therefore lacking in the element of jurisdiction over the person of the defendant. The facts showing a want of personal service were set forth in an affidavit accompanying the motion. The matter came on for hearing before Hon. Mitchell Gilliam, who denied the motion, upon the ground that it was not accompanied by an affidavit of merits, but gave leave to file another motion and an affidavit setting forth the merits of defendant's case.

[1] The ruling that a motion going to the vacation of a judgment, void for the want of jurisdiction over the person, should be supported by an affidavit of merits, is contrary to the settled practice in this state. *Lushington v. Seattle Auto & Driving Club*, 60 Wash. 546, 111 Pac. 785; *Wheeler v. Moore*, 10 Wash. 309, 38 Pac. 1053; *Hole v. Page*, 20 Wash. 208, 54 Pac. 1123. But the error is not now material. Thereafter defendant filed another motion, and supported it by a like affidavit, showing a lack of service and a show of merit. Because of the congested state of the docket this motion was heard by Hon. Ben Sheeks, a visiting judge, who denied the motion and entered an order, the material parts of which follow: " \* \* \* Said cause was tried and heard upon the motion of the defendant, H. G. Keeley, filed in this court on the 31st day of December, 1910, and the evidence of the respective parties being adduced and heard, and the court being fully advised in the premises, it is hereby ordered that said motion be and the same is denied, for the reason that the matters therein have been heretofore adjudicated against defendant, H. G. Keeley. To which said order defendant Keeley, excepted, and exceptions allowed."

[2] Defendant brings his case here upon the motions and affidavits mentioned. His affidavits are met by a motion to dismiss

his appeal, upon the ground and for the reason that there is no statement of facts settled or certified by the court, whereas it appears affirmatively that the trial judge heard and considered "the evidence of the respective parties, \* \* \* and the court being fully advised in the premises." It is the contention of the appellant that, inasmuch as the affidavit of merits is attached to his motion, referred to and thus made a part thereof, it becomes a part of the record, within the rule announced in *State v. Vance*, 29 Wash. 435, 70 Pac. 34, and *Chevalier v. Wilson*, 30 Wash. 227, 70 Pac. 487. The *Vance* Case announced the doctrine that, notwithstanding the court had held that evidence in the form of affidavits must be brought to this court in the form of a statement of facts or a bill of exceptions, an affidavit attached to and made a part of the motion by reference would, when included in the transcript, be considered as evidence without being so certified by the court. While the reasoning of the court in that case is, in the judgment of the writer and other members of the court as now constituted, without foundation, the case has since been followed by reference in the case of *Chevalier v. Wilson*, supra, *Richardson v. Richardson*, 43 Wash. 634, 86 Pac. 1069, and in the more recent case of *Spoar v. Spokane Turn-Verein*, 116 Pac. 627; and it being a question of practice, rather than of principle, the court is not disposed to overrule it.

But, taking that case and the cases depending upon it at their full worth, they do not, in the light of the record, bring aid and comfort to the appellant. The transcript shows that there was at least one affidavit—a counter affidavit—which must have been considered by the court at the time of the last hearing, and was no doubt a part of "the evidence of the respective parties." This affidavit and other evidence, if any, is not properly before us, and, not having a complete record, the case falls within the long line of cases, some of which are cited in the case just referred to. In the *Spoar* Case the court limited the rule of the *Vance* Case to the "attached" affidavit, saying that: "It is patent, from the recital in the order, that the respondent presented to the court more than one affidavit, and that the court reached its conclusion from reading all the affidavits offered by the parties. \* \* \* The rule there announced [in the *Vance* Case] applies to the affidavit referred to in the case at bar, but has no application to the other affidavits." To the authorities cited in these cases the following may be added: *State v. Lee Wing*, 53 Wash. 294, 101 Pac. 873, where the disposition of the court to limit rather than extend the doctrine of the *Vance* Case is clearly intimated. See, also, *Gray v. Granger*, 48 Wash. 442, 93 Pac. 912.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[3] Nor do we think we should be bound by the expression in the judgment to the effect that the motion was denied, for the reason that the matters therein suggested had been theretofore adjudicated against defendant. It may be admitted that the court overruled the motion for that reason improperly, but it does not follow that in the evidence of the respective parties a sufficient reason to sustain the judgment would not be found, if the evidence were properly before us.

Motion to dismiss allowed.

ELLIS, CROW, and MORRIS, JJ., concur.  
DUNBAR, C. J., concurs in the result.

### EDMONDS LAND CO. v. CITY OF EDMONDS.

(Supreme Court of Washington. Dec. 8, 1911.)

#### 1. MUNICIPAL CORPORATIONS (§ 433\*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—PROPERTY BEYOND MUNICIPAL BOUNDARIES.

A municipality has no power to levy an assessment on property located outside its boundaries for the construction of a sea gate, under the diking act of 1907 (Rem. & Bal. Code, §§ 7955-7964), though such property is directly benefited.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1044; Dec. Dig. § 433.\*]

#### 2. MUNICIPAL CORPORATIONS (§§ 488, 489\*)—PUBLIC IMPROVEMENTS—ASSESSMENT—ESTOPPEL—PETITION FOR IMPROVEMENT.

Where a trustee, holding title to land situated outside the boundaries of a municipality, signed a petition for the construction of a sea gate as a municipal improvement, the legal owner was not estopped to question the validity of a municipal assessment for benefits, on the ground of the location of the property, since the petition could not extend the assessing power of the municipality to lands beyond its boundaries.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.\*]

Department 2. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by the Edmonds Land Company against the City of Edmonds. Judgment for plaintiff, and defendant appeals. Affirmed.

S. J. White, for appellant. Preston & Thorgrimson, for respondent.

MORRIS, J. [1] The city of Edmonds appeals from the decree of the lower court, canceling certain assessments levied upon property of respondent situate outside of the municipal boundaries, to pay for the cost of building a sea gate constructed under the diking act of 1907, as found in Rem. & Bal. Code, §§ 7955 to 7964. In the proceeding before the court below, other questions were presented upon which it was sought to set aside the assessment. The

court, however, not passing upon the other questions submitted, held that the land, being outside the city, could not be assessed for an improvement undertaken as a municipal improvement. This conceded fact seems to us so conclusive as establishing the correctness of the decree that none other need be discussed. The city of Edmonds has no extraterritorial jurisdiction. It cannot levy an assessment upon lands beyond its limits to pay for an improvement undertaken as a municipal improvement, even though it should be confessed that such outside lands were directly benefited. The power to levy an assessment upon lands benefited must be held to be a power to be exercised upon lands that are subject to municipal control. If it is sought to exercise purely municipal powers outside of its own limits, such authority must be derived from some proper authority clearly conferring it. No such authority has been called to our attention, and we know of none under which this assessment can be sustained. *Farwell v. Seattle*, 43 Wash. 141, 86 Pac. 217; *Farlin v. Hill*, 27 Mont. 27, 69 Pac. 237; *Durrell v. Dooner*, 119 Cal. 411, 51 Pac. 628; *Gilchrist Appeal*, 109 Pac. 600; *In re Flatbush*, 60 N. Y. 398; *Devo v. Newburgh*, 138 App. Div. 465, 122 N. Y. Supp. 835; 28 Cyc. 1128.

[2] It is contended by appellant that respondent is estopped from avoiding its assessment because F. R. Atkins, in whom the title to the land then rested as trustee for the owners, signed the petition asking for the improvement. The city could not acquire jurisdiction over these outside lands by estoppel. The petition could be nothing more than a request to the city that it proceed within the powers conferred upon it by law in making this improvement. It could not act as authority to the city to proceed beyond and outside of any legal authority. And when the city departed from the exercise of its legal powers, it could not justify its departure upon the authority of any petition requesting it to do so. *Howell v. Tacoma*, 3 Wash. 711, 29 Pac. 447, 28 Am. St. Rep. 83; *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106; *Strout v. Portland*, 26 Or. 294, 38 Pac. 126; *McLauren v. Grand Forks*, 6 Dak. 397, 43 N. W. 710; *Wakeley v. Omaha*, 58 Neb. 245, 78 N. W. 511; *Batty v. Hastings*, 63 Neb. 26, 88 N. W. 139; *Grant v. Bartholomew*, 58 Neb. 839, 80 N. W. 45; *Dallas v. Ellison*, 10 Tex. Civ. App. 28, 30 S. W. 1128.

We have examined the cases cited by appellant, and do not find that they sustain any contrary rule. *Aberdeen v. Lucas*, 37 Wash. 190, 79 Pac. 632, upon which strong reliance is placed, holds that one who petitions for a local improvement cannot question the validity of the assessment, unless the city had no jurisdiction or so far departed from established methods as to lose

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

jurisdiction. It will be noted that the invalidity of the assessment in question, in so far as it touches respondent's lands, is because of a lack of jurisdiction in the city, and hence within the exception in the Aberdeen Case. Neither is *Travis v. Ward*, 2 Wash. 30, 25 Pac. 908, authoritative here. There, at the request of certain petitioners, county commissioners entered into a contract for the building of a road, and issued warrants in excess of the assessed valuation. It appeared that this was done in good faith at the request of petitioners, who, with full knowledge of the contract and all work done thereunder, permitted the work to proceed to completion and the warrants to issue. It was held that, having induced the commissioners to act and permitted the work to proceed without objection, they could not take advantage of their own wrong and enjoin the payment of the warrants. There could be no question in that case that the building of the road and the issuance of the warrants would subject the petitioners' property to the payment of the warrants, the property being within the district to be assessed. Here, however, the property is not within the district to be assessed. There the petitioners stood idly by and permitted the work to be done and the warrants to issue upon the faith and credit of their property. They not only made no objection, but by their every act acquiesced in the proceedings. Here respondent makes its objection to the city council as soon as it appears that it is the intention of that body to assess lands outside of the corporate limits. In the one case, petitioners not having spoken when they should, equity will close their mouths when they seek to take advantage of their own wrong. In the present case, respondent spoke at its first opportunity, and must be accorded its full legal rights.

Other cases cited by appellant are where a plea of *ultra vires* has been held unavailing because of performance. We cannot see how this principle is involved in the case at bar. Neither do we think there is anything in *Barlow v. Tacoma*, 12 Wash. 32, 40 Pac. 382, *Wingate v. Tacoma*, 13 Wash. 603, 43 Pac. 874, and *Tacoma Land Co. v. Tacoma*, 15 Wash. 133, 45 Pac. 733, that militates against the rule here announced. Each of those cases predicates an estoppel upon an equitable acquiescence in the proceedings complained of. In other words, one cannot complain of his own wrong, nor escape the effect of the cause he initiates. No such rule could extend the assessable power of a city to lands beyond its boundaries, which is the point we are here dealing with.

The judgment is therefore affirmed.

**DUNBAR, C. J.**, and **ELLIS, CROW**, and **CHADWICK, JJ.**, concur.

# **FRENGEN v. STONE & WEBSTER ENGINEERING CORPORATION.**

(Supreme Court of Washington. Dec. 8, 1911.)

## **1. MASTER AND SERVANT (§ 190\*)—FELLOW SERVANTS—VICE PRINCIPAL—PLACE FOR WORK.**

Where the safety of the place where a servant is at work is under the control of a master, and the servant depends upon signals given by others, any one to whom the master intrusts the duty of warning as to any movement of machinery increasing the danger of such place is a vice principal for whose negligence the master is liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 471; Dec. Dig. § 190.\*]

## **2. MASTER AND SERVANT (§ 196\*)—"FELLOW SERVANTS"—NATURE OF WORK.**

Plaintiff and a fellow workman were on the roof of a building taking care of timber as it was hoisted by a derrick, and when the timber reached the roof the foreman on the floor below would depend upon the men above for signals as to its further movement, and generally such signals were given by plaintiff's fellow workman, and after a heavy timber had been hoisted to the roof, while plaintiff had hold of the cable, the foreman, after asking if everything was all right, was told by plaintiff's fellow workman, "All ready, go ahead," and directed the starting of the cable without warning to plaintiff, whose hand was caught by the pulley and injured. *Held*, that plaintiff and the workman who gave the signal to start were "fellow servants."

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 486-488; Dec. Dig. § 196.\*]

## **3. MASTER AND SERVANT (§ 189\*)—FELLOW SERVANTS—VICE PRINCIPAL—NATURE OF WORK.**

Where employees are engaged in assisting one another in a common task, the fact that one takes the lead in directing the work because of age, experience, or common consent, does not change the relation of fellow servants and make the one so directing a vice principal.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 189.\*]

**Dunbar, C. J.**, dissenting.

Department 2. Appeal from Superior Court, King County; **J. T. Ronald**, Judge.

Action by **Anton Frengen** against the **Stone & Webster Engineering Corporation**. Judgment for plaintiff, and defendant appeals. Reversed.

**Farrell, Kane & Stratton**, for appellant. **Vince H. Faben** and **Henry Gulliksen**, for respondent.

**MORRIS, J.** Respondent was a common laborer in the employ of appellant in the construction of a six-story building at Seattle. On March 5, 1910, he was injured by having the fingers of his right hand caught in a pulley, which was part of an apparatus for hoisting large timbers to the upper floors. There was no permanent injury, except the loss of the first joint of the second finger. Respondent had been engaged in this work about two weeks, and on the day of the injury he and a fellow workman named **Boyle** were up on the roof to which the tim-

bers were on that day being hoisted. The method employed was to fasten a sling around the timber, to which was attached a hook at the end of a cable. The cable was operated by a derrick, the movements of which were controlled by an electric motor. The cable was connected with pulleys to control its rise and fall. After being placed in the sling and the hook and cable attached, ropes were placed around each end of the timber with a man at each rope to control its swing. It would then be hoisted to the roof, where it would be taken care of by respondent and Boyle, and placed where desired. When the timber reached the roof, where it could be handled by appellant and Boyle, and any direction was to be given as to the further movement of the derrick, the foreman, who was on the floor below, would depend upon the men above to give him a signal, which was generally, if not always, given by Boyle. The foreman would then signal the man in charge of the motor, and the derrick and cable would be moved accordingly. At the time of the injury, a large timber, weighing about 1,400 pounds, and intended for the top of the elevator shaft, had been hoisted up to the roof. Some lumber piled on the roof along the edge of the hoistway interfered with landing the timber on the roof, and the hoist was stopped and the lumber removed. At this point comes the only discrepancy in the testimony. Respondent and one of his witnesses testify that respondent was then directed by the foreman to grab the cable and pull in the timber. At that time there were only from six to ten inches of the cable between the end of the derrick and the pulley which respondent caught hold of, and while he had such a hold the foreman, suddenly and without warning, directed the starting of the motor, moving the cable and drawing respondent's fingers into the pulley. The foreman, and Boyle, who was working alongside of respondent, deny any such order was given to respondent. They testify that, without direction from any one, he grabbed hold of the cable just as the foreman gave the signal to the motor-man. The verdict would establish the theory of respondent as the fact in the case. It is, however, undisputed in the testimony that, before the foreman directed the starting of the motor, he inquired of the men on the roof if everything was all right, to which Boyle responded, "All ready; go ahead." Assuming, then, that, as testified to by respondent, the foreman gave him no warning that he intended to start the motor, is he entitled to recover? Appellant contends that respondent was guilty of contributory negligence in grabbing hold of the cable in such a dangerous place, as he knew that it was the purpose to immediately move it, and that, having only from six to ten inches free space, there could only be one result upon its starting, to draw the hand

into the pulley. Without discussing that feature of the case, it appears to us that the decision of the case must hinge on the relation between respondent and Boyle, since, whether or not the foreman gave any warning to respondent, it is unquestioned that Boyle, standing alongside of respondent, initiated the movement of the cable by telling the foreman they were, "All ready; go ahead." If Boyle, in giving such a direction to the foreman, was a vice principal, respondent can recover. If he was a fellow servant, he cannot.

[1] Respondent contends, citing *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114, and *Dossett v. St. Paul, Tacoma Lumber Co.*, 40 Wash. 276, 82 Pac. 273, that, where a servant is in a known dangerous place, it is the duty of the master to warn him before directing any movement of machinery that adds to the danger of the place, and that any one to whom the master intrusts the duty of giving such a warning is a vice principal for whose negligence the master must answer. That rule will readily be admitted. But we cannot conceive of its application here. That is the rule where the safety of the place where the servant is at work is under the control of the master, and where the servant depends upon signals being conveyed to him by others for his protection, as in *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765; *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376; *Norman v. Shipowners' Stevedore Co.*, 59 Wash. 244, 109 Pac. 1012; and *Jacobsen v. Rothschild*, 62 Wash. 127, 113 Pac. 261. There could be no broader statement of the rule than that given in the *Westerlund Case*: "It was the duty of appellants to furnish respondent with a reasonably safe place in which to work, and to keep that place reasonably safe during the progress of the work. This duty was not confined alone to the place where respondent performed his work, but was extended to all the instrumentalities, machinery, and appliances which from the nature of the work directly affected the safety of the place. Such, then, being the duty of the appellants, the failure to properly control the movement of the cable, by giving wrong signals or acting without signals, while respondent was in a position of danger, was negligence, irrespective of the men or means employed for that purpose. Being a duty imposed by law upon the appellants, such duty could not be delegated to others, whether coemployees of respondent or not, so as to relieve appellants from liability for their failure to properly perform this duty."

We have also held in a long line of decisions, commencing with *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 58 L. R. A. 313, 92 Am. St. Rep. 847, that fellow workmen may be fellow servants with regard to some particular part of the employment, and that as to other parts of the

employment the fellow workman may stand in the relation of vice principal to the others, depending entirely upon what is being done at the time. If a master takes a common laborer, and for the time being places him in a position where he contributes to the safety of the place where his fellow workmen are engaged, by giving signals which affect the safety of that place, and are relied upon by the workmen for their protection, being engaged in a nondelegable duty of the master, he is in the performance of that duty, and in the giving of that signal representing the master, and becomes a vice principal. But in all the cases where this rule is announced the injured servant has no connection with the signal. He neither initiates it nor communicates it. He simply acts in response to it, depending altogether upon others, for the time and manner of the signal, as his protection.

[2] Under the uncontradicted testimony in this case, respondent did not depend upon the foreman to signal him when the motor was to be started. The foreman on the other hand, depended upon respondent and his fellow workman, Boyle, to tell him when he should direct the movement of the motor and derrick. The signal was not one coming to them upon which they should act. It was one proceeding from them, upon which the foreman would act. If the foreman in this case directed the starting of the motor when respondent was in a position of danger, it was only after receiving a communication from Boyle—working alongside of respondent engaged in the same endeavor to pull in the timber—that everything was all right and to go ahead. Boyle and respondent were engaged in the same work at the same time. Neither one had any supervision over the other. They acted in common; each had ample opportunity to observe the other. Respondent knew that the foreman would not start the motor after it had stopped, to permit them to obviate the difficulty of its landing, until Boyle had informed him it was proper to do so. They answer every test of fellow servants. It is true that Boyle generally gave the signal, and that the foreman depended upon him to do so because of his greater experience. There was no necessity of respondent and Boyle jointly giving the signal. The respondent knew that the foreman would act on Boyle's signal, and we cannot see why, knowing this, and knowing he was in a position of danger, he did not inform Boyle, when the foreman called, that he was not ready to have the cable moved. It seems to us it was his duty to do so, having for two weeks been engaged in the same work, and knowing during all that time that the foreman would act under Boyle's direction, and having had every opportunity to observe his method of communicating the signal to the foreman. We might add, what more could the master do than he has done here? He

refused to act upon his own assumption that respondent and Boyle were ready, but required them to determine for themselves when they were ready. Their protection in this regard is placed in their own hands.

[3] We said, in *Ponelli v. Seattle Steel Co.*, 116 Pac. 884, where men were engaged assisting one another in a common task, that the mere fact that one took the lead in directing the work because of age, experience, or common consent, would not change the relation of fellow servants, and make the one so directing a vice principal. So that, the fact that Boyle, because of his greater experience, was relied upon by respondent and the foreman to initiate the movement of the cable, by directing the foreman when they were ready, does not make him a vice principal. Boyle's act was more the act of respondent, and represented their common situation upon which the master acted, than it was the act of the master communicating a situation to them upon which they acted.

If in the following relations the rule of fellow servants has been sustained: Two workmen unloading a car, one under the direction of the foreman tells the other what to do; a foreman and his helper erecting a post; a teamster and his assistant loading iron plates on a truck; two brick masons laying a wall; a foreman and a workman erecting a derrick; two motormen on an electric railway, who arrange their own meeting and passing places; two painters painting an engine, where one tells the other a known danger, which for the time stopped the work, has been removed, and relying upon this fact the injured painter returns to work; two brakemen, one on a car and the other operating a switch over which it was intended the car should pass—as we have held in: *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405; *Desjardins v. St. Paul & Tacoma Lumber Co.*, 54 Wash. 278, 102 Pac. 1034; *Mercer v. Lloyd Transfer Co.*, 59 Wash. 560, 110 Pac. 389; *Cavelin v. Stone & Webster Engineering Co.*, 61 Wash. 375, 112 Pac. 349; *Swanson v. Gordon*, 118 Pac. 470; *Grim v. Olympia Light & Power Co.*, 42 Wash. 119, 84 Pac. 635; *Berg v. Seattle, Renton, etc., R. Co.*, 44 Wash. 14, 87 Pac. 34, 120 Am. St. Rep. 968; *Millett v. Puget Sound Iron, etc., Works*, 37 Wash. 438, 79 Pac. 980; *Stevick v. Northern Pac. R. Co.*, 39 Wash. 501, 81 Pac. 999—we cannot see why, upon the application of the same principles, two workmen, engaged in unloading timbers from a hoisting derrick onto a roof, where by common consent of themselves and the master one undertakes to tell the master when the derrick should be moved, are not fellow servants. The fellow-servant rule is not a popular one with this court, and we have heretofore refused to make it the basis for defeating recovery for an injured workman, except in those cases where it was so plainly applicable that, to the majority of the court, there seemed no escape,

unless the doctrine was to be entirely abrogated and written out of the law of this state. If it is, it must be done by the Legislature and not by the courts. We are therefore constrained to hold that Boyle and respondent are fellow servants, and for that reason respondent cannot recover.

The judgment is reversed.

CHADWICK and CROW, JJ., concur.

ELLIS, J. I concur in the result only on the ground of contributory negligence. The respondent, when he took hold of the few inches of cable between the pulley and the sling, must have known that any movement of the machinery would crush his hand.

DUNBAR, C. J. I dissent. I have no fault to find with the law as announced by the majority, but in my judgment it has not been applied to the facts in this case. The opinion says, in the course of the statement, that the signal was generally, if not always, given by Boyle. The statement, to be literally correct, should be a little more definite on this crucial question. The testimony on this point was furnished by the defendant. The acknowledged foreman and signalman, Mr. Bartell, testified as follows: "Q. Boyle was a common laborer, was he? A. Boyle was a carpenter. Q. Working with those other men there? A. Yes, sir. Q. They worked all under your direction? A. Yes, sir. Q. Boyle did not hold any higher position than Mr. Frengen did? A. Boyle was a man that I always depended upon to give me the signal— Q. From above? A. As he had had experience in that business." This testimony was not disputed nor modified, and is one of the admitted facts in the case. Hence it appears that Boyle always gave the signal, and that the respondent had nothing to do with it. The case stands, then, without any controversy as to the fact that there were two signalmen. The signal could not be given to the engineer from the roof where the respondent was at work, and it was necessary for some one there to make a signal to the foreman below, and he would communicate it to the engineer, and that "some one," who was authorized to make the signal from above and who did make it, was Boyle. Hence Boyle became a signalman. It matters not if he did have other duties to perform in conjunction with the respondent. This would probably be simply an economic arrangement, and this particular duty of making the signal devolved upon him with as much force as if he had had nothing to do but to make signals. Then, if the doctrine is true, which this court has uniformly announced in numberless decisions, and which is supported by almost universal authority, and which is in fact quoted approvingly by the majority from the case of *Westlund v. Rothschild*, that a duty to signal, where a signal is necessary to protect a

workman in his right to a safe place to work, is a duty imposed by law upon the master which cannot be delegated to others whether employes of the master or not, so as to relieve the master from liability for their failure to properly perform their duty, how can the deduction be made that respondent and Boyle are fellow servants in a sense that would transfer responsibility for Boyle's delinquencies from the master to the servant? It has been just as uniformly held, and is candidly acknowledged by the majority, that fellow workmen may be fellow servants with regard to some particular part of the employment, and that as to other parts of the employment the fellow workmen may stand in the relation of vice principals to others, depending entirely upon what is being done at the time. This doctrine exactly meets the case in point. If in handling these timbers Boyle had negligently or awkwardly caused one of them to drop or slip or swing around and hurt the respondent, or had injured him in any way while in the performance of his duty as a laborer, the negligence would doubtless have been the act of a fellow servant for which the master would not be responsible. But where it is conceded, as it must be here, that the negligence of Boyle was in no way connected with the joint duties of him and the respondent, but was an independent duty with sole reference to maintaining a safe place to work, to hold that he was a fellow servant of the respondent conflicts with every cardinal principle that has been announced by this court on the subject of fellow servants, and the cases cited to sustain the rule announced show in my judgment an utter misconception of the principles involved in the respective cases and announced by the decisions.

The first case cited and quoted from, viz., *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405, was where a common laborer was directing and assisting the plaintiff in unloading a car of lumber. The master had told the plaintiff to go with the man that he designated, and he would instruct him how to unload the car. In unloading the car, while both men were engaged in the labor of unloading it, a post or support broke, and the plaintiff was injured, and it was held, as stated in the opinion, that in that particular case they were fellow servants. But it will be noticed that in that case they were both working in a common employment, and that the cause of the accident was simply an incident of the work. It was absolutely a joint occupation; the fellow workmen had no particular power delegated to him, and one man had the same opportunity to notice and avoid danger as the other. In announcing that opinion a quotation was made from *Hammarberg v. St. Paul & Tacoma Lumber Co.*, 19 Wash. 537, 53 Pac. 727, where it was said, in reviewing this question: "The doctrine was applied simply and humanely on the theory that, standing on a level with each other,



both as to employment and authority, they had notice which the master necessarily could not have of the dangers liable to result from the action of the workers. \* \* \*

But in the case at bar, while they were co-workers with relation to certain things, they were not co-workers with relation to the duty of signaling, because that was a duty that was conferred especially upon Boyle; and it was not an incident to the work which Boyle and the respondent here were doing together, viz., handling these timbers, but it was a vital and special duty of Boyle over which the respondent had no authority or control whatever, and he had a right to rely upon the presumption that the master had furnished an agent to make these signals who would make them properly and in the interest of his safety. The cases seem to have nothing in common.

The next case cited and quoted from is *Mercer v. Lloyd Transfer Co.*, 59 Wash. 560, 110 Pac. 889, where it was held that a teamster and his assistant were fellow servants when they were engaged in the common occupation of loading heavy iron plates on a truck; both being experienced men and having conferred together as to the proper manner of loading them, and the court saying in that opinion: "It appears that Peters, the driver, and respondent, as appellant's employes, were jointly engaged in the task of loading plates; that they were each in such a situation as to afford them a controlling influence the one over the other; and that the only negligence, if any, was their joint act in improperly loading the plates." It was certainly not the joint act of Boyle and the respondent in not giving this signal, or in giving it without warning to the workmen, because, as we have seen, the respondent was not authorized to give the signal and had no duty whatever concerning it.

The next case, *Desjardins v. St. Paul & Tacoma Lumber Co.*, 54 Wash. 278, 102 Pac. 1034, was where a millwright acting as foreman was assisting in the erection of a post which he was holding in place with his hands, and negligently let go, whereupon it fell and injured his helper. It was held that, as to such act in holding the post, he was a fellow servant, because that was a mere detail of the work for which the master was not responsible. There is no suggestion in this case of any act on the part of the foreman outside of the work he was doing as a joint worker with the plaintiff. And without further special review of the cases, they are all of the same character.

It is true that, if the real master, the owner of a business or occupation or factory, is working with a laborer in the capacity of a common laborer, in the performance of that labor he is a fellow servant, and if he negligently acts he is not responsible as master. The corollary of that proposition is that, if one who is ordinarily a fellow servant with another, in the performance of a

duty conferred upon him by the master which is not a joint work with the other laborer, negligently causes an injury to the laborer, the master is responsible; for, as before stated, it depends, not upon the official character of the men who commit the negligent act, but upon the particular kind of work that they are doing when such negligence is committed. Boyle, then, being a signalman, and it being the duty of the master to furnish a signalman at the place where the signal was given—and that is not disputed—when he failed to give a proper signal or signaled without notifying the workmen, was acting exclusively for the master in the carrying out of the master's duty, and the master is responsible for his negligent acts. The question of negligence on the part of the respondent in taking hold of the cable where he did, as suggested in the concurring opinion of Judge ELLIS, is a question entirely of fact. There was no contention and no showing anywhere in the testimony that the taking hold of the cable and pulling it as the defendant testified that he did, although there was only about an eight-inch space for him to catch hold of, was dangerous when the machinery was not moving; and the case was contested by the defendant simply on the ground that it did not instruct the respondent to take hold of the cable as he did.

The testimony of the respondent on that question was as follows: "A. (Continuing) And then the timber was hanging, you know, you could not—we could not land it on, any ways, and so the foreman told me to go and grab hold on that cable and pull it in so that we could land it down. Q. He told you that? A. He told me that. Q. Was there any other place to hold it or grab it? A. No other place to get hold of it. Q. And he told you to take it there? A. The foreman told me to take—grab hold of the cable and pull it in. Q. Grab hold of the cable and pull it in? A. Yes, and so I did. I went and grabbed hold of the cable like this (illustrating), and I was going to pull on it, and at the time I was going to pull then the block came up and caught my fingers right here (indicating). \* \* \* Q. How did that happen? What caused that? What caused that to do that? Why was it? Was there any signal to start up? A. There was no signal. I could not hear—was no signal given me to get out of there before it was—before the motor started." Again he testified that he had not been furnished with any peavey, and that the foreman told him to grab hold of the cable and pull it in. He was very positive on this point both in his direct and cross-examination. George Conrad, a witness for the plaintiff, testified as follows: "Q. You didn't hear the foreman tell him to grab hold of the cable and pull that in, did you? A. I did. Q. You heard that too? A. I heard that. \* \* \* Q. And the foreman told this man to grab hold of

that cable with his hand and pull it in, did he? A. He said, 'Grab hold of the cable and pull it in.' And he testified that he was in plain view of it all and heard it all. Two witnesses for the defense testified, one of them being near by and the other some distance off, that they did not hear the foreman tell the respondent to take hold of the cable. But the foreman, Bartell, testified positively as follows: "Q. And state to the jury and court whether or not you ever instructed him, or whether you instructed him on this occasion, to catch hold of that cable and pull the timber in. A. No, sir; I certainly never told anybody to grab hold of that cable and pull it in." So that it will be seen that on this question the testimony was absolutely conflicting. In such case deduction is for the jury.

These being the only two controlling questions in the case: The first, the question of fellow servant, being determined in favor of the respondent both by the admitted testimony and the uniform law on the subject; and, the second, the question of contributory negligence, having been decided in respondent's favor by a verdict of the jury—the judgment should be affirmed.

#### In re BONDS OF SOUTH SAN JOAQUIN IRR. DIST. (Sac. 1939.)

(Supreme Court of California. Nov. 15, 1911.)

#### 1. WATERS AND WATER COURSES (§ 216\*)—IRRIGATION DISTRICTS — ORGANIZATION — STATUTES—CONSTITUTIONAL LAW.

The irrigation act of 1897 (St. 1897, p. 254), authorizing the creation of irrigation districts, is not unconstitutional, because section 1 authorizes a majority of the holders of title of lands, according to the equalized county assessment roll for the year last preceding, to propose organization, on the theory that the apparent owners by the assessment roll may not be the present owners, since the Legislature could provide for the formation of districts without giving property owners any voice.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 216.\*]

#### 2. STATUTES (§ 64\*)—PARTIAL INVALIDITY.

The validity of the irrigation act of 1897 (St. 1897, p. 254) providing for the organization of irrigation districts, etc., is not impaired as a whole through unconstitutionality of its provision for an appeal to the superior court from a determination of the board of supervisors.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 58-66; Dec. Dig. § 64.\*]

#### 3. WATERS AND WATER COURSES (§ 216\*)—IRRIGATION DISTRICTS — BONDS—CONSTITUTIONAL LAW.

Irrigation Act 1897 (St. 1897, p. 265) § 34, is not unconstitutional for authorizing those appearing as owners upon the equalized assessment roll to petition for an election on the question of incurring indebtedness; the question being decided by a vote of the electors.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 216.\*]

#### 4. CONSTITUTIONAL LAW (§ 63\*)—IRRIGATION DISTRICTS — STATUTES — CONSTITUTIONAL LAW.

The irrigation act of 1897 (St. 1897, p. 254) is not unconstitutional for delegating powers to and imposing duties upon certain county officers in connection with the assessment and collection of taxes for irrigation districts.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 108-114; Dec. Dig. § 63.\*]

#### 5. STATUTES (§ 123\*)—TITLE—CONFORMITY OF SUBJECT-MATTER.

Irrigation Act 1897 (St. 1897, pp. 276, 277) §§ 68-72, providing for proceedings to test the validity of irrigation district assessments, is not invalid, under Const. art. 4, § 24, as being foreign to the title of the act, "An act to provide for the organization and government of irrigation districts and to provide for the acquisition or construction thereby of works for the irrigation of lands embraced within such districts, and also to provide for the distribution of water for irrigation purposes."

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 176-183; Dec. Dig. § 123.\*]

In Bank. Appeal from Superior Court, San Joaquin County; J. A. Plummer, Judge.

Proceeding to determine the validity of bonds of the South San Joaquin Irrigation District. Upon appeal from the judgment. Affirmed.

Clary & Louttit, for appellant. L. L. Dennett and Nutter & Orr, for respondent.

HENSHAW, J. This is a proceeding brought to determine the validity of bonds of the South San Joaquin Irrigation District, a proceeding authorized by the irrigation act of 1897. *Stats.* 1897, p. 254.

Upon this appeal it is urged:

[1] 1. That the law under which the district was created is itself unconstitutional and void. The contention herein is based on section 1 of the act, namely, that: "A majority in number of the holders of title or evidence of title of lands \* \* \* such holders of title or evidence of title representing a majority in value of said lands according to the equalized county assessment roll or rolls for the year last preceding, may propose the organization of an irrigation district;" and, further: "Said equalized assessment roll or rolls shall be sufficient evidence of title for the purposes of this act." From this language appellant argues that the apparent owners by the last equalized assessment roll may not be the present owners of the land at the time of the formation of the district, with the result that persons who are not landowners may petition for the formation of such a district, and subject the land of the true owners to the burdens of an assessment without those owners having a voice in the matter. But if this were all true it would not render unconstitutional the section under consideration. The Legislature, having the unquestioned power to provide for the formation of such districts, might do so without giving the property own-

ers any voice in the matter at all, and may, without question, do so, by authorizing the presentation of a petition, signed by a majority of those who, upon the last equalized assessment roll, appear as owners of the property. In *re Madera Irrigation District*, 92 Cal. 320, 28 Pac. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; *People v. Sacramento Drainage District*, 155 Cal. 373, 103 Pac. 207. If between the time of the making of the last equalized assessment roll and the time of the petition for the formation of the district, any of these lands shall have changed hands, the new owners will be charged with knowledge that they purchase under conditions where those who appear to be owners by the assessment roll could petition for the formation of the district. Such a burden upon the land would, in its nature, not be dissimilar to the lien of taxes which follows land in the hands of the new purchasers after the first Monday in March of each year. In the latter case the new purchaser may protect himself in the payment of his taxes by arrangement with the seller. He may in the instance here before us likewise protect himself by a similar arrangement with the seller; in brief, by the seller's agreement not to sign such a petition.

[2] 2. The fact that the provision of the irrigation law of 1897 for an appeal to the superior court from the determination of the board of supervisors has been declared unconstitutional (*Chinn v. Superior Court*, 156 Cal. 478, 105 Pac. 580) does not destroy the act as a whole. The act would have been valid without such provision. The general machinery of the law provides ample protection to the landowner, and every reasonable opportunity to correct specific abuses (*Inglis v. Hoppin*, 156 Cal. 483, 105 Pac. 582), so that the act can well stand as an entire and complete scheme after the elimination of the provision touching appeal.

[3] 3. What has been said under the first head disposes of the objection to section 34 of the act; that objection being that it authorizes those appearing as owners upon the equalized assessment roll to petition the trustees of the district to submit to the qualified electors the question of whether or not the indebtedness shall be incurred. It is to be noted that the indebtedness is not imposed upon the district, excepting by a vote of the electors themselves; and that the provisions of section 34 go only to the method of invoking the action of the trustees for the calling of an election for this purpose.

[4] 4. No weight can be accorded to the contention that, because the act delegates powers to or imposes duties upon certain of the county officers in connection with the assessment and collection of taxes of the district, it is therefore unconstitutional. The argument is fully met and conclusively answered in *Nevada Bank of San Francisco v.*

*Board of Supervisors of Kern County*, 5 Cal. App. 638, 91 Pac. 122.

[5] 5. The title is as follows: "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition or construction thereby of works for the irrigation of the lands embraced within such districts, and, also, to provide for the distribution of water for irrigation purposes." The body of the act (sections 68 to 72) contains provisions for the institution and prosecution by the district of the proceeding here brought to test the validity of an assessment. It is contended that these provisions are so foreign to the title of the act as to be void. Const., art. 4, § 24. To this view we cannot agree. It will be found repeatedly declared in our decisions that the purpose of the constitutional provision is, not to destroy legislation germane to the general object declared in the title, but to protect against the passage of clauses and provisions foreign to the title, subject, and purpose of an act—deceptive legislation, adroitly introduced and hidden in the body of the act. *People v. Sacramento Drainage District*, supra; *People v. Linda Vista Irrigation District*, 128 Cal. 477, 61 Pac. 86; *Law v. San Francisco*, 144 Cal. 388, 77 Pac. 1014. The matter of the proceeding to test the legality of the assessments and bond issues of a district under this broad and reasonable view comes clearly within the scope of the general purposes of the irrigation act. *Anderson v. Grand Valley Irrigation District*, 35 Colo. 525, 85 Pac. 313.

The judgment appealed from is therefore affirmed.

We concur: SHAW, J.; LORIGAN, J.; MELVIN, J.; ANGELLOTTI, J.; SLOSS, J.

Ex parte McCANDLESS. (Cr. 222.)

(District Court of Appeal, Second District, California. Oct. 6, 1911.)

PARENT AND CHILD (§ 17\*)—DUTY OF PARENT TO SUPPORT.

While it is the duty of a parent to support a child of tender years, yet he cannot be imprisoned for a failure to obey an order of court directing the support of such child, unless it is shown that he has the ability to comply with the order.

[Ed. Note.—For other cases, see *Parent and Child*, Dec. Dig. § 17.\*]

Petition by William Joseph McCandless for a writ of habeas corpus. Petitioner discharged.

A. W. Sorenson, for petitioner.

PER CURIAM. Petitioner, as shown by the return, is in the custody of the sheriff by virtue of a commitment issued on account of petitioner's failure to make certain monthly payments by the superior court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

directed for the support and maintenance of his minor children. It nowhere appears in the record, nor in any order or judgment of the superior court in connection with the proceedings, that petitioner has the ability to pay the sum ordered. While it is the duty of a parent to support children of tender years, that he be imprisoned on account of the failure to obey an order of the court in connection therewith, it must affirmatively appear that he has the ability to comply with the order of the court. In *re* Cowden, 139 Cal. 244, 73 Pac. 156; *Ex parte* Cohen, 6 Cal. 319; *Ex parte* Rowe, 7 Cal. 175; *Ex parte* Silvia, 123 Cal. 293, 55 Pac. 988, 69 Am. St. Rep. 58.

Petitioner discharged.

**BARNHART v. CONLEY et al.** (Civ. 1,031.) (District Court of Appeal, Second District, California. Oct. 11, 1911.)

**APPEAL AND ERROR (§ 773\*)—DISMISSAL—FAILURE TO FILE BRIEFS.**

Supreme Court rule 2, subd. 4 (78 Pac. vii), provides that the points and authorities must be filed within 30 days after the filing of the transcript. Appellant filed no points or authorities within 30 days after the transcript was filed, nor until after a motion to dismiss for failure to file briefs had been served, and no stipulation or order of court extending the time appeared. *Held*, that appellee was entitled to have the appeal dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 773.\*]

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Rose L. Barnhart against O. O. Conley and another. Judgment for plaintiff, and defendants appeal. Plaintiff's motion to dismiss appeal granted.

V. T. Watkins and Watkins & Blodget, for appellants. Gray, Barker, Bowen, Allen, Van Dyke & Jutten and N. A. Bailie, for respondent.

**PER CURIAM.** The transcript in this case was filed April 1, 1911. Appellants filed no points or authorities until after June 9, 1911, at which time a motion to dismiss the appeal on account of failure to file such points and authorities was duly served and filed. Thereafter, on June 26, 1911, appellants filed their opening brief. The affidavit in opposition to respondent's motion is insufficient to justify the court in refusing to grant the motion. Rule 2, subd. 4 (78 Pac. vii), of the Supreme Court, provides that the points and authorities must be filed within 30 days after the filing of the transcript, and, in the absence of stipulation, 20 days additional time may be granted by the court; good cause being shown therefor. No stipulation extending time or order of court in that regard appears. The rule above quoted, requiring the points and au-

thorities on behalf of the respective parties to be filed within a specified time after the filing of the transcript, confers rights which may be enforced by litigants. *McCabe v. Healey*, 139 Cal. 32, 72 Pac. 359. Respondent, therefore, possesses the right to have this appeal dismissed. The determination of such right being controlled by the facts existing at the time the notice of motion was given, the subsequent filing of points and authorities had no effect to restrict such right.

The motion to dismiss the appeal must be granted, and it is accordingly ordered.

**MULLER v. SWANTON et al.** (Civ. 534.) (District Court of Appeal, First District, California. Oct. 13, 1911. Rehearing Denied Nov. 11, 1911.)

**INSURANCE (§ 88\*)—AUTHORITY OF AGENT.**

Where defendant executed a note for a life insurance premium to a soliciting agent under a private agreement that defendant should not be called on to pay the same, and, the note having been transferred to the insurance company and payment demanded, defendant, after explaining the facts to defendant's general state agent, was informed by him that the company would look to the soliciting agent for settlement, and would give defendant no further trouble in the matter, the insurance company was not bound by such agreement; the same being beyond the local manager's authority and without consideration.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 88.\*]

Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

Action by Joseph Muller against F. W. Swanton and others. Judgment for defendant Swanton, and plaintiff appeals. Reversed.

Page, McCutchen & Knight, for appellant. Wm. T. Jeter, for respondent.

**KERRIGAN, J.** This is an appeal by the plaintiff from a judgment in favor of defendant F. W. Swanton, and from an order denying plaintiff's motion for a new trial. A former judgment in the same action in favor of said defendant was reversed by the Supreme Court. *Muller v. Swanton et al.*, 140 Cal. 249, 73 Pac. 994. The action is on a promissory note for \$1,222 which was executed by the defendant to W. B. Fonville and indorsed by Fonville to the New York Life Insurance Company, and by it, in turn, indorsed to the plaintiff merely for the purpose of collection. The answer does not deny the due execution of the note, nor that it was indorsed to the insurance company prior to maturity, but sets forth that there was no consideration for the note; that it was obtained by fraud; that the insurance company gave no consideration for the note, and took it with notice of the circumstances under which it was made.

The facts are these: W. B. Fonville was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

sent to this state by the home office of the New York Life Insurance Company to solicit insurance independently of the local office, of which the general manager was one A. G. Hawes. In carrying out this object, Fonville called on the defendant in Santa Cruz with a view to writing a policy of insurance on defendant's life or the life of some member of his family, and represented to defendant that, if he could do so, it would be a lead to others to apply for insurance in the company represented by him, as defendant's family was well known in that part of the state. He also told defendant that, if he succeeded in writing a named amount of large insurance, he would be installed in the position occupied by Hawes as the Pacific Coast representative of the insurance company, a position carrying a salary of \$20,000 a year. After much solicitation on the part of Fonville, Swanton finally consented to allow him to write a policy insuring the life of defendant's father for \$10,000, with the understanding that the note given by the defendant to Fonville for the premium would not have to be paid. In accordance with this arrangement Fonville procured the issuance of the policy by the insurance company, and the defendant made and delivered his promissory note for \$1,222, the amount of the premium, and Fonville gave defendant a written agreement that one-half of the premium should be returned, and represented to him that, when the other half became due, he (Fonville) would be the Pacific Coast agent of the company, and out of his salary could well afford to pay it, and would do so. When the note fell due the company caused it to be presented for payment, whereupon the defendant called on Hawes and explained the circumstances under which the note was made; and, according to Swanton's testimony (which however, is disputed by Hawes), the latter said that Swanton need give himself no further trouble about the matter, that he would take it up with Fonville, and would look to him for a settlement.

The Supreme Court on the former appeal discussed at length the insufficiency of the evidence to support the finding in favor of defendant, and the court there held that the issuance of the policy was a sufficient consideration for the indorsement of the note by Fonville, and that there was no evidence showing that the insurance company took the note with the knowledge of the circumstances under which the defendant executed it, and that, therefore, those circumstances did not constitute a defense to an action on the note by the company or its assignee.

[1] The defendant urges very strongly a point not made previously. He argues that even if the note were valid, and the defenses of fraud and want of consideration unavailing, nevertheless the insurance company and its assignee are estopped from enforcing the

payment of the note by reason of what took place between him and A. G. Hawes when he called on Hawes, and explained the circumstances of the transaction with Fonville. This argument is founded upon a finding of the court which reads that Hawes "then and there assured the said defendant F. W. Swanton that it would be all right, and that he, acting for said company, would take the matter up with said Fonville, and would look to him, Fonville, for a settlement, and would give said defendant, F. W. Swanton, no further trouble in the matter." There was considerable delay after the conversation between the defendant and Hawes, during which the defendant possibly could have proceeded against Fonville, and, while the point does not lack plausibility, it has some serious defects which it will not be necessary to note, for the late Mr. Justice McFarland in the former opinion anticipated this point, and effectually disposed of it in this language: "The finding (which is based upon conflicting and very slight evidence) that, after the note was due and its payment demanded, the managing agent at San Francisco told respondent for the company that he would look to Fonville for a settlement, and would give respondent no further trouble about the matter, is immaterial; for, in the first place, he had no authority to bind the company by such a promise, and, in the second place, the promise was without any consideration."

The evidence on the second trial was in no material particular different from that given on the former trial. There is nothing new in the case, and the views expressed by the Supreme Court upon the former appeal must control, and we perceive no reason why the trial court did not give effect to those views by permitting plaintiff to recover on the note.

For the foregoing reasons the judgment and order are reversed.

We concur: LENNON, P. J.; HALL, J.

#### POOLE v. GRAND CIRCLE, WOMEN OF WOODCRAFT. (Civ. 1,009.)

(District Court of Appeal, Second District, California. Oct. 6, 1911.)

#### APPEAL AND ERROR (§ 800\*)—DISMISSAL—FAILURE TO FILE JUDGMENT ROLL.

After plaintiff's motion to dismiss the appeal for failure to transmit a copy of the judgment roll, appellant, within seven days of notice of motion and before the hearing thereof, filed such judgment roll. *Held*, that under Supreme Court Rule 15 (78 Pac. x) the motion would be considered as an objection to the transcript, answered by filing of the transcript, and hence would be denied.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 800.\*]

Action by John R. Poole against the Grand Circle, Women of Woodcraft. Judgment for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiff, and defendant appeals. Plaintiff's motion to dismiss defendant's appeal denied.

John H. Foley, for appellant. Charles S. Burnell, for respondent.

**PER CURIAM.** Motion to dismiss appeal. The only reason suggested in support of said motion is the failure of appellant, before the filing of said motion, to cause to be transmitted to this court a copy of the judgment roll. It does appear that within seven days after service of notice of motion, and before the hearing thereof, appellant caused a transcript embracing such judgment roll to be filed. All that is essential to a review of the action of the superior court is now before this court. Under rule 15 (78 Pac. x) of the Supreme Court, respondent's motion may be considered as an objection to the transcript, affecting appellant's right to be heard, and the same was answered by filing the transcript embracing the judgment roll. "The object of the above-mentioned rule is to enable the appellant to remedy any defect or omission of the transcript for the purpose of enabling him to present his appeal upon the merits, and is to be liberally construed for that purpose." *Warren v. Hopkins*, 110 Cal. 509, 42 Pac. 987. Motion to dismiss appeal denied.

#### BLUMER v. MAYHEW. (Civ. 996.)

(District Court of Appeal, Second District, California. Oct. 6, 1911. Rehearing Denied by Supreme Court Dec. 5, 1911.)

#### 1. PLEADING (§ 236\*)—JUDGMENT (§ 344\*)—APPEAL AND ERROR (§§ 959, 982\*)—DECISIONS REVIEWABLE—DISCRETIONARY RULINGS—RELIEF FROM DEFAULT.

Under Code Civ. Proc. § 473, which provides that the court may allow amendments, relieve from a judgment, etc., for mistake, surprise, or excusable neglect, the making of an order refusing relief is within the discretion of the trial court, and will not be interfered with on appeal, unless the discretion is clearly abused.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 601; Dec. Dig. § 236;\* Judgment, Cent. Dig. § 673; Dec. Dig. § 344;\* Appeal and Error, Cent. Dig. §§ 3825-3833, 3877-3879; Dec. Dig. §§ 959, 982.\*]

#### 2. EXCEPTIONS, BILL OF (§ 43\*)—AUTHENTICATION OF RECORD—DISCRETION OF COURT.

Where a court refuses to authenticate a record presented for appeal from an order refusing to set aside a default, because not filed within the statutory limit, and the failure to file is caused by the ignorance of the party's attorney of the time given, it cannot be said to be an abuse of the discretion given by Code Civ. Proc. § 473.

[Ed. Note.—For other cases, see Exceptions, Bill of, Dec. Dig. § 43.\*]

Appeal from Superior Court, Los Angeles County; Walter Bordwell, Judge.

Action by Fred L. Blumer against Felix Mayhew. From an order denying relief under the Code of Civil Procedure, § 473, defendant appeals. Affirmed.

Frank S. Adams, for appellant. Valentine & Newby, for respondent.

**SHAW, J.** This is an appeal from an order of court, denying defendant's motion for relief under the provisions of section 473, Code of Civil Procedure.

On November 29, 1909, defendant's motion for a new trial and to have vacated and set aside a judgment theretofore rendered herein was denied. More than 60 days thereafter, and in the absence of any stipulation or order extending the time, he presented to the court what he termed a "Record on Appeal," consisting of copies of certain papers which he deemed necessary to constitute such record, together with a copy of the reporter's transcript of the testimony used at the hearing of the motion for a new trial, and, upon notice to plaintiff, applied to the court to have the same authenticated. Upon objection being made by plaintiff, the court refused to authenticate the papers, upon the grounds that the same were not presented within the time required by law. Thereupon defendant applied to the court to be relieved from his default, upon the grounds that the same was due to mistake, inadvertence, and excusable neglect. His application was denied by the court, and from this order he has appealed.

In his affidavit in support of the motion, defendant's attorney states that he had been instructed by his client to take an appeal from the order denying his motion for a new trial; that affiant had never before undertaken to prosecute such an appeal to the Supreme Court, and was unaware that the matters in support of such motion should be authenticated in a bill of exceptions, as provided in section 650 of the Code of Civil Procedure; that about 10 days after the date of the order of court, denying defendant's motion for a new trial, affiant was informed that under the decisions of the Supreme Court of this state the papers used upon such appeal should be embodied in a bill of exceptions, and the same authenticated by the trial judge, and thereupon he made an investigation of such decisions, and came to the conclusion that the Supreme Court based their opinions upon the ground that all of the records used in the court below had not been transferred to them, for which reason alone he concluded the court so decided said cases; that it would have been impossible to prepare the record within the time required by law; and that affiant did obtain an extension of 30 days time within which to file the record in the Supreme Court of California; he still being of the opinion at the time that no bill of exceptions was necessary.

[1] The making of an order granting or denying relief, when applied for by one who seeks to bring himself within the provisions of section 473, Code of Civil Procedure, is a matter purely within the discretion of the

trial court, and in reviewing such orders this court should refuse to interfere, unless it clearly appears there has been a plain abuse of such discretion. *O'Brien v. Leach*, 139 Cal. 222, 72 Pac. 1004, 96 Am. St. Rep. 105; *Vinson v. Los Angeles Pac. R. R. Co.*, 147 Cal. 479, 82 Pac. 53. The courts have suggested by way of advice to the trial judges that all doubts as to the propriety of their rulings upon such applications should be resolved in favor of the moving party (*Watson v. San Francisco & Humboldt B. R. R. Co.*, 41 Cal. 17; *Miller v. Carr*, 116 Cal. 381, 48 Pac. 324, 58 Am. St. Rep. 180), for the reason that such action tends to bring about a decision upon the merits. Notwithstanding this fact, however, the rule which prohibits interference, save and except in case of an abuse of discretion, has never been relaxed. *Ingrin v. Epperson*, 137 Cal. 370, 70 Pac. 165.

[2] In this case, upon the showing made in support of the application, it cannot be said that the court failed to exercise a proper discretion. Indeed, had the ruling been otherwise, noninterference by this court would have strained the rule, respect for which, as stated, prohibits the vacation of such order when it tends to give a hearing upon the merits of the case. The statutory provisions with reference to the procedure to be had and taken upon appeals from orders denying motions for new trial are of such long standing, so fully set forth in the Code of Civil Procedure, and have been so frequently passed upon and construed by the courts of this state "that ignorance of the time within which a statement or bill of exceptions must be prepared and served cannot be deemed the result of mistake or surprise or inadvertence, and the neglect to prepare and serve it within the time prescribed by the Code is not excusable." *Ingrin v. Epperson*, supra.

The order appealed from is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

## FRENCH v. ATLAS MILLING CO.

(Civ. 1,003.)

(District Court of Appeal, Second District, California. Oct. 6, 1911.)

### 1. APPEAL AND ERROR (§ 232\*)—RESERVATION OF GROUNDS—EVIDENCE—GENERAL OBJECTION.

Where a writing offered in evidence is material, as tending to prove the question in issue, and the only objection thereto on the trial was that it was incompetent, irrelevant, and immaterial, it cannot be objected on appeal that it was not signed by the party by whom it was purported to be executed, but by his attorneys, who were not shown to have been authorized to sign it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1351, 1363, 1430, 1431; Dec. Dig. § 232.\*]

### 2. SALES (§ 359\*)—EVIDENCE—WEIGHT AND SUFFICIENCY.

Evidence of the gross sum paid for handling all the hay on a particular ranch, including the hauling, weighing, and expenses and salary of a solicitor and collector, was not sufficient to establish the cost of loading on the cars a portion thereof; one-half of the expense of which defendant agreed to pay.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 359.\*]

Appeal from Superior Court, Los Angeles County; Benjamin F. Bledsoe, Judge.

Action by Dr. J. Rollin French against the Atlas Mining Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Hester, Merrill & Craig, for appellant. McKelvey & Sorenson, for respondent.

SHAW, J. Action to recover the contract price for 150 tons of hay alleged to have been delivered to defendant by Frank E. Kemp, plaintiff's assignor, pursuant to the terms of a contract for the sale and delivery thereof. The number of tons of hay delivered under the terms of the contract, as found by the court, was 141½ tons, for which, less a sum already paid on account of the purchase price thereof, it gave plaintiff the judgment from which defendant prosecutes this appeal.

Appellant insists the judgment should be reversed for the reason that the finding of the court fixing the number of tons of hay delivered is not supported by the evidence. There is no merit in this contention. Not only did the direct testimony of Kemp, the assignor of plaintiff, tend to prove the fact found by the court, but there was introduced in evidence a writing which purported to be executed by defendant, which, when considered with other evidence, is ample to support the finding.

[1] Appellant, however, insists that the court erred in permitting this writing to be admitted in evidence, for the reason that it was not in fact signed by defendant, but by its attorneys, who were not shown to have been authorized to act for it. When offered in evidence, no objection was made to its introduction upon such ground; the sole contention then being that the instrument was incompetent, irrelevant, and immaterial. If defendant had desired the exclusion of the instrument upon the ground now for the first time urged, it should have made its objection based upon such ground at the time of the trial, when opportunity would have been afforded plaintiff to meet the same. Not having done so, it will not now be permitted to urge an objection not made at the time of the trial, when the writing was offered in evidence. That the evidence was material is shown by the fact that it tended to prove the question in dispute, viz., the number of tons of hay delivered to appellant by plaintiff's assignor. It appears that Kemp, the assignor

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of plaintiff, and one Hewitt, were copartners in the ownership of a lot of hay grown upon the ranch of W. K. Fogg, who was entitled to one-third of the crop as rental. After the hay had been harvested, these parties, by a writing, apportioned the tonnage of hay according to their respective interest; it being agreed that Fogg, the landlord, owned and was entitled to 224 tons, and that plaintiff's assignor, Kemp, owned and was entitled to 160 tons of said hay, and that Hewitt was entitled to the remainder thereof. Appellant had theretofore, in an action brought against Hewitt, caused the hay to be attached, and after the levy of the attachment, and the making of the agreement between said parties apportioning the tonnage of hay as aforesaid, appellant by the writing offered in evidence agreed and stipulated to dismiss and cause the levy of the attachment to be dismissed as to the 160 tons of hay so attached and claimed by Kemp, and agreed that he should remove said 160 tons of hay from the field, and at or about the same time, by a written contract made with Kemp, purchased said hay from Kemp upon the basis and agreement that his interest therein consisted of 150 tons, more or less, scale weight; it being understood that it was all of the hay contained in said field so belonging to Kemp, less 10 tons thereof, elsewhere sold. The agreement between Hewitt and Kemp that the latter was entitled to 160 tons of hay was thus approved and assented to by appellant, who, with full knowledge of all the facts, succeeded to the interest of Hewitt by purchase at a sale under execution.

[2] The contract made with Kemp for the purchase of his hay contained a provision to the effect that he would share equally with defendant the expense of loading the 224 tons of hay belonging to W. K. Fogg on the cars at Buena Park, and defendant in its answer alleged that it had paid on account of such expense and pursuant to the terms of the contract, the sum of \$157.50, one-half of which sum it was claimed was chargeable to Kemp. The court found this allegation to be untrue. We cannot say that the court erred in so doing, for the reason that, while the evidence shows that the hay was loaded upon the cars, it fails to show the amount paid by defendant for the labor performed in doing the work. There was testimony tending to establish the gross sum paid for handling all of the hay received by defendant from that particular ranch, which included hauling, weighing, and the expenses and salary of a solicitor and collector. It cannot be determined from the evidence adduced what portion of the amount so paid should be applied to the cost of loading the hay belonging to W. K. Fogg.

The judgment is affirmed.

We concur: ALLEN, P. J.; JAMES, J.

**ALTUS ALFALFA MILLING CO. v.  
TAPPAN.**

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 627\*)—RECORD—TIME FOR FILING—EFFECT OF DELAY.**

Appeal dismissed, upon the ground that the petition in error and case-made were not filed in the Supreme Court within the time limited by law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749; Dec. Dig. § 627.\*]

Error from District Court, Jackson County; J. T. Johnson, Judge.

Action between the Altus Alfalfa Milling Company and Charles A. Tappan. From the judgment, the Milling Company brings error. Dismissed.

P. K. Morrill, for plaintiff in error. Crane & Ready, for defendant in error.

KANE, J. This cause comes on to be heard upon a motion to dismiss, upon the ground that the petition in error and case-made were not filed in this court within the time required by law.

The motion must be sustained. The record shows that on the 12th day of May, 1910, a motion for a new trial was overruled, and the plaintiff in error was granted 90 days within which to prepare and serve a case-made; that 10 days were given the defendant in error within which to suggest amendments, and said case to be settled upon 5 days' notice; that on the 11th day of August, 1910, counsel for plaintiff in error served his case-made. The case was served one day out of time. It is well settled that under such circumstances the appeal must be dismissed.

It is so ordered. All the Justices concur.

**DIACON v. BANK OF COMMERCE OF  
COWETA.**

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 757\*)—BRIEFS—ABSTRACT OF TRANSCRIPT.**

Where the plaintiff in error does not comply with that part of rule 25 of the Supreme Court (85 Pac. viii) which provides, "The brief of plaintiff in error in all cases except felonies shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court," his appeal will be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 757.\*]

Error from Wagoner County Court; W. T. Drake, Judge.



Action by F. C. Diacon against the Bank of Commerce of Coweta. From the judgment, Diacon brings error. Dismissed.

R. E. Burns, for plaintiff in error.

KANE, J. Counsel for plaintiff in error says in his brief (there is no brief for defendant in error) that "the law governing all questions has long been recognized, as fundamental principles so well settled and adjudicated, that he deems it useless to give authorities; that each and every exception and objection to the ruling of the court is well taken, and that this court from a perusal of the transcript will sustain plaintiff in error in his contention, and reverse and remand this action as prayed for by plaintiff in error."

Rule 25 of the Supreme Court (95 Pac. viii) provides: "The brief of the plaintiff in error in all cases except felonies shall contain an abstract or abridgment of the transcript, setting forth the material parts of the pleadings, proceedings, facts and documents upon which he relies, together with such other statements from the record as are necessary to a full understanding of the questions presented to this court for decision, so that no examination of the record itself need be made in this court." Counsel has not complied with this rule in any particular, and for failure to do so his appeal must be dismissed.

It is so ordered. All the Justices concur, except DUNN, J., absent and not participating

#### MCCLELLAND v. WITHERALL.

(Supreme Court of Oklahoma. Nov. 18, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773\*)—DISMISSAL—FAILURE TO FILE BRIEFS.

Where plaintiff in error files no brief, as required by rule 7 of this court (95 Pac. vi), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Cherokee County; James I. Coursey, Spécial Judge.

Action between R. A. Witherall and Daisy McClelland. From the judgment, McClelland brings error. Dismissed.

Bruce L. Keenan, for plaintiff in error. Soper, Huckleberry & Owen, for defendant in error.

ROSSER, C. The petition in error and transcript of the record was filed in this court November 11, A. D. 1909. The plaintiff in error has failed to file any brief in the case. The petition in error should therefore be dismissed, for want of prosecution. Hass v. McCampbell, 27 Okl. 290,

111 Pac. 543; Maddin v. McCormick, 27 Okl. 778, 117 Pac. 200, and cases there cited.

PER CURIAM. Adopted in whole.

#### COX v. ROGERS et al.

(Supreme Court of Oklahoma. Nov. 18, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773\*)—FAILURE TO FILE BRIEFS—DISMISSAL.

Where the plaintiff in error files no brief, as required by rule 7 of this court (95 Pac. vi), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Cherokee County; John H. Pitchford, Judge.

Action by J. D. Cox against Augustus L. Rogers and others. Judgment for plaintiff as to Augustus L. Rogers and in favor of the other defendants, and plaintiff brings error. Dismissed.

Kenneth S. Murchison, for plaintiff in error. Ezzard & Holtzendorff, for defendant in error.

BREWER, C. The petition in error and transcript of the record was filed in this court on November 12, 1909. The plaintiff in error has failed to file any brief in the case. The petition in error shall therefore be dismissed, for want of prosecution. Hass et al. v. McCampbell, 27 Okl. 290, 111 Pac. 543; Maddin v. McCormick et al., 27 Okl. 778, 117 Pac. 200; McClelland v. Witherall (not yet officially reported) supra.

PER CURIAM. Adopted in whole.

#### BENDER v. BENDER et al.

(Supreme Court of Oklahoma. Nov. 18, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773\*)—DISMISSAL—FAILURE TO FILE BRIEF.

Where plaintiff in error files no brief, as required by rule 7 of this court (95 Pac. vi), the appeal will be dismissed for want of prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3104-3110; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Alfalfa County; M. C. Garber, Judge.

Action by Luella Bender, administratrix of Frank Bender, against William Bender and others. Judgment for defendants, and plaintiff brings error. Dismissed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Titus, Carpenter & Davis, for plaintiff in error. E. W. Snoddy, for defendants in error.

BREWER, C. The petition in error and transcript of the record in this case was filed in this court November 4, 1909. The plaintiff in error has failed to file any brief in the cause, as required by rule 7 of this court (95 Pac. vi). The petition in error shall therefore be dismissed, for want of prosecution. *Hass et al. v. McCampbell*, 27 Okl. 290, 111 Pac. 543; *Maddin v. McCormick et al.*, 27 Okl. 778, 117 Pac. 200; *McClelland v. Witherall* (not yet officially reported) 119 Pac. 205.

PER CURIAM. Adopted in whole.

### COOPER v. AUSTIN.

(Supreme Court of Oklahoma. Nov. 18, 1911.)

(Syllabus by the Court.)

#### COURTS (§ 120\*)—COUNTY COURTS—JURISDICTION.

The original jurisdiction of county courts in civil cases, in any amount not exceeding \$1,000, conferred by section 12 of article 7 of the state Constitution, was not changed by sections 1 and 2 of the act of June 4, 1908 (Session Laws 1907-08, p. 284; Snyder's Compiled Laws, §§ 1977, 1978), so as to deprive said courts of jurisdiction where the amount involved did not exceed \$200.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 120.\*]

Commissioners' Opinion, Division No. 2. Error from Comanche County Court; Jas. H. Wolverton, Judge.

Action by A. C. Cooper against D. C. Austin. Judgment for plaintiff. From an order setting it aside and dismissing the case, plaintiff brings error. Reversed, with directions to reinstate case and the judgment.

Steck, Key & Davis, for plaintiff in error. Charles C. Black, for defendant in error.

ROSSER, C. This action was brought July 22, A. D. 1908, in the county court of Comanche county, by Mrs. A. C. Cooper, plaintiff in error, against D. C. Austin, defendant in error, to recover the sum of \$98, which she alleged he owed her as wages. The case was tried by a jury, and there was a verdict and judgment for the plaintiff for \$102.24. The defendant filed a motion for new trial, setting up all the statutory grounds, and on the 23d day of April, A. D. 1908, the court sustained the motion and dismissed the case. The order granting the new trial and dismissing the case states that it "is based upon the sole ground that the county court has no jurisdiction over the subject-matter of said action, because the amount in controversy is less than \$200." This appeal was taken to reverse the action of the court in

granting a new trial and dismissing the case.

The sole question presented by the record and in the briefs of counsel is whether the county court had jurisdiction of the amount in controversy.

It is conceded in the brief of defendant in error that jurisdiction of civil cases, where the amount involved did not exceed \$1,000, was conferred on county courts by section 12 of article 7 of the state Constitution. This, of course, was subject to the exceptions contained in that section; but it is not contended that this action was within any of the exceptions. It is contended by defendant in error that their jurisdiction was restricted by the second section of the act of June 4, 1908 (section 1978 of Snyder's Compiled Laws of Oklahoma; section 2 of article 1 of chapter 27 of the Laws of 1907-08) to amounts in excess of \$200. So much of that section as is material to the question involved here is as follows: "The county court, co-extensive with the county, shall have original jurisdiction in all probate matters, shall have concurrent jurisdiction with the district court in civil cases in any amount, over five hundred dollars and not exceeding one thousand dollars, exclusive of interest, and exclusive of original jurisdiction in all sums in excess of two hundred dollars, and not exceeding five hundred dollars." This section, read by itself, gives color to the contention of defendant, though no opinion is here expressed as to what would be its effect standing alone. But it must be read in connection with other parts of the same act. The first section of the same act (section 1977, Snyder's Compiled Laws; section 1, art. 1, c. 27, of the Laws of 1907-08) is as follows: "County courts, in their respective counties, shall have such jurisdiction and exercise such powers as have been conferred upon them by the Constitution of this state, and shall have such other jurisdiction and powers as are herein conferred, or may be conferred by law." Reading the two sections together, it is clear that the Legislature did not intend to restrict or curtail the county court of any of the jurisdiction conferred upon it by the Constitution. The first section provides that the county courts should have such jurisdiction as had been conferred by the Constitution, and "such other jurisdiction and powers as are herein conferred or may be conferred by law." This language indicates that the subsequent portions of the act were not to be construed as restrictive, if capable of any other construction. Section 2 of the act quoted above does not expressly take away the jurisdiction of the county court over amounts of less than \$200, and the first section indicates it was not the intention of the Legislature to take away any of its jurisdiction. It follows that the county court of Comanche county had jurisdiction of this action.

The case should therefore be reversed, with

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

directions to the lower court to set aside the order granting a new trial and dismissing the case, and to reinstate the judgment rendered for plaintiff in error.

PER CURIAM. Adopted in whole.

ATCHISON, T. & S. F. RY. CO. v. LOVE  
et al.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

PROHIBITION (§ 1\*)—WHEN GRANTED—EXERCISE OF JUDICIAL POWERS.

Prohibition is the proper remedy, where an inferior tribunal assumes to exercise judicial power not granted by law, or is attempting to make an unauthorized application of judicial force, and the writ will not be withheld because other concurrent remedies exist; it not appearing that such remedies are equally adequate and convenient.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. § 1; Dec. Dig. § 1.\*]

Williams, J., dissenting.

Application by the Atchison, Topeka & Santa Fé Railway Company for writ of prohibition to J. E. Love and others, members of the Corporation Commission, and the Corporation Commission. Writ granted.

Cottingham & Bledsoe, for plaintiff.  
Charles West, Atty. Gen., and Charles L. Moore, Asst. Atty. Gen., for defendants.

KANE, J. This is an original proceeding in prohibition, praying this court to prohibit the Corporation Commission of the state and the members thereof from proceeding with the trial of the plaintiff upon 12 separate and distinct citations for contempt growing out of violations of rule No. 10 of order No. 167 of the Corporation Commission, by charging storage on interstate shipments of freight, in accordance with the published interstate tariffs of the plaintiff. Rule No. 10, supra, provides that certain free time be given the consignees who live five or more miles from a railroad station, and in the published interstate tariffs of said plaintiff such free time was not allowed, and the plaintiff, in collecting storage charges, observed the terms and provisions of the interstate tariffs, which admittedly are in conflict with said rule No. 10. The Attorney General's view of the case is stated in his brief as follows:

"As stated in the return: 'This case is submitted to the court for the sole purpose of determining whether or not a rule regulating demurrage charges is an interference with interstate commerce, and, if so, is it a burden on interstate commerce or an aid to interstate commerce, and whether or not Congress, through the Interstate Commerce Commission, has taken jurisdiction of the subject-matter herein for the purpose of regula-

tion.' The relief prayed herein is to prohibit the State Corporation Commission from proceeding further with the trial of plaintiff for alleged violations of rule No. 10 of order No. 167 of the Commission, relating to free time to consignees living five miles or more from the railroad station, for storage charges on freight, received by interstate transportation. It is alleged in the petition, and admitted in the return, that all of the storage charges involved in the present hearing are upon interstate shipments, and that the charges are in accordance with the schedule and tariffs filed by plaintiff with the Interstate Commerce Commission in effect at said time.

"The congressional enactment, entitled 'An act to regulate commerce,' approved February 4, 1887, as amended by Act June 29, 1906, relates only to interstate commerce. Section 1 of same provides, among other things, that 'the term "transportation" shall include \* \* \* all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.' U. S. Comp. St. Supp. 1909, p. 1149. Section 6 of the same act requires every common carrier doing an interstate business to 'file with the Interstate Commerce Commission and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, etc. \* \* \* The schedule printed as aforesaid \* \* \* shall state separately all terminal charges, storage charges, icing charges, etc. \* \* \* No carrier shall charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property or for any service in connection therewith \* \* \* than the rates, fares, and charges which are specified in the tariff filed and in effect at the time.' Section 10 of the same act prescribes severe penalties for a violation of any of the foregoing provisions. It must be conceded, from the provisions cited, that storage charges on interstate shipments of freight are incidental to and a part of the transportation of interstate commerce, and that Congress, through the Interstate Commerce Commission, has taken jurisdiction of the regulation of storage charges on interstate shipments of freight, such as are involved here, thus depriving the state of such jurisdiction. The other branch of the inquiry, as to whether such storage charges are a burden upon, or an aid to, interstate commerce, seems to have been answered by this court by the first paragraph of the syllabus in the case of *St. Louis & San Francisco R. R. Co. v. State et al.*, 26 Okl. 62 [107 Pac. 929, 30 L. R. A. (N. S.) 137], in which it is held that the same 'interferes with and imposes upon in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

terstate commerce an unreasonable burden.' The Attorney General concedes that the storage charges involved herein are regulated as provided in the act of Congress referred to, and over which the State Corporation Commission has no jurisdiction or control, and that rule 10 of order No. 167 of the Commission is ineffectual upon which to predicate penalties in regulation of interstate commerce."

Adopting the view of the Attorney General, which we think is correct, it follows that the writ ought to issue. It clearly appears that the Corporation Commission is without jurisdiction in the premises, and no reason has been called to our attention, nor do we know of any, why it should be permitted to continue to issue citations for contempt in that class of cases in the face of the adverse opinion of the Attorney General, its constitutional legal adviser and the judicial determination of the court having appellate jurisdiction over the commission. No adequate remedy exists by appeal or otherwise for the protection of the plaintiff against repeated and continued citations issued against it for violations of a rule which has been adjudged by this court to be in conflict with the federal Constitution in so far as it relates to interstate shipments. The relief sought here is not against an individual, isolated proceeding, but against continuous proceedings, 12 of which were in progress at one and the same time. Aside from the great hardship these unwarranted proceedings entail upon the plaintiff, they are also an injustice to the people who patronize this transportation company, for upon them finally will fall the great expense growing out of that class of litigation. Common carriers of necessity depend upon the patronizing public for their dividends, and every dollar expended in needless litigation is just that much of an additional burden upon the people.

The question of the adequacy of an appeal is not urged by the Attorney General; but apropos to that question, and the phase of the case just under discussion, we quote from the opinion of Mr. Justice Boreman, in the case of *People ex rel. Pierce v. Carrington*, Com'r, 5 Utah, 531, 17 Pac. 735: "It is said that the applicant has a complete remedy by way of appeal. An appeal could only be resorted to after judgment. It would not prevent the unjust proceeding prior thereto, the expense, vexation, and annoyance of trial, and an appeal would subject the applicant to the necessity of taking all the preliminary steps therefor, giving undertaking, etc., or of going to jail if unable to give the appeal bond; and he would be required to follow the case into the district court, and take steps there for defense against the proceeding. When he should reach the district court, he would find that he could not have

the issues heard and determined there upon which he was tried and condemned by the commissioner. The only question there to be settled would be that the commissioner was acting without authority, and that the proceedings should be dismissed. Such would not be an adequate remedy for the vexations, expense, and probably damaging trial through which he had, against his will, been forced. It is said that the applicant has ample remedy by way of certiorari; but certiorari, like appeal, has no effect until after action has been had by the commissioner. A certiorari can only be issued when the inferior court 'has exceeded' its jurisdiction. It looks to the past, and not to the future. It then would not prevent the illegal proceedings that should follow. The writ of prohibition is preventive, and not remedial, in its nature, and therefore is the appropriate writ to arrest the unauthorized proceeding, prior to judgment, as well as after it, always, however, looking to the future, and not to the past." In *Ellis et al. v. Elkin et al.*, 130 Mo. 90, 30 S. W. 333, it is held: "A writ of prohibition will not be withheld because other concurrent remedies exist; it not appearing that such remedies are equally effective and convenient."

Writs of prohibition were recently issued by this court against the Corporation Commission in *St. L. & S. F. Ry. Co. v. Love et al.*, 118 Pac. 259, and *A. T. & S. F. Ry. Co. v. Corporation Commission et al.*, 118 Pac. 263, not yet officially reported, and against tribunals of purely judicial character in *Haskell v. Huston*, 21 Okl. 782, 97 Pac. 982, and *Evans v. Willis*, Co. Judge, 22 Okl. 310, 97 Pac. 1047, 19 L. R. A. (N. S.) 1050. In the former case it was held: "Prohibition is the proper remedy where an inferior court assumes to exercise judicial power not granted by law, or is attempting to make an excessive and unauthorized application of judicial force in a cause otherwise properly cognizable by it." No legitimate purpose can be conserved by sending this plaintiff back to the Corporation Commission to defend against a dozen different proceedings, all of which are confessedly not within its jurisdiction.

The interest of the state, as well as the interest of the plaintiff, requires a settlement of the question here involved, and the writ prayed for is accordingly granted. All the Justices concur, except WILLIAMS, J., who dissents.

ST. LOUIS BUTTON CO. v. MARTIN.  
(Supreme Court of Oklahoma. Jan. 10, 1911.)

(Syllabus by the Court.)

SALES (§ 363\*) — ACTION FOR PRICE — SUFFICIENCY OF EVIDENCE.

Evidence examined, and held sufficient to require the case to be submitted to the jury, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that defendant's demurrer thereto was improperly sustained.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 363.\*]

Error from Pottawatomie County Court; E. D. Reasor, Judge.

Action by the St. Louis Button Company against Stephen N. Martin. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Paul F. Cooper, for plaintiff in error. B. B. Blakeney, J. H. Maxey, and C. J. Benson, for defendant in error.

HAYES, J. Plaintiff in error, herein referred to as plaintiff, brought this suit in the court below against defendant in error, herein referred to as defendant, to recover on an oral contract entered into between them at the office of plaintiff in St. Louis, Mo., on November 9, 1907. A demurrer to plaintiff's evidence was sustained by the trial court, and judgment rendered thereon in favor of defendant, to review which this proceeding is prosecuted.

The evidence establishes that on November 9, 1907, the defendant called at the office of plaintiff in St. Louis, and entered into an oral agreement with it to have it manufacture for him 5,000 combination celluloid, metal, and ribbon badges, to be used at the inauguration of the state of Oklahoma at Guthrie on November 16, 1907. The price agreed upon for the badges was the sum of \$245. At the time the order was placed, plaintiff's manager stated to defendant that the terms were cash, and that plaintiff would expect payment in full from him at once before making up the goods. In answer thereto defendant replied that he was good for the money, and that Coffin & Lambard, who were backing him, were good for the money, and that Coffin & Lambard were "well rated in Dun's." Plaintiff's manager told defendant that, if that statement was true, he would accept a check for one-half of the price of the badges, and would draw through a bank for the balance. Defendant then gave to plaintiff his check drawn on the Bank of Commerce of Shawnee for the sum of \$122.50. The badges were to be consigned to Coffin & Lambard at Shawnee, Okl. Plaintiff was also to prepay the expense of shipping, including freight, and the amount thereof was to be repaid to it by defendant. Defendant at the time of giving the order stated that he would like to have all the badges shipped on Monday, the 11th day of November, if possible; but he was informed by plaintiff's manager that, on account of not having the badges in stock and their having to be manufactured, it would be impossible for plaintiff to turn out the complete order and ship them by that date, but that plaintiff would do the best it could and hoped to ship a part of them on Monday the 11th and the balance on the day following

the first shipment; that no agreement was made that the goods should be delivered to defendant on any definite date, or as to when shipment would be made, except that plaintiff agreed to hurry the order as much as possible, and hoped to be able to ship in the manner and at the time above mentioned. As soon as the order was placed, plaintiff immediately began the work of manufacturing the badges; and on Tuesday, the 12th day of November, 3,000 of the badges were shipped by it C. O. D. to Coffin & Lambard at Shawnee, Okl. On the 13th day of November plaintiff was informed that the check given to it by defendant, which had been by them sent forward for collection, had been refused payment by the bank on which it was drawn. Upon receipt of this information, plaintiff directed that the check be protested, which was done on the 14th by the drawee for want of funds. Upon receipt of the notice that the check had not been paid by the drawee, plaintiff wired the agent of the express company at Shawnee to raise the C. O. D. on the first shipment of badges that had gone forward on the 13th to the full amount of the order in the sum of \$245 and charges. The remainder of the badges were shipped by express, consigned to the same firm on November 13th. Defendant refused to receive the first shipment on its arrival, but wired to plaintiff that his check had been protested by mistake; that he refused to accept the shipment unless the C. O. D. condition was released; that, if plaintiff would draw on him and release the consignment, he would accept the goods. This plaintiff refused to do, and defendant has refused to accept the goods or to pay for same, and they are now in the express office at Shawnee.

Defendant contends that the demurrer to plaintiff's evidence was properly sustained, for the reason that it showed a breach of the contract on plaintiff's part, which relieved and discharged defendant from accepting the goods, in that the goods were shipped C. O. D. instead of open; also, that the evidence failed to show what damage, if any, plaintiff suffered by reason of defendant's failure to accept and pay for the goods.

Some of the assignments complain of the rejection of certain testimony offered, but they are without merit. The principal question in this case is: Was the refusal of plaintiff to deliver the goods without payment of the purchase price such violation of plaintiff's contract as to release defendant? We think not. There was nothing said between the parties as to whether the goods should be shipped open or upon bill of lading, with draft attached. We think, however, it is apparent from the entire transaction that it was intended by the parties that it should be a cash transaction, and full payment of the purchase price should be made by the time of the delivery of the goods. No credit was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 119 P.—14

asked or given. Plaintiff at first demanded that the entire purchase price be paid in advance before the work of manufacturing the badges was begun; but, upon being assured by defendant that both he and the consignee were responsible, it was agreed that one half of the amount should be paid in advance, which was done with the check given by defendant, and the other half was to be paid upon draft drawn by plaintiff. In the absence of any stipulation to the contrary, a cash sale is generally presumed to have been contemplated by the parties. In the instant case we are not left entirely to presumption as to the intentions of the parties, for the undisputed testimony is that one-half was to be paid in advance, and there can be but little, if any, doubt as to the intention of the parties as to the other half. The only difference ever existing between them at any time as to the terms of the sale was as to whether the entire amount should be paid before any of the articles were begun to be manufactured, or whether paid in the manner agreed upon. When defendant gave his check for one-half of the purchase price, there was an implied agreement and representation on his part that the check would be paid when presented to the bank upon which it was drawn, and that his check was equivalent to the cash. But it was never paid, because he had no funds at the bank with which to pay it. There was therefore a violation by him on his part of the contract from the date it was entered into; and, before the time had arrived for plaintiff to perform in full its part of the contract by delivering the badges to defendant, defendant had put himself in default, and by breach of his contract had relieved plaintiff from the necessity of offering to deliver in order to entitle it to recover any damages it may have sustained by reason of defendant's breach of his contract. *Scribner & Co. v. Schenkel*, 128 Cal. 250, 60 Pac. 860; *Lewis v. Craft*, 39 Or. 305, 64 Pac. 809. If the check had been paid, plaintiff would have been entitled to payment of the balance on the purchase price when it delivered the badges. This would have been the case if no agreement in reference thereto had been made. In *Palmer v. Hand*, 13 Johns. (N. Y.) 434, 7 Am. Dec. 392, the court stated: "When goods are sold to be delivered by the vendor without any stipulation for credit, it is his right to demand payment immediately upon their delivery. The payment being refused, he may reclaim the goods. Ordinarily this right to reclaim should be exercised promptly after refusal of payment."

To require a vendor under the circumstances in the case at bar to make an unconditional offer of delivery to a purchaser who has already violated his contract to pay part of the purchase price in advance is to enable irresponsible purchasers to secure the property of the vendor, and place it in their power to

immediately transfer it to some innocent purchaser, and thereby destroy all chance of the vendor to secure payment for his property or to secure a return of the property.

It is also insisted that the evidence fails to show what amount of damages, if any, plaintiff has sustained. The testimony of plaintiff upon that point was to the effect that the badges were manufactured for a special occasion, and that, after defendant refused to take them, they were practically valueless, and that plaintiff could not use them for anything else. We think this evidence was equivalent to saying that they were without any value; or, at least, we cannot say that such would not be a reasonable inference from it.

The judgment of the trial court is accordingly reversed, and the cause remanded. All the Justices concur.

McNABB et ux. v. HUNT et al.  
(Supreme Court of Oklahoma. Jan. 10, 1911.)

(Syllabus by the Court.)

PRINCIPAL AND AGENT (§ 24\*)—AUTHORITY OF AGENT—COLLECTIONS—EVIDENCE—QUESTION FOR JURY.

Where, to a suit by M. and wife, the mortgagors, against H. and S., the mortgagee, for an accounting and to have applied in payment of the mortgage debt certain moneys collected and retained by H. as agent for S. derived from sales of part of the mortgaged property, H. defaulted and S. denied the agency and by cross-petition sued to foreclose, *held*, after examination, that plaintiff's evidence was sufficient to take the issue of agency to the jury.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 722, 723; Dec. Dig. § 24.\*]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by Charles A. McNabb and Callie L. McNabb, his wife, against John W. Hunt and D. F. Sawyer. Judgment for defendant Sawyer, and plaintiffs bring error. Reversed and remanded.

William L. McCann, for plaintiffs in error.  
C. W. Stringer, for defendants in error.

TURNER, J. To a suit by Charles A. McNabb and Callie L. McNabb, his wife, plaintiffs in error, against John W. Hunt and D. F. Sawyer, defendants in error, in the district court of Oklahoma county for an accounting of all the moneys, proceeds of sales of part of certain mortgaged property, collected and retained by said Hunt as agent for said Sawyer, and to have the same applied, as agreed, in payment of the debt secured by mortgage thereon, made, executed, and delivered by them to Hunt, and by him on the same date transferred to said Sawyer, who furnished the money thereby secured, after default against Hunt, who had absconded, Sawyer, for answer, in effect, denied that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Hunt was acting as his agent in the premises and in receiving the money sought to be accounted for, and filed his cross-petition to foreclose said mortgage. After issue joined, there was trial to a jury, which resulted in judgment for Sawyer pursuant to the prayer of his cross-petition, and plaintiffs bring the case here. At the close of plaintiffs' testimony, Sawyer demurred to the evidence, which was sustained on the ground that the same was insufficient to take the case to the jury on the issue of agency; that is, on the issue of whether or not Hunt was acting as the agent of Sawyer in collecting, retaining, and failing to apply, as agreed, the moneys in question. This is assigned for error.

On this point the testimony discloses: That on March 20, 1902, plaintiffs in error were the owners of a homestead of 160 acres of land in Oklahoma county. That on said day they borrowed of said Hunt, as attorney and loan broker in Oklahoma City, \$4,000, executing their note therefor, due 5 years after date with 7 per cent. interest per annum, payable to him at his office in said city, and secured the same by mortgage on said land. That he on the same day assigned the same by written transfer to Sawyer, who resided in Iowa, the same being recorded in said county after this suit was brought. That on September 20, 1902, \$140 interest for the first six months was paid by the McNabbs to Hunt when due, they knowing by that time he was acting as agent for Sawyer, who at no time notified them to pay any other person. That about December, 1902, Sawyer for the first time met McNabb in Hunt's office in Oklahoma City, where Sawyer and wife were visiting Hunt's family, and a day or two later the Sawyers and Hunts visited the McNabbs on the land in question. That while there Sawyer said to McNabb he had been informed by Hunt that probably McNabb would want to increase the amount of the loan, whereupon McNabb replied, in substance, that he had talked with Hunt concerning the matter, but had decided not to do so but to sell off a part or all of the place, if necessary to clear up the indebtedness. That to the inquiry from Sawyer whether he had any offers on the place McNabb answered that he had been offered \$9,000, whereupon Sawyer replied: "Whenever you want to give this place away for \$9,000, you just tell John (referring to Hunt), and John will give you the money for me." Concerning this conversation, McNabb further testified: "During the time we were talking of selling a portion or all of the place, he asked me which I preferred to do, or which I thought I would do with reference to the sale, and I told him I did not care to dispose of all the place, if I could help it; I thought it would, enhance in value, and that I would probably sell a portion of it. He then said: 'Whenever you get ready to dispose of the

place, or any part of it, just make your arrangements with John (referring to Hunt, who was present), and everything will be the same as if you were transacting the business with me directly.'" That, relying thereon, the McNabbs and Hunt on March 16, 1903, entered into a contract in writing wherein it was recited that, whereas the McNabbs had that day deeded to Hunt a portion of the mortgaged land (80 acres, describing it), it was agreed that Hunt have the same platted in five-acre lots within a reasonable time, and sold to the best advantage, and the proceeds derived from said sale be applied (1) in payment of the expense of said platting and sale, (2) in payment of a \$500 note signed by the McNabbs, and (3) in payment of said mortgage debt; the balance, if any to be turned over to the McNabbs. That, pursuant to said agreement, said land was so platted and lots sold by Hunt to the amount of \$4,895.33, which, less expense of \$1,715.76, left net proceeds in his hands, \$3,179.58. Thus matters stood about November 1, 1903, a short time prior to which Sawyer again appeared in Oklahoma City and visited at Hunt's home. There McNabb saw and asked him if he could not set an hour when the three might get together in Hunt's office and go over their affairs and ascertain how McNabb stood with reference to the indebtedness in question and the number of lots that had been sold and what had been realized on them. To this Sawyer said he would be glad to meet the other two and go over the matter. He said, "John tells me you have sold several of the lots." McNabb said: "Yes, several sold, but very little actual money realized. There is quite a number of notes falling due right along and it will be some months before we realize on them." At that time Sawyer set the hour of meeting at 10 o'clock that morning in Hunt's office, at which time the McNabbs were there. That after waiting some time Sawyer came, but soon left, saying he had other business to look after, and deferred the matter indefinitely and walked out and left the city that same day. In reply to a letter concerning the matter, Sawyer wrote: "Iowa City, April 16, 1904. Mr. C. A. McNabb, St. Louis, Mo.—Dear Sir: Your favor of the 15th inst. received. Replying to your inquiry as to how much has been paid on your note of \$4,000 held, etc. The interest has been paid, but nothing on the notes. I have just had this matter up with Mr. Hunt, having learned in a roundabout way that a considerable amount of the 160 acres had been sold and nothing paid to me. I wrote to him, 'Hunt,' for a full detailed accounting of the matter. In reply, Mr. Hunt informs me that 35 acres have been sold—also \$2,000 of the money received from the sale is unpaid—will be due October next. I knew nothing of this, and am very much surprised that you don't know all about this whole deal, as it is certainly important to you. I also notified Mr.

Hunt that no more sales could be made unless the money from the sale were indorsed on 'your' notes. I also said to Mr. Hunt that I would accept my money 'at any time I wrote.' In reply, Mr. Hunt wrote me that as your mother was very sick he didn't care to take the matter up on that account, so it was decided to let the matter rest for the present—but why do you not know that nothing has ever been paid on your notes? Did you think there had? Yours truly, D. F. Sawyer."

The assignment of the paper in question was made by Hunt to Sawyer without recourse and was recovered after Hunt had gone not to return, on which day some 20 other assignments evidencing loans secured by notes and mortgages made by Hunt to Sawyer went to record in that county. As to the course of dealing between Hunt and Sawyer, the record discloses that Hunt collected interest and principal on said loans for Sawyer, for which the borrowers were credited on final settlement with Sawyer; that on a loan thus made to one Brissey the arrangement for paying the mortgage debt by sale of the property was similar to the one in question, which arrangement was known to and approved by Sawyer, and payment was made to Hunt under his direction and the mortgage released by him when thus paid. With reference to a loan to one Griffith in 1902, the testimony discloses that Hunt told Griffith in the presence of Sawyer that Sawyer was the man whom he was getting a loan of \$5,000 from; that Sawyer approved the security, directed Hunt to make the loan, which was done, and the mortgage taken thereon in the name of Hunt, to whom interest was afterwards paid, for which Griffith got credit.

The witness Chinn testified that in 1902 he made a loan of \$1,500, gave a note and mortgage to Hunt, and met Sawyer in Hunt's office at the time of the transaction; that he had a conversation with him about a year later concerning the loan; that he made interest payments to Hunt and received credits therefor; that later he had a settlement with Sawyer's lawyer; that Sawyer spoke of Hunt having beaten him out of a lot of money; and that witness exhibited receipts or coupon interest notes for payments made to Hunt for Sawyer, and was also credited therefor on the mortgage debt.

While it is a general rule that one paying to an agent the amount due upon written securities when the agent does not have the paper in his possession does so at his peril (*Haines v. Pohlmann*, 25 N. J. Eq. 179; *Smith v. Kidd*, 68 N. Y. 130, 23 Am. Rep. 157; *Williams v. Walker*, 2 Sandf. Ch. [N. Y.] 325; *Jones on Mortgages*, § 964), and it has often been held that authority to an agent to receive the interest on such security does not authorize one to pay him the principal (*Jones on Mortgages*, § 964; *Fisher v. Schiller*, 50

*Iowa*, 459; *Draper v. Rice*, 56 Iowa, 114, 7 N. W. 524, 8 N. W. 797, 41 Am. Rep. 88), the general rule and exception thereto is thus stated by Mr. Justice Dillon in *Tappan v. Morseman*, 18 Iowa, 500: "So that it may be laid down as a general rule that, if a debtor owing money on a written security pays to or settles with another as an agent, it is his duty, at his peril, to see that the person thus paid or settled with is in possession of the security. If not thus in possession, the debtor must show that the person to whom he pays or with whom he settles has special authority, or has been represented by the creditor to have such authority, although for some reason not in possession of the security." *Spence, Resp., v. Pieper et ux.*, App., 107 Wis. 453, 83 N. W. 660; *Mechem on Agency*, § 373.

Applying this rule and exception to the facts herein, the question is: Did Sawyer, in the scheme of the platting and sale of the lots, hold Hunt out to the McNabbs as his agent, and were the McNabbs deceived by appearances thus brought about and induced to part with the moneys derived from the sale of the lots to Hunt by reason of any act of Sawyer? If so, it might be fairly inferred that Hunt was acting as the agent of Sawyer, who is chargeable with the amount of his speculation and must account therefor; otherwise, not. Or if from the facts, which are undisputed, reasonable men might draw different conclusions, the question is one for the jury, and the court erred in taking it from them. The testimony is undisputed that about December, 1902, while on a visit to Hunt's home, where he met the McNabbs, Sawyer was informed of McNabb's desire to liquidate the debt by selling off a part or all of the place. As to selling it all, Sawyer, in effect, offered to give therefor through Hunt \$9,000, and to the suggestion of McNabb to sell a portion of it he replied: "Whenever you get ready to dispose of the place, or any part of it, just make your arrangements with John (referring to Hunt, who was present), and everything will be the same as if you were transacting business with me directly." A fair inference from all of which might be that thereby leave was granted by Sawyer to McNabb to make such disposition of the place, looking to the payment of the mortgage debt, as would be approved by Hunt, who would act in his place and stead with reference to the matter. The undisputed testimony further shows that McNabb, relying on the leave or ostensible authority thus given, deeded 80 acres of the mortgaged property to Hunt in trust to carry out the written contract between them of that date, to the effect that the net proceeds arising from the sale were to be applied by Hunt in payment of the mortgage debt. That Sawyer felt bound by this arrangement is evidenced by the fact that prior to the statement of account November



1, 1903, at which time McNabb first learned of how matters stood between him and Hunt with reference to the sale of the property, Sawyer, at Hunt's house, at the request of McNabb, set the hour of meeting at Hunt's office to review Hunt's action in the premises and ascertain how matters stood. Upon second thought, however, after appearing there at the hour set, he evaded the appointment and later wrote the letter of April 16, 1904, in effect denying all knowledge of or interest or participation in the transaction.

Without further discussion, we are of the opinion that the court erred in sustaining a demurrer to plaintiff's evidence, and for that reason this cause is reversed and remanded for a new trial. All the Justices concur.

### WILSON v. MORTON et al.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

#### 1. INDIANS (§ 20\*)—LANDS—SALES—PROCEEDINGS BY GUARDIAN.

The guardian and mother of two Cherokee minor children made, under section 22 of an act of Congress approved April 28, 1906 (34 U. S. Stat. at L. c. 1876, p. 145), application to the proper court for an order permitting her to sell and convey to the proposed purchaser of the mother's interest the undivided interest of her minor children and wards in the allotted lands inherited by them from their deceased father by filing in the court her petition, setting up the price offered by said purchaser and her contract to sell her interest to him, and introduced evidence to establish that the price offered for her wards' interests was the fair, reasonable market value thereof. The court thereupon made an order directing the sale of the minors' interests in the lands, and directed the guardian to convey to the purchaser of her interest the interests of her wards and to execute therefor her deed as guardian, all of which was done; and, upon report thereof made by the guardian to the court, the sale in all things was approved. *Held*, that the sale was made in substantial compliance with said section 22, *supra*.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 53; Dec. Dig. § 20.\*]

#### 2. INDIANS (§ 20\*)—LANDS—SALES—PROCEEDINGS BY GUARDIAN.

*Held*, also, that said statute prescribes the procedure to be followed in making sales of inherited lands of Indian minors, authorized by said statute to be sold.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 53; Dec. Dig. § 20.\*]

Error from District Court, Washington County; John J. Shea, Judge.

Action by D. H. Wilson, as guardian, against Asa D. Morton and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Plaintiff in error, as guardian of his two wards, Alberta Mac and Dixie Joe Keeler, brought this action in the district court of Washington county for possession of, and

to remove cloud from title and for an accounting for the rents and profits on, certain lands belonging to his wards located in that county. A demurrer to his petition was sustained by the trial court; and, since that action of the court constitutes the only assignment of error for reversal of the cause, it will be necessary to set out in some detail the facts alleged in his petition.

One Albert Keeler, who was a duly enrolled citizen of the Cherokee Nation and who died on October 20, 1905, was the father of the plaintiff's wards. At the time of his death there had been allotted to him the E. ½ of lot 2 and the S. ½ of lot 4, township 2 N., range 12 E., and thereafter deeds to said lands were executed by the duly authorized agents of the government. He left surviving him as his sole heirs at law Blanche Keeler, his widow, and his two minor children, now plaintiff's wards. He died intestate, and there was no administration upon his estate. Prior to his death he had leased the property in controversy for oil and mining purposes to the Cudahy Oil Company. That company has partially developed the property by drilling oil and gas wells thereon, and an income is being derived therefrom. About one year after Albert Keeler's death, Blanche Keeler, his surviving wife, was appointed guardian of their two children, and continued to serve as such until the 28th day of September, 1908, when the county court, in which her guardianship was pending, after due notice and proper proceedings, removed her as guardian and appointed plaintiff in error. Prior to her removal as guardian, to wit, on the 6th day of May, 1908, she sold and conveyed her one-third interest in and to said land to defendant Asa D. Morton. At the same time she sold and contracted to convey to Morton the interests of her wards in said lands. She thereupon filed her verified petition as guardian with the county court, in which she set up the death of her husband, his ownership of the lands at the time of his death, and the offer of Morton to buy the interests of her wards and her tentative contract to sell same to him, and prayed for an order of court permitting and directing her, as guardian, to execute to Morton a deed, conveying their title and interest in and to the lands. Affidavits supporting the allegations of her petition, that the price offered and agreed upon for the wards' interests was the fair market value thereof, were filed with the petition. Upon hearing the application and evidence in support thereof, the court found the price offered for the land was the fair value thereof, and that the best interests of the wards would be subserved by the sale. On the same day the application was presented and filed, to wit, on the 18th day of May, 1908, the county court ordered that the guardian

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

be authorized to make the sale and convey by deed to Morton the wards' title and interests, and that she be required to give an additional bond as required by law. On the same date, after the deed had been executed by her, the county judge indorsed his approval upon the deed; and, upon report of the same having been made by the guardian, an order was made by the county court in all things approving and confirming the sale. The sale and conveyance therefore by Blanche Keeler, as guardian, to Morton, was fully completed and consummated on May 19, 1908.

Grinstead, Mason & Scott, for plaintiff in error. Veasey & Rowland and J. D. Talbott, for defendants in error.

HAYES, J. (after stating the facts as above). [1] By agreement or concession of counsel there is but one proposition of law presented by this proceeding. That question is: Whether the proceedings taken and had by Blanche Keeler, guardian, in making the sale of her wards' interests in the lands, was in substantial compliance with the requirements of section 22 of an act of Congress, approved April 28, 1906 (34 U. S. Stat. at L. c. 1876, p. 145). It is the contention of plaintiff in error that in making a sale of a minor Indian's lands under said statute the statute of probate procedure of the state regulating the sale of real estate of minors shall be followed, and that, since it was not followed in this case, the sale is void. This contention necessarily presents as the first question for determination whether the state statute prescribing the procedure for sale of minors' lands has any application to the sale made under section 22 of the federal statute. Our decision upon this question renders it unnecessary to decide whether the departure in the procedure pursued in this case from the procedure prescribed by the state statutes would render the sale void or only voidable.

What is required in order to make a valid sale under section 22 of the federal statute is now presented to this court for the first time. There may have been other cases decided by the court heretofore, under the facts of which this question could have been presented. If so, our attention was not challenged or directed thereto, and no decision thereon has ever been made. The trial court took the view that said section 22 fixes within its own terms the procedure to be followed in making a sale thereunder, and that no other statute has any application thereto. In that view we concur. Section 22 of an act of Congress of April 28, 1906, reads as follows: "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been is-

sued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

[2] Congress by this statute intended to and did remove all restrictions upon the alienation of lands inherited from deceased Indians of the Five Civilized Tribes in the hands of adult heirs, which had been placed thereon by the various acts and treaties of Congress with the Indian tribes. It authorized all such adult heirs, except those of full blood, to sell their inherited lands without the approval of any one; but full-blood adult heirs could convey only with the approval of the Secretary of the Interior. The act does not undertake to remove generally the restrictions upon alienation by minor heirs. It does authorize under certain conditions certain minor heirs to convey. It is important in the construction of the statute and in arriving at the intent of the legislative will to notice the class of minor heirs whose inherited lands are authorized to be sold. The classification of those who may sell and those who may not sell is not made upon the basis of the quantum of Indian blood of the heirs, as has been the case in all instances before and since this act, where Congress has attempted to remove restrictions upon the power of alienation of certain members of these tribes, but to retain them as to others. The power of the minor heir to sell is not made dependent upon whether he is a full-blood Indian or less than a full-blood, nor dependent upon his age, or upon whether a sale of his land is necessary to his education and support, or to be made for the purpose of investment. His authority to sell by his guardian is made dependent upon the existence of an adult heir, and, where there is an adult heir, authority is not given to the minor to sell alone and separately his interest, but he may, acting through his guardian, upon order of court, join the adult heir in a sale. The act does not specifically prescribe that the sale may be made for the purpose or under the procedure prescribed by the statute then in force in the Indian Territory, authorizing and providing for the sales of real estate of other minors than Indians; and, if said stat-

utes or the statutes in force at the time of this sale ever had any application to the sales of minors' lands made under said section 22 of the federal act, they must be held to have done so by implication, and not by any express provision of the act. If Congress intended that the statutes in force in the Indian Territory at the time of the passage of this act should fix the procedure to be followed in making such sales at the passage of the act, it may be assumed that Congress knew what such statutes were; and, if the procedure prescribed by the statutes would in a large measure defeat the legislative purpose in permitting minor heirs to join the adult heirs in the sale, the act ought not to be held by mere implication to provide that such sales should be governed by those statutes. In placing restrictions upon the alienation by Indian allottees of the Five Civilized Tribes of their allotted lands, the legislative purpose was to protect the Indian against his own improvidence, against the cunning of those who, through cupidity, might undertake to procure from them their lands at inadequate prices, and to protect them against the superior business ability of his more experienced white neighbors until such Indians might become familiar with their lands and their value, and sufficiently adapted to the new condition in which they were placed by a division of their tribal property that they could realize the full value of their lands when the same were placed upon the market by them. In authorizing the adult heirs to sell their inherited lands, Congress correctly anticipated that many cases would arise in which there would be both adult and minor heirs, each holding an undivided interest in the lands of a deceased allottee; and, unless some provision was made for the minor heirs to join with the adult heirs in the sale of the entire property, the very property which the act authorizes the adults to sell would be attended with conditions that would greatly tend to prevent those Indians whom the government had theretofore kept under its protecting care from securing the market value of their interest in their inherited estates; and, if the adult heirs sold their lands, then the minor heirs, on becoming of age, or when the restriction should be removed from their power to sell, would find their opportunities to sell to any one except the purchaser from the adult heir greatly lessened and the value of their property greatly depreciated on that account before they had power or opportunity to convey. By permitting the adult heirs and the minor heirs to join in one sale of the entire property no embarrassment need arise in making the sale, because the property is owned by various persons.

Sections 3502-3511 of Mansfield's Digest of the Statutes of Arkansas (Ind. T. St. 1899, §§ 2398-2407), in force in the Indian

Territory at the time of the enactment of the federal act of April 28, 1906, provide for the sale of minor's land for certain purposes, and prescribe how such sales shall be made. Section 3502 authorizes the probate court to order a sale of a minor's real estate for the purpose of educating the minor, and the succeeding sections provide how such sales shall be advertised and conducted. Sales for the purposes provided by that section are required to be at public auction to the highest bidder, and by section 3506 the guardian is required to report the sale to the court for confirmation; and, if the court refuse to approve the sale, the order of sale is renewed, and the same proceedings had as upon the original order. Section 3509 authorizes a sale when it appears that it will be for the benefit of the ward for the sale to be made, and the proceeds put out at interest or invested in other property named in the statute; and the succeeding section provides how sales for this purpose shall be made. But the sale authorized by said section 22 of the federal act is not based upon either of the foregoing purposes. The power of the court to permit the guardian to join in a sale with the adult heir is not dependent upon the sale's being necessary for the purpose of educating the minor or upon its appearing beneficial to the ward's estate for the purpose of investment. The court's discretion is not limited by either of these statutes; and, if the sale is to be made under the procedure prescribed by these statutes then in force in the Indian Territory, which statute is to govern? The one regulating the sale for the purpose of education, or the one regulating sales for the purpose of investment? A sale made for the purpose of education must be at a public sale and to the highest bidder and a sale for the investment may be at public sale, if the court so orders. Sections 3503, 3511, 174, Mansfield's Digest of the Statutes of Arkansas (Ind. T. St. 1899, §§ 2399, 2407, 231). Such a sale contemplates one at which all may bid, and the highest bidder becomes the purchaser, if the amount bid by him meets the approval of the court as a fair price. But, if the highest bidder at a guardian's sale under the federal act was other than the purchaser from the adult heir (conceding without deciding that the act authorizes a sale under any condition by the guardian to any other person than the purchaser from the adult heir), it would then be in the power of the purchaser from the adult heir to prevent a sale to the highest bidder by refusing to purchase the adult heir's interest, unless he secured the minor heir's interest, for the act only authorizes the guardian to join in a sale with the adult heir; hence, there could, in effect, be but one bidder at the public sale. The language of said section 22 here under consideration can be said to be but slightly ambiguous, if ambiguous at all.

There can be no doubt as to what Indian minors may, under its provisions, sell their inherited lands, or when they can sell. As to how the sale shall be made, the act provides that it shall be by the guardian, duly appointed, upon order of the court, and that the order of court shall be made upon petition filed by the guardian. The procedure prescribed by the act itself seems to us complete. There is no express intent to incorporate the provisions of any other statute into this one, or to make any other statute applicable to sales thereunder; and we think it should not be construed as accomplishing this result, when to do so would lead to confusion and to a practical, if not complete, defeat of the purposes of the act.

The suggestion that this conclusion lodges a large discretion and unrestrained power in the courts of the Indian Territory and in the county courts of the state succeeding the courts of the Indian Territory in this jurisdiction does not militate against this construction of the statute. The power of Congress to regulate how lands may be sold which have been allotted by the federal government to members of the Indian tribes with restrictions upon their power to alienate them has been often sustained by the courts; and the policy of Congress both as to the Five Civilized Tribes and as to other Indian Tribes, where sales have been permitted subject to the approval of some designated agent or authority of the government, has been to lodge in such officer a broad discretion to be exercised in determining whether such sales shall be approved. The act authorizing certain of the minors to join with adult heirs in the sale does not apply to all minors, and is not general in its nature. It attempts to provide for the conveyance by certain minors in specific cases of their undivided interests in inherited lands, and we must look to the terms of the statute itself for the procedure by which such sales may be made, and not to the general statutes of the state authorizing and regulating the sale of the real estate of minors. The sale in this case was made in substantial compliance with its provisions. The sale was completed before the approval of Act Cong. May 27, 1908, 35 U. S. Stat. at L. p. 812, c. 199, and the provisions of that act have no application.

There may be other questions which, under the facts in this case, could have been presented, but they have been waived by counsel in their briefs, and our failure to notice them is not to be construed as in any manner passing upon them.

The judgment of the trial court is affirmed.

TURNER, C. J. and WILLIAMS, KANE, and DUNN, JJ., concur.

# STEWART v. COMMONWEALTH NAT. BANK.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

## 1. BILLS AND NOTES (§ 503\*)—ACTION BY ASSIGNEE—FAILURE OF CONSIDERATION—KNOWLEDGE OF ASSIGNEE.

In an action upon a negotiable promissory note by the indorsee thereof before maturity in due course of business, the maker of the note offered to introduce in evidence a written contract between him and the payee, executed as a consideration for the note and to show that the payee had violated the contract, and that the consideration of the note failed, before the maturity of the note. The refusal of the court to admit said contract and the rejection of evidence tending to show a violation thereof will not be held reversible error, in the absence of any showing, attempt to show, or statement by the maker that he could show, that the indorsee had notice of such contract and of the failure of the consideration at or before the time he purchased the note.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 503.\*]

## 2. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

The refusal of the court to permit a witness to answer a competent question is not reversible error, if subsequently the witness has been permitted to answer, the same or substantially the same question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.\*]

## 3. BILLS AND NOTES (§ 29\*)—PLACE OF PERFORMANCE.

A promissory note, dated in Texas and made payable in that state, in the absence of other proof, is a Texas contract and is governed by the laws of Texas relating to the validity of its provisions.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 248; Dec. Dig. § 29.\*]

## 4. EVIDENCE (§ 80\*)—FOREIGN STATUTES—PRESUMPTIONS.

In the absence of proof as to what the law of another state is upon any question, it will be presumed that the law of such state is the same as in this state, the forum in which the action is prosecuted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 14-16; Dec. Dig. § 80.\*]

Error from Pontotoc County Court; Joel Terrell, Judge.

Action by the Commonwealth National Bank against S. P. Stewart. Judgment for plaintiff. Defendant brings error. Affirmed.

Bullock & Kerr and J. F. McKeel, for plaintiff in error. Stone & Maxey, for defendant in error.

HAYES, J. Defendant in error, hereinafter called the "bank," instituted this action in the court below to recover on a promissory note the sum of \$437.50, interest, and attorney's fees. Said note was executed by plaintiff in error, hereinafter called "defendant," on the 7th day of July, 1907, to one L. M. Genereux, payable on the 1st day of the following November. The bank alleges that the note was transferred to it on the 4th

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

day of September, 1907, before maturity in the due course of business, without any notice of any equities between the maker and the payee. Defendant by his answer denies that the note was transferred to the bank before maturity without notice of equities, and alleges that since the execution and delivery of the note, without his knowledge or consent, a material alteration has been made in it, in that the word "ten," relating to the amount or rate of interest contracted to be paid on said note, has been erased and the word or figure "eight" inserted in the place thereof. Upon these issues the case was tried to a jury, whose verdict was for the bank, upon which judgment was accordingly rendered.

No question was made in the lower court, and none has been made here, as to the negotiability of the note sued upon. Both parties have proceeded in both courts upon the theory that it is a negotiable instrument, and we shall proceed upon the same theory, without examining the form of the notes for the purpose of ascertaining whether it is. The alleged errors of which defendant complains are the rejection of certain evidence offered by him and the allowance by the court of the bank to recover judgment for 10 per cent. of the amount of the note as attorney's fees. Defendant's counsel by various objections, most of which were sustained, offered to establish that which is stated in substance in the case-made in their own language as follows: "Defendant now offers to prove by the defendant's own testimony that at the time this note was executed same was executed upon an express written understanding with the payee, Generes, that he receive a policy of insurance, and that this note was to cover the first premium on same; and that the annual premiums were to be an agreed amount stated in said contract; and that no policy was ever delivered to the defendant in compliance with this agreement; that on various occasions, from and including the 11th day of September up to some time in October, defendant had conversations with Generes in which Generes exhibited this note to him and claimed to be the owner thereof."

[1] No error was committed in refusing permission to introduce in evidence the written contract alleged to be executed between the maker and the payee of the note at the time of the execution of the note. Defendant was permitted to prove that a written contract was executed between them at that time, but was refused permission to offer it in evidence. The evidence does not establish, and no effort was made by defendant to establish, that defendant in error had any notice or knowledge of the existence of such contract before it purchased the note, and defendant at no time stated that he could establish such fact, if permitted to do so. The purpose of the evidence rejected was to establish a failure of the consideration for

which the note was executed. There are only two conditions upon which said evidence could be competent or material, which are: The transfer of the note to the bank before maturity with notice of the equities between defendant and the payee, or transfer after maturity, in which latter event the law would charge the bank with such notice. Proof of failure of consideration in an action on negotiable instruments by one claiming to be a bona fide purchaser thereof in due course of business before maturity cannot defeat the action, without proof that plaintiff had notice thereof before he purchased the instrument; and where, as in this action, the transferee introduces the note in evidence and the indorsement of the payee thereon, executed before maturity, the burden of proving notice of the maker's equities, to the transferee before purchase, in order to destroy the bona fides of the holder, is upon the maker. *Gillespie et al. v. First Nat. Bank of Kingfisher*, 20 Okl. 768, 95 Pac. 220. The bank sought to recover in this case solely upon the ground that it was an innocent purchaser before maturity. There was no contention by it that it acquired the note after maturity, and that the equities between defendant and the payee of the note do not exist; and the jury was instructed that, in order for the bank to recover, the burden of proof was upon it to establish by a fair preponderance of the evidence that the note had been duly executed and transferred to it in due course of business for a valuable consideration; and that said transfer took place before maturity. By the general verdict, the jury found this issue in favor of the bank. The rejection, therefore, of said evidence offered for the purpose of proving what the equities between the original parties of the note were that would have constituted a defense in the event that the note was transferred after maturity, was not prejudicial.

[2] Objections to certain questions propounded to defendant, tending to show that the payee of the note was in possession of it at and after the time the bank claims to have purchased it, were sustained. If the evidence thus sought to be introduced was admissible, no prejudicial error was committed; for, in answer to similar questions not objected to, defendant was permitted to testify that he saw the payee with the note in his possession as late as September 25th after the alleged transfer on the 4th day of the same month.

Defendant also sought to testify that at the time after the alleged transfer of the note, Generes, the payee, while in possession thereof, claimed to be its owner. This testimony was also rejected, without error; for such statements of the payee, which are not claimed to have been made in the presence of the bank, could not bind the bank.

The question of material alteration of the note was, upon conflicting evidence, submit-

ted to the jury under instructions that correctly state the law pertaining to that question, and the verdict is conclusive of that issue.

[3.] The note stipulates for attorney's fees, if it is placed in the hands of an attorney for collection. It is dated at Dallas, Tex., and made payable at the same place. In the absence of other proof, these circumstances make the laws of Texas controlling on the question of validity of this stipulation. *Martin v. Berry*, 1 Ind. T. 399, 37 S. W. 835; *Daniel on Negot. Inst.* § 379. But the record does not furnish any proof as to what the laws of Texas are relative to stipulations for attorney's fees in such instruments. In the absence of such proof, they will be presumed to be the same as the law of this state, the forum in which the suit was brought. *Daniel on Negot. Inst.* § 891. Such stipulations in this jurisdiction are valid, and are enforceable. *Cooper et al. v. Bank of Indian Territory*, 4 Okl. 632, 46 Pac. 475.

Finding no prejudicial error in the record, the judgment of the trial court is affirmed.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

#### FIRST NAT. BANK OF MUSKOGEE v. TEVIS et al.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 1051\*)—REVIEW—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The evidence of T. that he delivered the box of jewels to the assistant cashier of the bank being positive and unequivocal and uncontradicted, the admission of incompetent evidence tending to corroborate such witness on that point, being merely cumulative, and there being no contradictory evidence offered on that issue, will not operate as reversible error.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4161-4170; Dec. Dig. § 1051.\*]

#### 2. DESCENT AND DISTRIBUTION (§ 91\*)—RIGHTS OF HEIRS—RIGHT OF ACTION.

Under the laws existing in the Indian Territory at the time of the erection of the state (*Mansf. Dig.* § 2522 [*Ind. T. Ann. St.* 1899, § 1820]), the personal estate not disposed of nor otherwise limited by marriage settlement, when a person dies intestate, descends to be distributed in parcenary to his or her kindred, male and female, subject to the payment of his or her debts, etc.

(a) There being no outstanding debts against such estate, and neither letters of administration applied for nor granted, the heirs may maintain an action to recover such personality.

[Ed. Note.—For other cases, see *Descent and Distribution*, Dec. Dig. § 91.\*]

#### 3. APPEAL AND ERROR (§ 216\*)—INSTRUCTIONS—REQUESTS—NECESSITY.

An instruction that "it is the duty of the bank to employ fit men, both in ability and integrity, for the discharge of their duties," is

not reversible error; the court not being requested to charge as to what degree of care should be exercised in making such employment.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 630-641; Dec. Dig. § 216.\* *Trial*, Cent. Dig. §§ 630-641.]

#### 4. WAREHOUSEMEN (§ 24\*)—SPECIAL DEPOSITS—LIABILITY FOR LOSS.

A national bank received a certain lot of diamonds on special deposit, it being the custom of such bank to take such special deposits from its customers, which was known and acquiesced in by the directors. The diamonds were lost through the gross negligence of the employees of the bank. *Held*, that the bank was liable for the value of said diamonds.

[Ed. Note.—For other cases, see *Warehousemen*, Dec. Dig. § 24.\*]

Error from District Court, Muskogee County; John H. King, Judge.

Action by Myra Tevis and others against the First National Bank of Muskogee. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. W. Zevely, J. M. Givens, and Edgar Smith, for plaintiff in error. Bailey & Wyand, for defendants in error.

WILLIAMS, J. This proceeding in error is to review the judgment of the lower court, wherein the defendants in error, Myra Tevis, Elizabeth Tevis, Buell Tevis, and Walter Stone Tevis, minors, by their next friend, William T. Tevis, as plaintiffs, sued the plaintiff in error, as defendant, declaring in their petition that on the 14th day of March, 1905, they were the owners of certain diamonds of the value of \$825, which were, by their said next friend, placed in the custody of said defendant for safe-keeping, with the agreement and understanding that the same was to be returned to plaintiffs on demand; that during the month of June, 1907, plaintiffs, through their said next friend, demanded the delivery of said diamonds, etc., from said defendant, and frequently thereafter demanded the same; but that defendant declined and refused to deliver the same or any part thereof to plaintiffs.

The evidence on the part of plaintiffs tended to prove that the diamonds in question belonged to the mother of said minors; that she died on March 14, 1905, intestate; that no letters of administration as to said estate had ever been applied for or granted; that no debts were outstanding against said estate; that the said plaintiffs were the only heirs thereto; that it was the custom of the officers of said bank to receive and keep such things for safe-keeping, which was acquiesced in by the board of directors.

[1] Counsel for plaintiff in error in their brief insist that the court erred in permitting W. T. Wisdom, the assistant cashier of said bank, to testify as follows: "Q. Well, just tell how you happened to see it again (referring to the box containing the diamonds). A. Why, Mr. Tevis came to my

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

window and said he wanted it, his people wanted to examine the contents of the box (containing the jewels), and told me to let him take it over home and he would return it. Q. How long until he returned it, if you remember? A. I don't remember whether he ever did return it or not, but I think he did; I am pretty sure that he did return it. Q. Well, don't you remember he did return it and handed it over to you? A. I remember his coming and getting it all right, and I feel sure that he did return it to me. Q. Then what did you do with it when he returned it? Mr. Smith: I object to the answer and move it be stricken because it does not show knowledge on the part of the witness. By the Court: What do you say about it, Mr. Wisdom? Witness: I just say I feel sure that he did return it to me. Q. Well, what did you do with it when he returned it to you? By the Court: Are you able to say any different from that, Mr. Wisdom? Witness: No, sir."

W. T. Tevis, the next friend, also, without contradiction, testified that he left the package of diamonds with Mr. Dabbs, the president of the bank; that thereafter he got the package from Mr. Wisdom, and returned it to him. He is also corroborated in part by his daughter, Miss Sallie Tevis.

McKelvey on Evidence, at page 390, § 243, says: "It has been seen in the rules heretofore discussed in the chapter on 'Hearsay' that a witness is expected to testify from his own knowledge. In the examination of witnesses much difference is brought out between the ideas and language of various witnesses in reference to their knowledge of the facts about which they are questioned. One witness will know a thing, another will have a recollection, and another will only go to the extent of giving his impression as to it. The chances are that all mean the same. Knowledge consists of an impression on the senses; and when the circumstances show, as they usually will, that what a witness calls an impression is not an opinion based on information, but the result of his own observation, such impression is admissible. As has been said: 'No line can be drawn for the exclusion of any record left upon the memory as the impress of personal knowledge because of the dimness of the inscription.' And a witness' knowledge, however uncertain, may always be introduced for what it is worth."

With the positive and unequivocal evidence of W. T. Tevis that he returned the box of jewels to the bank, delivering the same to W. T. Wisdom, the assistant cashier, and no witness denying this fact, the evidence of the assistant cashier was simply corroborative, and therefore, if it was incompetent, it could not operate as reversible error.

The evidence of the assistant cashier as to the custom of the bank in receiving packages and papers and the like for safe-keep-

ing from individual customers of the bank was competent. It is not essential that such evidence be proved by one of the directors. Any witness who knows the custom may testify as to what it is. The other objections as to the introduction of evidence are without merit.

[2] The defendant asked the following instruction: (a) "You are instructed that before plaintiffs can recover they must show title in themselves to the property which is the subject of the controversy. The fact that the mother was shown to have owned the property in her lifetime does not, in this case, show the title to said property in said plaintiffs, and the court instructs you as a matter of law that your verdict cannot be for the plaintiffs in this action, but must be in favor of the defendant."

This instruction was refused. On the contrary, the court instructed the jury as follows: (b) "The court instructs the jury that if you believe from the evidence that the plaintiffs are the children of Bell R. Tevis, deceased, and that the mother died without a will, and was the owner of the diamonds described in plaintiffs' petition herein, then and in that event the plaintiffs became the owners of said diamonds at the death of their mother by inheritance."

The court further instructed the jury: (c) "The jury are instructed that it is the duty of a bank to employ fit men, both in ability and in integrity, for the discharge of their duties, and if they believe that the defendant did not do this, and that in consequence of gross negligence on the part of the defendant in employing that character of men the defendant is unable to return the diamonds to plaintiff, their verdict will be for plaintiff."

Section 2522, Mansfield's Digest 1884 (section 1820, Ind. Ter. Statutes 1899), which was in force in Indian Territory at the time of the death of the mother of the plaintiffs, provides: "When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in part, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner: First: To children, or their descendants, in equal parts. \* \* \*"

We think the court properly refused the instruction (a) requested by the plaintiff in error. The undisputed evidence showing that the plaintiffs were all the children and heirs of the intestate, instruction (b) is without prejudicial error.

Paragraph 8 of the court's instructions is as follows: "The jury are further instructed that if they believe from the evidence that the defendant accepted said diamonds as a special deposit for safe-keeping, that it was the duty of the officers and agents of

said defendant to exercise reasonable care in keeping and returning the same upon demand, and if from a preponderance of the evidence it appears that some of the officers or agents of said defendant did not exercise reasonable care in keeping said diamonds and returning the same, and that as a result of this lack of reasonable care the defendant is unable to return the same, their verdict will be in favor of the plaintiff for the value of the diamonds."

[3] Paragraph 7 of the charge complained of is as follows: "The jury are instructed that it is the duty of a bank to employ fit men, both in ability and in integrity, for the discharge of their duties, and if they believe that the defendant did not do this and that in consequence of gross negligence on the part of the defendant in employing that character of men the defendant is unable to return the diamonds to plaintiff, their verdict will be for plaintiff."

Plaintiff in error insists that the court should have instructed the jury that the measure of the duty of the bank in employing fit men, both in ability and integrity, was to exercise reasonable care, but nowhere did it request an instruction as to what the measure of this duty was.

In *Moore v. O'Dell*, 27 Okl. 194, 111 Pac. 308, it is said: "As to instruction 'D,' relating to the burden of proof, it states the general rule. Counsel for plaintiff in error appears nowhere to have requested the court to instruct the jury as to what presumption arose from the conveyance as to the terms of the trust having been complied with. Not having made such request, he is not entitled on review here to complain."

Not having requested such supplementary instruction, plaintiff in error's contention is without merit.

[4] Upon plaintiff's theory of the case, and under the jury's finding, a recovery may be sustained. *National Bank v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *Manhattan Bank v. Walker*, 130 U. S. 287, 9 Sup. Ct. 519, 32 L. Ed. 959.

The judgment of the lower court is affirmed. All the Justices concur.

INCORPORATED TOWN OF RYAN et al. v.  
TOWN OF WAURIKA et al.  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

1. COUNTIES (§ 35\*)—COUNTY SEAT—LOCATION—SUBMISSION TO POPULAR VOTE.

That part of the act of April 17, 1908 (section 12), providing that "every person desiring to vote at such special election, after having passed the challengers \* \* \* and being admitted into the room shall, before being given a ballot, permit the clerks to fill out an affidavit and \* \* \* shall subscribe and swear to said

affidavit before said election commissioner, after which he shall be given a ticket, \* \* \*" (Laws 1907-08, c. 31, art. 4) construed with an act approved May 29, 1908 (S. B. 23, art. 1, subart. 7, § 5, Sess. Laws Okl. 1907-08), is mandatory. And where the election inspector on the morning of the election placed said blank affidavits, part of the election supplies, in the hands of third persons, who, with the knowledge of, and without objections from the election officials, are permitted by each voter to fill out for and hand him one of said affidavits at a table 100 feet from the polls as he passed thereby on his way to vote, and which in the room, after passing the challengers and before being given a ticket, he signs and swears to before the special election commissioner, with knowledge of the contents, after which he is given a ticket and then there voted, *held*, that said ballot is illegal, and cannot be counted for any town as a candidate for the county seat at such election, but may be counted for the purposes of determining the total number of votes cast at such election, and the required majority for the removal of the county seat.

[Ed. Note.—For other cases, see *Counties*, Dec. Dig. § 35.\*]

2. ELECTIONS (§ 291\*)—CONDUCT—EFFECT OF IRREGULARITIES.

Where the prima facie character of the returns of a precinct is destroyed, the election therein does not necessarily become a nullity, but the burden of proof then shifts and makes it necessary that the side claiming any benefit from the votes shall prove them. It is only where no proof is offered, and the frauds are of such a character that the correct vote cannot be determined that the returns of the precinct will be rejected.

[Ed. Note.—For other cases, see *Elections*, Dec. Dig. § 291.\*]

Kane, J., dissenting.

Original proceeding by the Incorporated Town of Ryan and others for injunction against the Town of Waurika and others. Temporary injunction sustained and made perpetual.

W. A. Ledbetter, Gilbert & Bond, Jones & Green, and O. B. Stuart, for plaintiffs. Devoreux & Hildreth, Bridges & Vertrees, and Robberts & Curran, for defendants.

TURNER, C. J. The constitutional convention located the temporary county seat of Jefferson county at the town of Ryan. On June 30, 1908, an election was held in said county for the purpose of locating the county seat thereof pursuant to section 6, art. 17, of the Constitution and an act approved April 17, 1908 (Sess. Laws Okl. 1907-08, pp. 378-387), in which said election there were three candidates, Ryan, Sugden, and Waurika. No one of these having received a majority of the votes cast, and Sugden receiving the lowest number of votes, on September 9, 1908, a second election was had. The returns of that election show that Ryan received 1,500 votes, Waurika 1,738 votes, giving Waurika a majority of 236. These returns were certified to the Governor of the state, whose duty it is under the Constitution to canvass the name and declare the result and "cause the will of the electors to be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



carried into effect." On September 21, 1908, plaintiffs filed in this court an original proceeding assailing the correctness of the returns at the Terrell and Waurika precincts on the ground of fraud and illegality and secured a restraining order against defendants, the county officers of Jefferson county, preventing them from removing, or attempting to remove, the records of their several offices from the town of Ryan to Waurika, alleging the fact to be that Ryan had received a majority of the votes cast in said election, and praying that it be declared the duly elected permanent county seat of that county. Later this court appointed Hon. C. A. Galbraith as referee, who took testimony and filed his report herein in favor of Waurika, and recommended a dissolution of said injunction, and that said town be declared the permanent county seat of said county.

[1] Assailing the validity of the 686 votes cast at the Waurika box, it is contended by counsel for Ryan that the same should have been by the referee excluded from the count, for the reason the record discloses that the inspector on the morning of the election and before the polls were open turned over the blank affidavits provided by section 12 of the act aforesaid to a partisan of Waurika, who, with the assistance of others, filled one of them out for the voter and handed the same to him at a table without the roped chute some 100 feet from the voting booth as he passed thereby on his way to the booth to vote. It is contended that by thus participating in a violation of the law, making it an offense for any person to have election supplies outside the inclosure wherein the election was required to be held (Act approved May 29, 1908, c. 31, S. B. 23, art. 1, subart. 7, § 5, Sess. Laws 1907-08), the voter, besides being punishable for such participation, in effect refused to permit the clerks of election to fill out for him said affidavit after he had passed the challengers, and after being admitted into the room and before being given a ballot, and which, it is further contended, was a violation of said section, which, they say, in so far as the same requires that the voter, "after having passed the challengers \* \* \* and being admitted into the room, shall, before being given a ballot, permit the clerks to fill out an affidavit and \* \* \* shall subscribe and swear to said affidavit before said special election commissioners, after which he shall be given a ticket \* \* \*" —is mandatory, and hence none of the votes in that box should be counted. By making it an offense to have election supplies outside the inclosure, the law, in effect, prohibited their use by the voter outside thereof, and said to him, by section 12, supra, "As to your ticket, you shall have no right to receive it for the purpose of voting until you have complied with certain conditions precedent, which are that you shall first pass the challengers, enter the room, and permit the clerk to fill out

an affidavit, which you shall sign and swear to before the special election commissioner. Then, and not till then, are you entitled to a ticket and a right to vote." Section 6, art. 17, of the Constitution, being self-executing, elections for the location or changing of county seats could have been held without this special act of April 17, 1908, supra. Obviously, the Legislature had a purpose, then, in enacting a special statute supplementary to said section of the Constitution. Courts are not at liberty to treat statutes as directory that were intended by the Legislature to be mandatory. The law is the master of the courts, and it is the duty of the judges to follow the mandates of the law.

What did the Legislature mean when it said that every voter desiring to vote at such special election, after having passed the challengers and being admitted into the room, shall, before being given a ballot, permit the clerks to fill out an affidavit before said special election commissioner, after having passed the challengers and being admitted into the room, but, after the affidavit is filled out before said special election commissioners in said room, he shall be given a ticket? Why does the Legislature exercise such care in the selection and use of this language? It is presumed to mean just what it says. Every elector that voted had as a matter of law the knowledge of this statute, and the only effect the court's action will have in giving effect to this provision is to cause another election. Such elector is not deprived of his right to participate in the final selection of a county seat, but, under these mandatory provisions, they are required to vote in the manner and form as therein pointed out before their votes shall be continued. Where they make an honest effort to vote, but fail to comply with these mandatory provisions, such votes amount to votes cast, but not votes counted. The place or town finally prevailing must have counted for it a majority of the votes cast. The result is that, where no place gets a majority of the votes cast counted for it, another election is held, and such continues to be the procedure until a place gets a majority of the votes cast counted for it. The wisdom of this special election law for the location of county seats was solely for the determination of the Legislature. The Legislature having acted and having hedged around the holding of such elections such provisions, mandatory in their nature, and especially so in the light of the history of this legislation, we are not permitted to disregard the same, howsoever we may dislike to order a new election and entail the expense of the same upon this county.

That this section is mandatory, and certainly when construed with the section of the act supra, is no longer an open question in this jurisdiction. In *Incorporated Town of Westville v. Incorporated Town of Stilwell et al.*, 24 Okl. 892, 105 Pac. 664, we said: "Is section 12 of said act, which provides

that 'every person desiring to vote at such special election, after having passed the challengers whose duties shall be the same as prescribed by law governing any general election, and being admitted to the room, shall, before being given a ballot, permit the clerks to fill out an affidavit and said intended voter shall subscribe and swear to said affidavit and before the said special election commissioner, after which he shall be given a ticket and permitted to prepare same and deliver said ballot to said special election commissioner who shall, in the presence of said voter, deposit said ballot in the proper ballot box, and shall deposit the said affidavit in the box provided for that purpose,' mandatory? \* \* \* In the case of the City of Pond Creek et al. v. Haskell, Governor, et al., 21 Okl. 711, 97 Pac. 338, it was held that section 6, art. 17, Const., providing for the holding of elections for the relocation, or removal of the county seats of the different counties of the state, is self-executing, said section providing complete machinery for holding such elections, and that it was not necessary for the legislative enactments in order that the same might be enforced. The act of April 17, A. D. 1908, is therefore merely supplemental thereto. State v. Scales, 21 Okl. 683, 97 Pac. 584; Reeves v. Anderson et al., 13 Wash. 17, 42 Pac. 625. What was the purpose, then, of the Legislature providing this supplemental legislation relative to county seat elections? Such location by the constitutional convention was temporary, self-enforcing machinery being provided for the relocation thereof by the respective counties, as is clearly evidenced by the fact that it is provided that after April 1, 1909, county seats, except where the petition for the election was filed prior to October 1, 1908, should be removed only by two-thirds of the votes cast in the county at such election. Section 6, art. 17, Const. In addition to the requirements of the general election law (section 8, art. 5, c. 31, p. 341, Sess. Laws 1907-08), he must permit the clerks of the election to fill out an affidavit, and then he must subscribe and swear thereto. \* \* \* The intention of the Legislature to impose the burdens, not only upon the election officers, but also upon electors of additional duties, is apparent. The affidavit in form gives the age, race, and number of years that the elector has been a resident of the county and state and the ward or precinct in which he then resided, and the length of time that he resided there prior to the time of the holding of the election, including his prior place of residence. It seems to not only constitute a species of registration, but also to contemplate subjecting each elector to the danger of the pains and penalties of perjury if he is not a qualified voter. In the case of Rampendahl v. Crump (decided at this term, but not yet officially reported, 105 Pac. 201) this court held: "That part of section 4, c. 17, p. 233, Sess. Laws Okl. T. 1906, which pro-

vides that on leaving the booth the voter shall "deliver the ballots to the inspector or judge temporarily acting as inspector, and such inspector shall forthwith, in the presence of the voter and members of the election board and the watchers, deposit same in the respective ballot boxes," is mandatory.' The following authorities were cited in support of that conclusion: Attorney General v. May, 99 Mich. 538, 58 N. W. 483, 25 L. R. A. 325; Attorney General v. Stillson, 108 Mich. 419, 66 N. W. 388; Attorney General v. Kirby, 120 Mich. 592, 79 N. W. 1009; Vallier v. Brakke, 7 S. D. 343, 64 N. W. 180; State ex rel. Bradley et al. v. Gay, 59 Minn. 6, 60 N. W. 676, 50 Am. St. Rep. 389; Spurgin v. Thompson, 37 Neb. 39, 55 N. W. 297; Tebbe v. Smith, 108 Cal. 101, 41 Pac. 454, 29 L. R. A. 673, 49 Am. St. Rep. 68; Lay v. Parsons, 104 Cal. 661, 38 Pac. 447; Kirk v. Rhoads, 46 Cal. 398; Taylor v. Bleakley, 55 Kan. 1, 39 Pac. 1045, 28 L. R. A. 683, 49 Am. St. Rep. 233; Curran v. Clayton, 86 Me. 42, 29 Atl. 930; Whittam v. Zahorik, 91 Iowa, 23, 59 N. W. 57, 51 Am. St. Rep. 317; Parvin v. Wimberg, 130 Ind. 561, 30 N. E. 790, 15 L. R. A. 775, 30 Am. St. Rep. 254; People ex rel. Nichols v. Board of County Canvassers, 129 N. Y. 395, 29 N. E. 327, 14 L. R. A. 624. See also the following authorities: Wright v. State Board of Canvassers, 76 S. C. 574, 57 S. E. 536; Major v. Barker, 99 Ky. 305, 35 S. W. 543; Preston v. Prince, 70 S. W. 623, 24 Ky. Law Rep. 1090; Gill v. Shurtleff, 183 Ill. 440, 56 N. E. 164; Patton v. Watkins, 131 Ala. 387, 31 South. 93, 90 Am. St. Rep. 43; Doerslinger v. Hilmantel, 21 Wis. 574. \* \* \* In this case there is neither any contention that any of the electors failing to swear to the affidavits were not otherwise qualified to vote at such election, nor that they did not make an honest though ineffectual effort to participate therein, so as to have their votes counted."

We are therefore of opinion that the act complained of was not only in violation of a mandatory, but probably also of a criminal statute, and for that reason said 686 votes should not have been counted for either of the towns, but such of them as were cast in an honest, but ineffectual, effort to vote, should be considered for the purpose of making up the total number of votes cast at that election. Are we correct in this conclusion that they should be considered as votes cast?

[2] It would serve no good purpose to recite in detail the evidence adduced by counsel for Ryan in support of their allegations of fraud on the part of the election officials and the voters of the Waurika precinct. It is sufficient to say that proof that Waurika in mass meeting assembled appointed an executive committee, one of whom served as judge of election at the Waurika box, and testified that he had been a participant in at least 20 county seat fights; that said town raised \$13,000 by popular subscription to be expended by said committee in the county

seat campaign; that all evidence concerning its expenditure was purposely destroyed, or no account kept; that said executive committee and no witness on the stand could or would tell how any considerable portion of said sum was expended; that partisans of Waurika just prior to the election caused a large number of negroes to be detained in the town for the purpose of voting them, said committee furnishing them free board and amusement; that three different gangs of transient railroad laborers were brought from a distance and voted; that of the 115 men employed on a ditch in the town and voted it is impossible to tell how many of them voted legally, or how many were paid \$2 by one of said committee, ostensibly for their day's work, but really for their vote; that all known voters thus paid were paid on written order given to each, only one of which was introduced in evidence and was No. 203; that the challenger, watcher, and poll book holder were excluded from the polls by the inspector contrary to law; that the voters were rushed through the voting booth in blocks of five, and at an unusual rate of speed; that partisans of Waurika with large sums of money, a part of the popular subscription, with the knowledge and consent of the executive committee, visited other voting precincts in the county on election day, and spent it in influencing votes for Waurika—was ample to sustain the finding of the referee that it was impossible to tell how much money was spent by Waurika in furthering her candidacy for the county seat for legitimate and how much for illegitimate purposes, and that the fraud disclosed was sufficient to destroy the value of the return as evidence, and justified the referee in so holding in effect, and in setting the same aside and proceeding to purge the poll. There is nothing in the contention of counsel for Ryan that, when the referee found, in effect, that there was sufficient fraud to destroy the value of the returns as evidence, he should have thrown out the box.

The rule is well stated in 10 Am. & Eng. Enc. of Law, 774, thus: "The fraud does not invalidate the legal votes cast, but, by destroying the presumption of the correctness of the returns, it makes it necessary that any person who claims any benefit from the vote shall prove them. \* \* \* It is only where no proof is offered, and the frauds are of such a character that the correct vote cannot be determined, that the returns of the precinct will be rejected." Or, as stated by Judge McCrary in his work on Elections:

"Sec. 48. Although the return of the vote of a given precinct, made in due form, and signed by the proper officers, is the best evidence as to the state of the votes, yet it may be impeached, on the ground of fraud or misconduct on the part of the officers of the election themselves, or on the part of others. In election cases, however, before a return

can be set aside, there must be proof that the proceedings in the conduct of the election, or in the return of the vote, were so tainted with fraud that the truth cannot be deduced from the returns. The rule is thus stated in *Howard v. Cooper* (1 Bartlett, p. 275): "When the result in any precinct has been shown to be so tainted with fraud that the truth can not be deducible therefrom, then it should never be permitted to form a part of the canvass. The precedents, as well as the evident requirements of truth, not only sanction, but call for, the rejection of the entire poll, when stamped with the characteristics here shown."

"Sec. 487. The rule just stated needs the following explanation, in order that it may be correctly understood: The committee no doubt meant to say that if the result, as shown by the returns, is tainted with fraud, the returns are to be rejected as false and worthless. But, as we have elsewhere seen, the question whether the entire vote of the precinct shall be rejected for fraud depends upon another question, viz.: Whether from any evidence it is possible to ascertain the true result. The returns may be rejected as fraudulent, and yet the true vote may be ascertained, and where it can be ascertained, independently of the rejected returns, the law requires that it be respected and enforced. Where the true vote cannot be ascertained whether from the returns or from the evidence at hand, the vote of the precinct is to be rejected."

In *State ex rel. v. Malo*, 42 Kan. 54, 22 Pac. 349, speaking of the rule to be applied when the prima facie character of the returns is destroyed, the court said: "The legal effect, then, of the destruction or suppression of the poll books and tally sheets of the election held in Cimarron township by the friends of that town is not only to destroy the prima facie character of the returns, but to cast upon them the burden of proving, circumstantially and in detail, every vote cast at that election. \* \* \* In all cases it is very desirable that all honest ballots shall be counted, notwithstanding the fact that there may exist such a state of affairs as authorizes the court, acting in accordance with well-established rules, to reject the whole returns as untrustworthy and unreliable. In every case of this character there is still left a certain number of votes that are admitted to be honest, or that could be easily proved to be so if ordinary diligence is exercised; and no matter how grievous the wrong committed by the election board, and how actively the great body of the supporters of the town assisted in the perpetration of the fraud, still the disposition is, and should be, to count every honest ballot that can be established as such." In *Londoner v. People*, 15 Colo. 557, 26 Pac. 135, the court in the syllabus said: "Upon the rejection of the returns from an election precinct, the election there-

in does not necessarily become an absolute nullity. The burden of proof then shifts upon respondent to establish by evidence aliunde that a sufficient number of legal ballots were cast for him to secure his success." See, also, *State ex rel. v. Fulton*, 42 Kan. 164, 22 Pac. 378; *Lloyd v. Sullivan*, 9 Mont. 577, 24 Pac. 218; *In re Wheelock*, 82 Pa. 299; *McCrary on Elec. § 535*. In *Rhodes v. Driver*, 69 Ark. 501, 64 S. W. 272, the court says: "The election returns of Fletcher township being thus discredited, in the absence of any proof showing how each and every qualified elector voted, it is impossible to purge the ballot of that township here. The contestees, if they depend upon the vote of that township, would have to show by proof other than the returns themselves as to how the votes were cast."

Applying this well-established rule, and the further rule that, where the returns are successfully impeached for fraud, they are wholly unworthy of credit, and are evidence of nothing except that a poll was opened (*Board of Supervisors of Knox County et al. v. George Davis et al.*, 63 Ill. 405), the referee, without objection, and we think correctly, sent for the Waurika box and ordered it opened, and its contents was introduced in evidence. During the purging an agreed list of 279 qualified voters was carved out of the box. Of these the record discloses 12 not on the poll books and 13 voting for Ryan, leaving the residue 254 votes for Waurika. Of a further list of 56 voters ordered purged by the court 6 are not on the poll books, 2 voted for Ryan and 37 for Waurika, leaving 11 unpurged in the box. Assuming the burden of proof, Waurika sought to qualify a list of 264 votes. Of these 19 were not on the poll books, 17 were disqualified, 2 on the agreed list, and 4 voted for Ryan, leaving the residue, 222 qualified votes, for Waurika. This leaves, instead of 661 votes for Waurika and 19 for Ryan, as shown by the official returns, 513 for Waurika and 19 for Ryan out of this box, leaving unpurged in the box 137 ballots after deducting the 17 disqualified voters, leaving also 549 voters who made honest but ineffectual efforts to vote, and whose ballots should and will be counted in making up the total number of votes cast at this election.

In view that we have held that of said 686 votes only 549 should be counted and that only for the purpose of determining the total number of votes cast, it would serve no good purpose to answer the contention of counsel for Ryan that the 513 votes thus found for Waurika should be still further reduced because they say in that box there was voted 89 ballots which were written with pen and ink. A purge of the Terrell box ordered by the court on proper showing subsequent to the first report of the referee disclosed and the referee found in effect that

of the 160 votes cast at that precinct 88 were for Ryan and 80 for Waurika, leaving 42 unpurged in the box. Said report is affirmed. Hence we have:

Cast in the county outside of Terrell and Waurika precincts:

	For Ryan 1,423	For Waurika 967
At Terrell precinct	33	80
At Waurika	.....	.....
Total	1,461	1,047

—making the total votes cast 2,508, plus the 549 votes cast at the Waurika precinct, but not counted for either town, or 3,057 votes, of which neither candidate received a majority.

As the counting as votes cast the 137 unpurged votes in the Waurika box and the 42 in the Terrell box would not change the result, we will not determine whether the same should be so counted. It follows that, as neither town received the requisite portion of all the votes cast, another election should be called pursuant to the prayer of the petition already filed and upon which this election was called for another election, pursuant to section 6, art. 17, of the Constitution at which election these two towns only are entitled to be candidates, and the town receiving the majority of votes cast at such election shall be the county seat of Jefferson county.

The injunction granted herein is sustained and made perpetual.

WILLIAMS and AMES, JJ., concur.  
DUNN, J., concurs in the result. KANE, J., dissenting.

#### FIRST NAT. BLDG. CO. v. VANDENBERG.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

##### (Syllabus by the Court.)

#### 1. DAMAGES (§ 124\*)—ELEMENTS OF COMPENSATION—BREACH OF BUILDING CONTRACT.

Where a clause of a building contract, which provides that under certain circumstances the owner shall be at liberty to terminate the employment of the contractor and take possession of the building for the purpose of completing it, is violated by the owner, by terminating the employment of the contractor and entering into possession without right, the primary damage, where the contractor elects to go for damages for breach of contract, is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services; and if he chooses to claim for anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 326-338; Dec. Dig. § 124.\*]

#### 2. EVIDENCE (§ 354\*)—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT—ORIGINAL ENTRIES.

In an action by the contractor to recover damages from the owner upon the above theory,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the contractor's books of original entries would be admissible and competent evidence to prove the work done and material furnished, and value thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1433; Dec. Dig. § 354.\*]

**3. EVIDENCE (§ 376\*)—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT—AUTHENTICATION.**

To justify the admission of a party's books of account on his own behalf, it is incumbent upon him to show by proper evidence that the record of the transactions is a faithful and honest one.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1628-1646; Dec. Dig. § 376.\*]

**4. EVIDENCE (§ 376\*)—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT—AUTHENTICATION.**

Entries in a book of accounts, kept by a bookkeeper employed for that purpose, must be verified by the bookkeeper, if alive and accessible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1628-1646; Dec. Dig. § 376.\*]

**5. EVIDENCE (§ 354\*)—DOCUMENTARY EVIDENCE—BOOKS OF ACCOUNT—"LEDGER"—"BOOK OF ORIGINAL ENTRIES."**

A "ledger" is a book of accounts, in which are collected and arranged, each under its appropriate head, the various transactions scattered throughout the party's journal or day-book, and is therefore not a "book of original entries," within the rule.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1433; Dec. Dig. § 354.\*]

For other definitions, see Words and Phrases, vol. 1, p. 841; vol. 8, p. 7592.]

**6. DAMAGES (§ 124\*)—EVIDENCE—ADMISSIBILITY.**

Under the circumstances of this case, the breach of the original contract will not entitle the plaintiff to recover as anticipated profits the gains and profits of subcontracts entered into by him as preparatory and subsidiary to the fulfillment of the principal contract.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 326-338; Dec. Dig. § 124.\*]

Error from District Court, Creek County; John Caruthers, Judge.

Action by Henry J. Vandenberg against the First National Building Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

Dale & Bierer, D. L. Sleeper, Carl C. Magee, and Martin, Rice & Lyons, for plaintiff in error. Poe, Biddison & Campbell, McDougal & Walker, and L. O. Lytle, for defendant in error.

**KANE, J.** This was a suit commenced by the defendant in error, plaintiff below, against the plaintiff in error, defendant below, to recover damages for the breach of a building contract, and to foreclose a mechanic's lien in connection therewith. The plaintiff was the contractor and the defendant the owner of the proposed building, and hereafter they will be so designated.

It seems that some time during the progress of the work the owner exercised a privilege, conferred upon it by article 5 of the contract, which reads as follows: "Should

the contractor at any time refuse or neglect to supply a sufficiency of properly skilled workmen, or of materials of the proper quality, or fall in any respect to prosecute the work with promptness and diligence, or fail in the performance of any of the agreements herein contained, such refusal, neglect or failure being certified by the architect, the owner shall be at liberty after five days (5) written notice to the contractor, to provide any such labor or materials, and to deduct the cost thereof from any money then due or thereafter to become due to the contractor under this contract; and if the architect shall certify that such refusal, neglect or failure is sufficient ground for such action, the owner shall also be at liberty to terminate the employment of the contractor for the said work and to enter upon the premises and take possession, for the purpose of completing the work included under this contract, of all materials, tools and appliances thereon, and to employ any other person, or persons, to finish the work, and to provide the materials therefor; and in case of such discontinuance of the employment of the contractor he shall not be entitled to receive any further payment under this contract until the said work shall be wholly finished, at which time, if the unpaid balance of the amount to be paid under this contract shall exceed the expense incurred by the owner in finishing the work, such excess shall be paid by the owner to the contractor, but if such expense shall exceed such unpaid balance, the contractor shall pay the difference to the owner. The expense incurred by the owner as herein provided, either for furnishing materials or for finishing the work, and any damage incurred through such default, shall be admitted and certified by the architect, whose certificate thereof shall be conclusive upon the parties."

The contractor alleged, in substance, that the owner, acting in collusion with the architect, fraudulently, corruptly, and in violation of the terms of said contract, and without giving him any notice, and without any default on his part, forcibly took charge of said building, and the construction of same, and notified said contractor that it had terminated said contract, thereby causing the contractor damage in the sum of \$8,617.17 for labor and material furnished and used by him in the construction of said building; by loss of prospective profits in the sum of \$12,015.17; and he prayed that he be given judgment for the sum of \$10,000, or so much thereof as may be necessary to satisfy all claims or demands made against plaintiff, by reason of certain subcontracts which he had made and entered into with various persons for the furnishing of materials and labor in the construction of said building, and that he may be decreed a lien upon the lots upon which said building was erected, to secure

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the payment of said judgment. The answer of the defendant admitted the execution of the contract, but denied that there was any fraud or collusion with the architect. There were other allegations to the effect that the defendant acted in accordance with the terms of said contract between the contractor and the owner; that said owner took charge of said work and materials and appliances thereon, and proceeded to employ properly skilled workmen, and to purchase proper and suitable materials, and proceeded with the construction of said building in accordance with the plans and specifications of said work; that it provided whatever labor and material essential to the work that it was bound to furnish under said contract between the plaintiff and defendant in such a manner and at such time as not to delay the progress of the work, and fully in accordance with the terms of said contract; that it paid plaintiff all estimates made upon the said work by the said architect at the time and in amounts specified by said estimates, and thereby paid plaintiff the sum of \$16,349.75, being the whole amount due the plaintiff at the time plaintiff abandoned said work, and up to and including the present time. After the issues were joined, the court referred the cause to a master in chancery, who found that the contractor was entitled to recover against the owner for labor and materials furnished up to the time of the forfeiture of the contract in the sum of \$5,617.21; for certain materials purchased by the contractor, which had not been paid for by him, and which were taken possession of by the owner and used in the construction of said building, in the sum of \$6,739.29; for certain materials belonging to the contractor, which the owner took possession of and appropriated to its own use, in the sum of \$297.20; and for anticipated profits, which the contractor would have been entitled to if he had completed the building, in the sum of \$5,000. The order of reference was made by the court upon its own motion, and the report returned prior to statehood. After statehood, the report was approved by the court in all particulars, and judgment rendered in accordance with the recommendations of the master. To reverse this judgment this proceeding in error was commenced.

Several assignments of error are directed to alleged error of the court in referring the cause to the master without the consent of the owner, and error of the master, based upon rulings during the trial that involved the question of abuse of discretion on his part. As the case will have to be reversed upon questions that involve its merits, and as those errors are such as will probably not occur again upon a new trial, we will not further notice them.

[1] Upon the question of the breach of the contract, the master found that: "The defendant, First National Building Company,

the owner of the building, was guilty of a breach of the contract made with the plaintiff contractor, for the following reasons: First. Because it failed to make and pay the estimates at the time, in the manner, and for the amounts provided for by the terms of the contract. Second. Because the defendant building company terminated the contract with the plaintiff contractor, and took possession of the building without right. Third. Because the plaintiff contractor had substantially complied with the terms of the contract up to the date that the defendant took possession of the building, and the reasons assigned by the architect for declaring a forfeiture of the contract were untrue and known to be so by the architect." We believe this finding was supported by sufficient evidence. Under such a state of facts, the primary damage is the amount of the contractor's loss, and this loss must consist of two heads or classes of damage—actual outlay, and anticipated profits. But failure to prove profits will not prevent the party from recovering his loss and outlay and expenditures; if he goes also for profits, they will be measured by the difference between the cost of doing the work and what he was to receive for it. *United States v. Speed*, 8 Wall. 77, 19 L. Ed. 449. Speaking of those two heads or classes of damage in *United States v. Behan*, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168, Mr. Justice Bradley, says: "The two heads of damage are distinct, though closely related. When profits are sought, a recovery for outlay is included, and something more. That something more is the profits. If the outlay equals or exceeds the amount to be received, of course there can be no profits. When a party, injured by the stoppage of a contract, elects to rescind it, then, it is true, he cannot recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a quantum meruit. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services. If he chooses to go further, and claims for the loss of anticipated profits, he may do so, subject to the rules of law as to the character of profits which may be thus claimed."

[2] We may concede, for the purposes of this case, that the rule of damage adopted by the master is correct, yet we find that the class of evidence offered to maintain the various items found due was entirely inadequate to support his findings. The report discloses that the findings of fact in relation to the amount of damage sustained on account of labor and materials furnished have the following testimony for their basis (the

contractor was being examined upon direct examination): "Q. You may examine this book that I now hand you, and state to the court what it is. A. Ledger account of the expense of the National Bank Building Company's building at Tulsa, Indian Territory. Q. You may state to the court whether the expense as shown in the items of that account has been paid by you. A. Yes, sir. (Objected to, and asked that it be stricken out.) Q. Mr. Vandenberg, whose book is this? A. It is mine. Q. Under whose instructions has this book been kept? A. Mine. Q. You may state to the court whether the items as shown in this book are and were true and correct at the time they were entered in the book. A. They were. Q. Examine Exhibit D to the complaint, filed in this court, and you may state whether or not you have compared the items as shown in said Exhibit D with the original entries in your ledger. (Objected to; incompetent and immaterial, and no proper foundation laid.) A. I have. Q. Mr. Vandenberg, you say that you have compared the items in your ledger, the original entries, with this Exhibit D, attached to the bill of complaint? A. I have. Q. How do they compare? (Objected to.) Q. We here and now offer the ledger in evidence. (Objected to; incompetent, irrelevant, and immaterial, and no proper foundation laid. Ledger admitted in evidence, subject to the objection, and marked 'Plaintiff's Exhibit F.')" There was other evidence to the effect that the ledger was kept by the bookkeeper of the contractor. Counsel for the owner contend that the ledger account could not be used to prove the value of the labor and material furnished, for the reason that, were it otherwise competent, no foundation has been laid for its introduction, and a finding based upon it was therefore wholly unauthorized.

In *McDaniel v. Webster*, 2 Houst. (Del.) 305, the rule governing the admission of books of original entries in cases like this is stated as follows: "If the work was done under a special agreement, such as has been stated, the plaintiff's book of original entries, with the charges and sums contained in his account, was not proper or sufficient evidence to prove the value of his services, or work done and material furnished by him in building the mill; for in that case the plaintiff would be confined to his special contract, and could only charge and recover in strict accordance with the terms of it. But, if the work was not performed, and the materials were not supplied, under any special agreement, or if there was originally a special agreement between the parties in regard to the matter, under which it was commenced and prosecuted as far as it was performed by the plaintiff, but which special contract was afterward rescinded or abandoned by reason of the misconduct of the defendant in unreasonably interfering with or interrupting the regular prosecution of the work, the plaintiff would then, in either case, be entitled to re-

cover on the common counts for his work and the materials furnished, as far as he had proceeded with it, without any reference to the special agreement, the same as if none had ever been entered into by him; and in either of those events we consider, and rule, that this book of original entries would be admissible and competent evidence to go to the jury under our statute, to prove the work done, and materials furnished, and the value of them."

[3] Applying the rule above laid down to the case at bar, we take it that books of original entries of the contractor would have been admissible upon proper identification and verification. "To justify the admission of a party's books of account on his own behalf, it is incumbent upon him to show by proper evidence that the record of the transactions is a faithful and honest one." 2 Enc. of Evidence, p. 629. Cases from Alabama, Arkansas, Illinois, Mississippi, New York, Ohio, and Texas are cited in support of the text.

[4] The rule generally, and the one applicable in the case at bar, is that entries in a book of accounts, kept by a bookkeeper employed for that purpose, must be verified by the bookkeeper, if alive and accessible. *Railway Company v. Henderson*, 57 Ark. 402, 21 S. W. 878. This is the rule in this jurisdiction at the present time. *M., K. & T. Ry. Co. v. Walker*, 27 Okl. 849, 113 Pac. 907. Even treating the book offered as a book of original entries, it is quite clear that it was not properly admissible in evidence under the rule above laid down.

[5] A ledger is a book of accounts, in which are collected and arranged, each under its appropriate head, the various transactions scattered throughout the party's journal or daybook, and is therefore not a book of original entries, within the rule. 2 Enc. of Evidence, p. 623. Treating the book introduced as a ledger, and that is what the contractor designated it in his testimony, there was an additional ground upon which objections to its introduction ought to have been sustained. With this book excluded, the court finds it impossible to determine even approximately the damage, if any, suffered by the contractor for labor and material up to the time the defendant took possession of the building for which the master allowed \$5,617.21. This book also forms the groundwork for the findings of the master as to the amount of damage due the contractor for materials purchased by him which had not been paid for, but which were taken possession of by defendant, and used in the construction of said building, for which he allowed the sum of \$6,789.29. Without considering the ledger, the court finds it impossible to arrive at any intelligent conclusion on that item of damage, and by consulting it it is quite apparent that some of the items allowed under the second head were also included and allowed under the first, thus constituting a double charge

against the owner to the amount of several thousand dollars.

[6] The sum of \$5,000 for anticipated profits was also based upon incompetent evidence. The contractor attempted to show what his profits would have been, had he been permitted to complete the building, by showing the cost of construction to him, based on subcontracts that he had entered into for the greater portion of the material and labor, and then attempted to show the reasonable cost to him for whatever material and labor he had not subcontracted. We do not believe that the subcontracts constitute a proper basis for proof of the loss of anticipated profits. The principal case on this subject is *Masterton v. Mayor of Brooklyn*, 7 Hill (N. Y.) 61, 42 Am. Dec. 38. In that case the contractor and owner entered into a contract for the erection of a certain building; the contractor entered into contracts with other parties to do a portion of the work and furnish certain materials. These subcontracts were used in evidence to show the amount of profits plaintiff would have made. They were admitted by the lower court, which action was held to be erroneous by the appellate court. In discussing the question, the appellate court said: "It will be seen that we have laid altogether out of view the subcontract of Kain & Morgan, and all others that may have been entered into by the plaintiffs as preparatory and subsidiary to the fulfillment of the principal one with the defendants. Indeed, I am unable to comprehend how these can be taken into the account or become the subject-matter of consideration at all, in settling the amount of damage to be recovered for a breach of the principal contract. The defendants had no control over or participation in the making of the subcontracts, and are certainly not to be compelled to assume them if improvidently entered into. On the other hand, if they were made so as to secure great advantages to the plaintiffs, surely the defendants are not entitled to the gains which might be realized from them. In any aspect, therefore, these subcontracts present a most unfit, as well as unsatisfactory, basis upon which to estimate the real damages and loss occasioned by the default of the defendants. The idea of assuming that the plaintiffs were necessarily compelled to break all the subcontracts as a consequence of the breach of the principal one, and that the damages to which they may thus be subjected ought to enter into the estimate of the amount recoverable against the defendants, is too hypothetical and remote to lead to any safe or equitable result. \* \* \*

The constituent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates. It is a very easy matter to figure out large profits upon paper; but

it will be found that these, in a great majority of the cases, become seriously reduced when subjected to the contingencies and hazards incident to actual performance. A jury should scrutinize with care and watchfulness any speculative or conjectural account of the cost of furnishing the article that would result in a very unequal bargain between the parties, by which the gains and benefits, or, in other words, the measure of damages against the defendants, are unreasonably enhanced. They should not overlook the risks and contingencies which are almost inseparable from the execution of contracts like the one in question, and which increase the expense, independently of the outlays in labor and capital. \* \* \*

The circuit judge clearly erred in that part of his charge to the jury which related to the contract of the plaintiffs with Kain & Morgan. No damages are allowable on account of this contract; nor am I able to see how it can be regarded as relevant evidence upon any disputed point connected with the amount for which the defendants are liable." Other cases in point are *Story et al. v. New York & Harlem R. R. Co.*, 6 N. Y. 85; *Devlin v. Mayor et al.*, 63 N. Y. 8; *United States v. Speed*, 8 Wall. 77, 19 L. Ed. 449; *Hinckley v. Pittsburg Bessemer Steel Co.*, 121 U. S. 264, 7 Sup. Ct. 875, 30 L. Ed. 967, and other authorities cited in 13 Cyc. 55, where the doctrine that "a breach of the original contract will not entitle the plaintiff to recover as damages the gains or profits of collateral enterprises or subcontracts into which he has been induced to enter" is approved, upon the ground that such profits or gains are entirely too speculative and contingent, and not the natural and probable consequence of the original breach. The two United States Supreme Court cases last above cited cite with approval *Masterton v. Mayor*, supra, and they and that class of cases differ from *Roehm v. Horst*, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953, relied upon by counsel for defendant in error to sustain their contention on the proposition now under consideration, in that the profits on the subcontract involved in the former cases depended on something contingent, on future bargains or speculations, while in the latter they did not. In the case at bar, as was said by Chief Justice Nelson, who delivered the opinion in the *Masterton Case*: "The contingent elements of the cost should be ascertained from sound and reliable sources; from practical men, having experience in the particular department of labor to which the contract relates."

For the errors noted, the judgment of the lower court must be reversed, and the cause remanded, with directions to grant a new trial.

TURNER, C. J., and HAYES, J., concur. DUNN, J., concurs in the conclusion.



## LYNCH v. PERRYMAN.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

## 1. PARTNERSHIP (§ 41\*)—WHAT CONSTITUTES.

Parties acting as stockholders attempting to organize a corporation, but failing therein for the reason that a corporation could not be organized for its declared purpose, or because all of its business was to be conducted in a foreign state, are generally held to be partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 56-59; Dec. Dig. § 41; Corporations, Cent. Dig. § 74.]

## 2. CORPORATIONS (§ 25\*)—FAILURE TO ORGANIZE—RIGHTS OF PARTIES.

Where in such a case a party buys all the stock or all the interests of the parties interested in the concern, he secures thereby all rights, contractual or otherwise, which could have been enforced by them.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 25.\*]

## 3. CORPORATIONS (§ 34\*)—ESTOPPEL.

Where a party owning and in possession of real property sells the same to a concern acting as and denominated in the deed as a corporation and enters into a lease contract with his grantee, in which he specifically agrees that he will not by or under said lease or through the possession of said property ever claim or contest the right of the lessor, he thereby waives the right and estops himself from defending against an action for rent by an assignee thereof on the ground that the concern with which he contracted, and which was attempting to act as a corporation, was a nullity without power to take title to the land or authority to enter into the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 81-96; Dec. Dig. § 34.\*]

Error from District Court, Kay County; W. M. Bowles, Judge.

Action by J. W. Lynch against A. S. Perryman. Judgment for defendant, and plaintiff brings error. Reversed.

Hackney & Lafferty and Sam K. Sullivan, for plaintiff in error. H. B. Martin, for defendant in error.

DUNN, J. This case presents error from the district court of Kay county. It was instituted on the 11th day of January, 1906, by plaintiff in error as plaintiff for the purpose of recovering rent due on a certain lease contract entered into by the defendant with the Ponca City Land & Improvement Company. No counter abstract is made or exceptions taken to the statement of facts as they appear in the brief of plaintiff in error, from which we glean the following to have been established by the pleadings and the evidence: The defendant, under the lease made to him by plaintiff's assignor, the Ponca City Land & Improvement Company, paid rent thereon from January 1, 1903, the date thereof, to September 1, 1904. The lease in question contained the following provision, among others: "And it is further agreed by said lessee that he will not, by or under this lease, or through the possession of said property,

ever claim or contest the rights of the lessor, and in case of sale give possession in thirty days." To the petition the defendant filed his amended answer, on July 3, 1908, alleging: That the above company had no interest or title to the property, and had no power or capacity to hold, convey, or lease real property in Oklahoma, on account of its incorporation under the laws of the state of Kansas, for the purpose of transacting business in the territory of Oklahoma, and that the incorporation under the laws of Kansas was fraudulently done for the purpose of defeating the laws of the territory of Oklahoma. Also, that the plaintiff made false representations to the defendant as to the ownership of said lots by said company, and that the plaintiff had no title to the same, and that the fact that this company could not hold title to any property in Oklahoma was well known to the plaintiff and its officers. That the defendant relying upon these statements, and believing them to be true, executed and delivered his deed to the above real estate, without any consideration, and that the company executed and delivered back to him a deed for an undivided one-half interest, and that the defendant did not enter the property under and by virtue of the lease. To this answer the plaintiff filed his reply, denying all of the allegations of the answer, and alleging that on the 15th day of August, 1902, the defendant executed and delivered to this company a deed conveying all his interest in this property; that the company on the same day, as a part of the same transaction, deeded to the defendant an undivided one-half interest in the property; that no false representations were made as to the interest of the company in this property, and its right to hold title thereto; and the further defense that this transaction occurred on the 15th day of August, 1902, and that the same was barred by the two years' statute of limitations. Upon the issues thus joined, a trial was had. The defendant, in his pleadings and in his evidence, admitted the execution of the lease and claimed that Lynch, the plaintiff, was to furnish his money to go into the livery business upon the lots above described; that he did furnish him some money between August, 1902, and January 1, 1903, at which time they attempted to have a settlement, and did adjust matters, and Perryman agreed to pay to the company or to Lynch \$20 a month for the use of the undivided one-half interest in this property under the lease sued upon. It is also shown that the plaintiff herein was the owner by purchase of the entire issue of capital stock of the so-called corporation, and all the interest of those who had invested in the concern. At the close of the testimony the court directed a verdict in favor of defendant dismissing plaintiff's case on the theory that the concern with which defendant had contracted had no existence either in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

law or in fact under the decisions of the territorial Supreme Court, by reason of the fact that the company was organized in the state of Kansas for the purpose of doing business in the state of Oklahoma, and was without authority of law to do anything in Oklahoma. Exceptions were saved to this action, and the case has been duly lodged in this court for review.

The Ponca City Land & Improvement Company has had a rather stormy legal career, evidences of which appear in the reports of the territorial Supreme Court. *Barnes et al. v. Lynch et al.*, 9 Okl. 11, 59 Pac. 995; *Barnes et al. v. Lynch et al.*, 9 Okl. 156, 59 Pac. 995; *Myatt v. Ponca City Land & Imp. Co.*, 14 Okl. 189, 78 Pac. 185, 68 L. R. A. 810; *Lafferty v. Evans*, 17 Okl. 247, 87 Pac. 304, 21 L. R. A. (N. S.) 363. It is conceded in this case that the company named in the foregoing cases is the same concern involved in the case at bar, and this case was tried in the light of the foregoing authorities.

[3] The conclusion which we have reached in this case, as announced in the syllabi, we believe to be supported in every particular by the plainest dictates of justice and equity, and while the doctrine and legal rules announced herein supporting them find ample support in the authorities, it will not be said that the line is either unbroken or without dissent. There are circumstances and conditions under which the general rule that a tenant cannot be heard to question his landlord's title does not obtain, and the exceptions are as well supported as the rule itself, and there are authorities which hold that this doctrine does not obtain where the tenant was in possession at the time of the making of the lease; and while there is strong reason and authority for the assertion that where one has dealt with a corporation in its corporate name or even a body acting as a corporation which the party recognized as a corporation, where he has received and retained the benefits of his contract that he will, when proceeded against thereon, be estopped to deny the legality of the corporate existence or its power to contract, there are some authorities which hold that he is not so estopped in such a case if there was no law or an unconstitutional law under which the alleged corporation could exist. An inspection of a large number of authorities, however, discloses that in virtually every instance where estoppel has not been allowed as in the case of *Lafferty v. Evans*, supra, the peculiar facts of the case itself rendered it unjust to allow it and controlled the decision.

Another instance of such a case is that of *Krutz v. Paola Town Co.*, 20 Kan. 397. In that case the Paola Town Company had ceased to exist as a corporation, but was seeking to maintain what was denominated by the court an inequitable action against the plaintiff in error. To defeat the same, he had denied the corporate existence of plaintiff and

its want of capacity to sue. This defense on his part was allowed by the court, which, in the discussion thereof, took note of the principles which we here invoke, and said: "The only remedy of the defendant to defeat this inequitable action is to show the fact that the town company as a corporation no longer exists. But if he can be prevented from showing this fact by the interposition of what is supposed to be an equitable estoppel, then an equitable estoppel may be invoked against equity, and to defeat equity. This would be a new use of equitable estoppel. Where it is equitable, however, to estop a party from denying the existence of a corporation, it is often done, and is usually so done; and it could probably be so done in this case if it were equitable to do so."

The rule generally is, as announced in the case of *Estey Mfg. Co. v. Runnels*, 55 Mich. 130, 20 N. W. 823, that: "Where a body assumes to be a corporation and acts under a particular name, a third party dealing with it under such assumed name is estopped to deny its corporate existence. Such is the general rule, founded upon equitable principles, and, if any exceptions exist, it is only where 'there are no facts which make it legally unjust to forbid its denial.'"

In supporting the contention of plaintiff in error, therefore, in this action, we do so on the proposition that there are no facts which would make it unjust in this case to follow the general rule, and every consideration of right dealing prompts us to do so.

The rule that one who goes into possession as a tenant of another is estopped to deny the title of his landlord in the majority of jurisdictions applies equally to a case where the tenant was in possession at the time of the making of the lease as well as where he takes possession under and by virtue thereof. *Hodges v. Waters*, 124 Ga. 229, 52 S. E. 161, 1 L. R. A. (N. S.) 1181, 110 Am. St. Rep. 168. This case is annotated in 4 Am. & Eng. Ann. Cas. 106, wherein authorities from nearly every state in the Union are noted. To the same point, see 2 *Taylor on Landlord & Tenant*, § 495; 2 *Underhill on Landlord & Tenant*, § 561, and authorities cited; *School Dist. v. Long* (Pa.) 10 Ala. 769; *Piper v. Cashell et al.*, 122 Fed. 614, 58 C. C. A. 396; *Sage v. Halverson*, 72 Minn. 294, 75 N. W. 229; *Ricketson v. Galligan et ux.*, 89 Wis. 394, 62 N. W. 87; *Hagar v. Wilkoff*, 2 Okl. 580, 39 Pac. 281.

In the case of *Piper v. Cashell et al.*, supra, the Circuit Court of Appeals of the Ninth Circuit said: "The plaintiff in error cites decisions of the Supreme Court of California to sustain the proposition that, where the tenant did not take possession under the lease, but was already in possession, he is not estopped to deny the lessor's title. *Tewksbury v. Magraff*, 33 Cal. 237; *Franklin v. Merida*, 35 Cal. 538, 95 Am. Dec. 129; *Davis v. McGrew*, 82 Cal. 135, 23 Pac. 41. The court of California stands practically

alone in asserting this doctrine. The overwhelming weight of authority is against it. *Lucas v. Brooks*, 18 Wall. 436, 21 L. Ed. 779; *Carter v. Marshall*, 72 Ill. 609; *Buchanan v. Larkin*, 116 Ala. 431, 22 South. 543; *Mitchell v. White*, 74 Ga. 327; *Forgy v. Harvey*, 151 Ind. 507, 51 N. E. 1066; *Bowditch v. Dubuque*, 38 Iowa, 341; *Kelley v. Kelley*, 23 Me. 192; *Tullis v. Tacoma Land Co.*, 19 Wash. 140, 52 Pac. 1017; *Campau v. Laferty*, 43 Mich. 429, 5 N. W. 648; *Hawes v. Shaw*, 100 Mass. 187; *Parrott v. Hungelburger*, 9 Mont. 528, 24 Pac. 14; *Jackson v. Ayers*, 14 Johns. [N. Y.] 224; *Hamilton v. Pittcock*, 158 Pa. 457, 27 Atl. 1079."

And discussing the facts in the case of *Ricketson v. Galligan et ux.*, supra, Justice Cassoday of the Supreme Court of Wisconsin said: "The defendant expressly agreed, in effect, to hold the said house and premises then occupied by him under the plaintiff as 'the owner thereof,' and 'as his tenant,' and to vacate the same at any time on six months' notice, and upon such notice being given to have the right to remove said building within six months. That agreement secured mutual benefits, and was signed by the plaintiff as well as the defendant; hence was mutually binding upon both parties. It certainly estopped the defendant from claiming that the plaintiff had no authority to make such contract or was not the owner of the land. *Skinner v. Richardson, Boynton & Co.*, 76 Wis. 464 [45 N. W. 318]; *Tondro v. Cushman*, 5 Wis. 279."

Nor, in our judgment, when the facts of this case are considered, may the defendant be heard to question his landlord's title, even though it should be made to appear that there was no law extant under which a corporation formed to conduct the business in which this one was engaged could be organized. Speaking of this specific concern, the Supreme Court of the Territory of Oklahoma, in the case of *Myatt v. Ponca City Land & Imp. Co.*, 14 Okl. 215, 78 Pac. 192, 68 L. R. A. 810, says: "When a person empowered to transfer the title to real estate conveys the same to a corporation, the title passes from him, and, whether rightfully or wrongfully, must be vested in the corporation, and it does not lie with him or any one else claiming through or under him to dispute the right of the corporation to receive the same." This doctrine finds support in a large number of authorities and has always been adhered to where the facts of the particular case would render it unjust to permit the party to assail the title which he had sought to convey. Judge Thompson, in his *Commentaries of the Law of Corporations* (1895) vol. 4, § 5414, says: "Where a person makes a deed of grant to a body by the use of a name which implies that it is a corporation, he will be estopped by his deed from challenging the fact that it is duly incorporated and capable of taking the land, especially after he has received the consid-

eration for the same; but the question whether the corporation is duly organized and capable of taking such a grant will be left to be decided in a contest between the state and the corporators, to oust them of their franchises." See, also, 2 *Thompson on Corp.* § 1952 (1909); *Brown v. Atlanta Ry., etc., Co.*, 113 Ga. 462, 39 S. E. 71; *Commercial Bank of Keokuk v. Pfeiffer et al.*, 108 N. Y. 242, 15 N. E. 311; *Seven Star Grange, etc., v. Ferguson*, 98 Me. 176, 56 Atl. 648; *Meikel et al. v. German Savings, etc., Society*, 16 Ind. 181; *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220; *Brown v. Sound Nat. Bank v. Fisher et al.*, 52 Wash. 246, 100 Pac. 724, 17 Am. & Eng. Ann. Cas. 528; *Plummer v. Chesapeake & O. Ry. Co.*, 143 Ky. 102, 136 S. W. 162.

It is to be noted in the case at bar that the defendant made, executed, and delivered to the company in question a deed to the property here involved, and that at the same time the company delivered to the defendant a deed to an undivided half interest therein. In both of these deeds the company is recognized as a corporation and so denominated, and it is further to be noted that the defendant in his lease contract specifically agreed that he would not by or under the same or through the possession of the said property ever claim or contest the right of the lessor. Under all of these circumstances we are unable to conclude otherwise than that if the defendant, under the law, would enjoy the right of assailing his landlord's title or the right and interest in and to the property of the concern with which he had dealt both as a grantor and a grantee, he had effectually waived the same by his specific contract, and that it would be violative of every rule of justice and good conscience to hear him assail the existence of the party with which he dealt in order to escape his contract obligation.

Speaking of the effect of previous transactions in which a concern was recognized as a corporation, the Court of Appeals of New York, in the case of *Commercial Bank v. Pfeiffer et al.*, supra, said: "We think that the defendants are not at liberty, under such circumstances, to dispute the existence of the plaintiff as a corporation capable of entering into contracts, and of acquiring and disposing of property as a corporation, under the law. In an action brought by the receiver of an insolvent mutual insurance company, upon a premium note given for insurance (*White v. Ross*, 15 Abb. Prac. 66), it was decided in this court, prior to the enactment of chapter 508, of the Laws of 1875: 'That the defendants were members of the corporation. They became such members when they delivered the note upon which this suit is prosecuted and received their policy. Having thus dealt with it as a corporation de facto, they cannot now be heard to question the validity of its organization.'

It was held, in *Phoenix Warehousing Co. v. Badger*, 67 N. Y. 298, that 'the defendant is not in a position to dispute the validity of the incorporation. He had become a stockholder, acted for several years as trustee, taken part in its management, and contracted with it as a corporation,' citing *Eaton v. Aspinwall*, 19 N. Y. 119; *Buffalo, etc., Railroad Co. v. Cary*, 26 N. Y. 75; *Aspinwall v. Sacchi*, 57 N. Y. 331; *White v. Ross*, supra. The general rule is stated in *Morawitz on Private Corporations*, § 141, 'that a person who has contracted with an association assuming to be incorporated and acting in a corporate capacity cannot, after having received the benefit of the contract, set up as a defense to an action brought upon it by the company that the latter was never legally incorporated, or that it had no authority to enter into the contract in a corporate capacity.'

In the discussion of the case of *Dickerson v. Colgrove et al.*, 100 U. S. 578, 25 L. Ed. 618, Mr. Justice Swayne, speaking of the effect of acts in the same class as those now before us for consideration, says: "The law upon the subject is well settled. The vital principle is that he who, by his language or conduct, leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit. It is akin to the principle involved in the limitation of actions, and does its work of justice and repose where the statute cannot be invoked"—and quoted approvingly from *Faxon v. Faxon*, 28 Mich. 159, wherein that court said: "There is no rule necessary to enforce good faith than that which compels a person to abstain from asserting claims which he has induced others to suppose he would not rely on. The rule does not rest on the assumption that he has obtained any personal gain or advantage, but on the fact that he has induced others to act in such a manner that they will be seriously prejudiced if he is allowed to fall in carrying out what he has encouraged them to expect."

It may be that to all the world besides, and to the state as well as the incorporators themselves, the concern was a mere nullity and its contracts void, but to this defendant, so far as was necessary to make the contract here in question valid between it and him, it was a concern capable of dealing. It had a being, a local habitation, and a contracting existence, and he could not dispute it.

Our statute on this subject (section 8 of chapter 16 [section 884] *Wilson's Revised & Annotated Statutes of Oklahoma 1903*; section 1191, *Compiled Laws of Oklahoma 1909*) provides as follows: "Any person or corporation, having knowingly received and accepted the benefits, or any part thereof, of any conveyance, mortgage or contract relating to real estate shall be concluded thereby and estopped to deny the validity of such conveyance, mortgage or contract or the power or authority to make and execute the same, except on the ground of fraud; but this section shall not apply to minors or persons of unsound mind who pay or tender back the amount of such benefit received by themselves."

There is no proof of any fraud in the case at bar, and the defendant knowingly received and accepted the benefits of this contract, and under the foregoing statute as well as by the law of the land he is estopped to deny the contract or the authority of the party with whom he dealt to make and execute the same.

[1] It is generally held that, where parties associate themselves together for the purpose of organizing a corporation and fail, they thereupon become partners to the extent of their interest. *Empire Mills v. Alston Grocery Co. et al.*, 4 Willson, Civ. Cas. Ct. App. (§ 221) 346, 15 S. W. 200, 205, 12 L. R. A. 366; *Wonderly v. Booth*, 36 N. J. Law, 250; *Jones v. Aspen Hardware Co.*, 21 Colo. 263, 40 Pac. 457, 29 L. R. A. 143, 52 Am. St. Rep. 220; *Arkansas Pass Harbor Co. v. Manning et al.*, 94 Tex. 553, 63 S. W. 627; *Baldwin et al. v. Johnson et al.*, 95 Tex. 85, 65 S. W. 171; *Queen City Furniture, etc., Co. v. Crawford et al.*, 127 Mo. 356, 30 S. W. 163; *Eaton v. Walker*, 76 Mich. 579, 43 N. W. 638, 6 L. R. A. 102.

In the case of *Empire Mills v. Alston Grocery Co. et al.*, supra, it is said: "A corporation cannot incorporate in one state for the purpose of carrying on all of its corporate business in another. The stockholders would be held to be partners. *Hill v. Beach*, 12 N. J. Eq. 31; *Cook, Stock & Stockholders*, § 238. See, also, *Land Grant R. & T. Co. v. Coffey County Com'rs*, 6 Kan. 245; *Morawetz, Priv. Corp. (1st Ed.)* § 513; *Erie R. Co. v. State*, 31 N. J. Law, 543, 544 [86 Am. Dec. 226]."

[2] From the evidence in this case it appears that the plaintiff, Lynch, had at the time of the beginning of this action secured title to all the stock and interests of his associates. This would carry with it the right to all assets and enforceable contracts of the concern, and it is held, in section 561 of *Underhill on Landlord & Tenant*, that the estoppel of the tenant to deny his landlord's title will operate in favor of all persons who are in privity of contract with the landlord during the term of his tenancy. The contract lease made herein inured equitably to

the benefit of the stockholders who are deemed to have been partners in this enterprise and the plaintiff, having secured the interests of all of these parties, secured with them all rights which grow out of or may be supported by this lease.

It therefore follows that the judgment of the trial court must be reversed, and this cause remanded, with instructions to grant plaintiff a new trial.

TURNER, C. J., and WILLIAMS, KANE, and HAYES, JJ., concur.

MISSOURI, K. & T. RY. CO. v. HORTON.  
(Supreme Court of Oklahoma. May 9, 1911.)

*(Syllabus by the Court.)*

**1. CONTINUANCE (§ 30\*)—SURPRISE—DILIGENCE.**

Surprise at the trial is not sufficient ground for a continuance, unless the surprise is such as cannot be obviated by the exercise of ordinary care and due diligence on the part of the party asking for the continuance.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 99-112; Dec. Dig. § 30.\*]

**2. TRIAL (§ 296\*)—INSTRUCTIONS—CONSTRUCTION AS A WHOLE.**

If an instruction complained of, when considered in connection with the other instructions given, fairly covers the legal phases necessary to present to the jury, the cause will not be reversed, although, standing alone, it may not be technically accurate.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 705-713; Dec. Dig. § 296.\*]

**3. DAMAGES (§ 99\*)—MEASURE—LOSS OF SERVICES.**

In an action by a parent for the loss of the services of his minor child, the damage to the parent is limited to such as will compensate him for the loss of the child's services to the time of his majority, the reasonable amounts necessarily expended in the treatment and care of the child, and the value of the parent's services while nursing the child; and the jury may consider that with age, growth, and experience the value of the child's services would increase, although they cannot consider that the child might, if not injured, engage in any particular calling.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 237-241; Dec. Dig. § 99.\*]

**4. RAILROADS (§ 301\*)—PUBLIC CROSSINGS—CARE REQUIRED OF RAILROAD AND TRAVELER.**

The obligations, rights, and duties of the railroads and travelers at public crossings are mutual and reciprocal, and no greater degree of care is required of one than of the other. Both parties are charged with a mutual degree of care in keeping a lookout on their part, and the degree of diligence to be exercised on both sides is such as a prudent man would exercise under the circumstances of the case.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 956; Dec. Dig. § 301.\*]

**5. EVIDENCE (§ 94\*)—BURDEN OF PROOF—GENERAL RULE.**

An instruction to the effect that the burden of proof is upon the plaintiff to establish each and every particular fact necessary to make out his cause of action by a preponder-

ance of the evidence, and the burden is upon the defendant to establish the affirmative allegations or defense set up in its answer by a preponderance of the evidence, was a correct general statement of the law governing the burden of proof, and therefore unobjectionable.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 116, 117; Dec. Dig. § 94.\*]

Error from District Court, Pittsburg County; Presille B. Cole, Judge.

Action by R. L. Horton against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Clifford L. Jackson and W. B. Allen, for plaintiff in error. J. E. Whitehead and Wallace Wilkinson, for defendant in error.

KANE, J. This was an action commenced by the defendant in error, plaintiff below, to recover damages from the plaintiff in error, defendant below, for loss of services of his minor son, by reason of injuries alleged to have been inflicted upon him by the defendant on the 2d day of March, 1908, under the following circumstances: On said date said minor son was walking upon Krebs avenue, in the city of McAlester, and crossing the tracks of the defendant company upon said street; the defendant, through its agents and employes, negligently and carelessly pushed a box car against plaintiff's said minor son, thereby knocking him down and severely injuring him. The answer was a general denial, except as to the incorporation of the defendant, and a further allegation to the effect that, even if the injuries complained of were sustained, said injuries were not due to the negligence of the defendant, but were due solely to negligence on the part of said minor son. The reply was a general denial. Upon trial to a jury, there was a verdict for the plaintiff, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

The assignments of error presented by counsel for plaintiff in error in their brief are: (1) That the plaintiff in error having announced ready for trial, and the jury having been impaneled, it was prejudicial error to permit the defendant in error to amend his complaint without granting the plaintiff in error a continuance; (2) it was error to instruct the jury that the injured boy and the trains of the railway company had an equal right to use the street at the point the defendant in error claimed the accident happened; (3) the court in his instructions to the jury incorrectly stated the rule as to the measure of the damages; (4) it was improper under the circumstances of this case to instruct the jury that the burden of proving affirmative defenses rested upon the plaintiff in error.

[1] It seems that originally the petition did not contain an allegation to the effect

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

that said minor son was exercising ordinary care in crossing said crossing, and that said injury was received without fault or negligence on the part of said minor son or of said plaintiff. When the case was called for trial, counsel for defendant objected to the introduction of any evidence, upon the ground that the petition did not state facts sufficient to constitute a cause of action, because the same did not allege that the boy was exercising ordinary care. The court took that view of the law, and permitted the plaintiff to amend his petition by interlineation in the respect complained of, whereupon counsel for defendant moved for a continuance, upon the ground that, "since this petition has been amended, we are not prepared to meet this evidence at this time." We do not believe it was error to overrule this motion. The rule seems to be well settled that: "Surprise at the trial may, and frequently does, operate as a ground for continuance, unless the surprise is such as might have been obviated by the exercise of ordinary care and due diligence on the part of the party asking the continuance." 9 Cyc. 129, and cases cited.

Granting that the court below was justified in requiring the plaintiff to amend his petition, we do not see how the amendment made could surprise the defendant. The pleadings had never been attacked by demurrer before the case was called for trial, and the answer sets up contributory negligence upon the part of the minor as a defense. Most ordinary prudence would require counsel for defendant to be ready to meet an issue joined by the pleadings before he announced ready for trial. Section 4346, Wilson's Oklahoma Statutes, 1903, which provides for continuances upon the amendment of pleadings, reads as follows: "When either party shall amend any pleading or proceeding, and the court shall be satisfied, by affidavit or otherwise, that the adverse party could not be ready for trial, in consequence thereof, a continuance may be granted to some day in term, or to another term of the court." There was nothing in the nature of amendments made that in any way changed the issues as they were joined by the pleadings, and it cannot be said that the defendant was surprised by the added allegation, when he had already set up contributory negligence as an affirmative defense.

[4] On the second proposition, the rule seems to be settled that the obligations, rights, and duties of the railroads and travelers at public crossings are mutual and reciprocal, and no greater degree of care is required of one than of the other. Both parties are charged with a mutual degree of care in keeping a lookout on their part, and the degree of diligence to be exercised on both sides is such as a prudent man would exercise under the circumstances of the case. *Continental Improvement Company v. Stead*, 95 U. S. 161, 24 L. Ed. 403; *T. & P. R. Co.*

*v. Cody*, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132.

[2] When the instruction complained of is considered in connection with other instructions given, we do not believe it would be misleading. It is true that, standing alone, it is not technically accurate; but, in view of the other instructions, we do not believe that it could give the jury the impression, as counsel for plaintiff in error seem to think, that plaintiff might heedlessly go upon the tracks, expecting the train to await his passage. From the character and momentum of the railroad train, and the requirements of public travel by means thereof, it cannot be expected that it would stop and give precedence to an approaching pedestrian to make the crossing first; it is the duty of the traveler to wait for the train. The train has the preference and right of way. *Continental Improvement Company v. Stead*, supra. On that point the court instructed the jury that: "It is the duty of every person, when going upon or across a railroad track at a public crossing, to look in each direction to see if cars are approaching, and a failure to do so is want of ordinary care. As a matter of law, both the minor son, Horton, and the defendant, the railway company, had an equal right to cross the street at the point where plaintiff claims the accident happened, and the law imposes on both parties the duty of using reasonable and prudent precaution to avoid accident and danger."

Another instruction, covering the same proposition, is as follows: "You are further instructed that the plaintiff in this case is charged with all the acts of the son, T. B. Horton, and all omissions of him at the time of the injury, and before he can recover he must establish by a preponderance of the evidence that his son was attempting to cross the tracks of the defendant at Krebs avenue, and that before attempting to cross he looked and listened, so as to ascertain whether or not any cars were approaching said crossing from either direction, and that duty was continuous until he had crossed all the tracks, and if the boy was injured by a failure on his part to exercise that degree of care the plaintiff cannot recover."

We think these instructions sufficiently explained to the jury the mutual rights and duties existing between the parties under the circumstances of this case.

[3] On the question of the measure of damages, the court instructed the jury as follows: "The court further instructs the jury that if you should find for the plaintiff that in arriving at the amount he would be entitled to recover you should take into consideration all the circumstances of the case, as shown by the evidence, tending to show the earning capacity of the boy, both before and after the injury, and the possible amount the father would likely have received therefrom, over and above what the son is capable of

earning in his present condition; but in arriving at this amount you cannot consider or take into consideration the pain or suffering of the son, nor any loss or disability he may have suffered or sustained because of the injury, as these things, if recovered at all, can only be recovered in a suit by the son."

The record shows that this instruction was requested by the plaintiff in error; but counsel complains that the instruction given should have been supplemented by the following instruction, which was requested and refused: "The court instructs the jury that, if you find for the plaintiff, the amount plaintiff is entitled to recover is such a sum of money as you may find from the evidence would represent the difference between the earnings of the son in his present condition and what his earnings would have been, had he not been crippled, from the time of his injury till he arrived at the age of 21 years, and in arriving at the amount you should consider the cost of maintaining, clothing, and schooling this boy, and deduct such amount from the amount representing the difference before mentioned."

Instead of giving the requested instruction, the court instructed the jury as follows: "The value of the boy's services, without having been injured, are deemed to be such as are ordinary with children in the same condition and station in life, considering his health, intelligence, and his probable loss of time for attendance at school, and such other like matters, and without regard to any peculiar value the plaintiff might attach to his boy's services."

There is no particular difference in the meaning of the instruction given and the one requested, except that the court omitted from the instruction given any reference to the cost of maintaining, clothing, and schooling the boy. There are many cases that hold that the cost of maintaining, clothing, and schooling the child should be deducted, but in these cases the minor is killed outright, and the father is no longer charged with that burden. In *Birmingham R. L. & P. Co. v. Chastain*, 158 Ala. 421, 48 South. 85, where the child survived, the rule as to the measure of damages was stated as follows: "In an action by a parent for the loss of the services of his minor child, the damages to the parent is limited to such as will compensate him for the loss of the child's services to the time of his majority, the reasonable amounts necessarily expended in the treatment and care of the child, and the value of the parent's services while nursing the child; and the jury may consider that with age, growth, and experience the value of the child's services would increase, although they cannot consider that the child might, if not injured, engage in any particular calling."

The above rule is applicable to the part of

the instruction relative to the compensation for loss of services in the case at bar, and, as that was the only item of damage claimed by the plaintiff, we think the instruction on that point was sufficient.

[5] On the last proposition, counsel contend that this was not a case where the issue of contributory negligence was to be proved by the plaintiff in error, but one where the jury should have been left to determine whether or not the defendant in error made out his case by a preponderance of evidence. We find no instruction upon which counsel could base an objection along this line. On the question of the burden of proof, the court instructed the jury as follows: "The burden of proof is upon the plaintiff to establish each and every particular fact necessary to make out his cause of action by a preponderance of the evidence, \* \* \* and the burden is upon the defendant to establish the affirmative allegations or defenses set up in its answer by a preponderance of the evidence." This is a correct general statement of the law, and therefore unobjectionable.

Finding no reversible error in the record, the judgment of the court below must be affirmed. It is so ordered. All the Justices concur.

REA, County Clerk, v. STATE ex rel. BOARD OF COM'RS OF LINCOLN COUNTY et al.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

1. STATUTES (§ 123\*)—SUBJECTS AND TITLES—PROVISIONS RELATING TO HIGHWAYS.

The act passed by the second Legislature (article 1, c. 32, Sess. Laws 1909, pp. 486-504), entitled "An act declaring section lines public highways and prescribing method of opening highways for public use; making township boards board of highway commissioners; and prescribing their powers and duties; providing for the appointment of road supervisors and defining their powers and duties; providing for road duty, and for levying tax for road and bridge purposes; providing for working county and state convicts upon the public highways; providing for the voluntary formation of road districts, for the construction of improved highways; authorizing counties and townships to issue bonds for road and bridge purposes; providing for the appointment of a county engineer and prescribing his powers and duties; repealing all laws conflicting with the provisions of this act, and declaring an emergency"—relates primarily to only one subject, namely, to public highways, the constructing and improving the same, and providing the agencies and means by which this may be done.

Its title is not repugnant to section 57, art. 5, of the Constitution.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 130-132, 176-183; Dec. Dig. § 123.\*]

2. STATUTES (§ 123\*)—SUBJECTS AND TITLES—PROVISIONS RELATING TO HIGHWAYS.

The authority for the issuance of bonds by the county and for the road improvement dis-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

trict, as provided in sections 53 and 54 of said act (Laws 1909, c. 32, art. 1), to pay the expense of road improvement in such road improvement district, is covered by the title thereof.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 123.\*]

**3. HIGHWAYS (§ 90\*)—DISTRICTS—ORGANIZATION—PETITION.**

The written petition upon which the road district is created must be signed by 15 per cent. of the qualified electors of the proposed road improvement district, excluding electors, residing within incorporated towns or cities comprised within the area of said district.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 90.\*]

**4. HIGHWAYS (§ 90\*)—DISTRICTS—ORGANIZATION—CONDITIONS PRECEDENT.**

Section 53, art. 1, c. 32, Sess. Laws 1909, at page 499 (section 7805, Comp. Laws of Oklahoma 1909), providing that, "before any improvement road districts are formed in the county, the several counties upon petition of twenty per cent. of the qualified voters of the county, as shown by the last general election held in said county, may by a vote of three-fifths of the votes cast upon the proposition, issue bonds," etc., is not mandatory; and such election by the county is not required as a condition precedent to the forming of such improvement road districts.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 90.\*]

*(Additional Syllabus by Editorial Staff.)*

**5. CONSTITUTIONAL LAW (§ 42\*)—PERSONS ENTITLED TO RAISE CONSTITUTIONAL QUESTIONS.**

Before a party can assail the constitutionality of a statute, he must be affected or injured by its enforcement.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 39; Dec. Dig. § 42.\*]

Error from District Court, Lincoln County; J. B. A. Robertson, Judge.

Action by the State, on the relation of the Board of County Commissioners of Lincoln County and others, against J. E. Rea, County Clerk. Judgment for relators, and the County Clerk brings error. Affirmed.

Emery A. Foster, for plaintiff in error.  
John J. Davis and M. D. Owen, for defendants in error.

**WILLIAMS, J.** The second Legislature passed an act (article 1, c. 32, Sess. Laws 1909, pp. 486, 504), entitled "An act declaring section lines public highways and prescribing method of opening highways for public use; making township boards board of highway commissioners, and prescribing their powers and duties; providing for the appointment of road supervisors and defining their powers and duties; providing for road duty, and for levying tax for road and bridge purposes; providing for working county and state convicts upon the public highways; providing for the voluntary formation of road districts, for the construction of improved highways; authorizing counties and townships to issue bonds for road and bridge purposes; providing for

the appointment of a county engineer and prescribing his powers and duties; repealing all laws conflicting with the provisions of this act, and declaring an emergency."

The plaintiff in error raises the following questions:

(1) Is said act repugnant to section 57, art. 5, of the Constitution of this state, in that the title contains two separate subjects?

(2) Is the provision in section 50 for the issuance of bonds by a road improvement district covered by the title?

(3) Is the alleged petition, signed by 15 per cent. of the qualified electors of the proposed road improvement district, the qualified electors of the road improvement district residing within the incorporated towns or cities embraced within its limits not being included, sufficient?

(4) No election having been held in said county for the purpose of ascertaining whether three-fifths of the qualified electors of said county approved the issuance of bonds by such municipality to bear its proportionate 25 per cent. of the expense of said improvement district in the establishment or improving of such roads, is that essential?

[1] 1. The title of the act here under consideration, relating primarily only to one subject, namely, to public highways, the opening and improving of the same, and providing the agencies and means by which this may be done, does not appear to be repugnant to section 57, art. 5, of the Constitution. State ex rel. v. Hooker, County Judge, 22 Okl. 712, 98 Pac. 964; Lindsay v. United States Saving & Loan Association et al., 120 Ala. 172, 24 South. 171, 42 L. R. A. 783; State v. Street et al., 117 Ala. 206, 23 South. 807.

[2] 2. In Williams et al. v. Board of Revenue of Butler County et al., 123 Ala. 432, 26 South. 348, an act passed by the General Assembly of that state at the 1898-99 session, entitled "An act to regulate the working and keeping in repair the public roads in Butler county, to authorize the issuance of bonds for that purpose, create a road fund for such county and create the office of public road supervisor and provide his duties and powers and provide for the working of convicts on the public roads" (Laws 1898-99, p. 935) was claimed to be repugnant to said section 2, art. 4, of the Constitution.

On page 435 of 123 Ala., on page 347 of 26 South., it is said: "Its first section provides: 'That the board of revenue of said county is hereby authorized and empowered to issue bonds of said county to the amount of \$100,000, the proceeds of which shall be applied exclusively to the construction and building, macadamized, turn-pike, gravel or chert roads, and for the repairing and improving of the public roads of said county,'

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



etc. The bill, questioning the constitutionality of the act on several grounds, sought an injunction, restraining the defendants from executing or attempting to execute it in said county, and a preliminary injunction to that end was granted. The defendants demurred to the bill, and moved to dismiss it for want of equity. The demurrer was sustained, and the motion to dismiss for want of equity was granted, and the bill was dismissed, unless amended in 30 days. From these rulings, the appeal is prosecuted. We allow the appellants to state, as they do in their brief, the alleged grounds of constitutional infirmity in said act: First. That section one (1) of the act, which authorizes the issuance of said bonds, is violative of article 4, § 2 (of the Constitution), in that the provisions of said section of said act are not clearly expressed in the title to said act; that the subject contained in said section is the grant of authority to the board of revenue of Butler county to issue bonds in the sum of \$100,000, 'the proceeds of which shall be applied exclusively to the construction and building macadamized, turn-pike, gravel or chert roads and for the repairing and improving of the public roads in said county,' while the title only expresses the subject of the issuance of said bonds in this language: "To regulate the working and keeping in repair the public roads of Butler county, to authorize the issuance of bonds for such purposes," etc. Second. That the title to the act expresses more than one subject, and those subjects are contained in the act, and the whole act is void; the same being for that reason violative of article 4, § 2, of the Constitution." This case settles the question that the title of the act under consideration is broad enough to include the authorization for the issuance of bonds in sections 53 and 54, or that such part of said sections are germane to the subject expressed in the title.

[3] 3. Section 52 of said act provides: "Road improvement districts consisting of not less than eighteen square miles in area may be created in any county upon a written petition signed by fifteen per cent. of the qualified electors of the proposed road improvement district being filed with the county clerk of the county in which said road improvement district is sought to be created, and seventy-five per cent. of the costs of improving any road within such district shall be borne by said district, and twenty-five per cent. by the county, provided that should any county refuse to vote bonds to pay its portion of costs of improving roads in road districts as provided in this act nothing herein contained shall prevent any road district in such county from paying the entire amount of costs of such improvement."

It appears that the written petition presented for the creation of the road district was signed by 15 per cent. of the qualified

electors of said proposed district, excluding the electors residing within incorporated towns or cities included within the area comprising said district. Was said petition sufficient?

Section 55, art. 1, c. 32, Session Laws of 1909, at page 501 (section 7807, Comp. Laws 1909), provides: "\* \* \* If any city or town through its proper officer shall within ten days represent to the board of county commissioners that such city or town will vote upon the proposition of making a donation of not less than ten per centum of the estimated costs of the construction of road improvement as heretofore provided, then the time for receiving offers of contribution shall be extended pending such election, which shall be held at the earliest possible date under the law."

Section 56 of the same article also provides: "Donations may be given and received for any road in this state. Cash contributions may be received from any source; any incorporated town or city may contribute not less than ten per cent. of the total cost of any roadway in any district out of any available fund or may issue bonds therefor. \* \* \*"

When said sections are construed with section 52, supra, we reach the conclusion that it was not intended that incorporated towns or cities under this act should be a part of said road districts. In the computation to determine the required per cent. of the signers on said petition, the exclusion of the electors residing within incorporated towns and cities within the area comprising such road district seems proper.

[4] Is the election provided for in this section essential to the formation of road districts? Section 53, art. 1, c. 32, Session Laws 1909, at page 499 (section 7805, Comp. Laws 1909), provides that, "before any improvement road districts are formed in the county, the several counties upon petition of twenty per cent. of the qualified voters of the county, as shown by the last general election held in said county, may by a vote of three-fifths of the votes cast upon the proposition, issue bonds," etc. Permission is thus granted; but it is not made mandatory for this action to be taken as a condition precedent to the forming of a road district.

[5] The briefs filed, assailing and defending the constitutionality of such act upon various grounds, are before us. Neither of the parties to this action have raised the constitutionality of this act upon any ground, other than that herein considered and determined. It is a settled rule that before a party is in position to assail the constitutionality of a statute he must be affected or injured by its enforcement. *Wiley v. Sinkler*, 179 U. S. 59, 21 Sup. Ct. 17, 45 L. Ed. 84; *Clark v. Kansas City*, 176 U. S. 114, 20 Sup. Ct. 284, 44 L. Ed. 392; *Lampasas v. Bell*, 180 U. S. 276, 21 Sup. Ct. 368, 45 L. Ed. 527; *Supervisors*

v. Stanley, 105 U. S. 305, 26 L. Ed. 1044; Shehane v. Bailey, 110 Ala. 308, 20 South. 359; Jones v. Black, 48 Ala. 540.

For that reason the objections sought to be raised by counsel as *amici curiæ*, to the validity of this statute, on the ground that it is repugnant to sections 7, 8, 9, and 26 of article 10, section 1, art. 16, section 1, art. 4, and section 7, art. 2, of the Constitution of this state, will not be considered in the case at bar. The questions raised in the pleadings in the trial court, and presented by the parties to this proceeding, have been considered in this opinion. Upon these questions only, the judgment of the lower court is affirmed. All the Justices concur.

**ATCHISON, T. & S. F. RY. CO. v.  
ROBINSON.**

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR (§ 569\*)—CASE-MADE—AUTHORITY OF JUDGE TO SIGN—SERVING CASE-MADE.**

Where a judge from one district is appointed or designated by the Chief Justice of the Supreme Court to hold a term of court in another district, and presides at the trial of a cause, he may, after the expiration of the term he was appointed to hold, sign and settle the case-made in the state outside of the district in which the cause was tried.

The time for making and serving the case-made having been extended to August 28, 1910, with ten days thereafter to suggest amendments, the case-made to be settled in five days notice by either party, said case-made having been served on August 27, 1910, and on September 3, 1910, the right to suggest amendments having been waived, on September 12, 1910, said case-made, after five days due notice, was settled by such judge. *Held*, that under such state of facts as appear in this record he was authorized to settle the same.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 569.\*]

Error from District Court, Lincoln County; J. J. Carney, Judge.

Action by C. E. Robinson against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff and defendant brings error. Motion to dismiss overruled.

Cottingham & Bledsoe, for plaintiff in error. H. H. Smith, for defendant in error.

**WILLIAMS, J.** The verdict was returned in the lower court in favor of the plaintiff (defendant in error) on April 20, 1910, before the Honorable J. J. Carney, one of the regular judges of the Thirteenth district court judicial district, who was sitting in the Tenth district under appointment by the Chief Justice of the Supreme Court, by virtue of section 9, art. 7, of the Constitution. On April 21, 1910, the motion for a new trial was filed. On April 30, 1910, the same having been overruled, the defendant was allow-

ed 60 days within which to make and serve a case-made; the plaintiff to have 10 days in which to suggest amendments thereto; the case-made to be settled and signed on 5 days notice by either party to the other. On June 30, 1910, the Honorable Roy Hoffman, the regular judge of the Tenth district court judicial district, made an order allowing the defendant 60 days, in addition to the time theretofore granted, within which to make and serve the case-made; 10 days to the plaintiff to suggest amendments; the case-made to be settled upon 5 days notice, in writing, by either party. The case-made was served on the attorney for the plaintiff on August 27, A. D. 1910, which was within due time. On September 3, 1910, plaintiff's attorney certified to the attorneys for the defendant that he had no amendments to suggest. On the same day notice was served upon him by the attorneys for the defendant that the case-made would be presented to Judge Carney at his chambers in Oklahoma City for settling and signing on September 12, 1910.

The attorney for the plaintiff moves to dismiss this proceeding in error on the grounds: First, that Judge Carney had ceased to hold court in the Tenth district court judicial district, under the original appointment by the Chief Justice, and therefore had no authority to settle the case-made outside of said district; second, that the time allowed the defendant in which to make and serve case-made having expired, together with the time to suggest amendments, such time was of the essence of his jurisdiction to settle and sign the same; and therefore he was without authority after the expiration of such time to settle and sign such case-made.

The first proposition has been decided adversely to the movant's contention in *Grayson v. Perryman*, 25 Okl. 339, 106 Pac. 954. The second contention has also been determined adversely to him in the following Oklahoma cases: *Barnes v. Lynch*, 9 Okl. 11, 59 Pac. 995; *Burnett v. Davis*, 27 Okl. 124, 111 Pac. 191.

The motion to dismiss is therefore overruled. All the Justices concur.

**TINKER et al. v. McLAUGHLIN-FARRAR CO.**

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR (§ 781\*) — DISMISSAL — GROUNDS—WANT OF ACTUAL CONTROVERSY.**

Where, pending the appeal, the judgment appealed from is satisfied and released in the court below, the appeal will be dismissed, because it presents only abstract or hypothetical

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

questions for determination, from which no actual relief can follow.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8122; Dec. Dig. § 781.\*]

Error from Osage County Court; C. T. Bennett, Judge.

Action between George E. Tinker and others and the McLaughlin-Farrar Company. From the judgment, Tinker and others bring error. Dismissed.

Boone & Macdonald, for plaintiffs in error. T. J. Leahy and Grinstead, Mason & Scott, for defendant in error.

HAYES, J. Defendant in error has filed a motion herein to dismiss this proceeding, because the judgment against the plaintiffs in error in the court below has been settled and released. In support of its motion, it has filed a certified copy of the journal entry in the court below, showing, first, an assignment of the judgment; and, second, that the same has been satisfied and released. The motion to dismiss has been served upon plaintiffs in error, who have made no response thereto.

It follows that the proceeding should be dismissed, because it presents only abstract or hypothetical questions for determination. *Reece v. Chaney et al.*, 28 Okl. 501, 114 Pac. 608.

TURNER, C. J., and KANE and DUNN, JJ., concur. WILLIAMS, J., not participating.

#### CITY OF PAWHUSKA v. RUSH.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(*Syllabus by the Court.*)

#### 1. PARTIES (§ 75\*)—OBJECTIONS—DEMURRER.

Under the Code of this state, misjoinder of parties is not ground for demurrer.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 116, 116; Dec. Dig. § 75.\*]

#### 2. APPEAL AND ERROR (§ 1170\*)—REVIEW—HARMLESS ERROR—PREJUDICIAL EFFECT.

By section 4344 of Willson's Rev. & Ann. St. 1908, this court is required to disregard all errors and defects in the pleadings and proceedings of an action that do not affect the substantial rights of the adverse party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 742\*)—TORTS—NUISANCE IN ALLEY.

In an action against a city and a private person for damages resulting from a nuisance in an alley, plaintiff alleges as her cause of action that defendant permitted the nuisance to be constructed and maintained in the alley; and that "the defendants and each of them failed, neglected, and refused to abate such nuisance when notified to do so." *Held*, that the petition sufficiently alleges notice to the city of the existence of the nuisance, and negligence on its part thereafter in removing same, to be good against a demurrer.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 742.\*]

Error from Osage County Court; C. T. Bennett, Judge.

Action by Nannie M. Rush against the City of Pawhuska. Judgment for plaintiff, and defendant brings error. Affirmed.

Paul B. Mason, City Atty., for plaintiff in error. Elmer E. Grinstead, for defendant in error.

HAYES, J. This action was prosecuted in the court below by defendant in error, hereinafter called plaintiff, against plaintiff in error, hereinafter referred to as the city, and one James R. Pearson, to recover damages. Plaintiff recovered in the court below separate judgments against the city and its co-defendant. From the judgment against it, the city prosecutes this appeal.

Plaintiff alleges in her petition in the trial court that she is owner of a certain lot in the city of Pawhuska on which she and her family have resided as their home; that there are two alleys running through the block in which her lot is situated, which are necessary in order that she may have egress and ingress to and from her lot, and complete enjoyment and use of her property. She alleges that defendants and each of them have permitted to be closed up and obstructed, and have closed up and obstructed, said alleys; that they have destroyed the egress and ingress over same to her lot, and have permitted and caused to be deposited therein large quantities of manure, filth, and other noxious substances, and have caused to be erected thereon cattle and hog pens; and that, because of the unhealthy and offensive odors arising therefrom, she and her family have been compelled to abandon their home; that her property has been depreciated in value; and that she has been compelled to lay out and spend large sums of money for medical treatment, because of which she prayed for judgment in the total sum of \$950.

[2] There was a motion by the city to require plaintiff to make her petition more definite and certain in several respects, one of which was that she be required to state how much damage she claimed for money expended for medical purposes, and the amount she expended; and that she be required to attach an itemized account of all the money so paid out. Failure to grant said motion as to this ground is complained of under the first assignment of error urged in the brief of the city's council. There is some merit in this contention. Money paid out or contracted to be paid out for medical attendance or medicine is special damages, and should be specially pleaded, and the sum so expended should be alleged, in order to entitle a recovery therefor. *Houston City St. Ry. Co. v. Richart* (Tex. Civ. App.) 27 S. W. 920; *Bates on Plead. & Prac.* vol. 1, p. 291. But we think the refusal of the court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

to require plaintiff to plead the amount expended by her for medical purposes, in view of the subsequent proceedings at the trial, was without prejudice to plaintiff in error. No evidence was introduced to establish any damages whatever arising from this cause, and the court in instructing the jury as to the measure of plaintiff's damages did not include as an element thereof money expended for medical purposes. We cannot see how the mere pleading in the petition that money was expended or contracted to be expended by plaintiff for such purposes, without pleading the amount thereof, could have prejudiced the substantial rights of the city, when all claim for damages on that account was abandoned by plaintiff in the subsequent proceeding at the trial. The court is required by the statute to disregard errors and defects in pleadings or proceedings that do not affect the substantial rights of the adverse party. Section 4344, Wilson's Rev. & Ann. St. 1903. The overruling of the motion, therefore, while error at the time the court acted, does not alone require a reversal of the judgment.

[1] To plaintiff's petition there was a general demurrer, filed by the city, setting up several specific grounds of demurrer, two of which were misjoinder of parties, and that the petition failed to allege that the city had notice of the nuisance in the alleys, and failed thereafter to remove same. As to the first of these grounds, it is settled under our Code that misjoinder of parties is no ground for demurrer. *Marth v. City of Kingfisher et al.*, 22 Okl. 602, 98 Pac. 436, 18 L. R. A. (N. S.) 1238.

[3] The petition charges the city with acts, both of commission and omission, in maintaining and permitting the nuisance in the alleys, by which plaintiff's access to her property was obstructed and her lot rendered unsuitable for residence purposes. It charges that the defendants caused to be constructed and did construct and maintain the nuisance in the alleys, and also charges that they (defendants) permitted said nuisance to be maintained therein. No notice is necessary to establish negligence where the city itself committed the act complained of. The doing of the negligent act is sufficient to charge the city with knowledge of it. *Abbott on Municipal Corporations*, vol. 3, § 1040. Since the petition charges the city with an act of commission, as well as an act of omission, the demurrer thereto for failure to allege notice should not be sustained; for, in any event, a cause of action is stated as to the act of commission. But we do not think the petition so defective in alleging negligent acts of omission as to render it vulnerable to a demurrer. Where the negligent act is not committed by the city, but the ground of liability is that the corporation permitted the

act to be committed by others, and the obstruction created thereby to remain in the streets, alleys, or public highways, the burden is upon plaintiff to allege and prove that the corporation had notice or reasonable knowledge of the wrongful acts or existence of the nuisance. *Abbott on Municipal Corporations*, vol. 3, § 1034. The petition does allege that "the defendants and each of them failed, neglected, and refused to abate such nuisance when notified so to do." This allegation of notice is not as specific and definite as good pleadings require, but it is good as against a demurrer. The fair meaning of this language is that notice was given to defendants to abate the nuisance, but that they not only failed and neglected, but refused, to do so. There was a demurrer to defendant in error's evidence, which was overruled and exceptions saved. There is no evidence tending to show that the city or its agents had anything to do with placing the obstructions in the alleys. The theory of the city's liability upon which the case was prosecuted at the trial was that the city, with knowledge of the existence of the obstruction in the alleys, and that its codefendant was maintaining therein a nuisance, by which defendant in error's property was injured, and the health of herself and family endangered and impaired, permitted him to do so, and failed to abate or to make any effort to abate the nuisance.

Under an assignment of error complaining of the court's overruling the demurrer to the evidence, counsel for the city contends in his brief that, while in platting the town site alleys were laid out upon the plat where said barn and lots stand, the alleys do not in fact exist; that they have never been opened, and have never been used by the public for the purpose of travel, or by adjoining property owners as a means of access to their property; and that if the nuisance exists at all it is a private nuisance, maintained by the owner of the property upon his own property, for which no liability exists against the city. We think the city is precluded by admissions in its answer from making this contention at this time. Plaintiff in her petition alleges the existence of the alleys in the block, and the city in its answer makes no general denial, but denies only such allegations in the petition as are not specifically admitted. One of the specific admissions in the answer is that the two alleys do exist in the block described, as alleged in the petition.

Finding that none of the errors assigned requires a reversal of the cause, the judgment of the trial court will be affirmed.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur. DUNN, J., not participating.

**FAST et al. v. ROGERS, County Treasurer, et al.**

(Supreme Court of Oklahoma. Nov. 18, 1911.)

(Syllabus by the Court.)

**1. EQUITY (§ 43\*)—JURISDICTION—REMEDY AT LAW.**

Relief will not be granted by a court of equity, where at the time there is a plain, specific, and adequate remedy at law.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 121-140; Dec. Dig. § 48.\*]

**2. TAXATION (§ 608\*)—ILLEGAL ASSESSMENT—INJUNCTION.**

Where the statutes provide a plain, specific, and adequate remedy for the correction of erroneous assessments, a court will not exercise its equity powers by restraining the collection of taxes due under an alleged error in assessment, where the complaining party neglects or refuses to avail himself of the remedy provided by statute for the correction of the error of which he is complaining.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.\*]

**3. TAXATION (§ 611\*)—INJUNCTION—REMEDY BY STATUTE.**

Where a petition for an order, enjoining the collection of taxes because of an erroneous assessment, shows on its face that the complaining party has refused or neglected to avail himself of the remedy provided by statute for the correction of erroneous assessments, it is bad on demurrer for failure to state facts sufficient to entitle complainant to equitable relief.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 611.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Muskogee County; John H. King, Judge.

Action by J. C. Fast and H. H. Bell against Connell Rogers, County Treasurer, and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

This was an action for an injunction, begun in the district court of Muskogee county, July 17, 1909, by plaintiffs in error herein, against the county officers of Muskogee county, restraining them from collecting taxes alleged to have been assessed against the public highway, or section line, lying south and along the tract of land belonging to plaintiffs in error. The county attorney of Muskogee county filed a demurrer to plaintiffs' petition, contending that the petition failed to state facts sufficient to entitle plaintiffs to the relief prayed for. On July 17th the court sustained the demurrer, and ordered the cause dismissed. On the same day plaintiffs filed a motion for a new trial, which was overruled by the court, and plaintiffs appeal from the judgment of the court sustaining the demurrer to the petition, and overruling the motion for a new trial.

N. A. Gibson and H. C. Thurman, for plaintiffs in error. Charles West, Atty. Gen., for the State.

HARRISON, C. (after stating the facts as above). There is but one question before

this court for determination, and that is whether the petition stated facts sufficient to entitle plaintiffs to equitable relief. The material allegations in the petition are: That the plaintiffs were owners of a certain tract of land containing 40 acres, as described in the petition; that during the year 1908 the officers of Muskogee county assessed said tract of land at \$700, and that the taxes on said tract for said year, under the tax levy for that year, amounted to \$20.78; that a strip of land  $1\frac{1}{4}$  rods in width and one-fourth of a mile in length, lying on the south side of said described land, was, prior to the organization of the state of Oklahoma, reserved and segregated from the said land, for the purpose of using the same as a public highway, under the provisions of the act of Congress, approved June 30, 1902 (Act June 30, 1902, c. 1323, 32 Stat. 500), entitled "An act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians and for other purposes"; that under the provisions of such act said strip of land was reserved from said tract of land for use as a public highway, and that the officers of the township in which said land was located, and the officers of the county of Muskogee, in violation of the rights of plaintiffs, assessed for taxation for said year the said strip of land containing three-fourths of an acre and charged the taxes thereon, amounting to 38 cents, against the plaintiffs; that on June 15, 1909, plaintiffs tendered to the county treasurer of Muskogee county the amount of taxes due on their tract of land, less the sum of 38 cents, alleged to have been assessed against the strip of land constituting the public highway; that the county treasurer refused to accept the tender so alleged to have been made, whereupon plaintiffs made application to the board of county commissioners for a certificate of error, correcting such alleged erroneous assessment; that the county commissioners refused to grant the certificate of error, whereupon plaintiffs filed their petition for a restraining order in the district court, praying that defendants and each of them, in their personal and in their official capacity, be restrained from declaring the said taxes delinquent, and from issuing a tax warrant for the collection of same.

Inasmuch as there is no brief filed by the county attorney of Muskogee county, it is difficult to determine upon what theory it was contended that the petition was bad on general demurrer, or wherein it was contended that the petition failed to state facts sufficient to entitle the plaintiffs to the relief prayed for. Neither the brief of plaintiffs in error nor the brief filed by the Attorney General offer any suggestions as to wherein the petition was defective, but it is argued by the Attorney General in his brief, and very clearly and ably so, that the title to the strip of land composing the public highway

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 119 P.—16

is in the state. This contention is conceded by plaintiffs in error, both in their petition in the court below and in their brief here, and, upon the theory that the title to the public highway was in the state, plaintiffs contended that the county officers had erroneously assessed them and charged them with the taxes levied on such strip, composing the public highway. Therefore the question of title to the strip in controversy is not before this court for determination. The questions for this court to determine are: Whether the strip of land composing the public highway was assessed for taxes and charged against the plaintiff, and, if so, whether such assessment and charge were erroneous, and whether, if erroneous, plaintiffs had resorted to and exhausted their statutory remedy for the correction of the erroneous assessment.

[1] The petition charges that their tract of land, containing 40 acres, was assessed at \$700, and also charges, in a general way, that the strip of land reserved from such 40-acre tract by act of Congress for a public highway was included in such assessment. It does not appear clearly from the petition whether the county officers had assessed their tract of land at a lump sum of \$700, or whether it was assessed at so much per acre, and that the section line or highway along the strip was included in the estimate to make up the number of acres; but from the allegations in the petition on general demurrer it reasonably appears that the strip in question was included in the assessment. There is nothing in the record to show whether such were the facts or not, except the allegations in the petition of the plaintiffs, and such allegations are to be considered as facts on general demurrer. We are of the opinion that in an action at law the petition stated facts sufficient to warrant the court in correcting the assessment, and if the cause was brought here on appeal from an action for legal redress we might be inclined to hold that the petition stated a cause of action. But from the record here, and from the averments in the petition, taking cognizance of the provisions of our statutes in such cases, it clearly appears that at the time this action was brought that the plaintiffs had a clear, specific, and adequate remedy at law for the correction of the assessment complained of, if such assessment were erroneous.

[2] The Statutes of Oklahoma in force at the time this action was brought (section 3, art. 5, c. 38, of the Session Laws of 1909), which was approved and became effective March 10, 1909, provides: "The boards of county commissioners of the various counties of the state of Oklahoma are hereby empowered to correct, either upon the assessment rolls or upon the tax rolls of the county, any double or erroneous assessment of property for taxation for any particular year, in the manner provided in the next section, and not otherwise."

Section 4 provides: "Whenever at either

of the regular meetings of the said boards (In January, April, July or October) upon complaint of the person or persons beneficially interested, their agent or attorney, it shall be made to appear, by the testimony of the claimant, and at least one reputable witness, borne out by the records of the county, that the same property, whether real or personal, has been assessed more than once for the taxes of the same year, or that property, whether real or personal has been assessed in the county for the taxes of a year to which the same was not subject, the said board is hereby empowered to issue to the complainant a certificate of error showing that the complaint has been investigated by the said board; that the said board has been satisfied of the truth of the allegations of the said complaint, and direct the same to the county treasurer of their said county, directing the said county treasurer to accept the said certificate as a payment of cash to the amount found by the said board to have been unjustly assessed, which said amount shall be named in said certificate, and shall by the treasurer be credited upon his tax roll, against the tax so found to be erroneous."

Snyder's Compiled Laws of Okla. 1909, § 1690, provides: "From all decisions of the board of commissioners upon matters properly before them, there shall be allowed an appeal to the district court by any person aggrieved, including the county by its county attorney, upon filing a bond with sufficient penalty, and one or more sureties to be approved by the county clerk conditioned that the appellant will prosecute his or her appeal without delay and pay all costs that he or she may be charged to pay in said district court; said bond shall be executed to the county, and may be sued in the name of the county upon breach of any condition therein."

Section 1691 of the same statute provides: "Said appeal shall be taken within twenty days after the decisions of said board by serving a written notice on one of the board of county commissioners, and the clerk shall, upon the filing of the bond as hereinbefore provided, make out a complete transcript of the proceedings of the said board relating to the matter of the decision thereon, and shall deliver the same to the clerk of the district court."

Section 1692: "Said appeal shall be filed by the first day of the district court next after such appeal and said cause shall stand for trial at such term."

Section 1693: "All appeals thus taken to the district court shall be docketed as other causes pending therein, and the same shall be heard and determined de novo."

Section 1694: "The district court may make a final judgment and cause the same to be executed, or may send the same back to the board with an order how to proceed, and require said board of county commis-

sioners to comply therewith by mandamus or attachment as for contempt."

It is plain from these statutes that at the time this action was brought (July, 1909) that the plaintiffs had a complete, specific, and adequate remedy at law for the correction of the wrong complained of, and equally plain upon the face of the petition that such legal remedies had not been exhausted.

It is averred in the petition that plaintiffs applied to the board of county commissioners for a certificate of error, as provided in section 4, art. 5, c. 38, of the Session Laws of 1909; but it further appears on the face of the petition that upon the refusal of the county commissioners to correct the assessment alleged to be erroneous they proceeded at once to a court of equity for relief, instead of exhausting their legal remedy by appealing from the order of the board of county commissioners to the district court. Upon their failure to appeal as provided by law, the order of the commissioners' court became final, and a court of equity would not have jurisdiction of the matter in controversy.

The Legislature, acting within constitutional limitations, has power to enact rules for the assessment, levy, and collection of taxes, and to prescribe rules of procedure for the correction of erroneous assessments or levies, and, having exercised such power by the enactment of rules by which the officers of the state are to be governed in the assessment, levy, and collection of taxes, and having provided a plain, specific, and adequate remedy for the correction of errors arising thereunder, the state has a right to demand that parties aggrieved by alleged errors of assessment shall have their rights measured, tested, and determined by the rules provided in the statutes; and it would have the effect of nullifying the law and disregarding the statutes for courts of equity to assume jurisdiction in such a case, and grant an order, restraining the collection of taxes, where the error complained of could be as speedily and adequately determined by the rules of law.

It is a well-settled rule that courts of equity will not act in granting relief where the complainant has a plain, complete, and adequate remedy at law for the adjustment of the wrongs complained of. 22 L. R. A. 699, and notes, in case of *Odlin v. Woodruff*, 31 Fla. 160, 12 South. 227; *Am. & Eng. Enc. of Law* (2d Ed.) vol. 16, § 6, and cases cited; *Cyc.* vol. 22, pp. 76-79, and cases cited; *Dows v. Chicago*, 11 Wall. 106, 20 L. Ed. 65; *Milwaukee v. Koeffler*, 116 U. S. 219, 6 Sup. Ct. 372, 29 L. Ed. 612; *Story's Equity Pleading* (10th Ed.) § 473.

[3] The rule being that courts of equity will not intercede and grant relief where a

plain, complete, and adequate remedy is provided by law for the redress of the wrongs complained of, and it appearing on the face of the petition that plaintiffs below had not availed themselves of the remedy provided by law, we think the demurrer was properly sustained, and the cause dismissed.

The judgment is affirmed.

PER CURIAM. Adopted in whole.

### JACOBS v. CITY OF PERRY.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 977\*)—REVIEW—DISCRETION OF TRIAL COURT—GRANT OF NEW TRIAL.

This court will not reverse the ruling of the trial court, granting a new trial, unless it can be seen, beyond all reasonable doubt, that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that, except for such error, the ruling of the trial court would not have been so made. The Supreme Court will very seldom and very reluctantly reverse the decision or order of the trial court which grants a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3865; Dec. Dig. § 977.\*]

Error from District Court, Noble County; W. M. Bowles, Judge.

Action by Lizbeth Jacobs against the City of Perry. From an order granting a new trial after verdict for plaintiff, she brings error. Affirmed and remanded.

P. W. Cress, for plaintiff in error.

DUNN, J. This case presents error from the district court of Noble county. Plaintiff in error, as plaintiff, brought her action against the city of Perry, to recover damages for personal injuries sustained on account of the alleged negligence of the defendant in failing to keep its sidewalks in a reasonably safe condition for public travel. To a petition alleging these facts, defendant filed its answer, and the issues tendered thereby were duly submitted to a jury, which, on the 23d day of September, 1908, returned a verdict for plaintiff in the sum of \$1,400. On a motion for a new trial being filed, in which all of the statutory grounds were set forth, some of which were supported by affidavits, the trial court, on the 15th day of October, 1908, granted the same, setting forth that it, "being sufficiently advised in the premises, finds that substantial justice has not been done in the premises, and that said motion for a new trial should be sustained." From this order allowing the motion for a new trial, plaintiff has brought the case to this court, asking for a reversal of the same, and that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the trial court be ordered to render judgment on the verdict. Counsel for defendant in error has filed no brief herein; counsel for plaintiff in error has briefed the case on the proposition that the court erred in the exercise of its discretion in the order granting a new trial.

In this contention we are unable to agree; the rule obtaining in this jurisdiction being that this court will not reverse the ruling of the trial court, granting a new trial, unless it can be seen, beyond all reasonable doubt, that the trial court has manifestly and materially erred with respect to some pure, simple, and unmixed question of law, and that, except for such error, the ruling of the trial court would not have been so made. The Supreme Court will very seldom and very reluctantly reverse the decision or order of the trial court which grants a new trial. *Hogan et al. v. Bailey*, 27 Okl. 15, 110 Pac. 890; *Farmers' & Mer. Nat. Bank of Hobart v. School Dist. No. 56 et al.*, 25 Okl. 284, 105 Pac. 641.

Discussing the duties of the trial court on the presentation of a motion for a new trial, this court in the case first cited said: "The trial court has a higher function under our jurisprudence than to act merely as a moderator or umpire between contending adversaries before a jury. Not only is it charged with the duty of seeing that the course and conduct of the trial gives to each of the litigants a fair opportunity to present his cause, and to have the facts weighed in the light of proper instructions, declaring the law relative thereto, but it is the imperative, abiding duty of the court, after the jury has returned its verdict and awarded to one or the other success in the controversy, where the justness of the same is challenged, as in this case, to carefully weigh the entire matter, and, unless it is satisfied that the verdict is responsive to the demands of justice, to set the verdict aside and grant a new trial. Not only must the jury be satisfied of the righteousness of the conclusion to which it arrives, but, unless that conclusion meets the affirmative, considerate approval of the mind and conscience of the court, it should not, where challenged, be permitted to stand. *Yarnell v. Kilgore*, 15 Okl. 591, 82 Pac. 990; *Trower v. Roberts*, 17 Okl. 641, 89 Pac. 113; *Ten Gate v. Sharp*, 8 Okl. 300, 57 Pac. 645; *City of Sedan v. Shurch*, 29 Kan. 190; *Citizens' State Bank of Lawton v. Chattanooga State Bank*, 23 Okl. 787, 101 Pac. 1118, and cases therein cited."

Under the doctrine therein set forth, we cannot find that error was committed by the trial court in its allowance of the order for a new trial, in view of the fact that it found specifically that in its judgment substantial justice had not been done in the premises; hence the order made, granting a new trial,

is affirmed, and the cause remanded to the trial court.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur. HAYES, J., absent, and not participating.

### THOMPSON et al. v. FULTON.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 556\*)—RECORD—"CASE-MADE."

"A 'case-made,' otherwise called a 'case settled,' or a 'case agreed upon,' or, more frequently, a 'case,' is a statutory method of preparing a 'record' for appellate review. It is a written statement of the facts in a case, agreed to by the parties, and duly authenticated by the judge who tried the case, and submitted to an appellate court for the purpose of obtaining a review of the alleged errors of law occurring in the proceedings of the court below, as shown in the record thus presented."

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 556.\*]

#### 2. APPEAL AND ERROR (§ 568\*)—RECORD—CASE-MADE—SETTLEMENT.

It is essential that all parties to an action be present or have proper notice of the presentation of the case-made for settlement, in order that they may suggest amendments or present objections to the case-made as thus presented for settlement.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. § 568.\*]

#### 3. APPEAL AND ERROR (§ 564\*)—RECORD—CASE-MADE—SETTLEMENT.

A joint judgment being rendered against T. and M. for the possession of a certain tract of land and the costs of the trial, T. was allowed 90 days in which to prepare and serve a case-made, 10 days for the suggesting of amendments; same to be settled upon 5 days notice by either party. Neither was any extension asked or granted to the codefendant, M. After the expiration of 3 days from the time of the entering of the judgment, the case-made was presented for settlement, but without any notice to M. Neither were any amendments suggested or the right to suggest same waived by M., or any one for him. Held, that notice to M. was essential, and also that as the prescribed 3 days had expired, and no extension of time had been granted to M., no valid case-made could then be settled for said M.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2501-2506; Dec. Dig. § 564.\*]

Error from District Court, Atoka County; Robt. M. Rainey, Judge.

Action by J. S. Fulton against Rachel Thompson and another. Judgment for plaintiff, and defendants bring error. Dismissed.

W. J. Gregg and John B. Meserve, for plaintiffs in error. J. G. Ralls, for defendant in error.

WILLIAMS, J. This proceeding in error seeks to review a joint judgment against the plaintiffs in error, Rachel Thompson and Ed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index



Mathis, for the possession of a certain 40 acres of land, and the costs of the action in the trial court.

[1] "A 'case-made,' otherwise called a 'case settled,' or a 'case agreed upon,' or, more frequently, a 'case,' is a statutory method of preparing a 'record' for appellate review. It is a written statement of the facts in a case, agreed to by the parties, and duly authenticated by the judge who tried the case, and submitted to an appellate court for the purpose of obtaining a review of alleged errors of law occurring in the proceedings of the court below, as shown in the record thus presented." *Burdick on New Trials and Appeals*, § 207, p. 173.

A case-made is solely a creature of the statute, and, whilst more comprehensive than a bill of exceptions, is a substitute therefor. *Parrault v. Marsant*, 9 Kan. App. 419, 58 Pac. 1027. The office of a bill of exceptions and that of a case-made are very dissimilar. The former is generally to bring up the record to review a decision of the court upon a matter of law which the record would otherwise not show, in which case it must be reduced to writing, allowed, signed, and filed at the term that the decision complained of is made, except where the statute permits, on order of the court, the allowing, signing, and filing same out of term time. Neither the pleadings nor the judgment nor orders of the court may properly be included in a bill of exceptions; nor are any of the parties entitled to notice of presentation for allowance. When filed, it becomes a part of the record, and is brought up by transcript, which must include the other parts of the record. As to the case-made, it may be settled, signed, and allowed beyond the trial term and in vacation, but it must be complete in itself; the pleadings, judgments, and orders of the court to be incorporated therein. It must contain the matters of record, as well as the proceedings not entered on the record. To present errors for review, the case-made must embody a statement of so much of the issue, proceedings, and evidence, or other matters in the action, as may be necessary to bring to the notice of the appellate court, from an examination of the paper settled and authenticated as a case-made, the errors complained of. The object of the case-made is to reduce the size of the record, eliminating all matters immaterial to the question sought to have reviewed. *Shumaker v. O'Brien*, 19 Kan. 476; *Davis v. Ringer*, 1 Kan. App. 32, 41 Pac. 676; *Pierce v. Engelkemeler*, 10 Okl. 308, 61 Pac. 1047; *Territory v. Cooper*, 11 Okl. 699, 69 Pac. 813.

[2] A case-made being, as said by *Burdick*,

"a written statement of the facts in a case, agreed to by the parties, and duly authenticated by the judge who tried the case," it is essential that all parties to an action be present or have proper notice of the presentation of the same for settlement, so that they may be present in order to make suggestions or objections pertaining to the settling of the agreed statement of facts or agreed case. Where the case-made is prepared and presented by all the defendants jointly, obviously no notice is required to either of them; but when the case-made is proposed by only one of the defendants, the others being necessary parties before the reviewing court, notice to such other defendants is essential in order that the case-made may be properly settled.

[3] A case-made at the instance of the complainant in error, *Ed Mathis*, could be settled only within the prescribed three days, as no extension of time was allowed to him. It is settled that a case, not served within three days after the judgment sought to be reviewed is entered, or within the extension of time allowed by the court, is void, and will not be considered. *Devault et al. v. Merchants' Exchange Co.*, 22 Okl. 624, 98 Pac. 342; *Bettis v. Cargile et al.*, 23 Okl. 301, 100 Pac. 436; *Bray v. Bray*, 25 Okl. 71, 105 Pac. 200; *Carr v. Thompson et al.*, 27 Okl. 7, 110 Pac. 687; *Cowan v. Maxwell*, 27 Okl. 87, 111 Pac. 388; *Lankford v. Wallace*, 26 Okl. 857, 110 Pac. 672. Parties to the record cannot by stipulation, which is not approved by the court or judge, extend the time for making and serving a case-made. *Bettis v. Cargile et al.*, supra. The record recites that: "Thereupon the defendant *Rachel Thompson* excepted to said judgment, and asked that she be given 90 days in which to prepare and serve a case-made, and that 10 days be given the plaintiff [*J. S. Fulton*] in which to suggest amendments, and that said case, when so made, be settled upon 5 days notice by either party, which time is by the court granted." This is the only order granting an extension of time to any one in said action for the settling and signing of the case-made. The case-made, when made, was served upon the plaintiff's attorney, but no service was had upon the co-defendant, *Ed Mathis*. Neither were any amendments suggested nor the right to suggest same waived by the said *Mathis*, or any one for him. It follows that the case-made is invalid. Whilst the questions sought to be raised could be brought up by transcript, yet the record is not certified by the clerk, and therefore cannot be considered as a transcript.

The proceeding in error is dismissed. All the Justices concur.

**HAYNES et al. v. SMITH.**

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 564\*)—CASE-MADE—FAILURE TO FILE IN TIME.**

A case-made, not served within 3 days after the judgment sought to be reviewed is entered, or within the extension of time allowed by the court or judge, is a nullity, and will not be considered by this court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2504; Dec. Dig. § 564.\*]

**2. APPEAL AND ERROR (§ 564\*)—CASE-MADE—SERVICE—EXTENSION OF TIME.**

An order granting an extension of time, made after the expiration of the time originally granted for making and serving a case-made, is void.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2503; Dec. Dig. § 564.\*]

**3. APPEAL AND ERROR (§ 361\*)—PETITION IN ERROR—AMENDMENTS.**

Within the time allowed for bringing proceedings in error in this court, amendments to a petition in error are generally allowed as of course.

After the expiration of such time, matters of form as a rule may be corrected, but no new allegations of error can be made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1956; Dec. Dig. § 361.\*]

**4. APPEAL AND ERROR (§ 724\*)—"ERRORS OF LAW OCCURRING AT THE TRIAL"—"TRIAL."**

The overruling or sustaining of a demurrer to a pleading is not included in "errors of law occurring at the trial." Section 4196, St. Okla. Ter. 1893 (section 5825, Comp. Laws 1909).

A trial does not commence until an issue of fact is joined.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 724.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7095-7103; vol. 8, p. 7821.]

Error from District Court, Kingfisher County; A. H. Huston, Judge.

Action by B. F. Smith against John E. Haynes and others. Judgment for plaintiff, and defendants bring error. Dismissed.

A. L. Emery, for plaintiffs in error. F. L. Boynton, for defendant in error.

**WILLIAMS, J.** On May 28, 1909, motion for new trial was overruled, and the defendants allowed 90 days within which to prepare and serve a case-made; the plaintiff to have 10 days thereafter within which to suggest amendments; the same to be settled upon five days notice of the time and place proposed therefor. On July 28, 1909, the defendants "are given 90 days in addition to the time heretofore granted in which to serve and file case-made." On November 3, 1909, it was ordered by the trial judge "that the time granted to the defendants to make and serve a case-made for the Supreme Court be and is extended for a period of 60 days in addition to the time already granted." On February 23, 1910, it was ordered by the trial judge "that the time already granted to the de-

fendants to make and serve a case-made for the Supreme Court be and the same is extended for a period of 30 days in addition to the time already granted." On March 24, 1910, it was ordered by the trial judge "that the time already granted to the defendants to make and serve a case-made for the Supreme Court be and the same is extended for a period of 30 days in addition to the time already granted." The case-made was served on April 27, 1910. On May 7, 1910, notice of the time and place of settlement was waived, together with the right to suggest amendments. On May 24, 1910, the case-made was settled and signed. The 90 days allowed on May 28, 1909, expired on August 27, 1909. The 90 days additional time granted on July 28, 1909, expired on November 25, 1909. The 60 days allowed on November 3, 1909, expired on January 24, 1910. The 30 days granted on February 23, 1910, expired on March 25, 1910, and the 30 days allowed on March 24, 1910, expired on April 23, 1910.

If it be that the order on November 3, 1909, was extended 90 days, instead of 60 days, in that event it would have expired on March 25, 1910, and the 30 days granted on March 24, 1910, would have expired on April 25, 1910. Under that theory, the case-made was not served in time, and some of the orders of extension were made out of time.

[1] It is settled that a case-made, not served within three days after the judgment sought to be reviewed is entered, or within the extension of time allowed by the court or judge, is void, and will not be considered. *Thompson et al. v. Fulton*, 119 Pac. 244, decided at this term, and authorities therein cited.

[2] It is also settled that an order granting an extension of time, made after the expiration of the time originally granted, is a nullity. *London & Lancashire Fire Ins. Co. v. Cummings et al.*, 23 Okl. 126, 99 Pac. 654; *Bray v. Bray*, 25 Okl. 71, 105 Pac. 200; *Ellis v. Carr*, 25 Okl. 874, 108 Pac. 1101; *Bettis v. Cargile*, 23 Okl. 301, 100 Pac. 436. It follows that the case-made in this proceeding is a nullity, and cannot be considered in this court.

The record, however, is certified as a transcript, and if any assignment of error in the petition in error raises any question that could be brought up on transcript the appeal should not be dismissed.

The following are the assignments of error in the petition in error: (1) Verdict and judgment contrary to law. (2) Judgment and verdict not sustained by the weight of evidence. (3) Error in the instructions given the jury. (4) Irregularities in the proceedings at said trial, by which the defendants were prevented from having a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fair trial. (5) Errors of law occurring at the trial, and excepted to by plaintiffs in error.

The assignments of error in the petition in error raise questions that it is essential to bring up the evidence and the rulings of the trial court thereon, either by case-made or bill of exceptions, in order to determine whether there was error.

[3] This proceeding in error was filed in this court on May 26, 1910, and a year has elapsed since that date. Within the time allowed for bringing proceedings in error in the Supreme Court, amendments to a petition in error are generally allowed as of course. *Railway Company v. Whitaker*, 42 Kan. 634, 22 Pac. 733; *Crawford v. Railway Co.*, 45 Kan. 474, 25 Pac. 885. After the expiration of such time, matters of form may be corrected, but no new allegations of error can be made. *Crawford v. Railway Co.*, supra; *Cogshall v. Spurry*, 47 Kan. 448, 28 Pac. 154.

[4] The overruling or sustaining of a demurrer to a pleading is not included in "errors of law occurring at the trial," since a trial does not commence until an issue of fact is joined. *Bank v. Harding*, 65 Kan. 655, 70 Pac. 655; section 4196, Stat. Okla. Ter. 1893; section 5825, Comp. Laws 1909. It follows that no error is assigned in the petition in error that may be reviewed on a transcript.

The proceeding in error is dismissed. All the Justices concur.

DENVER, W. & M. RY. CO. v. ADKINSON.  
(Supreme Court of Oklahoma. Jan. 10, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 564\*)—CASE-MADE—SETTLING AND FILING—"THEREUPON."

A party against whom a judgment is rendered on May 22, 1906, and who, within time properly extended, served on his adversary a case-made on October 1, 1906, which on the same day was returned with a waiver of suggestion of amendments, will not be deemed to have abandoned his appeal, where he has the said case-made duly signed and settled, on proper notice, on December 12, 1906.

(a) Nor will he be held to have abandoned his appeal by reason of the fact that the said case-made was not filed by him with the papers in the case until February 9, 1909.

(b) The word "thereupon," as used in section 6075, Comp. Laws of Oklahoma 1909, in the clause providing that "the case so settled and made shall thereupon be filed with the papers in the case," means "after being so settled and signed," and does not in this connection necessarily mean "immediately."

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 564.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 6953-6955.]

2. INDIANS (§ 27\*)—ALLOTMENTS—EJECTMENT—CERTIFICATE AS EVIDENCE OF TITLE.

Where, in an action of ejectment by an allottee of the Cherokee Tribe of Indians, plain-

tiff in support of her title shows that the land involved was allotted to her, and there is no denial of the said allotment, and plaintiff's claim of right, title, and possession is based upon her allotment certificate, the pleading and proof of the same is sufficient to place the burden upon a defendant who controverts plaintiff's rights thereunder.

[Ed. Note.—For other cases, see Indians, Dec. Dig. § 27.\*]

3. EMINENT DOMAIN (§§ 74, 268\*)—RAILROAD RIGHT OF WAY—INDIAN LANDS—COMPENSATION—EJECTMENT BY ALLOTTEE.

Under section 15 of an act of Congress, entitled "An act to grant the right of way through the Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February 28, 1902 (32 Stat. 47, c. 134 [U. S. Comp. St. Supp. 1909, p. 632]), before a railway company exercising the right of eminent domain thereunder may take or condemn lands, full compensation for the same and for all damages done by the construction of the road or the taking of the lands must be first made to the individual owner, occupant, or allottee of such lands or to the tribe or nation through or in which the same is situated, and where possession is taken without such payment, and the land is subsequently allotted, the allottee may maintain ejectment to secure possession.

[Ed. Note.—For other cases, see Eminent Domain, Dec. Dig. §§ 74, 268.\*]

4. EMINENT DOMAIN (§ 262\*)—REVIEW—VERDICT—INSUFFICIENCY OF EVIDENCE.

Where a verdict for damages is found by a jury, which is unsupported by any evidence, the same will be reversed and set aside on appeal.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 681-686; Dec. Dig. § 262.\*]

Error from District Court; Rogers County; T. L. Brown, Judge.

Action by Ella M. Adkinson, by her next friend, J. M. Adkinson, against the Denver, Wichita & Memphis Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. G. Wilson, for plaintiff in error. W. H. Kornegay, for defendant in error.

DUNN, C. J. This case presents error from the district court of Rogers county, and was an action of ejectment, brought under the laws in force in the Indian Territory prior to statehood.

The defendant in error, as plaintiff in the court below, brought her action to recover the possession of a strip of land 25 feet wide, running through a tract of land which was allotted to her as a member of the Cherokee Tribe of Indians. It is made to appear by the petition that on the 10th day of September, 1906, at the time of the allotment in question, the defendant, the Denver, Wichita & Memphis Railway Company, was unlawfully and without right occupying a portion of said allotted land, consisting of the strip referred to, which ran diagonally through plaintiff's allotment from a point about 50 feet west of the southeast corner to a point about 40 feet east of the north-

west corner, which land was known as the right of way of the defendant railway company. Plaintiff prayed to recover possession of said tract of land, and for damages. The certificate of allotment was set out and pleaded at length in plaintiff's petition. To this petition the defendant filed a demurrer, which was by the court overruled, to which exception was saved, whereupon defendant answered, admitting the issuance to plaintiff of the allotment certificate, but denied that she was entitled as against the defendant to the land sued for. It further pleaded that as a railway company it was entitled to all the benefits and privileges provided for by an act of Congress, approved February 28, 1902 (32 Stat. 47, c. 134 [U. S. Comp. St. Supp. 1909, p. 632]), relating to the condemnation by railroads of right of ways through Oklahoma and Indian Territories, and that, acting under the terms of the said act, the right of way here involved was legally condemned, and that the said strip of land was being used for railroad purposes at the time plaintiff took the land, and that she took with notice of these rights. Further answering, defendant denied that plaintiff was the owner and entitled to the immediate possession of the premises described, or that she was entitled to damages for its retention. A trial was had to a jury, which, under a peremptory instruction by the court on the evidence submitted, returned a verdict for plaintiff, and assessed her damages at \$150. Motion for new trial was filed and overruled, and the case has been regularly filed in this court for review.

A preliminary question to the consideration of the case on its merits is presented by counsel for defendant in error in his brief, wherein it is contended that this court is without jurisdiction to consider the case, by reason of the fact that counsel for plaintiff in error abandoned his appeal, and that the action should be dismissed. The basis for this claim is found in the following state of facts: The order and judgment of the court rendered herein was of the date of May 22, 1908, and defendant was granted 90 days within which to make and serve a case-made. Within the time so extended, and on the 11th day of August, 1908, the judge granted an order further extending the time within which to make and serve a case-made to and including the 22d day of September, 1908. On the 18th day of September, 1908, the court again extended the time within which to make and serve the case-made to October 22, 1908. The case-made was served on counsel for plaintiff on the 1st day of October, 1908, and on the same day was by counsel for plaintiff returned, with suggestion of amendment waived. The order granted 30 days after the service of the case-made within which to suggest amendments, and provided that the case was to be signed and settled on five days notice in writing by either party, and it is the

claim of counsel for plaintiff that the case could not be legally signed and settled later than November 7, 1908. Counsel concedes that he has found no authority decisive of the point made, but argues that, from the language of the statute (sections 6074 and 6075, Comp. Laws of Okla. 1909), it is contemplated that there could be no lawful delay in the signing and settling of the case-made, and its being filed with the papers in the case. Section 6074, *supra*, provides that: "The case and amendments shall be submitted to the judge who shall settle and sign the same, and cause it to be attested by the clerk and the seal of the court to be thereto attached. It shall then be filed with the papers in the case." Section 6075, *supra*, provides that after the amendments are suggested, "which when so made and presented [the case] shall be settled, certified and signed by the judge who tried the cause; and the case so settled and made shall thereupon be filed with the papers in the cause." Counsel's contention being that under these provisions "thereupon" can have no other meaning than "immediately," and that, when counsel, in addition to the delay incident to the signing and settling of the case-made, which took place December 13, 1908, delayed until February 13, 1909, to file the case-made with the clerk of the district court, he abandoned his appeal, and the same should be dismissed by this court.

The law under consideration is identical with the statute of Kansas, and it has been the uniform practice in that state and in Oklahoma to allow, within the limitation fixed by the statute for filing appeals, extensions of time within which to make and serve a case-made, so long as good cause could be made to appear to the trial judge. Where counsel for plaintiff in error makes and serves his case-made within a lawfully extended time, no lapse of time has been held sufficient to be considered an abandonment of his proceeding. The order of the court, extending time within which to make and serve a case, should fix the time within which the party served may suggest amendments. The court should, and usually does, direct the notice to be given for the presentation of the case-made for settling and signing after it has been served and amendments suggested or waived. This was done in the present case; but there is no statute fixing the time within which the proposed case-made and the suggested amendments, if any, shall be presented to the trial judge for his action thereon, with the exception of, speaking generally, the year within which the proceeding must be filed in the Supreme Court; hence, in our judgment, the case-made was served in time.

The conclusion which we have here reached finds support in several cases from the Supreme Court of Kansas, among which is the case of *Hill v. First Nat. Bank*, 42 Kan. 364, 22 Pac. 324. This case was afterwards

referred to and quoted from by that court in the case of *Benham v. Smith*, 53 Kan. 495, 36 Pac. 997, wherein the court said: "Within the authority of *Hill v. National Bank*, 42 Kan. 364 [22 Pac. 324], the court below had the power to settle and sign the case, although the time first fixed by its order had expired. The statute limits the time within which a case must be made and served, but no such limitation exists with respect to settling and signing a case; and the court may, for good and sufficient reasons, postpone the date for the presentation of the case, and cause it to be taken up upon reasonable notice at another time."

On this point, Chief Justice Horton of the Supreme Court of Kansas, in the case of *Hammerslough v. Hackett*, 30 Kan. 57, 1 Pac. 41, says: "While the statute provides for fixing the time in which the case-made must be served, and in which the amendments must be suggested, the time for settling and signing the case by the judge is not prescribed in the statute; therefore the objection that the case was not made within the proper time is not well founded."

[1] The foregoing discussion and the practical operation of the law referred to also shed light on the other proposition presented by counsel, to wit, that the delay in filing the completed case-made in the office of the clerk of the district court on February 9, 1909, being a little less than two months after the same was signed and settled, was an abandonment of the appeal. The statute directly applicable (section 6074, *supra*) provides, as we have seen, that the case-made, after being settled and signed, "shall thereupon be filed with the papers in the cause." Counsel contends that the word "thereupon," as here used, means "immediately," and hence that, where the case-made is not so filed immediately after being signed and settled, the appeal should be dismissed in this court. We cannot concur with counsel in this conclusion. The word "immediately" is undoubtedly one of the synonyms of "thereupon," but from a consideration of the entire act, its practical operation, and its purposes, we do not believe that it was used in that sense in this instance. As we view it, such an application would be inconsistent with the balance of the act, and would be an arbitrary requirement, without any substantial reason to support it. The statute fixes a definite time within which a motion for new trial may be filed, within which a case-made may be made and the amendments suggested; and, where the time is extended for the making and serving of a case-made, the same is conclusive on the party, and the courts so enforce it. If it was intended that the case-made should, on penalty of appeal being dismissed, be filed immediately, or within any definite fixed time, with the papers in the cause, in our judgment, the statute, considering the consequences sought to be

involved, would have so stated it and definitely fixed it; so that it appears to us the reasonable rule to be adduced from the language used, when we consider the entire scope of the law and the ends to be accomplished, is that, upon the case-made being settled and signed, it shall then be filed with the papers in the cause. Whether by rule of court the time for this could be limited, and whether a postponement for an extraordinary length of time for the purpose of delay might be followed by a dismissal of the appeal, we do not consider or pass upon, but hold that the case-made in this case, being filed within less than 60 days after having been signed and settled, was within time.

[2] The court overruled the demurrer which was filed to the petition, and likewise a demurrer which was directed to the sufficiency of plaintiff's evidence, both of which virtually raise for our consideration the same proposition, to wit, Was the plaintiff, under her unchallenged allotment certificate, entitled to the possession of the land, so that pleading and proof thereof shifted the burden to the defendant?

Section 23 of an act of Congress, entitled "An act to ratify and confirm an agreement with the Choctaw and Chickasaw Tribes of Indians, and for other purposes," approved July 1, 1902 (c. 1362, 32 Stat. 644), is as follows: "Allotment certificates issued by the Commission to the Five Civilized Tribes shall be conclusive evidence of the right of any allottee to the tract of land described therein; and the United States Indian agent at the Union agency shall, upon the application of the allottee, place him in possession of his allotment and shall remove therefrom all persons objectionable to such allottee, and the acts of the Indian agent hereunder shall not be controlled by the writ or process of any court."

Considering both propositions together, the plaintiff pleaded at length in her petition, and then offered in evidence, her certificate of allotment to the tract across which the railway right of way extended. This allotment certificate made no exception whatsoever of the right of way, and, in our judgment, on its face entitled plaintiff, under the statute above noted, to the possession of the land involved. See *Sorrels v. Jones et al.*, 26 Okl. 569, 110 Pac. 743.

[3] The defense made to plaintiff's action by the railway company is that the defendant company was authorized to exercise the right of eminent domain, and that it had secured its right in and to this land by virtue of certain proceedings which it had taken under the provisions of "An act to grant the right of way through the Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February 28, 1902 (32 Stat. 43). It is not denied on the part of plaintiff that the defendant

took proceedings with the intention of condemning the strip of land here involved; but it is claimed, among other things, that the statute under which defendant was acting was not complied with, and that its proceeding secured for it no title in the land. Referring to the act above noted, section 13 grants to a railway company the right to locate, construct, own, equip, operate, use, and maintain any railway and telegraph and telephone line or lines into, in, or through the Indian Territory, together with the right to take and condemn lands for right of way, depot grounds, etc., and that in so doing it might take any lands held by any Indian tribe, or nation, or other person in said territory. On the trial of the cause, it appeared that the referees selected and appointed by the court to condemn the right of way over the tract of land embraced in plaintiff's allotment returned the damages in the amount of \$30, payable to whomsoever was the rightful owner of said land. The damages so assessed were not paid to any one until November, 1907, at which time the money was paid into court. The action in this cause was at that time pending, it having been begun on the 7th day of May, 1907; and the contention is made for plaintiff that the defendant acquired no title to the land as a result of its proceedings, for the reason, among others, that it had failed to comply with the statute granting it the right of eminent domain in the Indian Territory. Section 15 of the Enid and Anadarko act last above referred to provides: "That before any railroad shall be constructed or any lands taken or condemned for any of the purposes set forth in the preceding section, full compensation for such right of way and all land taken and all damage done or to be done by the construction of the railroad, or the taking of any lands for railroad purposes, shall be made to the individual owner, occupant, or allottee of such lands, and to the tribe or nation through or in which the same is situated."

It is contended on the part of defendant that, until the company made full compensation for the right of way, and for all damages done by the construction of the railroad, it could not take any land, or enter into possession of the tract in question, and that its doing so without having performed these prerequisites made it a trespasser.

Lewis on Eminent Domain (volume 2, § 578), citing a large number of authorities to sustain the text, and speaking of the necessity of a full compliance with the law in order to secure title or right of possession in a company exercising eminent domain, says: "The only general rule which can be laid down is that possession cannot be lawfully taken without a strict compliance with the statute which applies to the particular case."

And, on the question of the necessity of making compensation prior to making entry and taking possession, the authorities seem to be practically uniform. In support of the doctrine thus suggested, the Supreme Court of Pennsylvania, in the case of *Phila., N. & N. Y. R. R. Co. et al. v. Cooper*, 105 Pa. 239, says in the syllabus: "An entry by a corporation invested with the right of eminent domain, upon private land without first making compensation to the owner or giving adequate security therefor, is a trespass. Until such compensation is made or security given, the full title to the premises is in the private owner, and he may maintain ejectment for their recovery." To the same effect see, also, 2 Lewis, Eminent Domain, § 456; 15 Cyc. p. 986; *Meeker v. City of Chicago*, 96 Ill. App. 23; *White v. Washash, St. L. & P. Ry. Co.*, 64 Iowa, 281, 20 N. W. 436; *Dater v. Troy Turnpike & Ry. Co.*, 2 Hill (N. Y.) 629; *Lake Erie & W. Ry. Co. v. Kinsey*, 87 Ind. 514; *Sherman v. Milwaukee, L. S. & W. Ry. Co.*, 40 Wis. 645.

[4] At the conclusion of defendant's evidence, the plaintiff moved the court to instruct the jury to return a verdict for the plaintiff, which motion the court sustained, and directed a verdict accordingly. The jury found the issues in ejectment in the action in favor of plaintiff, and also assessed her damages at the sum of \$150. There was no evidence to support the verdict for damages, and no instructions given by the court as to the proper measure thereof, and the exception taken to the jury's finding in this regard must be sustained. The case is accordingly reversed and remanded to the district court of Rogers county for such proceedings, not inconsistent with this opinion, as the parties may elect to take. All the Justices concur.

#### LADOW v. OKLAHOMA GAS & ELECTRIC CO.

(Supreme Court of Oklahoma. Jan. 10, 1911.)

(Syllabus by the Court.)

#### 1. PROPERTY (§ 7\*)—CONDITIONS OF OWNERSHIP—WELFARE OF SOCIETY.

As a general rule, the owner of property may retain to himself its exclusive use and occupation; but, as title and ownership in property depend upon municipal law for their recognition and protection, its use and enjoyment, and the rights and duties of owners, are subject to conditions imposed by law for the welfare and rights of others.

[Ed. Note.—For other cases, see Property, Cent. Dig. § 9; Dec. Dig. § 7.\*]

#### 2. ELECTRICITY (§ 13\*)—NEGLIGENCE—DEADLY WIRES—DUTY TO INSULATE.

While it is generally true that, where no duty is owed, no liability for negligence can arise, yet duties and liabilities grow out of circumstances and conditions; and, where an electric light company is using a current so powerful that contact with its appliances and wires

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is deadly or dangerous to life and limb, it owes a duty to one, not a wanton trespasser, who, in the ordinary pursuit of a lawful occupation, is in a place where he has a legal right to be, and liable to come in contact with such wires, to so insulate them as to render them harmless.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 6; Dec. Dig. § 13.\*]

### 3. ELECTRICITY (§ 14\*)—NEGLIGENCE—CARE COMMENSURATE WITH DANGER.

The degree of care to prevent injury to others, required to be exercised by those making a business of handling and selling electricity for a profit, calls for much greater precaution and care in its use than if the property involved was of a less dangerous character. The duty and care demanded is commensurate with the danger and the injury which may follow as a consequence of neglect.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. § 14.\*]

### 4. ELECTRICITY (§ 14\*)—NEGLIGENCE—USE OF STREET.

While not an insurer against unforeseen and unavoidable accidents, an electric light company, using the public streets of a municipality for its poles, wires, and appliances, in conducting its business, is required to exercise the highest degree of care, and to maintain in the best possible condition the best appliances known to the science, to render its business safe, and to use a degree of care, caution, and circumspection in keeping with the dangerous character of its business.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 7; Dec. Dig. § 14.\*]

### 5. ELECTRICITY (§ 16\*)—EVIDENCE OF NEGLIGENCE—LACK OF INSULATION.

Absence of insulation on an electric wire, in violation of an ordinance, is prima facie evidence of negligence.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 9; Dec. Dig. § 16.\*]

### 6. ELECTRICITY (§ 18\*)—INJURIES—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—CITY ORDINANCES—LACK OF PERMIT TO HANDLE WIRES.

Ordinances of a city provided a penalty for any person, other than the owner, without a written permit, touching, handling, molesting, interfering with, etc., any wires or cables used for the purpose of transmitting electric current for light, heat, or power, and provided for the full insulation of all wires of such company, so that they would be harmless to the touch of individuals. An employé of a telephone company, without the written permit provided for, in the ordinary course of his occupation, and in a place where he had a right to be, unintentionally came in contact with an uninsulated wire of the electric light company, and was injured. In an action for damages, the court instructed the jury, in substance, that, unless it found from the evidence that the plaintiff held a written permit, he was prohibited from touching, handling, molesting, or interfering with the wires or cables of the defendant company, and the said company was not guilty of negligence as to plaintiff for its failure to insulate the wires with which plaintiff came in contact, because it owed to him no duty, except not to purposely injure him; and also that if, without such written permit, the plaintiff stepped upon the cross-arm of defendant's pole, for his own purposes, he was thereby violating the law, and was guilty of negligence, such as would be a bar to his recovery, notwithstanding the fact that defendant was found negligent in failing to insulate its wire. *Held* error.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 10; Dec. Dig. § 18.\*]

### 7. APPEAL AND ERROR (§ 1068\*)—HARMLESS ERROR—ERRONEOUS INSTRUCTIONS—WHEN REVERSIBLE.

The insistence by a defendant that, notwithstanding certain instructions excepted to by the plaintiff were erroneous, the error therein was harmless, for the reason that no other verdict, under the evidence, could have been sustained, will not be allowed if, under the evidence in the record, a verdict found for plaintiff would not be set aside for want of evidence reasonably tending to support it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4225-4228; Dec. Dig. § 1068.\*]

### 8. ELECTRICITY (§§ 16, 18\*)—NEGLIGENCE—ELECTRIC LIGHT WIRES—LACK OF INSULATION—INJURIES TO TELEPHONE LINEMAN.

An electric light company which maintains a pole, on which its wires are strung, so near a pole similarly used by a telephone company that the employes of the latter company, in the performance of their ordinary duties, are liable to come in contact with such wires, owes such employes the duty of so insulating its wires as to render them harmless to the touch, and is bound to take notice that the employes of the telephone company, in the line of their duty, are liable and likely to come in contact therewith, and in a case where an employé of such telephone company, in the usual and ordinary performance of his duties, and not in the commission of a wanton trespass, comes in contact with an uninsulated wire of the defendant company, and is injured, he is not guilty of such contributory negligence as will bar recovery.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. §§ 9, 10; Dec. Dig. §§ 16, 18.\*]

(Additional Syllabus by Editorial Staff.)

### 9. NEGLIGENCE (§ 65\*)—"CONTRIBUTORY NEGLIGENCE."

"Contributory negligence" is nothing more nor less than negligence on the part of the person injured; and the rules of law applicable to the negligence of a defendant are applicable thereto.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. § 83; Dec. Dig. § 65.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1540-1547; vol. 8, p. 7817.]

Error from District Court, Oklahoma County; George W. Clark, Judge.

Action by Ben R. La Dow against the Oklahoma Gas & Electric Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

G. A. Paul and T. F. McMechan, for plaintiff in error. Flynn, Ames & Chambers, for defendant in error.

DUNN, C. J. This case presents error from the district court of Oklahoma county, begun August 10, 1905, trial being had to a jury February 28, 1908; judgment rendered in behalf of the defendant in error, who was defendant in the court below, to reverse which the plaintiff has brought the case to this court by petition in error and case-made. The action is one for damages, alleged to have occurred by reason of defendant's negligence. The facts out of which the case arose are substantially as follows:

The Pioneer Telephone & Telegraph Company owns and operates a system of tele-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

phones in the city of Oklahoma City. The defendant herein owns and operates an electric light plant in said city, and each of these companies has a line of poles and wires strung along the south side of an alley of the said city which at its east end opens on the west side of Broadway, between Main and First streets. At the edge of the sidewalk, just on the inside of the alley, where it enters Broadway, the defendant had placed a pole about 30 feet high, with 3 cross-arms placed at the top thereof a short distance apart, on which were strung wires used for the purpose of carrying the electric current. About 6 inches west of defendant's pole, up the alley from the street, there had been placed by the Pioneer Telephone & Telegraph Company a pole about 45 feet high, with three cross-arms, supported by an iron brace, upon which were strung telephone wires, cable suspensions, and messenger wires. It was not just certain which of these poles was placed first, and the jury, to a special question asked on that point, answered that it did not know. Both companies used this alley for its poles under a joint arrangement; the electric light wires being attached to poles of the telephone company, except at the point at the east end of the alley, where the two poles which we have just described were located. The plaintiff, an employé of the telephone company, on the 7th day of June, 1905, walking on its wires, was engaged in pulling a messenger wire from the west end of the alley to a pole across on the east side of Broadway. On the top cross-arm of the electric light pole were three wires, fastened to glass insulators, a short distance apart. These wires, or some of them, lacked proper insulation, and plaintiff, on arriving at this pole, while engaged in the work of stringing the wire, stepped from the telephone pole or wires on which he was walking onto the top cross-bar of the electric light pole, came in contact with the uninsulated wires, and received a shock which threw him to the pavement, injuring him, on account of which this action is brought.

On the trial, certain interrogatories were propounded to the jury, which, with their answers, are as follows:

"Did plaintiff's foot, while he was standing on this cross-arm, come in contact with the uninsulated end of the electric light wire? Yes.

"Did the plaintiff, while standing on the cross-arm with his foot in contact with the uninsulated end of the electric light wire, receive a shock from this wire, through the uninsulated end, which caused his fall to the sidewalk below, thus producing the injuries sustained? Yes.

"Had the plaintiff, immediately before the accident, passed around the telephone pole from the west side to the east side? Yes.

"In approaching the poles at which the accident happened, had the plaintiff supported himself on the wires of the telephone com-

pany by standing and walking along and upon said wires? Yes.

"Could the plaintiff pass from one telephone pole to another while walking and standing upon the telephone wires? Yes.

"Could plaintiff have passed from the west side of the telephone pole to the east side of the telephone pole by climbing a short distance up the pole, and between the pole and the brace supporting the bottom cross-arm of the telephone pole, and then down the east side of the telephone pole to the level of the wire he was stringing? Yes.

"Could plaintiff have passed around from the west side of the telephone pole to the east side of the telephone pole by standing on the telephone wires and supporting himself by holding to the telephone pole or the brace, or the wires or the cross-arms above him? Yes.

"Did the plaintiff have a written permit from the Oklahoma Gas & Electric Company, permitting him to touch, handle, molest, interfere with, or remove any of its wires or cables? No.

"If the plaintiff, at the time he stepped upon the cross-arm of the electric light pole, had looked, could he have seen that this cross-arm was on the electric light pole, and not on the telephone pole? Yes.

"Did the plaintiff, at the time he stepped upon the cross-arm of the electric light pole, look at the cross-arm and pole upon which he was stepping? Do not know.

"Did the plaintiff, when he stepped upon the cross-arm of the electric light pole, see that it was a separate pole from the telephone pole? Do not know."

There was testimony to the effect that on a former occasion an employé of the telephone company had been nearly knocked off of the identical pole by having come in contact with the exposed wires, and that this information had been carried to the defendant company; that this defective condition had existed for possibly a year, but that the company, intending to rebuild its line, declined to correct the deficiency.

In addition to the ultimate facts as found by the jury in its special finding, the details of the accident are given by plaintiff in his examination as follows: "Q. Were the electric light wires swinging on the same poles that the telephone wires were? A. Not on this same pole. Q. Were they on the other poles along there? A. They were on most of them. Possibly on all of them. The light people had their small poles in between ours. Q. They occupied those poles too? A. Yes, sir. \* \* \* Q. In getting down there, could you see the electric light pole setting up against this other pole? A. I didn't know there was any electric light pole there. Q. You didn't A. Not until I was told so up in my bed, up in the hospital. Q. What did you believe about that cross-arm you saw there? A. I looked down as I was going along the pole and saw the



cross-arm, and naturally supposed it was a Pioneer pole. Q. You thought it was a Pioneer pole? A. Yes, sir. Q. Never had been there before? A. No, sir. \* \* \* Q. Did you know the character of the wires on that cross-arm when you stepped on it? A. The character of the wire? Q. Yes; whether electric light wires or not? A. I knew there were electric wires on that lead underneath. Q. You supposed it was a cross-arm on the telephone pole? A. Yes, sir. Q. You couldn't see the small pole from the west? A. No, sir; I didn't see the pole at all. Q. How was you standing when you received this shock, if you can remember? A. I had passed my left foot around first. Q. How close to the telephone pole? Was you hugging the pole, or half an arm's length from it? A. In getting around the pole, I probably be. After I got my left foot placed, I had my right hand hold of the messenger wire, to hang onto while I reached with my left hand for the end of the handline. Q. And then what happened? A. Well, I got up against it, I guess. Q. Do you remember any more? A. Well, I received a shock that threw me terrible. I felt as though every muscle in my body was drawn, and that was practically the last I knew, although I guess I hollered; but that was the last I do know."

On cross-examination, the plaintiff, in response to interrogatories, gave the following evidence: "Q. I understood you to say, Mr. La Dow, that you thought this cross-arm carrying the electric wire on which you stepped was attached to the telephone pole. Is that correct? A. Yes, sir. Q. And you didn't find out afterwards until after the accident happened? A. Not until I was told so at the hospital, is the first I knew of it. Q. That was the first you heard they were separate poles? A. Yes; I supposed they were the same as some of the others back there in the alley."

An ordinance of the city made it the duty of the defendant to keep "all wires used for the purpose of transmitting electricity fully insulated by such outer covering and protection as will make them harmless to the touch of individuals and powerless to ignite any combustible material." Another ordinance of the city provided that: "No person other than the owner shall have the right to touch, handle, molest, interfere with, or remove any wires or cables strung within the city limits of the city of Oklahoma City, for the purpose of transmitting electric current for the transmitting of light, heat, and power, or for the transmission of telegraphic or telephone messages without a written permit from the company or companies, owning, controlling, or operating such wires or cables."

After the evidence was submitted, the court gave to the jury certain instructions, among which were two, which were numbered 4 and 5, which were based upon the

ordinances above noted. It is the giving of these instructions that plaintiff contends most strenuously was prejudicial error, resulting in a verdict for defendant, when it otherwise would have been for him. These instructions read as follows:

"(4) You are further instructed that, under the law in force in the city of Oklahoma City, at the time of this injury, the plaintiff, unless you believe from the evidence that he held a written permit, was prohibited from touching, handling, molesting, or interfering with the wires or cables of the defendant company, and if you believe from the evidence that said plaintiff had no such written permit, then the defendant was not guilty of negligence as to said plaintiff for leaving the wire or wires in controversy uninsulated, because the defendant owed to said plaintiff no duty in the premises, except not to purposely injure him.

"(5) You are further instructed that if you believe from the evidence that plaintiff stepped upon the cross-arm of the defendant's pole as a matter of convenience to himself, or for the purpose of more easily transacting the business in which he was engaged, and without written permit from the defendant, that said plaintiff in such case was violating the law, was guilty of negligence by reason thereof, and that such negligence is a bar to his recovery against the defendant, notwithstanding the fact that you may believe from the evidence that the defendant itself was negligent in maintaining said wire."

[6] The language of instruction No. 4, as we view it, was tantamount to an instruction to the jury to return a verdict for the defendant, for the reason that the testimony showed conclusively that plaintiff did not have the written permit mentioned in the instruction, and that the defendant did not purposely injure him, and as the defendant could not be liable to plaintiff, unless these conditions existed, then under this instruction there was left for the jury nothing else than to return the unanimous verdict which it did. The ordinance upon which this instruction is predicated, in our judgment, will not bear the construction here given it. To allow such construction would make of this ordinance a shield to the electric light company in every case, notwithstanding the gross character of negligence, where a party injured was without such permit, for of course it would never wantonly injure any one with its appliances. It would reduce those who could recover against the company at any time or under any circumstances, for its negligence, to the number who held written permits to touch or handle their appliances, and we do not believe that it can possibly be held to mean this. As we view it, the purpose of this ordinance was not to afford a shield to the company from the results of its own negligence, but was to protect its property from the intentional, wrongful, meddlesome, or the unlawful or

wanton interference of others, and to punish those who violated it, leaving the question of negligence as between it and others at large as it was prior to the passage of the ordinance. So that, if the defendant would be liable for negligence prior to the passage of this ordinance in cases of this character, this liability would be in no wise altered after its passage.

Taken in this connection, instruction No. 5 was likely to mislead the jury by reason of the fact that, included therein, in conjunction with the declaration that if the plaintiff stepped upon the cross-arm of defendant's pole as a matter of convenience to himself, there was connected the proviso that if he was without the written permit from the defendant, this in itself constituted a violation of the law, making him guilty of negligence, thereby precluding recovery, even though the jury might find that the defendant itself was negligent. It is true that some of the other instructions made a different declaration of the law than that given in the ones criticised, but the unanimous verdict of the jury convinces us that it followed these instructions, rather than the others, and to our minds the giving of the same was error.

[7] Counsel for defendant, however, invoke the rule that if, under all of the evidence, the verdict could not have been otherwise than as it was the giving of erroneous instructions will be deemed immaterial. This contention can be sustained only by a finding that if, on the evidence now before us, a jury had returned a verdict for plaintiff, which on a motion for a new trial had received the sanction of the trial court, the same would be reversed as unsupported, notwithstanding in its favor was considered all the evidence in support thereof, and all reasonable deductions. This insistence necessitates a further examination of the record. Counsel for plaintiff argue the case purely from the standpoint of negligence of the defendant and the innocence of plaintiff of any contribution to his injury; while counsel for defendant insist that plaintiff was a trespasser upon its pole, cross-arm, and wires, and that it owed to him no duty, not owing to a trespasser; and hence plaintiff's injuries were brought about by his own acts, and that he cannot of right hold defendant responsible therefor. As a primary proposition in the case, it is manifest that, before defendant could be negligent toward plaintiff, there must have been a duty owing from it to the plaintiff. In the absence of any duty, there could be no liability. Negligence would be the omission on the part of defendant to perform this duty; therefore our first inquiry must be to determine whether or not the defendant owed a duty to plaintiff which it failed to discharge.

[1] The Court of Appeals of Kentucky, in the case of *Bransom's Adm'r v. Labrot, etc.*, 81 Ky. 638, 50 Am. Rep. 198, said: "As a

general rule, the owner of land may retain to himself the exclusive use and occupation of it; but, as property in lands depends upon municipal law for its recognition and protection, the use and enjoyment of it are subject to conditions imposed for the welfare and rights of others." What this welfare is, and rights are, cannot be reduced to any definite, certain rule, but depend in all instances upon the particular circumstances of the case at hand. For instance, one who invites another to his premises for the sole benefit of the owner of the premises owes to the person invited the very highest possible degree of diligence to see to it that he is not injured by the condition of the place to which he is called. And one who goes to the premises of another upon a mission mutually advantageous is entitled, at the hands of the occupant of the premises, to have him exercise ordinary diligence to have them safe for the reasonable use of the occasion, and will be entitled to hold the occupant liable for ordinary negligence in a failure to meet this requirement. On the other hand, the general rule is that, where premises are visited by a person on his own business, of his own pleasure, and without invitation, the owner will owe to him slight diligence only, and will be liable to him for gross negligence only.

[2] The foregoing express the general rules recognized at common law under the conditions mentioned. All through them all, however, modifying and limiting, runs the doctrine that the proper diligence and due care in any case is dependent upon and determined by the consequence or probable result of neglect. In other words, an increase of the danger and evil results of negligence increases the degree of care required to meet the duty to be borne by the responsible party. The rule thus announced finds support in a number of authorities: *Keasbey on Electric Wires*, §§ 242 and 248; 2 *Joyce on Electric Law* (2d Ed.) § 734; *Hydraulic Works Co. v. Orr et ux.*, 83 Pa. 332; *Schilling v. Abernethy*, 112 Pa. 437, 3 Atl. 792, 56 Am. Rep. 320; *Turton v. Powelton Electric Co. et al.*, 185 Pa. 408, 39 Atl. 1053; *Union Pacific Ry. Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434; *Uggla v. West End Street Ry. Co.*, 160 Mass. 351, 35 N. E. 1128, 39 Am. St. Rep. 481; *Commonwealth Electric Co. v. Melville*, 210 Ill. 70, 70 N. E. 1052; *Newark Electric Light & Power Co. v. Garden*, 23 C. O. A. 649, 78 Fed. 74, 37 L. R. A. 725; *Knowlton v. Des Moines Edison Light Co.*, 117 Iowa, 451, 90 N. W. 818.

The case of *Hydraulic Works Co. v. Orr et ux.*, *supra*, was one wherein a private opening or cartway, shut in by a gate, contained a heavy platform, weighing eight or nine hundred pounds, attached by hinges within 18 or 20 inches of the wall, and which when lowered fell across the cartway, but, when not lowered stayed up against the wall, leaning so little beyond the center

of gravity that a jar or a slight pull would cause it to fall forward. On the occasion out of which the action grew, it so fell, and injured certain children who happened to be near it. On these facts, the court, in the syllabus, said: "While it is true, in general, that where no duty is owed no liability arises, this rule varies with circumstances, and where, therefore, an owner has reason to apprehend danger from the peculiar situation of his property and its openness to accident the question of duty then becomes one for a jury, to be determined upon all its facts of the probability of danger and the grossness of the act of imputed negligence."

Discussing the case, the court said: "Can it be righteously said that the owner of such a dangerous trap, held by no fastening, so liable to drop, so near a public thoroughfare, so often open and exposed to the entries of persons on business, by accident, or from curiosity, owes no duty to those who will be probably there? The common feeling of mankind, as well as the maxim, 'Sic utere tuo ut alienum non lædas,' must say this cannot be true; that this spot is not so private and secluded as that a man may keep dangerous pits or deadfalls there, without a breach of duty to society. On the contrary, the mind, impelled by the instincts of the heart, sees at once that in such a place, and under these circumstances, he had good reason to expect that one day or other some one, probably a thoughtless boy in the buoyancy of play, would be led there, and injury would follow, especially, too, when prompted by knowledge that a fastening was needed. Perhaps the best monitor in such a case is the conscience of one who feels, in his dreadful recollection, the crushing sense that he had left such an engine of ill to take the life of an innocent child. Such, too, is the humanity of the law, that one may not justifiably, or even excusably, place a dangerous pitfall, a wolf trap, or a spring gun, purposely to catch and injure even willful trespassers poaching upon his grounds. The common feeling of mankind, guided by the second branch of the great law of love, and the common sense of jurors, must be left, in such a case, to pronounce upon the facts." In the case of *Schilling v. Abernethy*, supra, the court in the syllabus said: "Where one has reason to apprehend danger from the peculiar situation of his property and its openness to accident, the rule that where no duty is owed no liability arises will not prevail; but the question of liability must be submitted to the jury, to be determined upon all the facts of the case."

The case of *Newark Electric Light & Power Co. v. Garden*, supra, was one where the Western Union Telegraph Company was the owner of a certain telegraph pole upon which a railroad company rightfully maintained several electric wires, supported by cross-arms. The Newark Electric Light &

Power Company also rightfully maintained its wires upon the same pole. The court said it was unimportant how the right of each of these parties on this pole was acquired. A man by the name of Mason, under the employ of the railroad company, was engaged with other fellow workmen in making a transfer of certain of the wires of his employer from the pole in question, and while so working stepped his right foot upon one of the cross-arms, on which there was an electric wire of the defendant, and was subjected to an electric shock which killed him. Defendant's wire was insulated, but the insulation was defective, and but for its exposed condition at one minute point the disaster would not have happened. There was a verdict and judgment for plaintiff, who was the administrator of decedent's estate, and the defendant appealed. The United States Circuit Court of Appeals of the Third Circuit, in the consideration of these facts, said: "If, in view of the facts which have been narrated, it could be unqualifiedly asserted that, at the time and place of the accident, Mason was wrongfully upon the separate property of the defendant, and if nothing but that bare fact should be regarded, but one conclusion could be reached; for the law is well settled that in general the right to keep his own property in such condition as the owner may see fit is not restricted by any requirement to guard against its causing injury to one who, without invitation, actual or apparent, but as a bare volunteer or mere trespasser, intrudes upon it. This limitation of the principle that no person may lawfully use even that which is his own so as to do hurt to another is, however, not controlling in all cases; and the duty of care, which the law imposes upon those who undertake to operate so dangerous a force as electricity, may, under some circumstances, be due to one who technically is a trespasser. In such a case as this one, its special facts are for consideration, and upon them, and not solely with reference to the ownership or occupancy of the locus in quo, the question of duty must be determined. 'It is true that, where no duty is owed, no liability arises.' \* \* \* But, as has often been said, duties arise out of circumstances. Hence, where the owner has reason to apprehend danger, owing to the peculiar situation of his property and its openness to accident, the rule will vary.' *Hydraulic Co. v. Orr*, 83 Pa. 332. It makes no difference, where the circumstances give rise to duty, that the plaintiff was 'technically a trespasser.' *Schilling v. Abernethy*, 112 Pa. 437, 3 Atl. 792 [56 Am. Rep. 320]. The true question is: Was he a trespasser there, in a sense that would excuse the defendant for the acts of negligence?"

[3, 4] And, after referring to the case of *Railway Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619, 38 L. Ed. 434, the court said: "The fact that, in all these cases, the courts

gave due weight to the circumstances that in each of them the person injured was a child would not justify us in restricting the application of the principle upon which they were decided to cases which present the same peculiarity. The doctrine of all of them is that a duty of care may, by reason of the circumstances, be due from the owner of property to one who is technically a trespasser upon it; and the youth of those most likely to suffer from a failure to discharge such duty is simply one of the circumstances which, when present, is to be considered with the rest. \* \* \* We are not attempting to lay down a rule applicable to all cases; but the principle which, in our judgment, is controlling in the present one is that any person who engages in a highly dangerous occupation is bound to take such precaution in its pursuit as a sensible man would ordinarily take to avoid doing fatal or other serious injury to one who comes upon his premises, not as a mere trespasser or positive wrongdoer, but for a purpose in itself lawful, and which the owner had reason to believe might bring him there." To the same point is the language of the Supreme Court of Illinois, in the case of *Commonwealth Electric Co. v. Melville*, supra, wherein the rule in the syllabus is declared as follows: "Electricity is a subtle and powerful agent. Ordinary care, exercised by those who make a business of using it for profit, to prevent injury to others therefrom, requires much greater precaution in its use than where the element used is of a less dangerous character. The care must be commensurate with the danger."

The facts out of which this case arose are substantially as follows: The electric light company had, under and by virtue of an ordinance, a right to place its wires under a sidewalk. It was made to appear that there was nothing to prevent access thereto from the adjoining lot by boys or any others who desired to enter. The appellee, a boy of 14 years of age, seeing smoke emitting from beneath the walk, due to fire produced by escaping electricity, on going to examine it, accidentally caught hold of the wire, as a result of which he was injured. It was insisted on the part of the company that the relation of the plaintiff to it was that of a trespasser or licensee, and that consequently it was not liable, unless the injury resulted from some willful or wanton act on its part. The court, however, rejected this contention, and, recognizing the rule which we have here invoked, said: "Electricity is a subtle and powerful agent. Ordinary care, exercised by those who make a business of using it for profit, to prevent injury to others therefrom, requires much greater precaution in its use than where the element used is of a less dangerous character. As there is greater danger and hazard in the use of electricity, there must be a corresponding exercise of skill and attention, for the

purpose of avoiding injury to another, to constitute what the law terms 'ordinary care.' The care must be commensurate with the danger. 10 Am. & Eng. Enc. of Law (2d Ed.) p. 875; *Alton Illuminating Co. v. Foulds*, 190 Ill. 367, 60 N. E. 537; *Perham v. Portland General Electric Co.*, 33 Or. 451, 53 Pac. 14, 24, 40 L. R. A. 799, 72 Am. St. Rep. 730; *Haynes v. Raleigh Gas Co.*, 114 N. C. 203, 19 S. E. 344, 26 L. R. A. 810, 41 Am. St. Rep. 786; *McLaughlin v. Louisville Electric Light Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812; *Ennis v. Receiver*, 87 Hun, 355, 34 N. Y. Supp. 379."

And it is held by the Court of Appeals of Maryland, in the case of *Ziehm v. United Electric Light & Power Co.*, 104 Md. 48, 64 Atl. 61, that: "Where defendant electric light and power company maintained certain high-tension wires near the distributing pole of a telephone company, which the latter's employes were required to climb, defendant owed such employes a legal duty to have its wires so placed and insulated as to permit them to perform their work in safety."

And in the case of *Yazoo City v. Birchett*, 89 Miss. 700, 43 South. 569, the Supreme Court of Mississippi held that: "Where a telephone lineman, while climbing a pole of his company, was injured by coming in contact with a guy wire of an electric plant, charged with electricity escaping by reason of defective insulation, the proximate cause of the injury was the current negligently imparted to the guy wire, although he would not have been injured if he had not stood upon a step of his company, touching a small abandoned wire which connected with the guy wire, thus forming a short circuit."

In the case of *Overall v. Louisville Electric Light Co.*, 54 S. W. 1102, 21 Ky. Law Rep. 886, the Court of Appeals of Kentucky, in the syllabus, held: "It is the duty of an electric light company whose wires are maintained near telephone wires to know that linemen of the telephone company must, in the course of their duties, come in close proximity with the electric light wires. It is the duty of a company maintaining and using in its wires a deadly current of electricity to furnish perfect protection of those points where people are liable to come in contact with the wires. 'The highest degree of care and skill usually exercised by prudent persons engaged in the same or similar business' is not enough."

In the discussion of this case, the court says: "Appellant at the time he was struck was in a place where his business required him to be, and where he had a right to be, and it was the duty of the electric light company to know that linemen of the telephone company would have to come into close proximity to its wires in attending to their duties; and it was its duty to use every protection which was accessible to insulate its wires at that point, and at all points where people have a right to go for business or

pleasure, and to use the utmost care to keep them so, and for personal injuries resulting from its failure in that regard it is liable in damages."

Considering the facts in this case, therefore, in the light of the principles and rule laid down in the foregoing authorities, there is but one conclusion open to us, which is that the defendant company, by maintaining its wires upon the telephone poles, as well as its own, along this alley as one system, and then maintaining the pole involved in the immediate proximity to the pole of the telephone company, which was loaded with wires upon which the plaintiff was required to be on account of his work, owed to him the duty to so insulate the same that he would not be injured on coming in contact therewith, and this aside from the specific notice which had been carried to it of the defective character of the insulation at this particular point. It was bound to take notice that the employees of the telephone company would, in pursuit of their usual avocation, be called on to work in immediate proximity to the wire or wires involved, and this knowledge on their part, coupled with the extreme danger of permitting them to be exposed, created the duty of insulating them, the violation of which, on damages following as a result thereof, rendered them primarily liable.

Counsel for defendant in their brief say that the doctrine of the case of the Shawnee Electric Light & Power Co. v. Sears, 21 Okl. 13, 95 Pac. 449, does not apply in this case, by reason of the fact that the escaping electricity in that case was on the street and at a point where the injured party had a right to be, and that the defective appliances in this case were on a pole 30 feet in the air, and at a point and place where plaintiff had no right to be, and where defendant could not expect any one. In our judgment, however, the underlying doctrine of both cases is the same. The injured parties in each case were at a place where they had a right to be, and where defendants were charged with notice that they would be; and the defendants in each case, in the exercise of due regard for the welfare of others, should have known that, being there, they would be in imminent danger of loss of life or limb, if their appliances were defective. The increase of the danger and evil consequences occasioned an increase of duty, and hence liability. Neither of which, with a less dangerous commodity or situation, might have existed.

[5] The ordinance passed by the city, requiring the defendant to keep fully insulated, so as to render harmless to the touch of individuals, all wires used for the purpose of transmitting electricity, is a recognition by the municipality of the extraordinary danger of its absence and the high degree of care which should be exercised by companies using high voltages of electricity, and a failure to comply with an ordinance of this character by an electric light company has been held

to be negligence per se, or, as is stated by the Supreme Court of North Carolina, in the case of *Mitchell v. Raleigh Electric Co.*, 129 N. C. 166, 39 S. E. 801, 55 L. R. A. 398, 85 Am. St. Rep. 735: "Absence of insulation on an electric light wire, in violation of an ordinance, is prima facie evidence of negligence." See, also, *Clements et ux. v. Louisiana Electric Light Co.*, 44 La. Ann. 692, 11 South. 51, 16 L. R. A. 43, 32 Am. St. Rep. 848; *Knowlton v. Des Moines Edison Light Co.*, 117 Iowa, 451, 90 N. W. 818; 1 Joyce on Electric Law (2d Ed.) § 445; *Croswell on the Law Relating to Electricity*, § 256. See, also, *Hayes, etc., v. Michigan Cent. R. R. Co.*, 111 U. S. 223, 4 Sup. Ct. 369, 28 L. Ed. 410.

[8, 9] We now come to the consideration of the contention of counsel for defendant that the plaintiff was guilty of contributory negligence. In support thereof, it is claimed that the answers given by the jury to questions Nos. 24, 25, and 26, which show that if plaintiff had looked he could have seen the cross-arm on which he stepped was on the electric light pole, and not on the telephone pole, and that the evidence did not show that the plaintiff looked or saw that the cross-arm where he was stepping was upon a different pole than on the telephone pole, and that these facts preclude plaintiff's recovery by showing him to have been guilty of such contributory negligence as would render him and not the defendant responsible for the injuries; and also from the further fact that it appears from the answers to questions Nos. 18, 20, and 21 that there were other methods which plaintiff could have adopted to have reached the east side of the telephone pole, without subjecting himself to the danger involved by coming in contact with the dangerous wire. Contributory negligence is nothing more nor less than negligence on the part of the person injured, and the rules of law applicable to the negligence of a defendant are applicable thereto. *Pitman v. City of El Reno*, 2 Okl. 414, 37 Pac. 851. Negligence, as defined by section 2830, Comp. Laws of Okla. 1909, is as follows: "The terms 'neglect,' 'negligence,' 'negligent,' and 'negligently,' when so employed, import a want of such attention to the nature or probable consequences of the act or omission as a prudent man ordinarily bestows in acting in his own concerns."

So now we must consider the action of the plaintiff, and then say whether, in view of his situation and the situation of defendant's property, he so conducted himself as to import a want of such attention to the nature or probable consequences of his acts as a prudent man ordinarily bestows in acting in his own concerns.

While the general principles involved in negligence and contributory negligence are the same, their application in any case must necessarily depend upon the facts of that identical case. From the conceded facts in this case, it appears that the plaintiff was

an experienced man in the line of work in which he was engaged, but that he had never before the day of his injuries worked on this particular portion of his employer's plant. The poles of the telephone company and of the defendant occupied the same side of the alley; the wires of the latter company occupying and being strung on both, except at this point. The plaintiff had been warned to be careful of coming in contact with the wires of the defendant company, and had made his way along the alley by walking on the wires of the telephone company. As he approached the poles at the outlet of the alley where the injuries occurred, the telephone pole, being the larger and nearer, obscured his view of the pole of the defendant company, and, although he might, on looking more carefully than he did, have learned differently, yet as he approached, there being nothing to warn him, he believed and thought he saw that the defendant's cross-arms were attached to the telephone pole, and never learned that there was any electric light pole there until after the accident. Now, when we take into consideration the facts as found by the jury, and the undisputed evidence relative to the situation, can we say that we would hold that a verdict of a jury, and judgment rendered by a trial court thereon, would be without evidence tending reasonably to support it? And can we say that such a verdict should be set aside because of evidence of negligence on the part of plaintiff, in that his conduct imported a want of such attention to the nature or probable consequences of his acts as a prudent man ordinarily bestows in acting in his own concern? It was the duty of the electric light company to keep its wires at this place in such condition that they would be harmless to the contact of the employees of the telephone company, when passing back and forth over and near them in the performance of their duties. *Joyce on Electric Law*, § 667; *Newark Electric Light & Power Co. v. Garden*, supra; *Illingsworth v. Boston Electric Light Co.*, 161 Mass. 583, 37 N. E. 778, 25 L. R. A. 552; *Knowlton v. Des Moines Edison Light Co.*, supra. And, in the absence of appearances showing that the insulation was defective, such employees had a right to assume that the company had discharged this duty. *Croswell on the Law Relating to Electricity*, § 256; *Clements et ux. v. Louisiana Electric Light Co.*, supra. In weighing plaintiff's acts, the situation as it presented itself to him must be considered, and from this the conclusion drawn. Within this rule we do not believe it can be held that plaintiff, working in the surroundings where he was placed, in view of the situation of the poles and the usage of both companies, and acting without notice under the reasonable belief that he was upon one of the poles and cross-arms of the telephone company, and not the electric light company, could be held guilty of subjecting himself to a known dan-

ger, or indifferent to the probable consequences of his acts.

Counsel, however, contend that, in view of the fact that plaintiff had been warned of the danger of coming in contact with defendant's wires, a high burden and duty was placed upon him, which was violated by his failure to observe that he was stepping upon the electric light pole, and that this was negligence of such a character as would preclude his recovery. The same insistence was made in the case of *Clements et ux. v. Louisiana Electric Light Co.*, supra. In the discussion of the case, the court says: "But it is urged that Clements was cautioned to keep away from the wires by his employer, Brady, and his failure to do so was gross carelessness on his part. The evidence on this point is as follows: 'Q. Did you call Clements' attention to the wires? A. No, sir; I cautioned him to be careful of the wires. Every man who goes over a roof must keep away from the wires. Q. It is the business of a man who goes over a roof to keep away from them? A. Yes, sir. Q. Did he understand that business? A. Yes, sir. Q. Did you caution him that morning to keep away from the wires? A. Yes, sir.' Clements' attention was not directed to any particular danger from the wires. No apparent defect was pointed out to him. The admonition to him was only of a danger which he knew to exist, according to the statement of Brady, before he advised him to be cautious of going near the wires, or to keep away from them. There was only that instinctive dread of danger which overtakes one when he approaches a railroad track. The track in itself is not dangerous, and is only made so by the passage of a train of cars over it. They announce their approach; and hence a person, before he attempts to cross the track, must exercise great caution, stop and listen, and look up and down the track. Having done this, if a train approaches silently, without the accustomed signal, and injures him, he would be entitled to recover damages for the injury. *Curley v. Railroad Co.*, 40 La. Ann. 817 [6 South. 103]; *Brown v. Railroad Co.*, 42 La. Ann. 350 [7 South. 682, 21 Am. St. Rep. 374]. The electric wires gave no signal of danger. Listening would not have revealed any danger. It is hidden and silent. But they are disarmed of danger, if properly insulated. By looking, one can see if there are evidences of insulation. If there are evidences of it, and no defects are visible after careful inspection, one whose employment brings him in close proximity to the wire, and which he has to pass, either over or under it, is not guilty of contributory negligence by coming in contact with it, unless he does it unnecessarily, and without proper precautions for his safety. \* \* \* Even in the presence of a known danger, to constitute contributory negligence, it must be shown that the plaintiff voluntarily and unnecessarily ex-

posed himself to it, unless it is of that character that the plaintiff must assume the risk from the very nature of the danger to which he is exposed."

But it is insisted that, in view of the fact that plaintiff might have taken a different course to proceed from the west to the east side of the pole, his coming in contact with defendant's wires was a voluntary and unnecessary exposure on his part to danger which constituted contributory negligence. The same insistence was made in the case of *Fitzgerald v. Edison Electric Illum. Co.*, 200 Pa. 540, 50 Atl. 161, 86 Am. St. Rep. 732. In the consideration of this case, the court said: "The nonsuit, however, seems to have been entered on the ground of contributory negligence of the decedent. He was lawfully upon the roof in the exercise of his business. It is said that there was no evidence that it was necessary for him to go on the roof to do the painting. No such evidence was required. His convenience was reason enough. It was convenient for him to get at the cornice in that way, and he had a right to do so. He found the wires in his way, and proceeded to prop them up, so that he could work under them. Whether the means he took were such as a prudent man should have taken is not so clear that it can be determined by the court. If the weight of the wire when it fell on him had been such as to knock him into the street, that would have been so clearly his own negligence that the court could have said so as matter of law. But, though he was bound to know in general the dangerous nature of such wires, and to use proportionate care in interfering with them, he was also entitled to presume, from the general custom, that they were properly insulated, unless the defect in their covering was visible to such examination as he ought to have made. All these considerations entered into the question of his negligence, and made it one for the jury."

So, also, in the case of *McLaughlin v. Louisville Electric Light Co.*, 100 Ky. 173, 37 S. W. 851, 34 L. R. A. 812, the plaintiff, who was a painter, thoughtlessly took hold of a wire of the defendant company. It was insisted in that case that plaintiff was guilty of contributory negligence, and the Court of Appeals of Kentucky, speaking to this point, said: "The evidence in this case conduces to show that appellant was at work at his regular trade, and was where he had a right to be, and the joint of the wire, being apparently insulated, was to some extent, at least, a guaranty that there was no danger; but, independent of that fact, the situation of the appellant, his work in hand, and the proximity of the wire were such that he might without negligence have thoughtlessly taken hold of the wire, because he seemed to need support; and besides it was hardly to be expected that the current was on the wire at about noon; the

wire being used wholly to supply incandescent lights or lamps. It seems clear to us that appellee should have been required to have had perfect protection on its wires at the point and place where appellant was injured. The fact that it was very expensive or inconvenient is no excuse for such failure. Very great care might be sufficient as to the wires at points remote from public passways, buildings, or places where persons need not go for work or business; but the rule should be different as to points where people have the right to go for work, business, or pleasure. At the latter points or places, the insulation or protection should be made perfect, and the utmost care used to keep it so."

It was also insisted that the decedent in the case of *Yazoo City v. Birchett*, supra, was guilty of contributory negligence by touching the guy wire of the defendant company. The facts out of which that case grew were that the decedent, who was an employé of the telephone company, ascended one of its poles in the performance of his duties. He was, at the time of his death, standing on an iron step on the telephone pole, to which was attached a small wire, which was attached to a guy wire of a pole of the defendant company. This contact would have been entirely harmless, except that the deceased, standing with one foot upon the wire, reached and grasped the guy wire of the defendant company, which was heavily charged with electricity. In the consideration of that case, the Supreme Court of Mississippi said: "There was testimony going to show gross negligence on the part of the city, and testimony going to show that the deceased did no more than an ordinarily prudent man might do. When a city embarks in the management of any utility for profit, it is liable, or not liable, by precisely the same rules applicable to private corporations or individuals conducting such enterprises. \* \* \* They [the jury] saw that telephone wires were not hurtful on contact; that Birchett went to correct a trouble with Birdsall's telephone connection; that he went directly to the telephone pole from which that connection came, and promptly ascended it, and was killed by a circuit formed by what should have been a cold and harmless guy wire with a high-voltage, death-armed wire of the city, negligently put in circuit with it, which he did not see, or if he did see, was not apparently dangerous where he was. \* \* \*

A process of elaborate inductive reasoning is not to be attributed to a man in the discharge of ordinary duty in an ordinarily harmless function. The attachment of the guy wire to the step of the telephone pole, of which all seem ignorant, may have been the fact without which the calamity would not have occurred; but, all the same, the negligent current on the guy wire was the proximate cause of the death, and the jury

did not hold Birchett to a strict scrutiny of every step he took up the pole."

So we must hold that, had a jury upon this evidence returned a verdict in favor of plaintiff, it would not be set aside because of the contributory negligence of the defendant. We therefore conclude that, the instructions which were given being erroneous, the error was not harmless, and, for and on account thereof, the order and judgment of the trial court denying the motion for new trial is set aside, and the case remanded to the district court of Oklahoma county, with instructions to grant plaintiff a new trial. All the Justices concur.

### FRANK OIL CO. v. BELLEVIEW GAS & OIL CO. et al.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

#### 1. MINES AND MINERALS (§ 55\*)—CONTRACTS—OIL AND GAS—CONSTRUCTION AND OPERATION.

Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas, therefore, is a grant, not of the oil that is in the ground, but of such a part as the grantee may find, and passes nothing except the right to explore for the same under the terms of such contract.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 153-165; Dec. Dig. § 55.\*]

#### 2. MINES AND MINERALS (§ 79\*)—OIL AND GAS LEASE—CONSTRUCTION AND OPERATION.

Where a party leases a tract of land for the purpose of mining and operating for oil and gas, the lessee contracting to deliver to the pipe line with which such well or wells may connect one-eighth of all oil saved from said premises, and to pay \$150 each year for the product of each gas well while the same is being used off the premises, if oil and gas are found on said premises, also paying cash in hand the sum of \$200 and agreeing to commence within 30 days from the date of said lease a well on an adjoining tract of land belonging to one Gibson, and in which the lessor had no direct interest, and the lease containing the following provision:

"If no well is commenced on said premises within one year from this date, then this grant shall become null and void, unless second party shall pay to the first party eighty (\$80.00) dollars for each year thereafter such completion is delayed, said rental to be paid quarterly in advance. Party of the second part further agrees to protect the lines of the land above described by immediately offsetting all wells drilled within 150 feet of said land, unavoidable delays excepted. It is further provided that this grant shall become null and void unless a well is commenced within thirty days from the date hereof on the following land belonging to Benjamin L. Gibson. \* \* \*"

Held, that this provision did not bind the lessee to pay any rent for the land or for delay in commencing to operate for oil and gas, said grant or lease, amounting to an option preventing the lessor, after receiving the consideration, for the first year, from leasing to another during such time, and after receiving a quarterly payment from leasing to another until such delay period of a quarter had expired, the lessee

having the option, by continuing to pay such quarterly payments, to continually renew such option by such succeeding payments, the word "year" being used merely as a basis to fix the amount of the quarterly payments.

(a) A gas and oil lease giving the lessee the option to pay a certain sum, and thus extend the lease, is operative against the lessor during such extension only upon the payment of such sum; contract rights being correlative and mutual.

(b) Where the lessee had abandoned his lease by nonpayment of quarterly payments of rent or delay money, as stipulated herein, and such lease or contract having been declared forfeited by the lessor, the rights of the lessee thereby were terminated.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 79.\*]

#### 3. MINES AND MINERALS (§ 73\*)—OIL AND GAS LEASE—CONSTRUCTION AND OPERATION.

A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases. Owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly against the lessee and in favor of the lessor.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 73.\*]

#### 4. CONTRACTS (§ 172\*)—CONSTRUCTION—GENERAL RULE.

When contracts are optional in respect to one party, they are strictly construed in favor of the party that is bound and against the party that is not bound.

[Ed. Note.—For other cases, see Contracts, Dec. Dig. § 172.\*]

#### 5. MINES AND MINERALS (§ 79\*)—LEASES.

The contract providing for the payment of the sum of \$20 quarterly in advance, the check for the first payment was mailed by the lessee to the lessor on the date the payment was to be made, and, being received by the lessor on the next day, it was accepted by him. The check for the second payment was mailed by the lessee to the lessor four days before the date of payment, and, being received by him prior to said date, was accepted. The third quarterly payment was not mailed to the lessor by the lessee until five days after the date provided for payment; the lessor having three days after the date of payment declared the lease forfeited on the ground of nonpayment. The check was received by the lessor six days after the date of payment and returned by him. Held, that the accepting of the first payment one day after the date of payment did not estop the lessor from declaring a forfeiture for nonpayment, or operate as a waiver to insist on the conditions of the contract; the lessee obviously not so construing it as an estoppel or waiver, as he sent the second payment four days before the date required, thereby indicating a recognition of the binding force of all the terms of the contract.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 79.\*]

Error from District Court, Okmulgee County; John Caruthers, Judge.

Action by the Belleview Gas & Oil Company and others against the Frank Oil Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

West, Mellette & Jones, for plaintiff in error. Geo. S. Ramsey, J. C. Stone, Thos. H. Owen, and C. L. Thomas, for defendants in error.



WILLIAMS, J. On the 15th day of October, 1906, the defendants in error, Elmer M. Lowe and Mollie E. Lowe, executed an oil and gas lease to the plaintiff in error upon a certain 80 acres of land allotted to Elmer M. Lowe, as a member of the Creek Tribe. Said contract is in hæc verba: "In consideration of the sum of one and no/100 dollars and the covenants and agreements hereinafter contained, Elmer M. Lowe, and Mollie E. Lowe, his wife, of Mounds, Indian Territory, first party, hereby grant unto the Frank Oil Company of Independence, Kansas, second party, its successors or assigns, all the oil and gas in and under the following described premises, together with the exclusive right to enter thereon for the purpose of drilling or operating for oil, gas or water, to erect, maintain, and remove all structures, pipe lines and machinery necessary for the production, transportation and storage of oil, gas or water, namely: A lot of land situated in Creek Nation, Western District of Ind. Ter. bounded and described as follows: The west half ( $\frac{1}{2}$ ) of the southwest quarter ( $\frac{1}{4}$ ) of section twenty-nine (29), township sixteen (16) north, range twelve (12) east of the Indian base and meridian containing eighty (80) acres more or less, according to the government survey thereof. Should oil be found in paying quantities on the premises second party agrees to deliver to the first party in the pipe line with which he may connect the well or wells, the one-eighth ( $\frac{1}{8}$ ) part of all the oil saved from said premises. If gas only is found, second party agrees to pay one hundred and fifty (\$150.00) dollars each year for the product of each well while the same is being used off the premises, and first party shall have gas free of expense to light and heat the dwellings on the premises. The second party shall have the right to use sufficient gas, oil or water, to run all machinery used by it in carrying on its operations on said premises, and the right to remove all its property at any time. If no well is commenced on said premises within one year from this date, then this grant shall become null and void unless second party shall pay to the first party eighty (\$80.00) dollars for each year thereafter such completion is delayed, said rental to be paid quarterly in advance. Party of the second part further agrees to protect the lines of the land above described by immediately offsetting all wells drilled within 150 feet of said land, unavoidable delays excepted. It is further provided, that this grant shall become null and void unless a well is commenced within thirty days from the date hereof on the following land belonging to Benjamin L. Gibson: The west half ( $\frac{1}{2}$ ) and the southeast quarter ( $\frac{1}{4}$ ) of the northeast quarter ( $\frac{1}{4}$ ) of section thirty (30), township sixteen (16) north, range twelve (12) east, in the Ind. Ter. All rentals and all gas royalties mentioned herein shall be payable to first party personally or deposit-

ed to his credit in the Bank of Mounds, of Mounds, I. T. In witness whereof, the parties have hereunto set their hands this 15th day of October, A. D. 1906. Elmer M. Lowe. Mollie E. Lowe. The Frank Oil Company, by F. B. Ufer, President, by Walter M. Litchfield, Secy. [Seal.]"

[2] The well on the Gibson tract was commenced within 30 days; but no well was commenced on the leased premises within one year from said date, nor had possession been taken thereof prior to the time of the alleged forfeiture. It becomes essential, under the facts stated, to determine the meaning of the provision, "unless second party shall pay to the first party eighty (\$80.00) dollars for each year thereafter such completion is delayed, said rental to be paid quarterly in advance."

This contract having been entered into prior to the erection of the state, section 1118 (section 876, Statutes Okl. Ter. 1890), Compiled Laws of Oklahoma, 1909, which provides, "Time is never considered as of the essence of a contract, unless by its terms expressly so provided," has no application in the construction of this lease, as certain statutes of Arkansas, as they appeared in Mansfield's Digest of 1884, were at that time in force in Indian Territory. Act of Congress, May 2, 1890, 26 U. S. Statutes at Large, § 31, c. 182, p. 94. Under the controlling decisions in Arkansas, the forfeiture in the language of this lease was permissible. Williams v. Green, 14 Ark. 315; Gann v. Ball, 26 Okl. 26, 110 Pac. 1067.

It is insisted by counsel for plaintiff in error that: "A lease for no definite term, with an annual rental, which is payable quarterly or monthly, is a lease from year to year. The fact that rent is payable monthly does not make it any the less a yearly holding." Ridgely v. Stillwell, 25 Mo. 570; Heck v. Borda (Pa.) 6 Atl. 392; Schneider v. Lord, 62 Mich. 141, 28 N. W. 773; Bank v. Merrill, 69 Wis. 501, 34 N. W. 514. This seems to be the general rule. But the question here arises as to whether this contract is not merely an option to exploit for gas and oil.

[1] In Kolachny v. Galbreath et al., 26 Okl. 772, 110 Pac. 902, it was held that: "Oil and gas, while in the earth, unlike solid minerals, are not the subject of ownership distinct from the soil, and the grant of the oil and gas, therefore, is a grant, not of the oil that is in the ground, but of such a part as the grantees may find, and passes nothing that can be the subject of an ejectment or other real action." And that: "Ejectment will not lie to recover possession of the land covered by such lease against the lessor or his grantee when the lessee has never had possession under said lease."

In addition to the authorities cited in support of that conclusion, attention is called to Backer v. Penn Lubricating Co., decided by the United States Circuit Court of Appeals, for the Sixth Circuit, June 18, 1908

(162 Fed. 627, 89 C. C. A. 419), the opinion being written by Knappen, District Judge, concurred in by Lurton and Richards, Circuit Judges, wherein it is said: "The law seems to be settled that, under a lease, of the nature here in question, title to the oil in place is not in the lessee."

This lease, under these decisions, does not have the effect of placing the title of the oil and gas that is under the surface of the land in controversy in the lessee, but to grant to the lessee the privilege of exploring for the oil and gas.

In *Ohio Oil Company et al. v. Detamore*, 165 Ind. 243, 73 N. E. 906, paragraph 5 of the syllabus is as follows: "A gas and oil lease, giving defendant, in consideration of \$120, all of the oil and gas under certain land, with the right to explore, and in case no well should be completed within six months the lease to be void, unless defendant should pay \$120, in which event defendant should have another six months, said lease being subject to continual renewal by succeeding payments, and which lease contains no promise by defendant to do anything, amounts to a six months option preventing lessor, after receiving the consideration, from leasing to another during such time."

The lease in the case at bar does not bind the lessee to do anything.

At page 248 of 165 Ind., at page 908 of 73 N. E., in the case of *Ohio Oil Company et al. v. Detamore*, supra, it is said: "The contract before us belongs to a rare type. It contains no express covenant to be performed by the company. It contains no promise of the company that it will ever drill a well; no promise that it will renew the term of six months by payment in advance of \$120, called 'rent.' The sum total of the company's unconditional agreement is that, if it failed to do one thing or the other—that is, if it failed for six months to complete a well, or advance \$120 for another term—the contract should be at an end. This case is radically unlike the cases in *Gadbury v. Ohio, etc., Gas Co.* (1904) 162 Ind. 9 [67 N. E. 259], *62 L. R. A. 895*, *Hancock v. Diamond Plate Glass Co.* (1904) 162 Ind. 146 [70 N. E. 149], and *Consumers' Gas Trust Co. v. Littler* (1904) 162 Ind. 320 [70 N. E. 363], with respect to the covenants of the lessee and termination of the contract. In the case of *Gadbury v. Ohio, etc., Gas Co.*, supra, it was stipulated that, in case no well was completed within 40 days from the date of the contract, the lease should be void, unless the company should pay the lessors \$1 per day, from the time completion was delayed beyond 40 days. There was no delay beyond 40 days, and payment by the company according to the contract. In the case of *Hancock v. Diamond Plate Glass Co.*, supra, no time was fixed for the commencement or completion of a well, and the contract was 'deemed' to commence from

its date, and to terminate whenever natural gas ceased to be used generally for manufacturing purposes. In the case of *Consumers' Gas Trust Co. v. Littler*, supra, no time was fixed for the beginning of operations, or for the completion of a well, but a covenant by the company that it would pay \$40 each year until gas was found in paying quantities, or until it was discovered that it did not exist. In this, as in other contracts of its class, the manifest purpose of the parties was exploration, and the mining of oil and gas. But here, to say the most of it, the grant is inchoate, and not absolute. It purports upon its face to grant all the oil and gas under the land, but in effect provides that in a consideration of \$120 the grantee shall have six months in which to decide whether it will accept the grant by entering into possession and beginning the work of exploration. Viewed from end to end, the contract amounts to nothing more or less than a six months option, with right of renewal, based upon a valid consideration, whereby the grantor bound himself not to lease the premises to another, and to give the grantee that length of time to consider and determine whether it would undertake the development of the land upon the terms named. If the grantee had decided in the affirmative, and had entered upon the land and proceeded with the execution of the contract and completed a well, within the option period, then acceptance would have been complete, and the grant effective. But by deciding in the negative that the prospect would not justify the expense, or by entering and drilling an unsuccessful well and then abandoning the enterprise and removing belongings from the premises within the paid period, without renewal, the contract was fulfilled and exhausted by an exercise of the option not to develop. Another test: The rent, or option money, was paid, in accordance with the contract, to August, 1897, and included the six months ending at that time. Suppose, as the fact was, that thereafter for four years the company did not drill a well, make a payment, or have possession, and that appellee had at that time brought an action to recover the back rent, or option money; could it be said, under the contract, in such a case, that non assumpsit would not have been a complete answer? Could not the appellant, *Ohio Oil Company*, have successfully said to the appellee: 'I did not promise to pay you money?' And it is certain that, if said appellant has a right to enter after the expiration of the paid period, it was liable for the rent. Contractual rights and obligations are correlative."

In *Hancock et al. v. Diamond Plate Glass Co. et al.*, 162 Ind. 146, 70 N. E. 149, it is said: "Contract for exploring for natural gas. Suit to recover stipulated sum for delay in putting down a well. On June 18, 1891, appellants and appellees, *Diamond Plate*

Glass Company, entered into a written contract whereby appellants 'granted and contracted' to said appellee and its assigns 20 feet square of a certain described tract of 40 acres, to be located by mutual agreement, for the purpose and with the exclusive right of putting down a gas well thereon with the right of ingress and egress, and to lay pipe and conduct gas therefrom. As a consideration for the grant the gas company agreed to deliver to appellants, in the highway nearest their dwelling house on said 40 acres, free of charge during the continuance of the contract, whatever amount of natural gas was necessary for domestic use in said dwelling, and in addition thereto to pay appellants on September 1st of each year \$100 for each producing gas well drilled on the premises, and until the company should put down a gas well on said premises the company agreed to pay appellants on September 1st of each year \$20 at the office of the company, in Kokomo. Appellants on their part further 'covenanted and agreed' for themselves, their heirs, executors, and assigns, 'not to drill, or suffer or permit others to drill, or put down, any other gas well, or wells, on any part of said entire 40-acre tract of land during the continuance of this contract.' It is further covenanted that 'this contract shall be deemed to commence at and run from the date of signing hereof, and shall be deemed to have terminated whenever natural gas ceases to be used generally for manufacturing purposes, or whenever the second party (the gas company), or their assigns, shall fail to pay or tender the rental price herein agreed upon within 60 days of the date of its becoming due. And in the event of the termination hereof, for any cause, all rights and liabilities hereunder shall cease and terminate.' \* \* \* We are unable to see how the principles pertaining to the relation of landlord and tenant are applicable to such a contract as the one before us, either where possession has or has not been taken under the contract. It seems to have been held in *Diamond Plate Glass Co. v. Curless*, 22 Ind. App. 346 [52 N. E. 782], and *Diamond Plate Glass Co. v. Echelbarger*, 24 Ind. App. 124 [55 N. E. 233], that similar instruments, granting the right to explore for and remove gas and oil for an indefinite period, are, in effect, leases creating tenancies from year to year, under section 7089, Burns 1901, which may be terminated by the tenant at the end of any year, without notice. But we cannot accept this view as correct. While a contract providing for an entry and removal of gas or oil from the premises is, perhaps, more than a license, we are unable to believe that it constitutes such a tenancy as is contemplated by sections 7089, 7090, Burns 1901. It must be agreed that such a contract is equally binding on the parties to it. Suppose, for instance, that, under such a

contract as this one, the operator shall enter and drill in a well which yields a much greater volume of gas, and is therefore much more valuable than was anticipated by the landowner when he made the bargain; will any one contend that the latter may avoid his contract and eject the operator by a three months notice to quit before the end of the first year, under section 7090, supra? And yet this is precisely what the doctrine leads to. There appears from the complaint no good reason why the contract should not be enforced against the appellees."

In *New American Oil & Mining Co. et al. v. Troyer et al.*, 166 Ind. 402, 77 N. E. 739, it is said: "Our statute relating to landlord and tenant rests upon the same foundation, that is, within the meaning of the statute upon the execution of a lease, it is implied that the lessor parts with, and the lessee acquires, some vested right in a fixed and certain property interest in the demised premises; such as the right to possess and use the land or tenements, to till the soil and carry away the crops, to enter and take gravel, stone, ore, coal, and other fixed substances under the surface, of which the earth and estate are composed. *Heywood v. Fulmer*, 158 Ind. 658, 32 N. E. 574, 18 L. R. A. 491. In this class of leases, whatever title or right is acquired under the lease becomes vested upon the execution of the contract. It is different with contracts relating to the prospecting for gas or oil, and, if successful, the mining thereof. It cannot be claimed that the one we are considering belongs to any other class. In addition to the stipulation above quoted, and upon the strength of which it is sought to distinguish the contract, another very characteristic provision is found in the body of the instrument, as follows: 'Should second party (company) refuse to pay such rental when due, such refusal shall be construed by both parties hereto as the act of the second party for the purpose of surrendering the rights hereby granted and this instrument, in default of the rental, shall be null and void without further notice to second party.' The peculiar wandering character of gas and oil precludes ownership in their natural state, and hence they are not subjects of sale and conveyance until they have been reduced to possession and placed under control by being diverted from their natural paths into artificial receptacles. In such cases the real subject of the contract is the mining of the gas, or oil, that may be found, on the terms specified. The preliminary exploring is a mere incident that goes for nothing if unsuccessful, and unless oil or gas is found in paying quantities, then there is and was not at the inception of the contract anything to which it could attach. So the title in such contract is at least inchoate until the result of the drilling is ascertained. And if barren territory is developed, then there is no lease, no continuing contract, no conveyance of ti-

tle, because nothing to pass under the agreement. Added to this peculiarity is the custom of making such contracts greatly in advance of the demand for the product, the impracticability of drilling until lines of transportation approach within reasonable reach, the delays in the beginning of operations, secured by the payment of a small sum, called rent, sometimes justifiable, and sometimes unreasonable, and, merely for speculative purposes, the possibility, and occasional practice, of extracting the fluids from under lands through wells on the premises of another, the uncertainty of the discovery, the large profits sometimes realized, the heavy expense of drilling the test well, the total loss of labor and expense in case of failure—these and other like considerations have led courts, long before the making of the contract involved in this suit, to place oil and gas contracts, on account of the 'known characteristics of the business,' in a class of their own. *Gadbury v. Ohio, etc., Gas Co.*, 162 Ind. 9, 13, 67 N. E. 259, 62 L. R. A. 895; *McKnight v. Natural Gas Co.*, 146 Pa. 185, 23 Atl. 164, 28 Am. St. Rep. 790. Such contracts are not ordinary leases nor within the purview of our statute concerning the relation of landlord and tenant. *Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146, 153, 70 N. E. 149."

*Dill v. Frazee*, 169 Ind. 53, 79 N. E. 971, was an action to cancel a certain gas and oil contract. We quote from the opinion as follows: "The contract which is set forth in the complaint states that, in consideration of \$1, Charles F. Dill and wife, described as the first party, have granted unto Emmett Frazee, described as the second party, all the oil and gas under a certain described 40 acres of land, 'for the purpose of drilling and operating for oil and gas,' for and during the term of five years from date, and as long as oil and gas can be found on said real estate in paying quantities or the rental is paid thereon as provided in the contract. The provisions as to royalties are then set out, and there follows this language: 'In case no well is completed within sixty days and number 2 well in sixty days thereafter from this date, then this grant shall become null and void unless second party shall thereafter pay at the rate of forty dollars for each year such commencement is delayed. A deposit to the credit of the first party in Merchants' Bank, Muncie, Ind., will be good and sufficient payment for any money falling due on this grant. First party has the right to locate roads to and from places of operation, and locate first well; if oil is found in paying quantities a well shall be drilled each thirty days thereafter until four wells are drilled or as many more as the party of the second part see fit to drill and further agree to leave a water well. The second party shall have \* \* \* the right to remove all its property at any time, and may cancel and annul this contract or any undrilled por-

tion thereof at any time upon payment of one dollar to said first party and releasing the same of record.' The lease was executed May 26, 1903, and this action was commenced December 31, 1903. It is alleged in the complaint that operations have not been commenced to drill a well on the land, and that no sum whatever has been paid or deposited for the delay. The complaint further alleges that the recited consideration of \$1 for the execution of the agreement was not in fact paid. There are also charges that the defendants have never taken possession, but have abandoned the same. Separate paragraphs of answer were filed by the appellee oil companies, each charging, in substance, that it was the assignee of said contract for a valuable consideration, and had taken the same without knowledge that the original consideration of \$1 for the execution of said contract had not been paid; that it proposed to enter upon said land to prosecute the drilling and operation of gas and oil wells in the spring of 1904; that, while it admitted that the sum fixed as the price of delay had not been paid, yet it had in good faith construed said contract as not requiring said payment to be made in advance, and it offered to pay the annual rental should the court hold that it was due. A demurrer was addressed to these paragraphs, but was overruled, and, upon the completion of the issues, there was a trial, which resulted in a finding and judgment for appellees. No question is made by counsel for the latter concerning the sufficiency of the complaint, except in so far as it presents the question whether the rent was payable in advance. \* \* \* The agreement contains an express provision for a forfeiture if a well is not completed within 60 days, unless the second party thereafter pays at the rate of \$40 per year for each year such completion is delayed. The unit of payment was \$40. \* \* \* The situation of appellant must be considered. There was no express agreement on the part of the operator that he would even explore for gas or oil; on the contrary, he had reserved the right at any time, upon the payment of the nominal consideration of \$1, to cancel and annul the contract. He had not agreed that he would pay any sum in the nature of rent. *Ohio Oil Co. v. Detamore*, supra; *Van Etten v. Kelley*, 66 Ohio St. 605, 64 N. E. 560. The contract was not a lease (*Hancock v. Diamond Plate Glass Co.*, 162 Ind. 146, 70 N. E. 149; *New American, etc., Co. v. Troyer* [166 Ind. 402], 77 N. E. 739), and as the relation of landlord and tenant did not exist, and as there was no beneficial use or occupation, an action could not have been maintained on an implied agreement to pay."

In *Van Etten et al. v. Kelley*, 66 Ohio St. 605, 64 N. E. 560, the syllabus is as follows: "An oil lease, which required certain wells to be completed within stated times, contained the following: 'In case no well is com-

pleted within thirty days from this date, then this grant shall become null and void, unless second party shall pay to first party thirty dollars each and every month, in advance while such completion is delayed.' Held, that this did not constitute a promise or obligation to pay rental; and held, further, that the lessee had the option to complete wells, or pay rentals, to keep the lease alive; and that, upon breach of the agreement to complete wells, no action would lie for the recovery of rentals."

In *Glasgow v. Chartiers Oil Co.*, 152 Pa. 48, 25 Atl. 232, the syllabus is as follows: "An oil lease demised the oil and gas under the grantor's land with the right to go upon and operate the land for oil and gas purposes. The lease was to continue for five years and as much longer as oil or gas should be found in paying quantities. The consideration was a bonus of \$100, and a royalty of one-eighth part of the oil produced. If gas was found, the rental was fixed at \$300 per year for each well. The lease then proceeded as follows: 'Provided, however, that this lease shall become null and void and all rights hereunder shall cease and determine, unless a well shall be completed on the premises within one month from the date hereof, or unless the lessee shall pay at the rate of \$100 monthly in advance for each additional month.' Held, that the lease contained no covenant on the part of the lessee to pay rent or develop the land. The only penalty imposed upon him for failure to operate the land or pay \$100 per month for delay was a forfeiture of his rights under the agreement. The legal effect of the agreement is to confer on the grantee the right to explore for oil on the tract described. If he does not exercise the right within one month, it is lost to him, unless he chooses to pay \$100 in advance, as the price of another month's opportunity to explore. If he does exercise it, and finds nothing, he is under no obligation to continue his explorations. If he explores and finds oil or gas, the relation of landlord and tenant or vendor and vendee is established, and the tenant would be under an implied obligation to operate for the common good of both parties and pay the rent or royalty reserved."

In the opinion it is said: "The appellant contends that, because he might pay, under the terms of the contract, he may be compelled to pay. But payment was the means provided by the contract by which the exercise of the right of the lessor to assert a forfeiture could be postponed. If the lessee did not wish to postpone the exercise of such right, he had only to refrain from making the payment."

In *Snodgrass v. South Penn Oil Co.*, 47 W. Va. 509, 35 S. E. 820, the syllabus is as follows: "Where a party leases a tract of land for the purpose of mining and operating for oil and gas, the lessee contracting to

deliver to the credit of the lessor one-eighth of the oil produced, and saved from the premises, and to pay \$200 per year for the gas from each well drilled, and the lease also contains the following provision: 'Provided, however, that this lease shall become null and void, and all rights thereunder shall cease and determine, unless a well shall be completed on the premises within one year from the date hereof, or unless the lessee shall pay at the rate of \$350 quarterly in advance for each additional three months such completion is delayed from the time above mentioned for the completion of such well until a well is completed.' Held, that this provision did not bind the lessee to pay any rent for the land, or for delay in commencing to operate for oil and gas, and, in the absence of some other clause binding the lessee to pay for such rent or delay, an action of assumpsit could not be maintained on such lease for failing to pay such rent, or for such delay."

See, also, *Robinson v. Boys*, 61 N. J. Law, 179, 38 Atl. 813; *Rawlings et al. v. Armel et al.*, 70 Kan. 778, 79 Pac. 683.

Under the lease in the case at bar, no obligation existed on the part of the lessee to pay the delay or rent money, and the contract was in effect an option during a certain period to explore for oil and gas, but as a condition to this option the delay or rent money must be paid at the rate of \$80 per year, quarterly in advance.

[3] In *Superior Oil & Gas Co. v. Mehl*, 25 Okl. 809, 108 Pac. 545, 138 Am. St. Rep. 942, it was held: "A different rule of construction obtains as to oil and gas leases from that applied to ordinary leases or to other mining leases; and, owing to the peculiar nature of the mineral, and the danger of loss to the owner from drainage by surrounding wells, such leases are construed most strongly against the lessee and in favor of the lessor."

[4] This contract is an option to explore for gas and oil. The rule is settled by this court that, when contracts are optional in respect to one party, they are strictly construed in favor of the party that is bound and against the party that is not bound. *Kolachny v. Galbreath et al.*, 26 Okl. 772, 110 Pac. 902; *Jones v. Moncrief-Cook Co.*, 25 Okl. 856, 108 Pac. 403.

Here we have a contract that is unilateral; the lessee being bound to do nothing, except at his own option. It has expended no money by way of developing the lessor's property. The well that was sunk on the Gibson tract was in all probability sunk in accordance with a contract made with the owner thereof to prevent a forfeiture of that lease, and such was in all probability the case where other wells were sunk on adjoining lands. The lessor had no direct interest, so far as this record discloses, in the development of the Gibson tract. This contract clearly contemplated the exploration for oil as a specula-

tion or promotion on the part of the lessee, which is permissible under the law. The consideration for the first year's delay in making this development on lessor's tract was \$200 cash in hand paid, and the commencement within 30 days from the date of the lease of the sinking of a well on the Gibson tract. That year elapsed and no well was sunk or begun on the tract of the lessor. The lessee had the option to be allowed additional time as delay in the exploring of lessor's tract by paying to the lessor \$80 for each year thereafter such completion was delayed; such delay money to be paid quarterly in advance. This lease, being an option, is the anomalous construction to be here adopted of the language, "then this grant shall become null and void unless second party shall pay to the first party eighty (\$80.00) dollars for each year thereafter such completion is delayed, said rental to be paid quarterly in advance," so as to change this part of the lease from an option to a tenancy, creating the relation of landlord and tenant for a year when the first quarterly payment in advance is made, thereby obligating the lessee to pay the other three quarterly payments? This would violate the settled rule of construction that an option is to be construed liberally in favor of the party granting it and strictly against the holder thereof. If a clause in an option contract or lease is intended to be, not a part of the option, but a rental contract, binding the lessee to pay a certain rent, the parties thereto should have made such intention reasonably certain, especially so in view of the settled rules of construction as to option contracts. Every intendment by presumption is here in favor of the lessor. The reasonable construction of this language is that, if no well is commenced on the premises within one year from the date of the lease, then the grant shall become null and void unless the lessee shall pay to the first party at the rate of \$80 per year for each year thereafter such completion is delayed; said delay money, called "rental," to be paid quarterly in advance. Default having been made in the payment of the third quarter, for what reason should a court of equity intervene to save the lessee from the forfeiture? Unless some equitable reason exists, no court of chancery should have the hardihood to intervene against the rules of law and interfere with the letter of this contract. No case has been cited where, similar language being used in the lease, equitable relief was granted, except where the lessee was in possession of the leased lands and making improvement. *Lynch v. Versailles Fuel Gas Co.*, 165 Pa. 518, 30 Atl. 984; *Edwards et al. v. Iola Gas Co.*, 65 Kan. 362, 69 Pac. 350; *Duffield v. Hue*, 129 Pa. 94, 18 Atl. 566; *South Penn Oil Co. et al. v. Edgell et al.*, 48 W. Va. 348, 37 S. E. 596, 86 Am. St. Rep. 43; *Little Rock Granite Co. v. Shall*, 59 Ark. 405, 27 S. W. 562.

Had the lessee entered upon this 80-acre tract and sunk a well and made development and made an outlay of money for the direct benefit of the lessor, if, by misadventure or misfortune or mistake, the lessee did not pay the quarterly payment on time, a court of equity might then intervene to remove the forfeiture; but no such case exists in this record.

In *Harris v. Ohio Oil Company*, 57 Ohio St. 118, 48 N. E. 502, the lessee took possession of the tract of land and drilled 12 wells. The lessor claimed that then more wells should be drilled and undertook to re-enter and drill the same himself. An injunction was awarded the lessee against the lessor drilling on the property; the trial court sustaining the lessee's contention.

In *Duffield et al. v. Michaels et al.*, 102 Fed. 820, 42 C. C. A. 649, the suit was brought by the lessor to cancel the lease; the lessee having taken possession and begun to develop the property. The court denied the relief.

In *Monfort v. Lanyon Zinc Co.*, 67 Kan. 310, 72 Pac. 784, the delay money was paid in advance, and the lessor brought suit to cancel, not for specific performance, and failed therein.

In *Consumers' Gas Co. v. Littler*, 162 Ind. 320, 70 N. E. 363, the action was instituted by the lessor for cancellation. The court held that he had waived the forfeiture.

In *Allegheny Oil Co. v. Snyder*, 106 Fed. 764, 45 C. C. A. 604, the rents or delay money had all been paid, but there was no development. The lessor brought suit to cancel, which was denied.

In *Doddridge County Oil & Gas Co. v. Smith et al.* (C. C.) 154 Fed. 970, suit was brought by the lessor to cancel. The lessee was in possession, developing the property. The injunction was denied.

In *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213, a forfeiture was enforced at the instance of the lessor.

We have been unable to find a single case where a court of chancery ordered the specific performance of a lease at the instance of a lessee where there had been no development and the lease provided only that it should be forfeited unless the lessee paid a certain sum of money for delay, such contract being merely optional; but, where the contract provided that there should be certain development or the lessee should pay a certain specific sum of money, then, in the event of delay or failure of development, an obligation was incurred on the part of the lessee to pay a certain sum of money. Of this character of cases are *Hukill v. Myers et al.*, 86 W. Va. 639, 15 S. E. 151; *Steiner v. Marks*, 172 Pa. 400, 33 Atl. 695; *Campbell v. Rock Oil Company*, 151 Fed. 191, 80 C. C. A. 467.

[5] It is further contended that the lessor was estopped from declaring this forfeiture. The quarterly payment due on October 15,

1907, was sent by check from Independence, Kan., on that date, reaching Lowe on October 16th, the next day, which was accepted by him. The second quarterly payment was sent from Independence, Kan., by check on January 11th, reaching him prior to January 15th. The third quarterly payment, according to the finding of the trial court, was not sent from Independence, Kan., until April 20th, five days after the date said quarterly payment was permitted to be made and two days after the forfeiture had been declared. The trial court held that the accepting of the one payment one day late was not sufficient to show that the lessor reasonably indicated to the lessee that he would waive the strict compliance with that part of the option, to wit, the time of payment. We cannot say that in that he erred, for, as the time approached in which he was to make the second payment, the same was mailed four days before the time expired in which he was permitted to make such payment, when it would only take one day for the check to reach the lessor. The record rebuts the idea that the acceptance of the check one day late one time misled the lessee, for the lessee, when he made the second payment, evidently acted on the assumption that he was bound to make such payment by the 15th of the month by mailing the check within ample time for it to reach the place of destination. There is no question in this case as to the miscarriage of the check by mail, or the lessee being thereby prevented by an unavoidable casualty or misfortune from making such payment.

Courts of equity are not justified in finding estoppels or waivers against contracts made and entered into by parties capable of executing the same, except upon a sufficient predicate. Contracts are made and entered into in order that the rights of the parties may be definitely and certainly fixed thereunder, and, when such terms of forfeiture are fixed in such contracts as are permitted by law, courts of equity should relieve against the same only in a proper case.

No case has been cited where the lessor was held to have waived a forfeiture or was estopped from insisting upon the same upon such a state of facts as exists in this record.

It follows that the judgment of the lower court must be affirmed. All the Justices concur.

#### SKELTON v. DILL

(Supreme Court of Oklahoma. Nov. 18, 1911.)

(Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 1011\*)—QUESTIONS OF FACT.

Where the Creek rolls show that a woman and her deceased child are of Creek blood, and

she and her husband testify to the same effect, a finding of the trial court that they are of Creek blood will not be disturbed, though a number of persons, including some relatives, testify they were adopted Creeks, and not of Creek blood.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

#### 2. ACKNOWLEDGMENT (§ 57\*)—SUFFICIENCY.

A certificate of acknowledgment, taken in another state, which stated that the maker of the instrument came before a notary public, and which was attested by the person making the certificate as chancery clerk and ex officio notary public, was sufficient to admit the instrument to record under the law in force in the Indian Territory prior to statehood.

[Ed. Note.—For other cases, see Acknowledgment, Dec. Dig. § 57.\*]

Commissioners' Opinion, Division No. 2. Error from District Court, Okfuskee County; John B. Patterson, Special Judge.

Action by William H. Dill against L. S. Skelton and W. E. Whitman. Judgment for plaintiff, and defendant Skelton brings error. Affirmed.

Stanford & Cochran, for plaintiff in error. Martin L. Frericha, for defendant in error.

ROSSER, C. This is a suit by William H. Dill, defendant in error, hereinafter called plaintiff, against L. S. Skelton, plaintiff in error, hereinafter called defendant, and W. E. Whitman, to recover certain lands described in plaintiff's petition. The lands were the allotment of Archie Hamby, deceased, who was the son of Archie H. Hamby, a noncitizen, and Dora Hamby, a member of the Creek Tribe of Indians. Archie Hamby died on the 26th of July, A. D. 1901, leaving surviving him his father, mother, three brothers, and a sister. The record is silent as to when this land was selected as his allotment, but the enrollment card shows that his enrollment was approved July 31, 1905. The deeds from the Creek Tribe to both his homestead and surplus allotments are dated May 24, 1907.

Plaintiff claims title as follows: On the 20th of July, A. D. 1906, Dora Hamby, joined by her husband, A. H. Hamby, executed a warranty deed to the lands to S. M. Wilson. On the 28th of July, A. D. 1906, S. M. Wilson and wife conveyed by warranty deed an undivided half interest in the lands to the plaintiff. On the 31st of December, A. D. 1906, Samuel M. Wilson and wife conveyed their remaining interest in the lands to Ada Smith by warranty deed. On the 18th of February, A. D. 1907, Ada Smith conveyed her interest in the lands to the plaintiff, William H. Dill, by warranty deed. The defendant W. E. Whitman filed a disclaimer as to any interest or title to the lands, and alleged that he was holding merely as tenant of the defendant L. S. Skelton.

The defendant L. S. Skelton claims title to the lands as follows: On the 2d day of Sep-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tember, A. D. 1905, A. H. Hamby, the father of the allottee, Archie Hamby, deceased, executed a power of attorney to H. E. P. Stanford, the first paragraph of which is as follows: "To make, execute and deliver warranty deeds, mortgages, and releases upon my interest in the allotment of my deceased child, Archie Hamby, set aside as his approximate share of the lands of the Creek Nation of Indians in the Indian Territory." On the same day Dora Hamby, the mother of the deceased allottee, executed and delivered to H. E. P. Stanford a power of attorney, the third paragraph of which is as follows: "To make, execute and deliver warranty deeds, mortgages, and releases upon my interest in the allotment of my deceased, Archie Hamby, set aside as his approximate share of the lands of the Creek Nation of Indians in the Indian Territory." On the 13th of September, A. D. 1905, H. E. P. Stanford, acting under the powers as above set out, in the name of A. H. Hamby and Dora Hamby, executed a warranty deed to the lands to L. S. Skelton, describing A. H. Hamby as a noncitizen of the Creek Nation of Indians, and Dora Hamby as an adopted citizen of the Creek Nation of Indians, and the two as sole heirs at law of Archie Hamby, deceased. On the 1st of July, A. D. 1907, H. E. P. Stanford, as attorney in fact for A. H. Hamby and Dora Hamby, executed a warranty deed to the same lands to the defendant L. S. Skelton, upon the same consideration mentioned in the first deed. On the 12th of August, A. D. 1907, H. E. P. Stanford, acting under the power given him by A. H. Hamby, executed another general warranty deed in the name of A. H. Hamby, for the same consideration, to the defendant L. S. Skelton.

A. H. Hamby and Dora Hamby testified that Dora Hamby was of thirty-second Creek blood, and that the deceased son was one sixty-fourth Creek. The enrollment card, which was introduced in evidence, also showed that Dora Hamby was one thirty-second Creek, and that the deceased, Archie Hamby, was one sixty-fourth.

The defendant offered in evidence the testimony of several witnesses, taken before the Commission to the Five Civilized Tribes, upon the hearing of the application of Mary E. Bowen et al. for enrollment as citizens by blood of the Creek Tribe, including that of several relatives, for the purpose of showing that Mary E. Bowen, who was Dora Hamby's grandmother, was never a member of the Creek Tribe, and that Mrs. Bowen's father's family were citizens by adoption, and not by blood. He also offered in evidence the testimony of Mary E. Bowen, who testified that her father was a quadroon Indian, but admitted that she had never drawn any money as a member of the tribe. In the course of her examination, the Commission seems to have examined various records, and to have found that her name was not on any authenticated tribal roll of the Creek Nation, and

also to have found that on July 10, 1895, the Creek Citizenship Commission rendered a judgment, rejecting her application for enrollment, because she had no Creek blood, and because she was not living with her father, Jim Gentry, at the time he and his family were adopted into the Creek Tribe. All of this testimony was objected to by plaintiff at the time it was offered.

The parties waived a jury, and submitted the issues to the court to find the law and the facts. The court found the facts as to the conveyances as stated above, and also found that the deceased, Archie Hamby, was one sixty-fourth Creek Indian, and that Dora Hamby, was one thirty-second Creek, and upon these facts found that the plaintiff was entitled to recover.

Several questions are raised in the briefs of counsel in the case, and to cover all points that are or might be raised in the case would be to write a treatise upon the land laws in the Creek Nation, and also upon the rights of married women. A principal question raised in the brief of plaintiff in error is as to the blood of Dora Hamby and Archie Hamby. It is contended by the plaintiff in error that Dora Hamby and Archie Hamby, though enrolled as one thirty-second Creek Indian and one sixty-fourth Creek Indian, respectively, were, in fact, white people, and therefore, at the time of the execution of the power of attorney by Dora Hamby to H. E. P. Stanford, that their lands were not restricted, and that she had a right to convey them, and that therefore the deeds executed by H. E. P. Stanford, in the exercise of the power, were valid, and conveyed title to the defendant (plaintiff in error).

The second contention of defendant is that the allotment not having been selected, and the patents not having been issued until after the supplemental treaty took effect, that the land descended as provided in chapter 49 of Mansfield's Digest of Arkansas (Ind. T. Ann. St. 1899, c. 21), and the mother, Dora Hamby, not being a Creek by blood, was postponed to the father, A. H. Hamby, and that he took either an estate in fee simple, or, if the land was a new acquisition in Archie Hamby, deceased, a life estate in the lands; and that the power given by him to Stanford was valid, and that the conveyance from him gave either a fee simple or a life estate to defendant, depending on whether the estate of the allottee was an inheritance or a new acquisition.

Another contention of the defendant is that the deed from A. H. and Dora Hamby to S. M. Wilson was not properly acknowledged, and was therefore not entitled to record, and was not admissible as evidence in the case.

In order to clearly understand these questions it is necessary to refer to some of the Creek agreements and the statutes bearing upon the right to dispose of Creek Indian lands.

Section 16, Supplemental Creek Agreement,



ratified by act of Congress, approved June 30, 1902, c. 1323, 32 Stat. 500, is as follows: "Lands allotted to citizens shall not, in any manner whatever, or at any time, be encumbered, taken or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior. \* \* \*

The Indian Appropriation Bill of April 21, 1904, c. 1402, 33 Stat. 189, among other things, provides as follows: "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe. \* \* \*

Section 22 of the act of Congress of April 28, 1906 (34 Stat. 137, c. 1876) entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," is as follows: "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs, or belonged, may sell and convey the land inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in the sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory."

Section 8 of the Supplemental Agreement, approved June 30, 1902, and put in force, by proclamation by the President, August 8, 1902 (32 Stat. 500, c. 1323), is as follows: "All children who have not heretofore been listed for enrollment living May 25, 1901, born to citizens whose names appear upon the authenticated rolls of 1890 or upon the authenticated rolls of 1895, and entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. 861), shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

The third paragraph of section 7 of the Original Creek Agreement, ratified by the act of Congress of March 1, 1901 (31 Stat. 861, c. 676), is as follows: "The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children

born to him after the ratification of this agreement, but if he have no such issue then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, free from such limitation."

In the case of *De Graffenreid v. Iowa Land & Trust Co.*, 20 Okl. 687, 95 Pac. 624, the latter part of the paragraph quoted is construed to mean and include all lands; and it is held in that case that all lands, whether homestead or not, of the Creek allottees, where the descent was cast while the treaty was in effect, shall descend to their heirs, according to the laws of descent and distribution of the Creek Nation.

Section 6 of the Supplemental Creek Agreement (32 Stat. 500) is as follows: "The provisions of the act of Congress approved March 1, 1901 (31 Stat. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in the Indian Territory: Provided, That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit the lands of the Creek Nation; and provided further, that if there be no person of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizen heirs in the order named in chapter 49."

The first question for decision is as to the blood of allottee, Archie Hamby, and his mother, Dora Hamby. If Dora Hamby was of Creek blood, she would inherit the allotment of her child, whether the Creek laws of descent and distribution were in force at the time the descent was cast, or the descent was governed by section 6 of the Supplemental Creek Agreement, which put in force chapter 49 of Mansfield's Digest of the Statutes of Arkansas. Under the provision of section 6 of the Supplemental Agreement, if of Creek blood, she would be preferred to her husband, and if the case of *Shulthis v. MacDougal* (C. C.) 162 Fed. 331, is to be followed she would have a fee-simple title to the lands; but, if the estate is not a new acquisition, she would still have an estate for life, and her deed would convey such title as would enable her to maintain ejectment against a person having no title. *Hurst v. Sawyer*, 2 Okl. 470, 37 Pac. 817. Therefore it is not necessary to decide in this case whether the estate was a new acquisition in Archie Hamby, or whether it was an inheritance. If Archie Hamby was of Creek blood, his allotment was subject to the restrictions contained in section 16 of the Supplemental Creek Agreement; if he was not of Creek blood, then it would be necessary

to decide whether the restrictions were removed from the sale of his allotment by the provision of the Indian Appropriation Bill of April 21, 1904.

[1] Dora Hamby and her husband both testified that she and her deceased son were members of the Creek Tribe of Indians by blood. They testified that she was one thirty-second Creek, and that the deceased was one sixty-fourth Creek. The enrollment card showed them to have Creek blood. If any of the testimony taken before the Commission to the Five Civilized Tribes should be considered, then the testimony of Mary E. Bowen, Dora Hamby's grandmother, shows she was of Creek blood. The defendant introduced a copy of the testimony of some witnesses, taken before the Commission to the Five Civilized Tribes, for the purpose of showing that Mary E. Bowen, the grandmother of Dora Hamby, was not a Creek by blood. A great deal of the testimony offered for this purpose was inadmissible at the time it was given before the Commission, even under the liberal rule with reference to pedigree and family relationship. But certainly none of the testimony taken before the Commission in the application for enrollment of Mary E. Bowen et al. was admissible in this case. No attempt whatever was made to account for the absence from this trial of the witnesses who had testified before the Commission. The plaintiff objected to its introduction, and when the court admitted it, over his objection, excepted. Whether the court proceeded upon the theory that many courts do, where there is no jury, that it saves time to admit everything, and then reject the incompetent testimony when considering the case, or whether he considered the evidence, does not appear from the record. But, considering all the evidence, incompetent as well as competent, it cannot be said that there is not sufficient evidence to sustain the finding of the court.

It follows from the finding that Archie Hamby and Dora Hamby were of Creek blood; that the lands were subject to the restrictions contained in section 16 of the Supplemental Agreement at the time of the execution of the power of attorney by Dora Hamby; and that the deed executed by Stanford under the power conveyed nothing to the defendant. The plaintiff's deed having been executed by Dora Hamby, the adult heir of the deceased allottee, after section 22 of the act of April 28, 1906, had become the law, conveyed her title to the plaintiff, and whether she owned a fee simple or a life estate only, when her interest vested in plaintiff, he had such title as would maintain ejectment. With this view of the case, it is not necessary to pass on any of the other questions involved, except as to the sufficiency of the acknowledgment of the

deed from A. H. Hamby and Dora Hamby to S. M. Wilson.

[2] The defendant objected to the introduction of the deed from A. H. Hamby and Dora Hamby to S. M. Wilson, giving as a reason that the acknowledgment recited that it was taken before a notary public, when in fact it was taken before a chancery clerk. The certificate of the officer taking the acknowledgment recites that "on this day came before me, the undersigned, a notary public, within and for the state of Mississippi," etc., and concludes as follows: "Witness my hand and seal as such chancery clerk and ex officio notary public," etc. It is subscribed, "A. L. Endy, Chancery Clerk and Ex Officio Notary Public." This acknowledgment was sufficient. *Goree v. Wadsworth*, 91 Ala. 416, 8 South. 712; *Owen v. Baker*, 101 Mo. 407, 14 S. W. 175, 20 Am. St. Rep. 618; *Buntyn v. Shippers' Compress Co.*, 63 Miss. 94. The acknowledgment would have been good, if taken either by the chancery clerk or by a notary public. *Mansfield's Digest*, Stats. of Ark., § 651. It is urged in the brief of defendant that the officer attached no seal to the certificate, but that was not stated as a ground of objection, and cannot now be considered. Plaintiff in his reply brief claims there was a seal attached.

It follows that the judgment of the lower court should be in all things affirmed.

PER CURIAM. Adopted in whole.

#### McDANIEL v. STATE.

(Criminal Court of Appeals of Oklahoma.  
Dec. 11, 1911.)

CRIMINAL LAW (§ 1081\*)—APPEAL—NOTICE OF APPEAL—DISMISSAL.

Where the record shows that notices of appeal in a criminal case were not served on the county attorney and the clerk of the district court within the time required by law, the appeal will be dismissed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2722-2724; Dec. Dig. § 1081.\*]

Appeal from District Court, Le Flore County; Malcolm E. Rosser, Judge.

Henry McDaniel was convicted of grand larceny, and appeals. Appeal dismissed.

Tom W. Neal, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error was, by information filed in the district court of Pushmataha county on the 13th day of July, 1909, charged with grand larceny. A change of venue was granted to the district court of Le Flore county. Upon his trial there had the jury returned a verdict of guilty, and assessed his punishment at imprisonment in the state penitentiary for a period of one year. In accordance with the verdict, on Novem-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ber 12, 1910, judgment and sentence was pronounced and entered.

The record shows that notices of appeal were not served on the county attorney and clerk of the district court within the time required by law. For this reason the Attorney General has filed a motion to dismiss the appeal. The motion is well taken, and is sustained.

The appeal is accordingly dismissed.

# STOUSE et al. v. STATE.

(Criminal Court of Appeals of Oklahoma. Dec. 11, 1911.)

## (Syllabus by the Court.)

### 1. CRIMINAL LAW (§ 627\*)—SERVICE OF ACCUSATION ON ACCUSED—WAIVER OF RIGHT.

Section 20 of the Bill of Rights gives to the accused in a criminal prosecution a constitutional right to have a copy of the accusation against him. The accused may waive this right, and, unless he demands a copy before announcing ready for trial, his right to a copy is waived.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1399-1408; Dec. Dig. § 627.\*]

### 2. HOMICIDE (§ 194\*)—EVIDENCE—ADMISSIBILITY—SELF-DEFENSE.

In a homicide case, where the plea is self-defense, evidence as to whether the accused was intoxicated or under the influence of intoxicating liquors at the time of the homicide is competent for the purpose of aiding the jury to determine whether or not the accused acted under the influence of a well-grounded and reasonable belief that he was in imminent danger of losing his life, or receiving great personal injury.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 417-419; Dec. Dig. § 194.\*]

### 3. WITNESSES (§ 329\*)—CROSS-EXAMINATION—SCOPE AND EXTENT.

As the general reputation of any person is established by the opinions of witnesses as to the general estimation of his character, it is permissible upon cross-examination of such witness to show the sources of his information and particular facts may be called to his attention, and he may be asked if he ever heard of them. This is permissible, not for the purpose of establishing the truth of such facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given to his testimony.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 329.\*]

### 4. CRIMINAL LAW (§ 1120\*)—WRIT OF ERROR—OBJECTIONS TO EVIDENCE—SCOPE AND SUFFICIENCY.

When objections to a question are sustained, if it is desired to reserve the question as to the competency of the testimony sought to be introduced for the determination of this court, the record must contain some showing as to what the testimony of the witness would have been had he been permitted to answer the question. Otherwise this court cannot determine as to whether the accused has been injured by the ruling of the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2931-2937; Dec. Dig. § 1120.\*]

### 5. CRIMINAL LAW (§ 1156\*)—WRIT OF ERROR—REVIEW—DISCRETION OF TRIAL COURT.

Where, in a motion to set aside the verdict and grant a new trial, an attempt is made to show that one of the jurors was prejudiced against the accused, and an affidavit is attached to the motion showing prejudgment statements by a juror, and the state files a controverting affidavit of the juror wherein he denies that he made any such statements, in the absence of a showing of abuse of discretion, the decision of the trial court will not be disturbed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.\*]

### 6. CRIMINAL LAW (§ 923\*)—WRIT OF ERROR—REVIEW—HARMLESS ERROR—IMPANELING JURY.

As a general rule, a verdict will not be set aside for reasons that would be sufficient to disqualify a juror on a challenge for cause, which existed before the juror was sworn, but which was unknown to the accused until after the verdict, unless it appears from the whole case that the accused suffered injustice from the fact that the juror served in the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2219-2237; Dec. Dig. § 923.\*]

Appeal from Coal County Court; A. T. West, Judge.

W. H. Stouse and another were convicted of manslaughter in the first degree, and appeal. Affirmed.

The plaintiffs in error were by indictment jointly charged as having on the 25th day of December, 1908, in Coal county, feloniously, without authority of law, and with premeditated design, killed one J. T. Bunch. The record shows that there were some 10 persons who claim to have been eyewitnesses to the tragedy.

The proof on the part of the prosecution tends to show the following facts:

Geo. Wheeler, the first witness called for the state, testified: That he was talking to the deceased just before the shooting commenced. That the defendants were passing along the street, and Stouse spoke to Dud Jackson, a cousin of the deceased, and told him to be less bolsterous. The deceased was walking across the street at the time, and said to the defendants, "Now, if you fellows are game, go and get him. He has hollowed again." The defendant Stouse said, "No; we will get you;" and the deceased said, "No; you won't;" and the defendants both drew their guns and shot the deceased five or six times, killing him instantly. That, when the first shot was fired, the deceased fell, and several shots were fired while he was down. That the defendant Stouse said, "Now you will give up, won't you." That he did not see a gun in the hand of the deceased.

John Adair testified that he went to the defendant Stouse's house with Geo. Causey and Ed Wooten about 11 o'clock, and both the defendants were there, and Stouse had

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

a bottle of whisky and offered Geo. Causey a drink; that the defendants appeared to be drinking; that he heard the defendant Kennedy make a threat against the life of the deceased, but did not remember whether it was right at that time; that he had heard Kennedy more than once threaten the life of the deceased; that Kennedy told him that he would kill the deceased if he ever got a chance; that such threats were made by Kennedy off and on for a year and a half before the killing; that shortly after the killing Kennedy told him that he hated to have done it, but it did not bother him like he thought it would.

Dr. Frank Bates testified that he was called as a physician, and found Bunch dead; that he made an examination to see what the cause of his death was; that there was a gunshot wound under the arm which went straight through the body; that there were two wounds in the abdomen and four on the left leg.

Joe Cathcart testified that in October or November preceding the tragedy the defendant Kennedy stated to him "that he and Bunch were kin folks, and had right smart of trouble, and the last trouble he had he told him if he ever spoke to him again he would kill him."

Mrs. Ester Myers testified that she knew the deceased in his lifetime and the defendants; that her home is about 100 feet from where the killing occurred; that she heard four shots and went to the window, and saw the deceased lying in the middle of the street, and Mr. Stouse standing at his feet with two six shooters in his hand, and Mr. Kennedy, standing at his side, fired one more shot, the last shot that was fired, and it looked like it might go through Mr. Bunch's side. That she heard Stouse say, "Keep him off, or I will kill him;" that she did not know what he meant unless it referred to Dud Jackson; that the defendants walked away, and she went to where Mr. Bunch was lying; that she did not see anything in his hands.

Herman Whitt testified that he lived about 100 yards from where the killing occurred; that he was looking at the defendants and the deceased when the shooting occurred; that the defendants were both shooting; that the deceased fell down, and that, after he fell, the defendant Kennedy fired one or two shots; that he could not tell whether the deceased had a pistol or not.

Frank Logsdon testified that about a year before he heard the defendant Kennedy say, speaking of the deceased: "We had trouble once. I told him, if he ever spoke to me or came to my house, I am going to throw lead bullets in him, and by God, I mean to make my word live."

Guy Bounds testified that he was on the porch of Mr. Acock's house, about 50 yards from where the killing took place; that the defendants were coming up on the north side

of the street when they met the deceased, who was standing in the middle of the street; that the defendant Stouse walked out into the street where the deceased was; that he could not hear what was said, but the deceased hit at him, and Stouse drew his gun, and went to shooting; that Kennedy then commenced shooting; that there were six or seven shots fired.

Mrs. Freelove Bunch testified that she was the mother of the deceased; that, hearing the shooting, she went to where her son was and went up to him, and asked him if he could speak, and, when she raised up, Bill Stouse was standing with both pistols leveled down on him; that Stouse said, "Mrs. Bunch, I hated to do this as bad as you do, but I had to do it," that some one asked Kennedy who did it, and he said: "I am the fellow that killed him. I am the man that killed him."

Several witnesses testified that they had heard the defendant Kennedy at various times threaten to kill the deceased.

On behalf of the defendants, Jim Skeith testified that he is a brother-in-law of the defendant Stouse, that he saw the defendants and the deceased when they met; that he saw Bunch strike at Stouse with his fist; that he was looking through a window then, and he stepped out on the porch and saw Bunch strike at Stouse again; that he saw him strike three times; that Stouse said, "Baldy, go on and behave yourself. I do not want to have any trouble with you;" that Bunch stepped back, and said, "You God damn bully sons of bitches. I will kill both of you," and run his hand in his pants and drew a gun and fired at Stouse; that the next thing all of them were firing their guns about the same time; that Bunch stood until he fired two shots, and then staggered, and fired another shot and fell, and then fired another shot after he fell, that Stouse then threw his gun down on Bunch, and says, "Baldy, don't fire any more, throw that gun down. I do not want to kill you;" that Stouse picked up a gun from the street and carried it off with him; that the shooting occurred about 1 o'clock.

Iva Stouse testified that she was a step-daughter of Jim Skeith, and the defendant "W. H. Stouse is my uncle"; that she was standing on the porch when her uncle and Mr. Kennedy met the deceased, who was in the middle of the street; that he came up near to where the defendants were and said, "Oh, you bullies, you sons of bitches, I am going to shoot you both;" that he drew back and struck three licks at her uncle and jerked his gun and fired two shots; that the defendants drew their guns and fired three shots apiece, and, after he fell, he raised up on his left shoulder and fired two more shots; that the first and the last shot was fired by the deceased; that she did not hear the defendants say anything.

Bessie Williams testified that she was at

Jim Skeith's, visiting Iva Stouse, and was on the porch when the shooting took place; that she saw the defendants when they met the deceased, and the first thing that happened the deceased pulled a gun out of his right hip or some place on the right side and fired twice; that she did not see any other shooting. On cross-examination she stated that she did not hear more than two shots.

Delbert Wise testified that he was standing on the street when the defendants came walking up the sidewalk, and Mr. Bunch came walking down the middle of the street, and Mr. Jackson was going down the street, hollowing, and Stouse said, "Dud, don't start any disturbance;" that Mr. Bunch then said that, "If you sons of bitches, if you feel like starting it," and struck at Mr. Stouse; that after he struck him the shooting commenced and he ran; that Mr. Bunch fired the first shot.

Hilda Robertson testified that she witnessed the tragedy, and, when the deceased met the defendants, Mr. Stouse told him that "he did not want to have any trouble with him," go on and have a good time, he "did not want to have any trouble with him"; that Bunch said, "You damn sons of bitches, I will kill you," and then he shot at Mr. Stouse; that she did not see any other shooting, although she stood on the porch until after it was over with.

Mr. Trice, counsel for the defendants, then stated: "We have been surprised in this witness. I believe we have a right to lead." In response to leading questions, she then stated she saw Mr. Stouse shoot once, and that she saw Mr. Bunch shoot twice after he fell, and that the last shot was fired by Mr. Bunch.

Mrs. Lou Olmstead testified that she saw the defendants and the deceased come together; did not hear what they said, but saw Mr. Bunch hit Mr. Stouse with his right hand; that he struck three times at him, and got his pistol from his bosom and shot at Mr. Stouse; that she could not say how many times Mr. Bunch shot; but he shot twice after he fell; that Mr. Stouse fired a shot, but she did not see Mr. Kennedy shoot; that Stouse picked up a pistol from the street, and then walked back to the sidewalk.

J. M. Wilson testified that he was a justice of the peace in Coalgate; that Kennedy was his constable and Stouse was his deputy; that Kennedy was a city marshal; that he saw the two defendants about 11 o'clock, and they were duly sober to the best of his knowledge; that they drank some weak eggnog at his house before noon; that after the shooting they came to his house, and he examined the three pistols they had. Two of the pistols were loaded all around, and one of them had two loads, four empty chambers in it. He also testified as a character witness for the defendant Kennedy.

J. W. Hurst testified that he met the defendants about five minutes before he heard the shooting, and talked with them; that, if

they were under the influence of whisky, he could not tell it.

Hattie Wise testified that she was the wife of Delbert Wise; that she saw the defendants and the deceased when they met before the shooting; that she did not hear what was said, but Mr. Bunch struck at Mr. Stouse three times; that Stouse pushed him back, and Mr. Bunch fired; that Mr. Stouse then fired; that Mr. Bunch fired two shots before he fell, and two after he fell, one of them being the last shot that was fired; that her husband was standing on the sidewalk close to Mr. Stouse at the time; that she is the daughter of Mrs. Lou Olmstead; that the deceased was wearing an overcoat, but she did not see where he took the pistol from.

W. H. Stouse testified on behalf of himself and his codefendant that he was 43 years of age; that at the time of the homicide he was city marshal or chief of police of Coalgate; that the defendant Kennedy took dinner with him that day at his home; that they then walked downtown and met Mr. Bunch coming across the street. To use his own language, he then stated: "When they got up tolerable close, he made a remark; 'There is them two bully sons of bitches; I want both of them;' and when he said that he grabbed his coat—he had on an overcoat and a dress coat—and started to throw it back, and I laid my hand on his arm. I says, 'Go on.' He just threw his hand up like that, and threw his coat backward, and says, 'God damn you,' and struck. I just guarded the lick off, and, when I done that and he made the next pass at me, I threw my hand against him, and, when I pushed him back and when I straightened up the next time he had a gun. I don't know where he got it. When I first saw it as I straightened up, he had it, and I hadn't more than saw it till he pulled the trigger." He then fired another shot toward him. "Q. What next happened? A. When he fired the next shot, of course, I was getting my gun out, and, when he fired the next shot, I had my gun out. I dodged back, the smoke and powder in my eyes, and I guess I staggered back a little, and, as I straightened, the three shots, the one I supposed he shot at Kennedy, and my shot and Mr. Kennedy's shot, I reckon they all three went together. Q. Then what next happened? A. When I fired the first shot, he staggered back it seemed to me about two steps to the best of my knowledge. The first shot I fired I just jerked my gun, and threw it right down, and fired. It wouldn't have hit—in my judgment it wouldn't have hit him in the body. I didn't have my gun high enough. As we all three fired, he started and just sort of sank down. I couldn't tell whether he was falling or squatting, but, as he squatted down, I fired my last shot. I fired just as he stepped back, before he squatted down. I shot again after he fired a shot, and then you might say we practically all three shot together, and when that shot was fired, he

fell to the ground on his left side, and, as he fell, he dropped on the ground like that, and threw his gun on his hip and fired his gun, and, when he done that, I threw my gun on him, and said: 'Baldy, drop that gun. I don't want to kill you, but I will have to.' He looked at me, and let it go, and it fell, and I reached over him and picked up his six shooter, and went to the sheriff." On cross-examination he testified that he was duly sober, that he had only drank about half a glass of eggnog at Judge Wilson's, and a half bottle of beer at home.

J. E. Kennedy testified on his own behalf and on behalf of his codefendant: That he was a constable of Coalgate township. That on the day in question, when they met the deceased, he heard him say: "Both of you bully sons of bitches can't run me off the street. I am out here to get both of you sons of bitches." That Stouse asked him to behave himself, and kind of put his hand out, and witness stepped a couple of steps beyond Stouse, and was standing with his hands behind him, and the deceased, standing in the street, put his right foot on the sidewalk, and says, "God damn you, Bill Stouse," and struck at him two or three times, and then jerked a gun from somewhere in front of him, "somewhere from his hip like that," and fired at Stouse; that he stepped up, and says, "'Baldy, for God's sake don't do that,' and he said, 'You son of a bitch, I want you, too,' and flung his gun on me. I reached for my gun, and me and Bunch fired together, and I fired three straight shots as fast as I could;" that the deceased fired one shot after he fell on the ground; that that was the last shot fired; that he shot the deceased in self-defense to save his own life; that his wife and the wife of the deceased were sisters; that, when his wife separated from him, she went to the home of the deceased on their father-in-law's place; that the next time they separated that his wife went to her father's; that shortly thereafter she returned to witness; that he did not make the threats to kill the deceased as testified to, but did warn him to keep away from his place.

Upon the trial the jury returned a verdict finding the defendants guilty of manslaughter in the first degree, and assessing their punishment at imprisonment in the penitentiary for six years and six months. July 12, 1909, judgment and sentence was pronounced and entered in accordance with the verdict.

To reverse the judgment and order denying a new trial, the defendants appealed by filing in this court on January 11, 1910, their petition in error with case-made.

Fooshee & Brunson and George Trice, for plaintiffs in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. (after stating the facts as above). The assignments of error and the

questions presented thereon in so far as they seem to warrant discussion and decision will be considered in the order of time upon the trial.

[1] The indictment was returned and filed in open court on March 12, 1909. The defendants were arraigned March 15th, and were then enlarged on bail. June 30th the case was called for trial. The state and the defendants announced ready, and, after the jury had been impaneled and sworn, the defendants interposed an objection to proceeding further with the trial for the reason that they had not been served with copies of the indictment as required by the Constitution and laws of the state.

The state called the clerk of the court, who testified that he furnished copies to the defendant's attorneys, but did not remember who received them; that he made no record of the delivery or receipt of such copies; that he also offered copies to the defendants, and they refused them, saying they had attorneys to attend to their case. Each of the six attorneys appearing for the defendants testified that he had not received a copy of the indictment. The court, after hearing the testimony, overruled the objection, and the ruling is assigned as error.

Our Constitution (section 20, Bill of Rights) prescribes: "In all criminal prosecutions the accused \* \* \* shall be informed of the nature and cause of the accusation against him and have a copy thereof. \* \* \*" The defendants had a constitutional right to have copies of the indictment. It follows that there was error as contended by counsel, unless the defendants could and did waive this right. A defendant in a capital case is not to be presumed to waive any of his constitutional rights, but that he may waive such rights has often been judicially determined. In the case of *Starr v. State*, 5 Okl. Cr. 440, 115 Pac. 356, it was said that where a constitutional right in a criminal cause is largely for the benefit of the accused, or in the nature of a personal privilege, the law is well settled that an accused may waive such right. Mr. Bishop says: "Any right given by statute or otherwise to the defendant for his benefit, such as to have a copy of the indictment, or a list of the jurors, or of the witnesses against him, at a particular time or before trial, may be waived, either in words, or by omitting to apply for the thing. And if, for example, the copy of the indictment furnished him is incomplete, he cannot first object after trial." Bishop's *New Crim. Proc.* par. 128. That there was a waiver by the defendants of this right can be neither doubted nor denied. It appears from the record that the defendants were enlarged on bail more than three months preceding the trial, and they could at any time have demanded copies of the indictment. The record shows no application for the benefit of such privilege. On the other hand, it shows that the clerk tendered the defendants

copies of the indictment which they refused to accept. The language of the provision is permissive, "The accused shall have a copy thereof"; that is, he may have if he request. If he does not request, then he cannot complain that a copy was not forced upon him. It was held in the case of *Blair v. State*, 4 Okl. Cr. 359, 111 Pac. 1003, that, unless the defendant demands a copy of the accusation before announcing ready for trial, his right to a copy is waived.

The objection was properly overruled.

Objections were made and exceptions taken to rulings in admitting and rejecting evidence. These rulings are collectively assigned as error.

[2] The first is error in admitting evidence that the defendants were drinking intoxicating liquor shortly before the homicide. We have no difficulty in determining that the ruling of the court was undoubtedly correct. Prof. Wigmore says: "Intoxication, as a mental condition of temporary stupefaction, may be evidenced circumstantially in the same general modes that are available for mental capacity or condition in general. (1) It may be evidenced by the person's conduct. (2) It may be evidenced by predisposing circumstances; i. e. by the drinking of intoxicative liquor. (3) It may be evidenced by his prior or subsequent condition of intoxication within such a time that the condition may be supposed to be continuous." Intoxication, if it is of such a degree as to deserve the name, involves a numbing of the faculties so as to affect the capacity to observe, to recollect, or to communicate; and is therefore admissible to impeach." Wigmore on Evidence, §§ 235, 933. It is said by the Supreme Court of Illinois in the case of *Miller v. People*, 216 Ill. 309, 74 N. E. 743 (this was a murder case; Miller as village marshal shot and killed a man, and his plea was self-defense): "In order to arrive at a just and proper conclusion as to the reasonableness of the acts of the plaintiff in error on the occasion in question, we think it not at all improper that the jury should have known that he was intoxicated, if such was the fact. His ability to see and comprehend what was occurring, and to form therefrom a reasonable and well-grounded belief that he was in danger of losing his life or suffering great bodily harm, would be affected, in a greater or less degree, by intoxication. A man in a state of intoxication may, because therefrom, misconceive his situation and surroundings, misapprehend the acts and conduct and purposes of others, and arrive at a wholly unfounded, irrational, and unjustifiable belief of personal danger which would not find lodgment in his mind if his mental faculties were not in an abnormal condition."

The defendants claim that as peace officers they were preserving the peace when

the deceased made a murderous assault upon them, and in necessary self-defense they killed him. It is a matter of common knowledge that the effect of intoxicating liquor upon the human mind is to magnify grievances, whether real or imaginary, and this evidence was competent for the purpose of aiding the jury in determining whether the defendants acted under the influence of a well-grounded and reasonable belief that they were in imminent danger of losing their lives or receiving great personal injury, or whether the killing was the result in whole or in part of a drunken disregard for human life.

J. M. Wilson, as a witness for the defendants, testified that he was a justice of the peace in and for Coalgate township, Coal county; that the defendant Kennedy was constable and marshal of Coalgate township and city, and the defendant Stouse was his deputy at the time of the homicide; that Kennedy was a prudent officer, and never drew his gun in making an arrest; that he chided him on different occasions for not using his gun enough; that he had known Kennedy for three years, and knew his general reputation and character for peace and quiet, and as being a law-abiding citizen, and that it was good. On cross-examination he was asked to state if he ever heard any person or persons talking about Kennedy and his mistreatment of his wife, and saying that he had handcuffed her, and whipped her with the belt of his pistol, and he answered, "I have heard it from one or two persons."

The wife of the defendant Kennedy was next called as a witness for the defendants, and was permitted to testify, over the objection of the state, that the deceased and his family caused her to leave the defendant, her husband, on two occasions, and that the defendant was a good husband to her, and that he did not whip her. On cross-examination she was asked if on one of the occasions of leaving her husband she went to the home of the deceased, and exhibited bruises on her body to her sister, the wife of the deceased, and her mother, Mrs. England, and told them that her husband had whipped her with a pistol belt, and she answered, "No, sir." We cannot conceive upon that theory the testimony of Mrs. Kennedy was admissible. The inquiry upon the cross-examination of Wilson, the only character witness testifying, was directed to the witness hearing reports of acts of misconduct, and not of the fact of misconduct.

[3] As the general reputation of any person is established by the opinions of witnesses as to the general estimation of his character, it is permissible upon cross-examination of a character witness to show the sources of his information and particular facts may be called to his attention, and

he may be asked if he ever heard of them. This is permissible, not for the purpose of establishing the truth of these facts, but to test the credibility of the witness, and to ascertain what weight or value is to be given to his testimony.

The state in rebuttal was permitted to introduce the testimony of Mrs. Bunch, the wife of the deceased, and Mrs. England, the mother of Mrs. Kennedy, to the effect that Mrs. Kennedy on the occasions of leaving her husband came to their home and exhibited bruises on her body, and said they had been made by her husband whipping her. Counsel insist that the court erred in admitting this rebuttal testimony. We believe that, in view of the fact that the collateral issue was raised by the evidence introduced on the part of the defendants, they cannot now be heard to complain of an erroneous ruling of the court thereon.

[4] It is also insisted that the court erred in refusing to permit the defendants to introduce material evidence in their behalf. From a careful examination of the record we are led to believe that the rulings of the court on the admission of evidence were more than favorable to the defendants. It is impossible to determine from the record what evidence was intended to be introduced, because no offer to prove was made.

"When objections to a question are sustained, if it is desired to reserve the question as to the competency of the testimony sought to be introduced, for the determination of this court, the record must contain some showing as to what the testimony of the witness would have been had he been permitted to answer the question. Otherwise this court cannot determine as to whether the defendant has been injured by the ruling of the trial court." *White v. State*, 4 Okl. Cr. 143, 111 Pac. 1010. The record shows that the defendants took no exception to any of the instructions given, and the instructions criticised in plaintiffs brief were not set out in the defendants' motion for a new trial. The instructions as given by the court fully and fairly present the law of the case.

Error is assigned on the refusal of the court to give a requested instruction on the right of a third person, viewing an attack made by one person on a second person to slay the attacking party, when it appears necessary to save life or prevent great bodily injury. This instruction was properly refused. It was not in the abstract a correct statement of the law, and neither of the defendants claimed or testified that he shot in defense of the other; both testifying that the deceased shot at each of them before either of them shot the deceased.

[5] Error is assigned upon the order of the court refusing to set aside the verdict and denying a new trial. One of the grounds of the motion is: "That prior to the time of the

trial and subsequent to the time that the crime is alleged to have been committed in this case, Sam McCutchen, one of the jurors who tried the case, was heard to say that he wanted to get on the jury that tried this case, and hoped that he would be able to get on the jury that tried this case, and that these defendants ought to be hung; that if he was successful in getting on the jury that he would hang the defendants, if possible, or that he would give them 99 years in prison or the most severe punishment that he could cause to be inflicted upon them; that he was very bitter in his remarks against them, and he would endeavor to inflict the punishment aforesaid regardless of what law or the testimony was; that at the time that Sam McCutchen was accepted on said jury neither the defendants nor their attorneys knew that he had made such statements, or that he had formed or expressed any opinion, or had any fixed opinion as to the guilt or innocence of the defendants, or that he had ever expressed any desire to be on said jury; that if said juror made the statement aforesaid, and had a fixed purpose in his mind as aforesaid, that he was at the time that he was accepted on said jury an incompetent juror, and that the defendants could not have been tried by a fair and an 'impartial' jury as provided by the Constitution of the state of Oklahoma; that the affidavit of R. O. Parish sustaining the allegations aforesaid is hereto attached, marked 'Exhibit A.'" In reply to said motion and the affidavit thereto attached, the state filed the controverting affidavit of said juror Sam McCutchen. On the issue of fact thus raised testimony was taken, and the juror Sam McCutchen testified that he had never made any such statements. It is contended by counsel that: "It is error in a capital case for the trial court to refuse to grant a new trial when it appears that one of the jurors who tried the case had formed and expressed an opinion adverse to accused, when such juror has qualified on his voir dire, and his disqualification is unknown to the accused or their counsel at the time such juror is accepted." The identical question here presented was considered in the case of *Smith v. State*, 6 Okl. Cr. —, 114 Pac. 350, wherein this court said: "These affidavits presented a question of fact which was submitted for determination to the trial court. The judge who tried this case for many years had resided in Coal county, and was in a much better condition to determine as to whether the juror or the parties whose affidavits were filed in behalf of the appellant were the most credible. The mere fact that two parties attempted to impeach a juror does not by any means settle the question of credibility as between such parties and the juror. If it did, but few verdicts could be



sustained, because in almost any case it would be possible to find two or more persons who would make affidavits impeaching a juror. In passing upon this very question, the Supreme Court of Texas in the case of *Gilleland v. State*, 44 Tex. 357, said: "It is true that there are two affidavits in support of the motion and one in rebuttal, but we do not think that the decision of the question presented by the motion should necessarily depend upon the mere number of affidavits on one side over the other." The question of credibility was one to be determined by the trial court; and, in the absence of a showing that this discretion was abused, it cannot be reviewed here. There is nothing in this record to indicate any abuse of discretion on the part of the trial judge."

[6] It is well settled that, as a general rule, a verdict will not be set aside for reasons that would be sufficient to disqualify on a challenge for cause which existed before the juror was sworn, but which was unknown to the accused until after the verdict, unless it appears from the whole case that the accused suffered injustice from the fact that the juror served in the case. The juror denies that he made any such statement, and the verdict returned, not only corroborates him, but is almost conclusive of the fact that the defendants were tried by a fair and impartial jury.

Upon a careful consideration of the whole case, we find no error prejudicial to the substantial rights of the defendants.

Wherefore the judgment of the district court of Coal county is affirmed.

FURMAN, P. J., and ARMSTRONG, J., concur.

#### RAGLAND v. STATE.

(Criminal Court of Appeals of Oklahoma. Dec. 18, 1911.)

(*Syllabus by the Court.*)

#### CRIMINAL LAW (§ 1159\*)—APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

The credibility of witnesses and the weight or value to be given to their testimony is a question solely for the jury's determination, and to reverse a judgment for the reason that the verdict is contrary to the evidence this court must find as a matter of law that the evidence is insufficient to warrant the conviction.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 8074-8083; Dec. Dig. § 1159.\*]

Appeal from Texas County Court; W. C. Crow, Judge.

Carl Ragland was convicted of a misdemeanor, and appeals. Affirmed.

Wiley & Edens and J. E. Breslin, for plaintiff in error. Smith O. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. The plaintiff in error was convicted in the county court of Texas county, and on May 10, 1910, was sentenced to serve a term of three months in the county jail and to pay a fine of \$50, on an information which charged that Carl Ragland, did on or about the 7th day of July, 1909, "commit the crime of carrying a deadly and dangerous weapon openly with the intent and for the avowed purpose of injuring his fellow men in the manner and form as follows, to wit: Did then and there willfully, maliciously, and unlawfully carry openly a dangerous and deadly weapon, to wit, a shotgun, with the intent of injuring his fellow man, T. H. Latham." From the judgment and the order denying a new trial this appeal is taken.

The only question presented is: "That the verdict is contrary to the evidence and the law." The testimony shows that T. M. Latham, sheriff of Texas county, with J. V. Farr, city marshal of Guymon, arrested the defendant while he was driving up and down the streets of Guymon in a surrey with a loaded shotgun; that upon his arrest he stated to the sheriff that he was going to kill him—that they both could not live in the same county. It was further shown that shortly before his arrest he had announced that he intended to kill Sheriff Latham. The defendant, testifying on his own behalf, denied that he had made any threats to kill the sheriff; that at the time he was preparing to go upon a hunting trip. Joe Vaney testified that the defendant called him up by phone and ordered a team to go hunting, and that he delivered the rig to the defendant shortly before he was arrested.

The provision of the Penal Code under which this conviction was had is as follows (section 2751, Snyder's St. 1909): "It shall be unlawful for any person in this state to carry or wear any deadly weapons or dangerous instrument, whatsoever, openly or secretly, with the intent or for the avowed purpose of injuring his fellow man." There was testimony showing the intent and avowed purpose of the defendant in carrying the shotgun, and, while there is some conflict, the testimony was with proper instructions submitted to the jury, and the verdict of the jury on the questions of fact is conclusive upon this court. It is no more the province of an appellate court than of the trial court to determine controverted questions of fact arising upon conflicting evidence. Neither can lawfully usurp the functions of the jury, and neither can substitute its judgment for that of the jury, where there is a conflict in the evidence. The credibility of the witnesses and the weight or value to be given to their testimony is a question solely for the jury's determination, and to reverse a judgment for the reason that the verdict is con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

trary to the evidence this court must find that as a matter of law the evidence is insufficient to warrant the conviction. On the record before us there is nothing for this court to do, other than to affirm the judgment.

The judgment of the county court of Texas county is therefore affirmed.

FURMAN, P. J., and ARMSTRONG, J., concur.

### HENRY v. STATE.

(Criminal Court of Appeals of Oklahoma.  
Dec. 11, 1911.)

(Syllabus by the Court.)

#### 1. WITNESSES (§§ 329, 372\*)—EXAMINATION—CROSS-EXAMINATION—SCOPE AND EXTENT.

On cross-examination a witness may be asked any question the answer to which would tend to test his means of knowledge, his intelligence, the reliability of his memory, or his bias, prejudice, or interest in the case.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1104, 1105; Dec. Dig. §§ 329, 372.\*]

#### 2. WITNESSES (§ 317\*)—INSTRUCTIONS—CREDIBILITY.

An instruction is improper which directs a jury that, if they find from the testimony that any witness has willfully testified falsely as to any material fact in the case, they are at liberty to disregard the testimony of such witness except in so far as the same may be corroborated by other credible evidence; the true rule being that the jury are the exclusive judges of the credibility of witnesses and the weight of the evidence, and the value to be given to their testimony, and they may, if they think proper, reject the whole of the testimony of such witness, who they may find has willfully testified falsely to a material fact, or may give it such weight where it has been corroborated by credible evidence as they may deem it entitled to have.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1080-1083; Dec. Dig. § 317.\*]

Appeal from Superior Court, Oklahoma County; Edward D. Oldfield, Judge.

Newton Henry was convicted of murder, and appeals. Reversed and remanded.

Forrest L. Hughes and Moman Prulett, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. First. Appellant, the deceased, and Lucy Carrington, the prosecuting witness, were all negroes and were acquainted with each other prior to the date of the homicide. In the city of Oklahoma, in what is called "Packingtown," there is a negro hotel which had been conducted by the prosecuting witness, but which at the time of the homicide was being conducted by appellant. The state proved that on the day of the homicide Charles Lucas was at this hotel for his

washing; that while there a difficulty arose in which he lost his life at the hands of appellant. There was only one witness to the homicide besides appellant; that was Lucy Carrington. Her testimony, if believed by the jury, made out a case of murder. When she was on the stand testifying in behalf of the state, for the purpose of showing her interest in the trial and thereby affecting her credibility, counsel for appellant attempted upon cross-examination to prove that said witness was a married woman, was living separate and apart from her husband, and that for three weeks prior to the homicide she has been living with the deceased and occupying a bedroom with him as his wife. All this was objected to by counsel for the state upon the ground that it was not proper cross-examination. This objection was by the court sustained, to which counsel for appellant excepted.

[1] The reason why the Constitution of the state provides that in all criminal cases the accused must be confronted by the witnesses who testify against him is that the defendant may exercise the right of cross-examination. The right of confrontation is given for the purpose of enabling a defendant to test the means of knowledge of a witness, his intelligence, the reliability of his memory, and his bias, prejudice, or interest in the case. The right of proper cross-examination is everywhere recognized as one of the most important and valuable rights possessed by a defendant and is just as important to him as the right to examine a witness against him in chief is to the state. Necessarily the object of cross-examination is to break or weaken the force of the testimony given by the witness on his examination. From this it follows that any matter which would have a tendency to lessen the credibility of a witness is a proper matter of inquiry on cross-examination. The general rule, therefore, is that anything which tends to show bias or prejudice on the part of the witness or anything which shows his friendship or enmity toward either of the parties is commonly a proper subject of inquiry; so, also, is anything which tends to show that in the circumstances in which he is placed he has a strong temptation to swear falsely. The situation of the witness in regard to the result of the trial, his interest therein, or inclination for or against either of the parties may be shown. Mr. Wigmore says that the right of cross-examination is "beyond doubt the greatest legal engine ever invented for the discovery of the truth." In the case at bar the witness Lucy Carrington was the only eyewitness introduced for the state. It was principally on her testimony that the conviction of appellant was obtained. If it was true that she had abandoned her husband and was living with deceased as his wife, this fact would have a strong tendency to indicate bias on her part

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in favor of the deceased, and was therefore a proper subject of inquiry on behalf of appellant. There was error in the action of the court in refusing to allow this inquiry to be made.

[2] Second. Upon the trial of the cause, among other things, the court instructed the jury as follows: " \* \* \* The court instructs you that, if you believe that any witness has willfully testified falsely as to any material fact, you are at liberty to disregard the testimony of such witness except in so far as the same may be corroborated by other credible evidence." In the case of *Charles Hast v. Territory*, 5 Okl. Cr. 162, 114 Pac. 261, a conviction was affirmed where an instruction similar to the above had been given; but in that case no exceptions were reserved to the instruction and the attention of the court was not directly called to it. But, even if this had been done, the conviction would have been sustained, regardless of this instruction, upon the ground of harmless error, because the facts stated in that opinion clearly show that the guilt of Hast was conclusively shown by testimony other than that of the prosecuting witness. This case presents an entirely different question. Here the jury could not legally have convicted appellant, unless they had given full faith and credit to the testimony of Lucy Carrington. This instruction is open to the objection that it might have created the impression upon the minds of the jurors that, although they may have found that Lucy Carrington had testified falsely to any material fact in the case, yet if they further found that her testimony was corroborated by other credible evidence, they would be forced to accept and act upon it. In a close case like this we do not think that the above instruction should be given. The better and safer plan would have been to instruct the jury as follows: "If you believe from the evidence that any witness who has testified in this case has willfully and knowingly sworn falsely to any material fact, then you may, if you think proper, reject the whole of the testimony of such witness, or you may give such weight to the testimony of such witness on other points as you may deem it entitled to have. You are the sole judges of the credibility of the witnesses and the weight and value to be given to their testimony." See *Coleman v. State*, 6 Okl. Cr. —, 118 Pac. 594. Under the evidence in this case we can well see how the jury may have been misled to the injury of appellant by the errors above pointed out, and although it is true that appellant is only a poor, ignorant negro, and is dependent upon the charity of his attorneys for his defense, yet he is entitled to and will receive at the hands of this court the same consideration as though he were the wealthiest and most influential man in the state.

The judgment of the lower court is therefore reversed, and the cause is remanded for a new trial.

ARMSTRONG and DOYLE, JJ., concur.

#### DREW et al. v. CITY OF BUTTE.

(Supreme Court of Montana. Nov. 11, 1911.)

#### 1. MUNICIPAL CORPORATIONS (§ 1034\*) — CHANGE OF GRADE OF STREET—DAMAGES—COMPLAINT—"BODY POLITIC AND CORPORATE."

A complaint, in an action for damages by a change in the grade of a street, which alleges that the defendant is a municipal corporation, organized and existing under the laws of the state, and that in a specified year the defendant committed the act causing the injury complained of, sufficiently alleges that the city which committed the act was at that time a municipal corporation and a "body politic and corporate," within Rev. Codes, § 3202.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 2206; Dec. Dig. § 1034.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 820, 821.]

#### 2. EVIDENCE (§ 31\*)—JUDICIAL NOTICE—EXISTENCE OF MUNICIPAL CORPORATION.

Under Rev. Codes, § 7888, requiring courts to take judicial notice of legislative acts, the court will take judicial notice of the act incorporating the city of Butte, and the act making it the county seat of a county, and the statute bringing it within the general municipal corporation act, and that it was a municipal corporation in 1908.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 40, 41; Dec. Dig. § 81.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 404\*) — CHANGE OF GRADE OF STREET—DAMAGES—COMPLAINT—EVIDENCE.

A complaint, in an action against a city for damages by a change in the grade of a street, which described the property as a designated lot in a specified block of a certain addition to the city, according to a private plat, and that the lot adjoined a street named, and a deed, describing the lot by metes and bounds, and by the use of the same number in the same block "of reserve portion" in the addition mentioned, sufficiently described the property, where the evidence showed that the plat of the addition had been filed; that at the time the plat was filed a part of the land embraced within it was acre property, and that subsequently such part was subdivided into lots and blocks, and a private plat made; that plaintiff's property was a part of the acre property subdivided, which was further identified by street number in the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 993; Dec. Dig. § 404.\*]

#### 4. EVIDENCE (§ 358\*) — DOCUMENTS — PRIVATE PLAT.

Where the complaint, in an action against a city for damages by a change in the grade of a street, described the property as a designated lot in a specified block in an addition to the city according to a private plat, the private plat, showing the location of plaintiff's property with reference to other parts of the addition,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was admissible to aid in identifying plaintiff's property.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1500-1508; Dec. Dig. § 358.\*]

**5. MUNICIPAL CORPORATIONS (§ 404\*) — CHANGE OF GRADE OF STREET—DAMAGES—COMPLAINT—EVIDENCE.**

Where, in an action against a city for damages to property by a change in the grade of a street, the evidence showed that the plaintiff had been in possession of the property some time prior to the change of the grade, and had made improvements thereon, including the erection of a dwelling house, and his unrecorded deed, apparently produced by his counsel, was offered in evidence while he was testifying, there was sufficient evidence to connect plaintiff with the title.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 996; Dec. Dig. § 404.\*]

Appeal from District Court, Silver Bow County; Jno. B. McClernan, Judge.

Action by William J. Drew and another against the City of Butte. From a judgment for plaintiffs, defendant appeals. Affirmed.

H. Lowndes Maury, John A. Smith, and N. A. Rotering, for appellant. William Meyer, for respondents.

**HOLLOWAY, J.** This action was brought to recover damages for injuries to real property, occasioned by a change in the grade of a street. Plaintiffs recovered judgment, and the city appealed. The complaint alleges: "That the above-named defendant, the city of Butte, is a municipal corporation, organized and existing under the laws of the state of Montana." The answer of the city "admits that it is and was a municipal corporation, as charged in the complaint."

[1] 1. It is insisted that the complaint does not state a cause of action, in that it does not allege that the defendant was a municipal corporation in 1908, when the wrongful act was committed. The complaint names the defendant "the City of Butte." The city of Butte answered. In paragraph 7 of the complaint, it is alleged that in 1908 the defendant committed the act which caused the injury to plaintiffs' property. This is an allegation that in 1908 the city of Butte committed the act. In this state a city "is a body politic and corporate with the general powers of a corporation" (section 3202, Rev. Codes), and it would seem to follow that the statement in the complaint is a sufficient allegation that the city of Butte, which committed the act in 1908, was then a municipal corporation. *Clark v. North Muskegon*, 88 Mich. 308, 50 N. W. 254; *Crockett v. Barre*, 66 Vt. 269, 29 Atl. 147.

[2] By virtue of section 7888, Revised Codes, the courts take judicial notice of the act incorporating the city of Butte (Laws 1879, p. 77), the act making it the county seat of Silver Bow county (Laws 1881, p. 85), and the statute bringing it within the general municipal incorporation act (section 5032, Pol. Code 1895 [Rev. Codes, § 4841]); and in con-

formity with the great weight of authority we hold that judicial notice will be taken of the fact that during 1908 the city of Butte was a municipal corporation, existing under the laws of this state, and was the county seat of Silver Bow county. 16 Cyc. 909; *Bituminous Lime Rock P. & I. Co. v. Fulton*, 33 Pac. 1117; *City Council of Montgomery v. Wright*, 72 Ala. 411, 47 Am. Rep. 422; 1 *Dillon on Municipal Corporations*, § 84; 14 *Ency. Pl. & Pr.* 225.

[3] 2. Counsel for appellant contend that the description of plaintiffs' property in the complaint and in a deed offered in evidence is too indefinite to identify the property. The description given in the complaint is: "Lot number eleven (11) in block number nine (9) of the Hope addition to the city of Butte according to the private plat and survey thereof in the office of C. S. Passmore & Company, Butte, Montana. That said lot fronts on and adjoins Lewisohn street in said city of Butte." In the deed the lot is described by metes and bounds, starting from the northeast corner of lot 2, in block 9, of the Hope addition, and the description given is followed by this recital: "This tract is also known as lot number eleven (11) in block number nine (9) (private plat) of reserve portion of Hope addition to the city of Butte." The evidence discloses that the plat of the Hope addition has been filed with the county clerk and recorder of Silver Bow county; that at the time the plat was filed a portion of the land embraced within it was acre property; that afterwards this portion was subdivided into lots and blocks, and a private plat of it made; and that plaintiffs' property is a part of the acre property thus subdivided. The property was further identified as No. 912 Lewisohn street, in the city of Butte. We think the description is sufficient.

In *State ex rel. Arthurs v. Board of Commissioners of Chouteau County*, 118 Pac. 804, decided November 8, 1911, we had occasion to review at length the authorities upon this subject. A reference to that case is sufficient here. So far as disclosed by this record, there was not any special demurrer interposed to this complaint, nor, indeed, any general demurrer or objection to the introduction of evidence. The language of this court, in *Billings Realty Co. v. Big Ditch Co.*, 43 Mont. 251, 115 Pac. 828, is pertinent: "It may be admitted that if the execution to be issued upon a judgment rendered in this action would operate directly upon the land in question, as, for instance, in the case of the sale of the land itself, or if it was sought to enforce a tax or other lien, the description herein given might not be sufficiently specific to enable the proper officer to identify it; but in an action for damages for trespass,

<sup>1</sup> Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 99 Cal. xvii.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

where the property enters into the controversy only incidentally, much less particularity is required in describing it. All that the plaintiff is called upon to do is to inform the defendant, with reasonable certainty, of the location of the property upon which the trespass is alleged to have been committed, to the end that a defense may be made, or a plea of former adjudication thereafter interposed, if another action should be instituted for the same injury."

[4] 3. Exception is taken to the ruling of the trial court in admitting in evidence the private plat of C. S. Passmore & Co. The plat shows the location of plaintiffs' property with reference to the other portions of the Hope addition, and was admissible, not as an official document, but to aid in identifying the property, and upon the same theory that a pencil sketch, made by a witness while on the stand, to show the location of property with reference to some known object or permanent monument, would be admissible. The rule is recognized uniformly, and is stated in 17 Cyc. 412, as follows: "It is common practice in the courts to receive private or unofficial maps, diagrams, models, or sketches, for the purpose of giving a representation of objects and places which generally cannot otherwise be as conveniently shown or described by witnesses, and, when proved to be correct or offered in connection with the testimony of a witness, they are admissible as legitimate aids of the court or jury."

4. The evidence is sufficient to show that plaintiffs' property is a part of the Hope addition to Butte, and within the city limits. Upon the trial counsel for the city admitted that the defendant did the work of which complaint is made.

[5] 5. It is insisted that plaintiffs did not connect themselves with the title to the property. It appears from the evidence that this property had formerly been acquired by C. S. Passmore and others. Plaintiffs offered in evidence a deed to them from Passmore and others, purporting to convey this property. The deed had not been recorded, and there was not any direct evidence offered that it had ever been delivered to plaintiffs. This loose, careless manner of trying a case is open to severe criticism; but in the present instance we do not feel justified in reversing the judgment, since it does appear that plaintiffs have been in possession of the property since 1907, have erected a dwelling house, and made other improvements upon the property. Furthermore, the deed was offered in evidence while plaintiff William Drew was on the witness stand, was apparently produced by plaintiffs' counsel, and it would seem to be a fair inference that plaintiffs were in possession of the deed at the time it was produced for identification. The objections urged are highly technical. None of

them goes to the merits of the controversy.

We do not find any reversible error in the record. The judgment and order denying defendant a new trial are affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

O'DONNELL et al. v. CITY OF BUTTE  
(Supreme Court of Montana. Nov. 11, 1911.)

1. PLEADING (§ 372\*)—GENERAL DENIAL—EFFECT.

A general denial puts in issue every material allegation constituting plaintiff's cause of action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1215; Dec. Dig. § 372.\*]

2. PLEADING (§ 372\*)—GENERAL DENIAL—ALLEGATIONS NOT PUT IN ISSUE.

A general denial does not raise an issue upon an allegation that a certain person is the duly appointed, qualified, and acting guardian of minor plaintiffs.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 1215; Dec. Dig. § 372.\*]

3. PLEADING (§ 372\*)—GENERAL DENIAL—ALLEGATIONS PUT IN ISSUE.

In a suit against a city for damages caused by changing a street grade, an answer containing a general denial, followed by an affirmative defense, stating that plaintiffs' land was located within the city, did not raise issue on plaintiffs' allegations that the property was so located.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 372.\*]

4. PLEADING (§ 93\*)—DEFENSES—INCONSISTENCY.

A defendant may plead inconsistent defenses, if they are not so incompatible as necessarily to render one absolutely false.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. § 93.\*]

Appeal from District Court, Silver Bow County; J. M. Clements, Judge.

Action by Mary O'Donnell and others against the City of Butte. From a judgment for plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

H. Lowndes Maury, John A. Smith, and N. A. Rotering, for appellant. Breen & Jones, for respondents.

HOLLOWAY, J. This action was brought by Mary O'Donnell and certain minors, by Mary O'Donnell, their guardian, to recover damages for injuries to real estate, caused by a change of grade in the street upon which the plaintiffs' property abuts. The answer admits the corporate existence of the city, the plaintiffs' ownership of the land, and "denies generally each and every allegation contained in plaintiffs' complaint not herein specifically admitted or denied." This was followed by an affirmative defense. Upon the trial plaintiffs failed to introduce any evidence of the appointment of Mary O'Donnell as guardian of the minors, or that the land was situated within the cor-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

porate limits of Butte. The trial resulted in a verdict and judgment in favor of plaintiffs. The defendant city appeals from the judgment, and from an order denying it a new trial.

Two questions only are presented, and these arise upon a consideration of the evidence. It is urged that the evidence is insufficient to support the verdict, in this: (a) There is not any evidence that Mary O'Donnell was appointed guardian of the minor plaintiffs; (b) there is not any evidence that the property injured is situated within the city of Butte.

[1, 2] 1. In the complaint it is alleged that Mary O'Donnell is the duly appointed, qualified, and acting guardian of the minors, who are her coplaintiffs. The parties hereto apparently treat the denial above as a general denial. Strictly speaking, it is not; but for present purposes assume that it is, and the question arises, Does a general denial raise an issue upon this allegation? It is the rule that a general denial puts in issue every material allegation constituting the cause of action. *Pomeroy's Code Remedies*, § 542, \*666; *Bliss on Code Pleading*, § 325. An allegation that minor plaintiffs have a duly appointed guardian is not any part of the statement of their cause of action, but rather a statement of the authority by which they appear. The action is not by the guardian. The guardian is not the plaintiff, but the action is by the minors, who are required to appear through or by a guardian (*Rev. Codes*, § 6481), so that the question is one of capacity to sue. Section 6534, *Revised Codes*, enumerates the grounds of demurrer. Subdivision 2 provides that one ground of demurrer is "that the plaintiff has not the legal capacity to sue." Section 6538 provides: "When any of the matters enumerated in section 6534 do not appear upon the face of the complaint, the objection may be taken by answer." Section 6535 provides that objection under subdivisions 1, 3, or 6 of section 6534 may be stated in the language of the Code; then follows this sentence: "An objection taken under either of the other subdivisions must point out specifically the particular defect relied upon." When these several provisions are read together, it would seem to follow that the objection that plaintiff lacks legal capacity to sue cannot be raised by a general denial. The lack of capacity does not appear from the face of the complaint. Let us assume that Annie O'Donnell, an infant, brought this action in her own name, but did not plead her infancy; defendant could only raise the question of her want of capacity by pleading specially that she is under the age of majority. The objection may be taken by demurrer, if the fact of infancy appears from the face of the complaint. If it does not so appear, the objection may be made by answer.

Section 6535, above, provides that the ob-

jection of want of capacity to sue cannot be raised by pleading in the words of the statute, but the objection must point out specifically the particular defect. It may be suggested that section 6535 deals primarily with a demurrer, but there is not any reason for a more specific designation of the defect by demurrer than by answer. In fact, the Code seems to contemplate that an objection of want of capacity to sue, defect or misjoinder of parties, or misjoinder of causes of action must be made by a pleading which specifically points out the defect relied upon, whether the pleading be a demurrer or an answer. There is not any distinction made between these grounds of objection, and we imagine that there cannot be found a lawyer who would insist that under our Code the objection or defect of parties or misjoinder of causes of action could possibly be raised under a general denial. While the authorities are somewhat in conflict upon this question, the decided weight of authority supports the view we have announced. 22 Cyc. 686; *Ewen v. Chicago & N. W. Ry. Co.*, 38 Wis. 613; *Dillaye v. Parks*, 31 Barb. (N. Y.) 132; *Cheatnam v. Riddle*, 12 Tex. 112; *Downs v. McCombs*, 16 Ind. 211; *Rogers v. Marsh*, 73 Mo. 64; *Schuek v. Hagar*, 24 Minn. 339; *White v. Moses*, 11 Cal. \*70; *Bank v. Boyd*, 99 Cal. 604, 34 Pac. 337; *Blackwell v. British-American M. Co.*, 65 S. C. 105, 43 S. E. 395. Since the objection to the capacity of these minor plaintiffs to sue was not taken in the manner provided by the Code, it is deemed to be waived. Section 6539, *Rev. Codes*.

Appellant relies upon the decision in *Johnson v. Southern Pacific Co.*, 150 Cal. 535, 89 Pac. 348, but the question we are considering was not even before the court in that case, and was not decided. There the court had before it evidence of the appointment of a guardian ad litem for a minor 16 years of age upon the petition of the guardian alone, without permitting the minor to exercise the right of nomination given her by law. Under these circumstances, the court held that the appointment was irregular; but there is not any suggestion in the opinion that an issue was attempted to be made upon the allegation of the appointment by a general denial. All that appears is, "An issue was joined upon this allegation by the answer."

[3, 4] 2. The complaint alleges that plaintiffs' property is within the corporate limits of the city of Butte. It is insisted that this allegation is traversed by the general denial. Immediately following the paragraph of the answer in which is found the denial claimed to be a general denial, there are set forth allegations in the nature of an affirmative defense, in which it is stated that plaintiffs' land is within the city. Plaintiffs did not offer any evidence in support of their allegation that their property is

within the city, and did not offer in evidence the affirmative defense contained in the answer of the defendant city; and it is now claimed that they failed to prove one of the material allegations of their complaint.

Appellant makes the mistake of assuming that its answer contains a general denial. Section 6540, Revised Codes, enumerates the various matters of which an answer may consist. They are: (1) A general denial; (2) special denials; (3) denial of knowledge or information; (4) specific admissions or denials, coupled with a general denial of all allegations not specifically admitted or denied; (5) new matter constituting a defense or counterclaim. Instead of this answer containing a general denial of all the allegations of plaintiffs' complaint, it denies only those allegations not specifically admitted. An allegation in an answer that a fact stated in the complaint as true is true, or the affirmative statement in the answer of a fact which is likewise pleaded in the complaint, is an admission of the truth of the allegation of the complaint, and proof is not necessary. If it be said that this determination practically denies to a defendant the right to interpose inconsistent defenses, our reply is that the defendant does not have such right unqualifiedly. The rule is established in this state that "the defendant may plead inconsistent defenses, provided they are not so incompatible as necessarily to render one or the other absolutely false." *Johnson v. Butte & Superior Copper Co.*, 41 Mont. 158, 108 Pac. 1057.

If the denial in this answer above be construed as a denial that plaintiffs' property is within the city of Butte, then such denial is so far inconsistent with the affirmative matter that one or the other is absolutely false. However, we will not hold that the party verifying this answer committed perjury; rather we will give the answer as a whole that construction which is entirely reasonable, viz., that the denial above was intended only to put in issue those allegations which do not appear from the answer, as a whole, to be admitted to be true. Under this construction, the allegation of the complaint that plaintiffs' property is within the city of Butte is admitted, and did not require any proof.

We do not find any error in the record. The judgment and order are affirmed. Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

#### THOMAS v. THOMAS et al.

(Supreme Court of Montana. Nov. 11, 1911.)

#### 1. MORTGAGES (§ 502\*)—FORECLOSURE—SALE—NECESSITY OF EXECUTION.

Rev. Codes, § 6861, provides for foreclosure by action, and directs that the court's judgment

may direct the sale. Section 6817 provides that, when a judgment is for money or the possession of real or personal property, the same may be enforced by execution, and, when the judgment requires a sale of property, it may be enforced by a writ. *Held*, that section 6817 has no application to sales in foreclosure, the court having inherent power to order such sale without a formal execution, the sheriff deriving his power to sell from the decree, and not from a so-called order of sale.

[Ed. Note.—For other cases, see *Mortgages*, Dec. Dig. § 502.\*]

#### 2. MORTGAGES (§ 502\*)—FORECLOSURE—ORDER OF SALE—DEFECTS.

Since an officer's authority to sell land on foreclosure emanates from the decree, and not from a so-called order of sale issued thereon, the fact that such order ran in the name of "the People of the State of Montana," instead of "the State of Montana," the style required for process by Const. art. 8, § 27, was immaterial.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1489; Dec. Dig. § 502.\*]

#### 3. MORTGAGES (§ 512\*)—FORECLOSURE—SALE—SINGLE TRACT.

Where property is described in a mortgage as a single tract, it may properly be so sold in proceedings to foreclose, unless the court directs a different method of procedure.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1515; Dec. Dig. § 512.\*]

#### 4. MORTGAGES (§§ 512, 538\*)—FORECLOSURE—SALE IN GROSS.

Rev. Codes, § 6830, providing that when real property, consisting of several known lots or parcels, is sold under execution, they must be sold separately, is directory only, so that a sale in gross is voidable only, and not void nor open to collateral attack.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1515, 1559; Dec. Dig. §§ 512, 538.\*]

#### 5. MORTGAGES (§ 512\*)—FORECLOSURE—SALE—PARCELS.

Where a mortgage covered two different pieces of property, on which were various buildings used for business and residence purposes, and certain of the buildings were built across the line between the two tracts, the sheriff, on making the sale, was not bound to sell each building and the ground necessary to support it as a separate parcel, but properly sold the entire property en masse.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1515; Dec. Dig. § 512.\*]

Appeal from District Court, Silver Bow County; J. B. Poindexter, Judge.

Suit by Mattie A. Thomas against Arthur Thomas and others. From an order granting a writ of possession, defendants appeal. Affirmed.

Baldwin & Baldwin, for appellants. Howell & Davis, for respondent.

SMITH, J. On November 9, 1908, a decree of foreclosure of a mortgage held by the respondent on certain real property of the appellants was entered in the district court of Silver Bow county. On November 14, 1908, an order of sale, containing a copy of the decree, was issued to the sheriff. This order of sale ran in the name of "the People of the State of Montana." The sheriff sold the prop-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

erty en masse to the respondent, for the amount of the mortgage debt. The decree provided that the mortgaged property "be sold, after due notice, at public auction by the sheriff of Silver Bow county in the manner prescribed by the laws of Montana for the sale of real estate under execution." On December 15, 1909, the sheriff issued a deed to the purchaser. On January 28, 1910, the appellants being still in possession of a portion of the premises, the respondent filed with the court a petition setting forth the facts heretofore recited, and praying that she be put in possession. The appellants filed an answer, in which they alleged, in substance, that the sale was void for two reasons: (1) Because the order of sale did not run in the name of "the State of Montana"; and (2) because the premises consisted of several known lots and parcels of land which were not sold separately. At the hearing the district court made the following finding of fact, among others: "That the said property covered by said mortgage and described in said judgment consisted of two adjoining tracts of land upon which were several buildings used for business and residence purposes, one tract being a portion of the Silver Hill lode, and the other tract being lot 1 of block A of the Belle of Butte addition. Certain buildings were built across the line between said tracts, such buildings facing the west, and said division line running north and south. That to have sold said lot 1 in block A of the Belle of Butte addition separate from the Hill tract would have divided such buildings through the center, practically rendering each portion of the buildings so divided useless. That it was more beneficial to the said parties to said action to sell said tracts of land en masse than to sell the same separately as described in said mortgage." The court concluded that the respondent was entitled to the relief prayed for, and entered an order accordingly. The appeal is from the order.

[1] 1. Section 6861, Revised Codes, provides (in part): "There is but one action for the recovery of debt, or the enforcement of any right secured by mortgage upon real estate or personal property, which action must be in accordance with the provisions of this chapter. In such action the court may, by its judgment, direct a sale of the incumbered property, and the application of the proceeds of the sale, and the payment of the costs of the court and the expenses of the sale, and the amount due the plaintiff." This section is found under the chapter heading: "Action for the Foreclosure of Mortgages." Under the chapter heading, "Executions," we find section 6817, Revised Codes, which reads as follows (in part): "When the judgment is for money or the possession of real or personal property, the same may be enforced by a writ of execution. \* \* \* When the judgment requires the sale of property, the same may be enforced by a writ reciting such judgment or the material parts thereof, and directing

the proper officer to execute the judgment, by making the sale and applying the proceeds in conformity therewith."

It is contended that the sale of real property under foreclosure proceedings can only be made pursuant to process, to wit, a writ of execution as provided in section 6817, Revised Codes, just quoted, or, as the process is called in this case, an order of sale, and that such writ or order must issue in the name of the state of Montana to conform to the mandates of the Constitution and the Codes. Section 27, art. 8, Const. Mont., provides: "The style of all process shall be 'the State of Montana.'" Section 6814, Revised Codes, provides: "The writ of execution must be issued in the name of the state of Montana." Section 6861, Revised Codes, supra, declares that an action to foreclose a mortgage must be in accordance with the provisions of that chapter. There is nothing in the remainder of the chapter relating to the point in question. The proceedings therein provided for are exclusive. The sale is directed by the court by its judgment, and such judgment is sufficient warrant to the sheriff for making the sale. The scope and purpose of the writ of execution referred to in section 6814, Revised Codes, supra, are set forth at length in the subsequent provisions of that section. We find there no reference to a writ of execution for the purpose of carrying a decree of foreclosure into effect. The distinction between an ordinary execution and an order of sale of mortgaged property is that in the one case there is nothing in the judgment itself giving the officer authority to sell the property of the debtor. Before he is authorized to proceed, he must have specific directions so to do, while in the second case the property to be subjected to the payment of the debt is already indicated by, and described in, the decree, coupled with a mandate that it be sold by the sheriff to satisfy the demands of the plaintiff. A mortgagor contracts, either expressly or by implication, that the mortgaged property may be sold to satisfy his debt. See sections 5731, 5736, 5742, Revised Codes. The property of the defendant against whom an ordinary money judgment is entered is subjected to the payment of the judgment by operation of law, and the sheriff may not proceed against any particular property without a warrant for so doing. The word "process" employed in the Constitution does not include the order of sale found in the decree of a court of equity in foreclosure proceedings.

The Supreme Court of California in *Newmark v. Chapman*, 53 Cal. 558, sustained a sale, in foreclosure proceedings, made by a sheriff having as his authority a certified copy of the decree only. The court held that such "process" was erroneous, but that the same was amendable, and would be considered as having been amended when attacked collaterally. The court there appears to hold that the proper practice would have



been to enforce the foreclosure decree by virtue of a writ of execution, citing a code provision similar to our section 6817, Revised Codes. Whether we regard the order of sale found in the decree as "erroneous process," but amendable, or as the only authority required by the officer, and complete in itself, the result to these appellants is the same; but we are of opinion that the better reasoning results in the conclusion that no order of sale or writ of execution is necessary to carry the judgment of the court into effect. We think section 6817, Revised Codes, has no application to sales of property in foreclosure proceedings. There can be no doubt of the inherent power of a court of equity to order a sale of mortgaged property without issuing a formal writ of execution, unless that power has been taken away by statute, and we find no such provision in our Codes. In the case of *Johnson v. Colby*, 52 Neb. 327, 72 N. W. 313, the court said: "It is said that the sale was either void or voidable because the order on which it was made does not run in the name of the state of Nebraska. It is unnecessary to consider whether or not the order sufficiently followed the constitutional provision as to the style of process, because a decree of foreclosure operates directly upon the mortgaged property, and is itself sufficient authority for the officer to proceed. It is unnecessary that any order aside from the decree should issue." We quote, also, from the case of *De Witt County N. Bank v. Mickelberry*, 244 Ill. 77, 91 N. E. 88, 135 Am. St. Rep. 304, as follows: "It has been held that, under a decree directing the sale of the premises sought to be redeemed, it is not necessary that an execution should be issued and levied on the premises. Under the chancery practice, no execution issues except on personal money decrees, but a decree of sale is itself the authority upon which the officer proceeds."

[2] It is determined, therefore, that the sheriff did not derive his power to sell from the so-called "order of sale" but from the decree itself, and that any defects in the order were immaterial, and should be disregarded.

[3] 2. It will be noticed that the decree provided, touching the manner of the sale, that it should be made "in the manner prescribed for the sale of real estate under execution." Section 6830, Revised Codes, provides (in part): "When the sale is of real property, consisting of several known lots or parcels, they must be sold separately." According to the description in the mortgage, the premises consisted of a portion of the Silver Hill lode mining claim, described by metes and bounds, and lot 1 of block A of the Belle of Butte addition to Butte. The Centerville road (so called), being a highway about 30 or 40 feet wide, runs through the property, and is covered by the mortgage. On the east side of this road there is

situated upon the mortgaged real estate a nine-room brick dwelling house, occupied by the appellant Arthur Thomas as a residence, and known as No. 800 North Main street. This building is inclosed by a fence on the south and east sides. On the north side there is a store building, and the house itself is on or very near what the witnesses termed the west line. Also on the east side of the road is a brick-veneered building known as Nos. 802 and 804 North Main street. On the west side of the road are situated a brick building known as No. 809 North Main street, and a 31-room frame building known as No. 819. In addition to the above, there is covered by the mortgage a large tract of ground with no improvements thereon.

No complaint is made that the property was not sold according to the two separate descriptions found in the mortgage, but the claim appears to be advanced that the buildings should have been separately sold, together with the ground upon which each stands. The reason for not selling according to the description found in the mortgage becomes apparent on inspection of the court's finding, heretofore quoted, to wit, the dividing line between the two parcels would intersect the buildings. It does not appear that the property was divided in any public records, into known lots or parcels in conformity to the position or situation of the buildings thereon. The fact that the buildings were so situated as to be susceptible of separate sale or that they were known as separate buildings is not of itself sufficient to overcome the presumption that the officer performed his duty. *Burton v. Kipp*, 30 Mont. 275, 76 Pac. 563. The sheriff, especially in the absence of the judgment debtor, would have no authority arbitrarily to so divide the property. The statute distinctly refers to known lots or parcels of real property, not known buildings. No duty devolved upon the officer to exercise his personal judgment as to how much land was necessary to accommodate each building, in the absence of express direction so to do. *Dates v. Winstanley*, 53 Ill. App. 623. And it may be suggested, if he had undertaken to set apart a portion of land to each building, there would still have remained a large unimproved area which could not theretofore have been known as a separate parcel.

Where property is described in a mortgage as a single tract, it may properly be so sold in proceedings to foreclose, unless the court directs a different method of procedure. *Field v. Brokaw*, 159 Ill. 560, 42 N. E. 877; *Patton v. Smith*, 113 Ill. 499; *Davis v. Dresbach*, 81 Ill. 393; *Durm v. Fish*, 46 Mich. 312, 9 N. W. 429; *Griswold v. Fowler*, 24 Barb. (N. Y.) 135.

[4] But the order of the court must be upheld for another reason. The statute requiring known pieces and parcels of land to be sold separately is merely directory.

At most, the sale in gross is voidable, and not void. It is not open to collateral attack.

[5] There is not anything in the statute to indicate an intention on the part of the lawmaking body to declare the sale void for failure to sell separately, and there are, we think, many reasons, founded in equitable considerations, why it should not be so considered. This court in *Burton v. Kipp*, supra, held that an execution sale was not void for failure to give notice thereof. Mr. Freeman in his work on Executions (vol. 2, § 296) says: "In truth, though the statute of the state expressly commands the officer to sell in parcels, the requirement is generally construed to be directory only. \* \* \* We have so far proceeded upon the theory that sales en masse, though voidable, are not void. This, we believe, necessarily follows from the fact that a person who deems himself prejudiced thereby may move for their vacation, and by his failure to do so he ratifies them, and precludes himself and others from insisting that they are void." We think this rule is founded in equity and good conscience, as well as legal reason. At most, the failure to sell separately is a mere irregularity, which may or may not result in prejudice to the defendant. If he deems himself aggrieved, he may move to have the sale set aside and the property resold, or he may proceed by bill in equity. Either method would constitute a direct attack upon the sale. But he ought not to be permitted to remain silent and inactive until demand is made for possession, and then resist such demand by collateral attack upon the proceedings leading up to the sale. See *Willard v. Finnegan*, 42 Minn. 476, 44 N. W. 985, 8 L. R. A. 50; *Miller v. Trudgeon*, 16 Okl. 337, 86 Pac. 523; *Wallace v. Feely*, 61 How. Prac. (N. Y.) 225; *Bozarth v. Largent*, 128 Ill. 95, 21 N. E. 218. In the last case above cited the Supreme Court of Illinois said: "It is objected that the mortgaged premises were improperly sold en masse. If this be conceded, it would not render the sale void. At most, it would only be ground for setting the sale aside, on proper application to the court in apt time." See, also, *Gregory v. Bovier*, 77 Cal. 121, 19 Pac. 232; *Hudepohl v. Liberty Hill W. & M. Co.*, 94 Cal. 588, 29 Pac. 1025, 28 Am. St. Rep. 149; *Power v. Larabee*, 3 N. D. 502, 57 N. W. 789, 44 Am. St. Rep. 577; *Palmer v. Riddle*, 180 Ill. 461, 54 N. E. 227; *Lewis v. Whitten*, 112 Mo. 318, 20 S. W. 617.

3. It appears that the plaintiff on or about the 1st day of January, 1909, directed the tenants of certain of the buildings to pay rent to him, and that they have done so. At the trial an accounting was had of these rents and profits, but we do not understand that this evidence was to be considered save in the event the court should hold the sale

void. It having been determined that the sale was not void, it follows, as it seems to us, that the plaintiff is entitled to the relief demanded.

The order is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

#### MORSE v. GRANITE COUNTY et al.

(Supreme Court of Montana. Nov. 11, 1911.)

#### 1. COUNTIES (§ 20\*)—ORGANIZATION—NATURE —"MUNICIPAL CORPORATIONS."

While a county is not strictly a municipal corporation, yet, in the sense that it is a body corporate with only such powers as are expressly conferred by statute, it is within the rules applicable to such corporations.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 20.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4620-4627; vol. 8, p. 7728.]

#### 2. COUNTIES (§ 47\*)—BOARD OF COMMISSIONERS—POWERS.

A county board of commissioners is an executive body of limited powers and must in every instance justify its action by reference to the provisions of law defining and limiting its powers; but, where the mode of exercise of a power granted is not prescribed, the board has discretion to adopt any mode reasonably well adapted to the end proposed.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 47.\*]

#### 3. COUNTIES (§ 178\*)—COUNTY BUILDING—CONSTRUCTION—ISSUANCE OF BONDS—VOTE —PETITION.

Since by Rev. Codes, §§ 2894, 2905, 2933, 2934, county commissioners are expressly given power to provide for the erection of county buildings and to issue bonds to provide funds therefor on an affirmative referendum vote, but there is no provision requiring that the board shall act on petition, it may act on its own initiative and determine whether it is necessary to effect a loan and the amount required.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273; Dec. Dig. § 178.\*]

#### 4. COUNTIES (§ 177\*)—COURTHOUSE BONDS—COUNTY COMMISSIONERS—FINDINGS.

Rev. Codes, § 2934, provides that, whenever it is necessary to submit to a vote of the electors of a county the question of making a loan, the county board must first determine the amount necessary to be raised. Held that, where county commissioners determined that it was necessary to issue bonds for the purchase of a site and the erection and furnishing of a new courthouse, it was not necessary that the board should make specific findings of the amount necessary for each of such purposes, but it was sufficient that it determined the amount required for the general purpose.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 177.\*]

#### 5. COUNTIES (§ 178\*)—COUNTY BOARD—PURCHASE OF REAL PROPERTY—BONDS.

Rev. Codes, § 2894, prohibiting county commissioners from purchasing any real estate unless its value had been previously estimated by three disinterested citizens, did not prevent the board from ordering an election to authorize bonds for the purchase of a site and the con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

struction of a new courthouse before the terms of purchase of the site had been agreed on.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273; Dec. Dig. § 178.\*]

**6. COUNTIES (§ 178\*)—BONDS—ELECTION.**

Under Rev. Codes, § 2933, providing that the question whether a loan shall be procured by a county shall be submitted to the electors thereof, it is only necessary that the question whether the board shall procure the loan for the purpose stated and in the amount found necessary for such purpose be submitted to the electors, and it was therefore not material that the ballot used by the electors did not permit them to vote on the proposition in the exact form in which it was stated in the proclamation, or because an option to redeem the bonds was not reserved in the terms stated therein.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273; Dec. Dig. § 178.\*]

**7. COUNTIES (§ 178\*)—BONDS—REQUISITES.**

Rev. Codes, §§ 2905, 2911, 2912, provide that, on the issuance of county bonds, the board shall fix the date of maturity at a period not longer than 20 years from the date of issue and reserve the option to redeem the bonds, or some of them, prior to the maturity date, and that the interest provided for shall not exceed 6 per cent. and be payable semiannually on the 1st days of January and July. *Held* that, while such requirements are mandatory, subject to them, the board may fix the date of the bonds, the rate of interest, and the terms of the option to redeem to meet its own judgment as to the county's ability to discharge the indebtedness without submission of the same to the electors.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273; Dec. Dig. § 178.\*]

**8. COUNTIES (§ 178\*)—BONDS—ELECTION—ORDER.**

An order for an election to confer authority to issue county bonds need only inform the electors of the contemplated action of the county board and of the time and place at which the electors may vote, and if it states unnecessary matters, but is not misleading so as to cause the electors to lose their votes, it will not be invalid; a substantial compliance with the statute only being required.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273; Dec. Dig. § 178.\*]

**9. COUNTIES (§ 178\*)—COUNTY BONDS—VOTE—BALLOT—CONTENTS.**

That a form of county bond adopted by the commissioners was incorporated in the proposition as printed on the ballot used at a referendum election did not invalidate the vote.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 178.\*]

**10. COUNTIES (§ 177\*)—COUNTY BOARD—SPECIAL MEETINGS—NOTICE.**

Rev. Codes, § 2886, provides that special meetings of a board of county commissioners may be had by an order, signed by a majority of the members of the board, on five days' notice, and that the order must specify the business to be transacted, and none other than that specified may be transacted at that meeting. *Held* that, where a call for a special meeting provided that the board intended to do all things necessary in connection with the advertising and sale of county bonds for the construction of a courthouse, such disclosed purpose included a formal order directing the issuance of the bonds.

[Ed. Note.—For other cases, see Counties, Cent. Dig. §§ 269-273; Dec. Dig. § 177.\*]

**11. COUNTIES (§ 177\*)—COUNTY COMMISSIONERS—MEETINGS—NOTICE.**

Where all the members of a county board signed an order calling a special meeting for

the purpose of performing the steps necessary to the issuance of certain county bonds, and all the members of the board were present and took part in the business transacted, whether the order for the meeting covered an order directing issuance of the bonds was not material to their validity.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 177.\*]

**12. COUNTIES (§ 178)—COUNTY BONDS—ISSUANCE—REFERENDUM ELECTION—"MAJORITY OF THE ELECTORS OF THE COUNTY."**

Const. art. 13, § 5, provides that no county shall incur any indebtedness or liability for a single purpose to an amount exceeding \$10,000 without the approval of a majority of the electors, voting at an election to be provided by law. Rev. Codes, § 2933, declares that county boards shall not borrow money for any single purpose to an amount exceeding \$10,000 without the approval of a majority of the electors of the county and without first having submitted the question of a loan to a vote of such electors; and section 2937 declares that, if a majority of the votes cast are in favor of the loan, then the board may make the loan and issue the bonds. *Held*, that the enactment of section 2933 was not intended to add any requirement to that prescribed by the Constitution, and that the words "majority of the electors of the county," as used therein, should be construed to mean "a majority of the votes cast."

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 178.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4286-4292; vol. 8, p. 7712.]

Appeal from District Court, Granite County; F. C. Webster, Judge.

Action by George A. Morse against the County of Granite and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

D. M. Durfee, W. E. Moore, Albert J. Galen, Atty. Gen., W. S. Towner, Asst. Atty. Gen., for appellants. Clayberg & Horsky, for respondent.

**BRANTLY, C. J.** At the general election held in November, 1910, there was submitted to the electors of Granite county the question whether the board of commissioners of the county should issue its bonds to secure a loan of \$50,000 to provide funds to build, furnish, and equip a county courthouse and to secure ground for site purposes, in addition to that already owned by the county, in case it should be found necessary. On a canvass of the returns it was found by the board of commissioners that, of the total of 1,302 qualified electors in the county, 483 had voted in favor of issuing the bonds, and 378 had voted adversely. The board thereupon declared that the loan had been approved by the requisite majority of the electors, and was proceeding to issue and sell the bonds under the authority thus assumed to have been given. The plaintiff, an elector and taxpayer of the county, thereupon brought this action to enjoin the board and its members from proceeding further in the premises. It is alleged in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

amended and supplemental complaints that the proceedings of the board were nugatory and that the bonds were invalid: (1) Because the board failed first to determine that it was necessary to purchase additional ground for site purposes or to ascertain what amount of the proposed loan would be required to effect the purchase; (2) because the reservation, in the bonds offered for sale, of the option to redeem, is a distinct departure from that determined by the board prior to the election and from that upon which the electors voted; and (3) because the resolution of the board, at a special meeting held after the election providing for the issuance of the bonds, was not adopted as required by the statute. It is also alleged that the issue of bonds was not authorized by a majority of the electors of the county as required by the statute. The following is a synopsis of the resolution and orders of the board under which the election was held: At a regular meeting held on September 12, 1910, it was determined by a majority vote of the board, upon consideration of a petition submitted by certain residents and taxpayers of the county, that the "present building used for a courthouse is insecure," and that it was to the "best interest of the people of the said county that a suitable and fireproof building be built." It was thereupon ordered that an election be proclaimed for November 8, 1910, and that the proclamation be spread upon the journal of proceedings of the board as its order determining the necessity for the loan and its amount, the purposes for which the bonds were to be used, and the statement of the proposition submitted to the electors. This order reads as follows:

"Whereas it is considered by a majority of the board of county commissioners of Granite county, Montana, that it is necessary in order to furnish and provide suitable, secure and safe storage room for the county records of the county, and for the convenience of the county officers of this county and for holding the district court of said county, that a new, modern, fireproof, secure and convenient courthouse for said county should be erected; and whereas, it may be necessary to secure additional ground for a site for said courthouse in addition to the ground already owned by the county; and whereas, there are not sufficient funds in the treasury of said county to pay the costs of securing such additional ground for the construction of said courthouse or for the furnishing or equipment of the same; and whereas, it is considered by the board that the sum of fifty thousand dollars will be necessary for such purposes as aforesaid; and whereas, it will be necessary to issue and sell coupon bonds of the said county in the sum of fifty thousand dollars, in order to provide a fund for the building of such courthouse and the purchase of additional ground therefor, and the furnishing and equipment of the same; and that such bonds to be issued and sold in order to obtain

the highest market price for the same should be when issued payable in twenty years from the date thereof, and to be redeemable as follows, to wit: Five thousand dollars thereof to be redeemable in ten years thereof; five thousand dollars thereof to be redeemable and payable each and every year after ten years.

"It is therefore ordered by the board, that at the general election in the county of Granite, to be held on the 8th day of November, 1910, at the regular established polling places in the various precincts in the county, there shall be submitted to the qualified electors of said county who are duly registered according to law and entitled to vote at such election, the question and proposition as to whether coupon bonds of the said county amounting in the aggregate in the sum of fifty thousand dollars, bearing date the first day of March, 1911, and bearing interest at the rate of  $4\frac{1}{2}$  per cent. per annum, payable semiannually from date, which shall be payable in twenty years from the date thereof, and five thousand [dollars] worth thereof shall be redeemable in ten years from the date thereof, and five thousand dollars worth thereof shall be redeemable in ten years, on the first day of March, in each and every year, after ten years.

"Such bonds to be issued and sold for the purpose of providing a fund for said county for the purpose of the construction of a county courthouse at the county seat at Phillipsburg, Montana, and for the purchase of additional ground for the site for said courthouse, and the equipment and furnishing the same.

"It is further ordered that [at] said election separate ballots be provided and the same duly numbered and perforated, as the regular ballots are, with the following proposition clearly stated thereon; that is to say, the form of the ballot to be used at said election for the purpose of voting upon such proposition shall be substantially as follows, to wit:

- ☐ For authorizing and giving the authority to the county commissioners of Granite county, to issue and sell coupon interest-bearing bonds of said county in the sum of fifty (\$50,000.00) thousand dollars, bearing interest at  $4\frac{1}{2}$  per cent. redeemable in ten years, payable in twenty years, for the purpose of the construction of a county courthouse for the said county and the purchase of additional ground therefor, and the furnishing and equipment thereof.
- ☐ Against authorizing and giving the authority to the county commissioners of Granite county, to issue and sell coupon interest-bearing bonds of said county in the sum of fifty (\$50,000.00) thousand dollars, bearing interest at  $4\frac{1}{2}$  per cent. per annum, redeemable in ten years, payable in twenty years, for the purpose of the construction of a county courthouse for the said county and the purchase of additional ground therefor, and the furnishing and equipment thereof."

The above order was thereafter duly published as the notice of election. The ballot

used at the election was prepared in conformity with the order of the board; the clerk causing to be printed thereon the usual instructions as to how the elector should indicate his choice. On February 23, 1911, a special meeting was held by the board pursuant to notice given on February 17th. The notice stated the purpose of the meeting as follows: "Said meeting is called for the purpose of adopting a form of bond, fixing the denomination of the same, and for the purpose of advertising the sale of courthouse bonds, and to do all necessary things in connection with the advertising and sale of bonds for the erection of a courthouse." The journal of the proceedings, after reciting that authority had been conferred upon the board by the election and also the purpose of the meeting, contains the following: "Resolved, in accordance with the authority so given the board at said election: That the said board issue, and they do hereby issue said coupon bonds to the number of fifty, in denominations of one thousand each, in the amount of \$50,000.00, bearing interest at  $4\frac{1}{2}$  per cent. per annum, payable semi-annually," etc. Upon the passage of this resolution, a form of bond was adopted and an order was made fixing April 4, 1911, at 10 o'clock a. m., as the date of sale and directing publication of notice thereof, to be made by the clerk as provided by the statute. This was done. The date of issuance was not specifically stated in the order, but the dates for the payment of interest were fixed as January and July of each year. The adopted form bore the date July 1, 1911, and the due date was fixed as July 1, 1931, or, at the option of the county, as July 1, 1921, or "at any interest paying period after the 1st day of July, 1921." The district court held the bonds void and ordered the injunction to issue. The defendants have appealed. There is submitted the question whether the bonds are invalid for any one or more of the reasons alleged.

By way of preliminary, it may be remarked that the validity of the proposed bond issue is questioned solely on the ground that the board was guilty of an omission to observe the requirement of the law in substantial particulars. There is no allegation or suggestion of fraud or willful wrongdoing, by which the plaintiff or any other elector was misled so that he lost his vote.

[1] While, in a strict sense, a county is not a municipal corporation, yet, in the sense that it is a body corporate with such powers only as are expressly conferred by the Code and special statutes, and such as are necessarily implied from those expressed (Rev. Codes, § 2870), it comes within the rules and principles applicable to such corporations.

[2] Therefore its board of commissioners—its executive body—is a body of limited powers and must in every instance justify

its action by reference to the provisions of law defining and limiting these powers. Section 2894; State ex rel. Lambert v. Coad, 23 Mont. 131, 57 Pac. 1092. If, however, there is no question of the existence of the power to do the act proposed, and the mode of its exercise is not pointed out, the board is left free to use its own discretion in selecting the mode it shall adopt or the course it shall pursue, and the result cannot be called in question if the course pursued is reasonably well adapted to the accomplishment of the end proposed.

1. "The board of county commissioners has jurisdiction and power: \* \* \* (3) To purchase, receive by donation, or lease any real or personal property necessary for the use of the county, preserve, take care of, manage and control the same; but no purchase of real property must be made unless the value of the same has been previously estimated by three disinterested citizens of the county, appointed by the district judge for that purpose, and no more than the appraised value must be paid therefor. (8) To cause to be erected and furnished a courthouse, jail, hospital, and such other public buildings as may be necessary. \* \* \*

(27) To issue on the credit of the county, coupon bonds to an amount sufficient to secure the necessary funds for the procurement of necessary building sites, for the construction of necessary public buildings and for the construction of bridges and highways, in accordance with the provisions of articles III and IV, chapter II, title II, part IV of the Political Code." Rev. Codes, § 2894. Article 4 of the Political Code of 1895, referred to in the last subdivision of this section, comprises sections 2933 to 2938 of the Revised Codes. Section 2905 also confers the power, among others, to issue bonds for the purchase of necessary building sites, and for the construction of necessary public buildings. Section 2933 provides that the question whether a loan shall be effected shall be submitted to the electors of the county. Section 2934 declares: "Whenever it is necessary to submit to a vote of the electors of the county the question of making a loan, the board must first determine the amount necessary to be raised."

[3] There is nowhere in the Codes any provision requiring the power of the board to be put in motion by petition. It may, therefore, proceed upon its own initiative and determine whether it is necessary to effect a loan and what amount is required. Having ascertained that it is necessary, it must determine the amount in order that the electors may know the extent of the burden they assume. This is a necessary prerequisite to the validity of all subsequent proceedings. Section 2934.

[4] Was the board required by this provision to make specific findings of the amount

necessary for each of the three purposes included in the general purpose, viz., the erection of a suitable courthouse building? The section does not say so in terms, and since the power to purchase real estate necessary for the use of the county, and to cause to be built and furnished necessary county buildings, including a courthouse, and to issue bonds for these purposes, is conferred by sections 2894 and 2905, we hold that the finding of the amount necessary for the general purpose was sufficient.

In *Hefferlin v. Chambers*, 16 Mont. 349, 40 Pac. 787, this court in construing section 5, art. 13, of the Constitution, which prohibits a county from incurring indebtedness or liability for any single purpose in an amount exceeding \$10,000, expressly held that the purchase of a site and the erection of a courthouse thereon is a single purpose within the meaning of the prohibition. And in the case of *Yegen v. Board of County Commissioners*, 34 Mont. 79, 85 Pac. 740, in which this court, in considering the validity of a statute creating a state board of health, and referring to certain provisions therein which authorized the board of county commissioners to erect a detention hospital, said: "While these sections do not in express terms empower the boards of commissioners to acquire sites for the erection of detention hospitals for their respective counties, they do confer the power to build them, and, by the well-settled rule that every power necessary to execute the power expressly granted is necessarily implied, the power to acquire by purchase or otherwise suitable sites for these hospitals is necessarily implied; for it would be idle to say that the boards have power to erect suitable buildings for the expressed purpose, and then say that they have no power to proceed because there is no express grant of power to purchase suitable sites for them." The same may with equal propriety be said of the necessary furnishing of the building. The site and the furnishing are both necessary parts of the general purpose to provide the county with a courthouse, because not only must the building be suitable in structure and arrangement to serve the public as a courthouse, but it must also be so furnished and equipped that it will be useful for that purpose. The preliminary finding of the board was sufficient.

[5] But counsel for plaintiff say that subdivision 8 of section 2894, supra, prohibits the board from purchasing any real estate, unless its value has been previously estimated by three disinterested citizens, appointed as therein provided. This is true, but it does not follow that the price must be ascertained before the issue of bonds may be voted by the electors. The prohibition becomes operative only when the time has arrived when it becomes necessary to fix the terms of the purchase.

[6] 2. Nor do we think the bonds should be held invalid either because the ballot used by the electors did not permit them to vote upon the proposition exactly in the form in which it was stated in the proclamation, or because the option to redeem was not reserved in the terms stated therein. The only question which it was necessary to submit to the electors was whether the board should effect the loan for the purpose stated and in the amount found necessary. This was done, and we do not think the result should be declared nugatory because the board consulted the electors as to the date the bonds should bear, or when they should mature, or as to the rate of interest they should bear, or as to the terms of the option to redeem, or as to the dates at which the interest should be due and payable.

[7] It is mandatory upon the board to fix the date of maturity of such bonds at a period not longer than 20 years from the date of their issuance, and to reserve the option to redeem them, or some of them, prior to the date fixed for their maturity. So, also, must the interest, not exceeding 6 per cent., be made payable semiannually on the 1st days of January and July of each year. Rev. Codes, §§ 2905, 2911. 2912. *Carlson v. City of Helena*, 39 Mont. 82, 102 Pac. 39. Subject to these requirements, however, the board may fix the date of the bonds the rate of interest, and the terms of the option to redeem to meet its own judgment as to the ability of the county to discharge the indebtedness.

[8] With these matters the electors have nothing to do. The order of the board in such cases is jurisdictional. It must contemplate an indebtedness which falls within the power of the board to create for a designated purpose. When it meets this requirement, or, in other words, when it embodies all the statements which the statute requires it to contain, the consent given by the electors is not restricted or enlarged by reason of the fact that through inadvertence or mistake it contains matters the determination of which lies exclusively in the discretion of the board. The function of the order is not to notify the electors what the law is, but to inform them of the action which the board proposes to take, and of the time and place at which those entitled to give or refuse their consent may do so. *State ex rel. Whitmore v. Carbon County*, 38 Utah, 394, 104 Pac. 222. A notice in substantial compliance with the statute is sufficient. 10 Am. & Eng. Ency. of Law (2d. Ed.) 631. It need not state matters implied, and, if it does, it will not be nugatory so long as it is not so misleading as to cause the electors to lose their votes. 15 Cyc. 323. It is analogous to a pleading in an ordinary action or special proceeding. The familiar rule applied to the construction of a pleading, viz., that, if it states a cause of action, surplus

and redundant allegations may be stricken out or disregarded, is applicable to such an order, and matters wholly irrelevant to the proposition to which the electors must give their consent may be treated as surplusage. That the electors have been asked to give their consent to things which the board may or must do without such consent, may not be held to restrict the discretion lodged in it by the statute. The instant case is to be distinguished from that of *Carlson v. City of Helena*, supra, and like cases. In that case the ordinance calling the election submitted to the electors the question whether the city should issue its bonds to procure a particular supply of water, instead of the question generally, whether it should issue bonds to procure a supply, thus divesting itself of the discretion, lodged in it by law, to procure any supply which it might find available. The proposition submitted to the electors of the city departed substantially from that which the council had authority to submit. The election was held void for that reason, and not because the council asked the approval of the electors of things which might be done without it.

[9] While the form of bond adopted incorporated the proposition as printed upon the ballot, it was not incumbent upon the board to have it so. The amount and purpose of the loan, as stated in the ballot, was all that was required to be stated.

[10] 3. The statute authorizing special meetings of boards of county commissioners requires them to be called by order signed by a majority of the members of the board and five days notice to be given by the clerk to each member not joining in the order. It provides: "The order must specify the business to be transacted and none other than that specified must be transacted at such meeting." Rev. Codes, § 2886. The purpose of this requirement is to give every member of the board the opportunity to be present and take part in the business to be transacted. If any member does not choose to be present, he may under this provision exercise his option to remain away in case he thinks his interest in the pending business is not such as to demand his personal attention. If he does not care to attend, he has the assurance that the board will not take up any other business than that specified. It is true that the order in question contains no reference to an intention on the part of the board to adopt a formal resolution directing the bonds to issue; but it does state that the board intended to do all necessary things in connection with the advertising and sale of the bonds for the construction of a courthouse. This cannot be construed to mean anything other than that the board intended to do everything in connection with the preparation of the bonds which was necessary to effect a sale of

them. This included, of course, a formal order directing them to issue, if such an order were necessary.

[11] Besides, the order calling the meeting was signed by all the members of the board, and all were present and took part in the business transacted. There is, we think, no merit in the contention made by counsel for plaintiff that the bonds are void because the call for the meeting did not specially state that the formal order directing the bonds to issue would be made.

[12] 4. Was a majority of the vote cast in favor of the issuance of the bonds within the meaning of the provision of law applicable? Section 5 of article 13 of the Constitution declares: "No county shall incur any indebtedness or liability for a single purpose to an amount exceeding ten thousand dollars (\$10,000) without the approval of a majority of the electors thereof, voting at an election to be provided by law."

Section 2933, supra, of the Revised Codes, and section 2937, read as follows:

"Sec. 2933. The board of county commissioners must not borrow money for any of the purposes mentioned in this title, or for any single purpose to an amount exceeding ten thousand dollars without the approval of a majority of the electors of the county, and without first having submitted the question of a loan to a vote of such electors."

"Sec. 2937. If a majority of the votes cast are in favor of the loan, then the board may make the loan, issuing bonds, or otherwise, as may seem best for the interests of the county."

In the case of *Tinkel v. Griffin*, 26 Mont. 426, 68 Pac. 859, this court, construing the provision of the Constitution, supra, said: "The evident meaning of the Constitution is that the approval must be the result of an expression of a majority of those voting. The expression 'majority of the electors thereof voting at an election,' etc., clearly means a majority of those who vote, and not a majority of all the electors of the county, or of those who vote upon any other issue at the same or some other time." This conclusion was reached because the language employed indicated that the convention had adopted the theory that the control of public affairs must be regarded as belonging to those electors who take a sufficient interest in them to give expression to their views at the ballot box.

But counsel for plaintiff insist that since the Constitution is only a limitation upon the power of the Legislature, and the provision thereof quoted above goes no further than to declare that indebtedness beyond the amount mentioned shall not be contracted without the approval of a majority of the electors "voting at an election to be provided by law," it does not operate as a limitation upon the power of the Legislature, but is only a requirement without the ob-

servance of which the proposed debt cannot be contracted, and hence that the Legislature is free to declare that a county cannot issue bonds for any purpose unless they are authorized by a larger vote than that required by the Constitution. We shall not stop to examine this contention. Assuming that it is based upon sound principle, in the absence of an intention clearly expressed by the Legislature to the contrary, we are not at liberty to conclude that it in the enactment of section 2933, supra, purposed to add any requirement to that prescribed by the Constitution. Though the language of the section deviates from that employed in the Constitution, it was evidently enacted in pursuance thereof and must be held to mean the same. That this is true is clear from the position occupied by the section in the article in which it is found and the subject with which it deals, as well as from the provision found in section 2937, which follows substantially the language used in the Constitution. Section 2933 is the first section in the article, and in pursuance of the constitutional requirement declares the limit beyond which the county may not go without the consent of the electors. The words "majority of the electors of the county" were evidently loosely used, without any purpose of declaring definitely what majority of the electors was deemed necessary. On the other hand, when the Legislature came to declare a definite purpose on this subject, in section 2937, by use of the words "a majority of the votes cast," it indicated its purpose not to add anything to the requirement prescribed by the Constitution, but to pursue it strictly. These sections were enacted at the same time, with three other sections, each dealing with a different particular of the mode prescribed for the negotiations of loans by counties. They must be construed, therefore, so as to render them harmonious with each other. The construction we have given them renders them so. In any event, under the rule of construction provided by the Codes (section 3558), since section 2937 stands later in numerical order in the title, and is not inconsistent in its provisions with the general meaning and purpose of it as a whole, it must prevail.

We are of the opinion that the proceedings of the board, though irregular, were in substantial compliance with the law; that the election was properly conducted; and that authority to issue the bonds was granted by a majority of the electors, as required by the Constitution and the statutes made in pursuance thereof.

The order granting the injunction is, accordingly, reversed, and the cause is remanded.

Reversed and remanded.

SMITH and HOLLOWAY, JJ., concur.

# ULBRIGHT v. BASLINGTON (WRIGHT, Intervener).

(Supreme Court of Idaho. Nov. 7, 1911.)

(Syllabus by the Court.)

## 1. NAVIGABLE WATERS (§ 36\*)—RIPARIAN RIGHTS—TITLE TO BED OF STREAM.

Under the laws of this state, as construed by the uniform decisions of the highest court of the state, a riparian owner on a meandered stream or body of water, whether navigable or nonnavigable, takes title to the center or thread of the stream.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

## 2. NAVIGABLE WATERS (§ 36\*)—RIPARIAN RIGHTS—ADJOINING OWNERS.

A riparian proprietor on a meandered lake, where the lake is circular in form, must, in determining the boundary line between his land and that of an adjoining riparian proprietor, extend the side line or boundary line on a deflected course from the intersection of such side line with the meander line to the center of the lake.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by Amel Ulbright against George Baslington and James H. Wright, interveners. From a judgment for plaintiff, the interveners appeals. Reversed and remanded.

See, also, 119 Pac. 294.

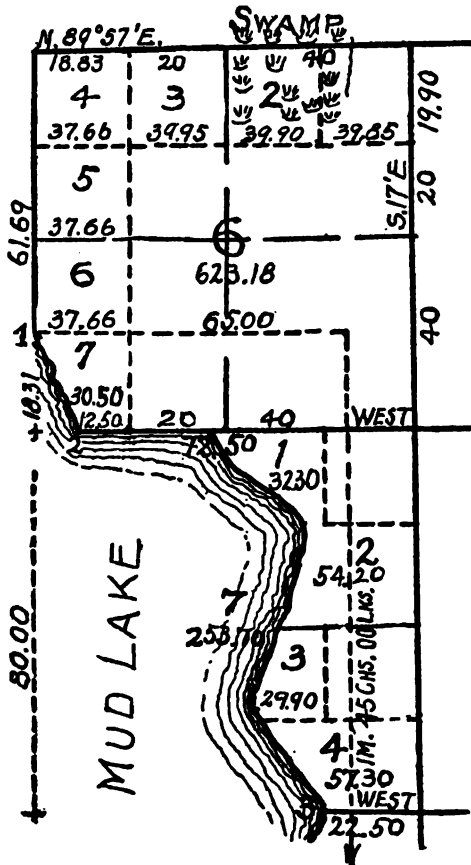
McFarland & McFarland, for appellant. J. L. McClear and Ezra R. Whitla, for respondents.

AILSHIE, J. This action was instituted by the respondent, Amel Ulbright, against George Baslington, who is also a respondent in this court, for the recovery of the possession of what plaintiff termed in his complaint "all of fractional section 7 in township 51 north of range 5 west, Boise Meridian," and damages for the withholding of the possession thereof, as well as for the rents, issues, and profits. Baslington filed his answer, alleging possession and ownership of the lands, and thereafter and by order of the court the appellant herein, James H. Wright, was allowed to intervene. The intervenor alleged title by mesne conveyances from the United States to the E. ½ of the S. W. ¼, and lots 6 and 7 of section 6, township 51 north of range 5 west, Boise Meridian. The respondent, on the other hand, claimed the property in controversy by reason of being a purchaser from the Northern Pacific Railway Company. It appears that on the 22d of December, 1894, patent issued from the government under the Northern Pacific land grant to the Northern Pacific Railway Company for lots 1, 2, 3, and 4 and the N. E. ¼ of the N. E. ¼ and the N. E. ¼ of the S. E. ¼, which comprised all of the lands in section 7 of township 51 north, range 5 west, Boise Meridian. These lands abut upon what

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



is designated on the official map as "Mud Lake," and the whole controversy here arises over the right to the land lying between the meander line and the water line of Mud Lake. This land was surveyed in 1880, and the survey thereof was approved by the Surveyor General on July 23, 1881. Mud Lake was meandered in accordance with the statutes of the United States and the rules of the General Land Office. The official plat of that survey comprising sections 6 and 7 of township 51 was introduced in evidence and is as follows:



It will be seen from an examination of the plat, and it likewise appears from the field notes and is also testified to by the witnesses, that lot 7 and the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 6, belonging to the intervenor, abut on Mud Lake, and it likewise appears that lots 1, 2, 3, and 4 in section 7, belonging to Ulbright, abut on the same body of water. It will be noticed that lot 1 extends west some rods beyond the half section line or the southeast corner of the intervenor's premises. There is consequently a portion of the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 6 extending from the corner to the westerly meander line of lot 1 in section 7 which does not abut on the lake, and which therefore has no meander line.

[1] The whole controversy in this case is

over the right of ownership and possession of the land lying between the meander line of the intervenor's property and the water line of the lake, and comprises about 37 acres. This court has so repeatedly considered and passed upon the right of a riparian proprietor to take such land as he may find lying between the meander line and the center of the stream meandered that it would seem useless for us to again enter into a discussion or consideration of that question. We have repeatedly held that the riparian or abutting upland owner will, as a general rule, take everything between his meander line and the center of the meandered stream. *Lattig v. Scott*, 17 Idaho, 508, 107 Pac. 47; *Johnson v. Johnson*, 14 Idaho, 581, 95 Pac. 499, 24 L. R. A. (N. S.) 1240; *Moss v. Ramey*, 14 Idaho, 598, 95 Pac. 513; *Johnson v. Hurst*, 10 Idaho, 308, 77 Pac. 784.

[2] The contention, however, is made by the respondent that the Northern Pacific Railway Company took title by grant from the government to all the land within section 7, and that, since the meander line and the section line coincide along the south boundary of appellant's land, the appellant cannot cross that line, and consequently respondent is entitled to take all land within the exterior boundaries of what would constitute section 7. This position would be correct if the south boundary line of appellant's property were only a section or subdivision line; but it is more than that. It is a section line and a meander line and so appears from the official plat, and likewise upon the field notes, as the same were returned by the surveyor to the Surveyor General's office. This was a meander line of a body of water, and it follows that the patentee to the lands bounded by this meander line is a riparian proprietor, and he is consequently entitled to take to the water. The same is true as to the respondent, who owns lots 1, 2, 3, and 4 in section 7.

The rule with reference to the upland owner projecting the side lines of his premises in a right line to the center of the stream must necessarily receive a modification in the case of a circular lake. A lake has a center, and sometimes a center line, but seldom a thread or stream. It is necessary, therefore, that the side lines of riparian and upland proprietors should converge to the center of the lake. In such a case, none of the lines can be projected in a right line with the section or subdivision lines as established by the government. In this case the deflected line establishing the boundary between the appellant and respondent as the same will be extended from the meander line to the center of the lake will start at the point where the west meander line of respondent's lot 1 connects with the south line of the S. E.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 6. From that point a right line should be drawn toward the center of the

lake and thus establish the boundary line between the appellant and respondent. This is the rule which has been announced by some of the courts with reference to lakes, and it appeals to us as equitable and just. See *Hanson v. Rice*, 88 Minn. 273, 92 N. W. 982. In the foregoing case, the Supreme Court of Minnesota, in passing on the question as to the projection of side lines and the establishment of boundary lines between adjoining tracts, said: "The boundaries of adjoining tracts, as to land beyond the meander line, are fixed by extending their side lines on a deflected course from their intersection with the meander line toward a point in the center of the lake."

In *Hardin v. Jordan*, 140 U. S. 397, 11 Sup. Ct. 817, 35 L. Ed. 439, the Supreme Court of the United States, in commenting upon and criticising a decision of Judge Gresham, wherein the latter had held that, since there is no current to a lake and no threat to the stream, it was impracticable to extend the lines of riparian proprietors into lakes, as is done with flowing streams, said: "As to the supposed difficulty or inconvenience in applying the law, it is no greater than that which occurs on any bay or incurved shore, even of a large river, in adjusting the outgoing boundary lines between adjoining proprietors over the submerged bottoms or flats lying in front of their riparian lands. Just and equitable rules have been adopted for settling the mutual rights of parties in such cases. Where a lake is very long in comparison with its width, the method applied to rivers and streams would probably be most suitable for adjusting riparian rights in the lake bottom along its sides, and the use of converging lines would only be required at its two ends." See, also, *Gouverneur v. National Ice Co.*, 134 N. Y. 355, 31 N. E. 865, 18 L. R. A. 695, and notes, 30 Am. St. Rep. 669.

We conclude, therefore, that the appellant is entitled to take the upland between his meander line and the lake within side or boundary lines drawn from the end of the meander line at each side of his tract of land to the center of the lake; that is to say, the one line drawn from the extreme easterly point where the meander line bounds his upland and the other line drawn from the extreme westerly point where the meander line bounds his upland. And the same method should be pursued in establishing the exterior boundary lines of respondent's lands between the meander line and the lake.

The judgment must be reversed, and it is so ordered, and the cause is remanded for further proceedings in harmony with this opinion. Costs awarded to appellants.

STEWART, C. J., and SULLIVAN, J., concur.

ULBRIGHT v. BASLINGTON (WRIGHT, Intervener).

(Supreme Court of Idaho. Nov. 27, 1911.)

(Syllabus by the Court.)

COSTS (§ 254\*)—APPEAL—PRINTING OF TRANSCRIPT.

The amendments embodied in chapters 117, 118, and 119 of the 1911 Session Laws (1911 Sess. Laws, pp. 375-381), with reference to the prosecution of appeals to the Supreme Court, do not prohibit or forbid the printing of transcripts on appeal, and the appellate court will allow costs to be taxed for a printed transcript at the same rate that has heretofore been allowed under the rules of the Supreme Court.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 254.\*]

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Motion to tax costs on appeal. Objections overruled.

See, also, 119 Pac. 292.

McFarland & McFarland, for appellant. J. L. McClear and Ezra R. Whitla, for respondents.

AILSHIE, J. The respondent, Ulbright, has filed his objections to appellant's cost bill and moves the court to tax the costs in accordance with the provisions of section 4913, Rev. Codes, as amended by act of March 10, 1911 (1911 Sess. Laws, p. 673) and rules 83 and 84 of this court. The objection is made against only one item of the cost bill, which is set forth in the memorandum of costs as follows: "To amount paid Lakeside Printing Co. of Coeur d'Alene, Idaho, for printing transcript on appeal to the Supreme Court, 118 pages at 75¢ per page, \$88.50."

Respondent contends that chapter 117 of the 1911 Session Laws (1911 Sess. Laws, p. 375) has so amended the law with reference to appeals as to provide for typewritten transcripts and to render a printed transcript both unnecessary and unauthorized. Counsel therefore insist that the only charge which can be made for transcript is the statutory fees that may be paid to the reporter and the clerk of the court, respectively, for extending the notes and preparing a typewritten transcript as prescribed by chapters 117, 118, and 119, of the 1911 Session Laws (1911 Sess. Laws, pp. 375-381). While the new statute does not provide for or require the printing of the transcript, it does not prohibit the same, and the only reason which could be urged against the printing would be the extra expense that might be entailed in so doing. Section 4434 of the Rev. Codes as amended would seem to indicate that the Legislature did not intend that procuring a transcript of the reporter's notes as therein prescribed should be exclusive, because it is there said that, "in lieu of preparing, serving and procuring the settlement of a bill

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

of exceptions as in this chapter provided," the party may procure a transcript of the testimony and proceedings, etc. It will also be noted that no amendments have been made to the sections of the statute providing for the preparation and settlement of bills of exceptions. It might be said, however, that the amendments by inference and implication necessarily repeal section 4428, which provides for the settlement of a statement or bill of exceptions where the sufficiency of the evidence to support the verdict or findings constitutes the issue to be urged on appeal. However this may be, it is unnecessary to pass upon it here.

This statute is new, and we have seen but little of its practical operation. We are not at this time inclined to deny litigants the right to bring their cases here in printed form, nor are we inclined to deny a successful appellant the right to collect his costs as prescribed by the old rule of this court for printing the necessary transcript on appeal. The appellant who causes his transcript to be printed takes the chance of having to pay for the entire transcript if he is not successful; and, in the event he is successful, we are inclined to allow him to collect the same costs which have heretofore been allowed in such cases.

The objections to the cost bill are overruled, and costs are allowed as claimed in appellant's memorandum.

STEWART, C. J., and SULLIVAN, J.,  
concur.

### NOBACH v. SCOTT.

(Supreme Court of Idaho. Nov. 11, 1911.  
Rehearing Denied Dec. 12, 1911.)

#### (Syllabus by the Court.)

#### 1. PLEADING (§ 1\*)—WHAT CONSTITUTES.

Under the provisions of section 4162, Rev. Codes, the pleadings in an action are the complaint, the demurrer to the complaint, the answer, and the demurrer to the answer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

#### 2. PLEADING (§ 288\*)—SIGNATURE.

Under the provisions of section 4198, Rev. Codes, pleadings must be signed by a resident attorney.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 854-858; Dec. Dig. § 288.\*]

#### 3. MOTIONS (§§ 1, 14\*)—DEFINITION—SIGNATURE.

A motion is defined by section 4880, Rev. Codes, as an "application for an order," and is not required in terms to be signed, but it is the proper practice for the counsel or the party to sign it.

[Ed. Note.—For other cases, see Motions, Cent. Dig. §§ 1, 8; Dec. Dig. §§ 1, 14.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4609, 4610.]

#### 4. APPEAL AND ERROR (§ 655\*)—TRANSCRIPT—MOTION FOR NEW TRIAL.

Where a motion for a new trial has been made in writing and served upon opposing counsel and through neglect or oversight has not been signed, and the court acts upon it as though it had been signed, such motion will not be stricken from the transcript on appeal for that reason.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 655.\*]

#### 5. APPEAL AND ERROR (§ 1170\*)—HARMLESS ERROR.

Under the provisions of section 4231, Rev. Codes, the court must in every stage of an action disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.\*]

#### 6. APPEAL AND ERROR (§ 192\*)—WAIVER OF OBJECTIONS.

A party to an action will not be permitted to stand by and neglect or refuse to raise seasonable objections to mere defects in pleadings or proceedings, and thereafter take advantage of such defects on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1221-1225; Dec. Dig. § 192.\*]

#### 7. APPEAL AND ERROR (§ 394\*)—BOND—SUFFICIENCY.

Under the provisions of section 4809, Rev. Codes, when more than one appeal in the same action is taken at the same time, but one undertaking of \$300 for damages and costs is required to be filed, and such undertaking should refer to both appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2097, 2098; Dec. Dig. § 394.\*]

#### 8. DENIALS IN ANSWER.

Held, that the denials and averments contained in the answer are sufficient to put in issue the principal allegations of the complaint.

#### 9. PLEADING (§ 126\*)—"NEGATIVE PREGNANT."

A negative pregnant in a pleading is a negative implying also an affirmative. It is such a form of negative expression as may imply or carry with it an affirmative (citing 5 Words and Phrases, 4739).

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 261-263; Dec. Dig. § 126.\*]

#### 10. PLEADING (§ 34\*)—CONSTRUCTION.

Under the provisions of section 4161, Rev. Codes, the forms of pleadings in civil actions and the rules by which the sufficiency thereof are to be determined are those prescribed by the Codes, and under the provisions of section 4207, Rev. Codes, all allegations or denials in a pleading must be liberally construed, with a view to substantial justice between the parties.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 66-75; Dec. Dig. § 34.\*]

#### 11. DISMISSAL AND NONSUIT (§ 53\*)—TECHNICALITIES.

The purpose and object of our Code of Procedure is to have actions tried upon their merits, and not to have them dismissed on mere technicalities.

[Ed. Note.—For other cases, see Dismissal and Nonsuit, Dec. Dig. § 53.\*]

#### 12. DENIALS IN ANSWER.

Certain denials in the answer held sufficient.

**13. PLEADING (§ 364\*)—ANSWER.**

Where an answer contains averments and allegations of probative facts as a separate defense, which might be proven under general or specific denials, such averments ought to be stricken out on motion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1156-1162; Dec. Dig. § 364.\*]

**14. EVIDENCE (§ 99\*)—ADMISSIBILITY.**

All competent evidence tending to prove the material allegations of the complaint or denials of the answer ought to be received when offered.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 99.\*]

**15. EXCHANGE OF PROPERTY (§ 8\*)—EVIDENCE.**

In an action for the purpose of rescinding a contract for the sale of certain real estate, whereby certain shares of stock in a corporation were a part of the consideration, and it is sought to rescind the contract on the ground that the corporation was insolvent and that such shares of stock were valueless, it is incumbent on the plaintiff to prove that the corporation was insolvent or in a failing condition at the time or on the date that the trade was made, and it is not sufficient proof of that fact simply to show that such corporation made an assignment for the benefit of its creditors a little over six months after the date of the contract sought to be rescinded.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 8.\*]

**16. EXCHANGE OF PROPERTY (§ 8\*)—NONSUIT.**

Under the facts of this case, held that the appellant was in as favorable a position to know and ascertain the condition of said corporation and the value of its capital stock and assets as was the respondent, and as he neglected and failed to do so, and failed to show that said corporation was insolvent or in a failing condition at the date of the contract referred to, the judgment of nonsuit at the close of his testimony will not be disturbed.

[Ed. Note.—For other cases, see Exchange of Property, Dec. Dig. § 8.\*]

Appeal from District Court, Kootenai County; Robert N. Dunn, Judge.

Action by H. P. Nobach against J. T. Scott. From a judgment of dismissal, plaintiff appeals. Affirmed.

Reed & Boughton, for appellant. McFarland & McFarland, for respondent.

**SULLIVAN, J.** This action was brought for the purpose of having rescinded a certain contract for the sale of certain land known as "Kootenai Addition" to the city of Coeur d'Alene. On the trial, after the plaintiff had put in certain evidence and the court had refused to receive other offered evidence, the plaintiff rested, and counsel for respondent interposed a motion for a nonsuit, the main ground of which was that the evidence was not sufficient to sustain the principal allegations of the complaint. Said motion was sustained by the court and judgment of dismissal entered. A motion for a new trial was denied, and this appeal is from that order and from the judgment.

Counsel for respondent has filed two motions, one to strike out part of the transcript and another to dismiss this appeal. The first motion is based on the ground that the motion for a new trial is not signed by either the party or his attorneys. Said motion was served on the attorneys and filed in the case and was acted upon by the court as though it had been signed.

[1] Under the provisions of section 4162, Rev. Codes, the only pleadings in an action are the complaint, the demurrer to the complaint, the answer, and demurrer to the answer. Under the provisions of our statute, a cross-complaint is classed with the complaint, and a demurrer to that, of course, may be made.

[2, 3] Under the provisions of section 4193, the pleadings are required to be signed by a resident attorney, and section 4880, Rev. Codes, defines a "motion" as an application for an order, and is not specifically required to be signed, but in our practice motions are usually signed, and it is the proper practice to have them signed by the parties or their counsel.

[4] But where a motion has been made in writing and served upon opposing counsel, and through oversight or neglect counsel have failed to sign it, and the court acts upon it as though it had been signed and recognizes it as a motion, we think that sufficient. Counsel for respondent inform this court that they observed that the motion was not signed, and for that very reason concluded it was not a motion, hence did not appear to contest it, and that it was not their duty to point out any defects in said motion. They having declined to appear and enter an objection to the hearing of said motion, they thereby waived any right they had to raise that question on appeal.

[5] Under the provisions of section 4231, Rev. Codes, the court is directed in every stage of an action to disregard any error or defect in the pleadings or proceeding which does not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. The defect in the motion was not sufficient to mislead the respondent or affect his substantial rights.

[6] Parties will not be permitted to stand by and not raise seasonable objections to mere defects in papers and proceedings in a court, and thus permit the court to act as though there were no defects in the proceedings, and thereafter take advantage of such defects on appeal. Said motion is denied.

Respondent next moves to dismiss the appeal on the ground that a sufficient undertaking has not been filed. It is contended that as there were two appeals, one from the judgment and one from the order denying a new trial, an undertaking in the sum

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of \$600 should have been given, \$300 on each appeal.

[7] Both of said appeals were taken by the same notice of appeal, and are presented to this court upon the same transcript. Section 4809, Rev. Codes, provides, among other things, as follows: "Provided that when more than one appeal in the same action, whether from the judgment and an appealable order or orders, or from two or more appealable orders, are taken at the same time, but one such undertaking or deposit for damages and costs need be filed or made." The question presented is whether under said provision the appellant should have given an undertaking of \$600 on both appeals—that is, \$300 on each—or whether an undertaking in the sum of \$300 referring to both appeals and given to perfect both is sufficient. We think said provision of the statute is too plain to require any construction whatever, and clearly intends and requires in such cases as the one at bar but one undertaking in the sum of \$300, and not a \$300 undertaking on each of the appeals. Where one undertaking of \$300 is given on two appeals, it must refer and apply to both of such appeals. The first provision of said section requires that an undertaking on appeal must be given for \$300, and the provision above quoted provides, "but one such undertaking \* \* \* need be filed or made," where more than one appeal is taken in the same action. Said motion to dismiss is therefore denied.

While numerous errors are assigned, counsel for appellant presents them under four heads, the first of which is, Did the court err in refusing to strike out certain portions of defendant's answer on the ground that they were defective? Practically all of the portions moved to be stricken out, it is contended, are negative pregnant or denials of matter not alleged in the complaint, and constitute no defense to the action, and should have been stricken out.

[8] A negative pregnant in a pleading is a negative implying also an affirmative, and it is such a form of negative expression as may imply or carry within it an affirmative. Black's Law Dictionary; 5 Words and Phrases, p. 4739.

[10] Under the provisions of section 4161, Rev. Codes, the forms of pleadings in civil actions and the rules by which the sufficiency of such pleadings are to be determined are prescribed, and under section 4207, Rev. Codes, one of the rules is to the effect that in the construction of a pleading for the purpose of determining its effect its allegations must be liberally construed with a view to substantial justice between the parties. When the denials and averments in an answer all taken together clearly indicate that it was the intention of the defendant to deny the allegations of the complaint and put all of such allegations in issue, they will be construed in accordance with the clear intention

of the pleader, and the case must be tried upon its merits.

[11] The purpose and object of the law is to try lawsuits upon their merits, and not to dismiss cases upon technicalities which do not go to the merits of the case.

[13] The court ought to have stricken out paragraph nine of defendant's answer, as the averment that respondent had sold and conveyed a portion of the "Kootenai Addition" would be no defense to this action.

[3, 12] While the answer is not one that we would adopt as a precedent or as a model to follow, we conclude that the separate denials and the averments in the separate defense are amply sufficient to put in issue the material allegations of the complaint and sufficient to put the plaintiff upon his proof.

[14] A number of assignments of error go to the admission and rejection of certain testimony offered. We have made a careful examination of those, and we do not think the action of the court in that regard is reversible error. Plaintiff sought by testimony from the witness Daughters to show that his wife owned some stock in said corporation, and that he had made considerable effort to sell or dispose of said shares, and was unable to do so. Said witness testified that he did not know anything about the market value of said stock except as to the shares held by his wife which he had been unable to sell. He also testified that Mr. Collins, who traded respondent's stock to appellant, refused to undertake the sale of his wife's stock. That evidence was not sufficient to show that said corporation was bankrupt or insolvent or in a failing condition on the 24th day of December, 1909, the date when the trade was made between appellant and respondent. We do not find any evidence in the record sufficient to show that said corporation was bankrupt or insolvent or in a failing condition on the 24th of December, 1909. The evidence shows that there had been two dividends declared—one of 5 per cent. and one of 10 per cent. Appellant testified that Collins told him to go and see Winn and Barr, who had general charge of said corporation business, and inquire of them in regard to the condition of said corporation, which he did, and also inquired of three other individuals in regard to the condition of said corporation. Nobach had the means at hand to ascertain what dividends, if any, had been paid. It would appear from the evidence that Collins urged the appellant to investigate the matter for himself and ascertain the value of said shares of stock and the financial condition of the corporation. He had no conversation whatever with the respondent in regard to said stock until after or about the time the stock was transferred and the deed to the real estate turned over. And it appears that he was very anxious to make the trade, and insisted on Collins paying him \$100 in order to bind the bargain, and this was after he

had satisfied himself of the value of the stock, or had made inquiry of five different parties in regard thereto. On the first or second Monday in January, 1910, a very short time after the trade was made, the appellant was made a director of said corporation and so remained until the date of said assignment, to wit, the 15th of July, 1910, and he testified that he did not learn anything about the value of said stock until two or three months after said assignment was made.

From the record it would appear that no one connected with this transaction knew whether said company was solvent or not. It was doing a large business, and had a large stock of goods on hand. The appellant, after he became a director, did not attempt to ascertain anything about the solvency of said corporation or its indebtedness, or anything about the value of the stock of goods on hand. The evidence shows that Collins did tell appellant that the stock had paid from 10 per cent. to 17 per cent. dividends. The witness Daughters testified that there were two dividends declared, one of 5 per cent. and one of 10 per cent. The witness Barton testified to the same effect. Appellant undertook to show by the witness Barton that one of the dividends was paid out of the capital stock, or that it impaired the capital stock. That evidence was thereafter shown to be hearsay, or not the best evidence of said facts. Many of the questions propounded by appellant to the witnesses Barton, Daughters, and S. A. Wells tended to elicit secondary and hearsay evidence as to the solvency of said corporation, and was not the best evidence, and did not confine such testimony to the time when said trade was made. The appellant was residing in the same town where said corporation was doing business, and was referred to the manager of the corporation and others to ascertain the condition of said corporation and the value of said stock, and was also elected a director of the corporation a very few days after he made the purchase of said stock, and continued as such up to the time of the failure of the corporation. And, when the corporation failed, he did not then go to the defendant and demand a rescission of the contract, and did not do so until two or three months after said corporation had failed and gone into the hands of an assignee.

[15] At the close of plaintiff's evidence, the court granted a nonsuit, and we think the court did not err in doing so. The evidence is not sufficient to establish the fact that on December 24, 1909, at the time said trade was made, said corporation was bankrupt or in a failing condition, and there is no evidence tending to show that respondent or Collins, his agent, knew or suspected that said corporation was in such condition; and, in order to recover in this action, it devolved up-

on the plaintiff to prove that on December 24, 1909, said corporation was insolvent or in failing condition, as many things might have happened to make it insolvent between that date and the date when the assignment was made. The fact that the corporation failed within about six or seven months after said date does not establish the fact that it was insolvent, or in a failing condition on that date.

[16] We have proceeded upon the theory that Collins was the agent of the defendant, and that the defendant was responsible for the representations that Collins made to appellant in regard to the value of said stock and the solvency of said corporation, and we find nothing in the record that would justify this court in reversing the judgment and remanding the case for a new trial, as it would be impossible to recover in this case unless it is shown that the corporation was insolvent or in a failing condition at the date said trade was made.

We find no reversible error in the record. The judgment must be affirmed, and it is so ordered, with costs in favor of the respondent.

STEWART, C. J., and AILSHIE, J., concur.

Ex parte GEMMILL.

(Supreme Court of Idaho. Dec. 8, 1911.)

(Syllabus by the Court.)

1. COMMERCE (§ 54\*)—SUBJECTS OF REGULATION—STATE AND COUNTY PRINTING.

Sections 1475 and 1476 of the Revised Codes, which require that state and county printing, binding, and stationery work shall be done within the state and within the county where required for use, is not an interference with or regulation of commerce, and is not repugnant to the commerce clause of section 8, art. 1, of the federal Constitution.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. § 54.\*]

2. CONSTITUTIONAL LAW (§§ 89, 225\*)—LIBERTY TO CONTRACT—DUE PROCESS OF LAW—EQUAL PROTECTION OF LAWS—PUBLIC PRINTING.

Sections 1475 and 1476, which provide that the printing, binding, and stationery work shall be done within the state and the county in which it is to be used, does not interfere with or restrict the right of any person to freely contract, nor does it deny to any person the equal protection of the law, and is not repugnant to the provisions of section 1 of the fourteenth amendment to the federal Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 157, 681, 682; Dec. Dig. §§ 89, 225.\*]

3. STATES (§ 94\*)—COUNTIES (§ 113\*)—CONTRACTS—PUBLIC PRINTING.

Sections 1475, 1476, Rev. Codes, refer only to the work to be done in printing and binding, and such work as is necessary to prepare paper, books, and stationery for public use in the respective state and county offices, and has no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

reference to the purchase of the material itself upon which the work is done, and makes no attempt to deprive any person of the right to sell to the state or county any material which may be needed for such public use. These sections of the statute, on the contrary, simply prescribe the locality or situs where certain work to be done for the people in their corporate and sovereign capacity shall be performed, and such statute is a constitutional exercise of the power of the Legislature to prescribe by law the duties of state and county officers, and to command them as to the manner in which they shall exercise certain powers in performing the business and proprietary duties of their respective offices.

[Ed. Note.—For other cases, see States, Dec. Dig. § 94;\* Counties, Dec. Dig. § 113.\*]

#### 4. CONSTITUTIONAL LAW (§ 70\*)—PUBLIC POLICY.

Sections 1475, 1476, Rev. Codes, are not in violation of any public policy of this state, and cannot for that reason be held invalid and void, and with the business and economic wisdom and policy of such statute the courts have nothing to do.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132; Dec. Dig. § 70.\*]

Sullivan, J., dissenting.

Original application by Emmett J. Gemmill for writ of habeas corpus. Writ quashed, and petitioner remanded to custody of sheriff.

G. G. Pickett, for petitioner. G. W. Suppiger, Pros. Atty., and Morgan & Morgan, for the State.

AILSHIE, J. The petitioner, Emmett J. Gemmill, was on the 26th day of September, 1911, held to answer before the district court on the charge of violating sections 1475 and 1476 of the Revised Codes. The charge preferred against the petitioner is that while he was acting as assessor and ex officio tax collector of Latah county, and as such officer, he "did then and there willfully and unlawfully obtain and have executed without the geographical boundaries of the said county of Latah certain county printing, to wit, tax sale certificates, blanks, and duplicates thereof, for the county of Latah, for the payment of which said county printing the said county of Latah then and there became responsible, and there being then and there within the said county of Latah practicable facilities for executing said printing." The petitioner applied to this court for a writ of habeas corpus directed to the sheriff of Latah county, and a writ was thereupon issued. Return was made justifying the detention of the petitioner on the grounds above stated.

[1] Counsel for petitioner insists that the statute under which this prosecution is had is unconstitutional and void, in that it violates the commerce clause of section 8 of article 1 of the federal Constitution, which authorizes Congress to regulate commerce between the states, and that it also violates

section 1 of the fourteenth amendment to the federal Constitution, in that it denies to certain persons the equal protection of the law. Sections 1475 and 1476 of the Revised Codes, the consideration of which is involved in this proceeding, are as follows:

"Sec. 1475. All county printing, binding and stationery work, executed for or on behalf of the several counties throughout the state, for which the said counties contract, or become in any way responsible, shall be executed within the county for which said work is done, when there are practicable facilities within the said county for executing the same, but when it shall become necessary, from want of proper facilities, to execute the work without the said county, then the same shall be executed at some place within the state of Idaho, except as provided in the following section.

"Sec. 1476. Whenever it shall be established that any charge for printing, binding or stationery work is in excess of the charge usually made to private individuals for the same kind and quality of work, then the state or county officer or officers having such work in charge shall have power to have such work done outside of said county or state, but nothing in this chapter shall be construed to oblige any of said officers to accept any unsatisfactory work."

Section 1476a provides that any city or county officer, either as an official member of a board or purchasing agent, who violates any of the provisions of sections 1475 and 1476, shall be guilty of a misdemeanor, etc. This case has been argued principally upon the theory that the statute prohibits the letting of any contract for county printing to a nonresident of the state. This, however, is clearly not the purpose or intent of the statute. The statute has nothing to do with letting contracts to either residents or non-residents of the state. All the state attempts to do is to require that certain work done for the several counties shall be actually executed within the confines of the county or state, as the case may be, and this is without any reference or regard to the person who may do such work. It will be noticed from a reading and analysis of the statute that it is not directed at the purchase of the material—that is, paper and material—but solely to the manual and mechanical work and labor in printing and binding books, stationery, etc., necessary for the several counties. It makes no difference whether the person who does the work is a resident of this state or has a place of business in this state, but the only test is that he shall have the work done within the county, or, if it cannot be done in the county, then in the state if such work can be done within the state. It would be as much a violation of this statute for a citizen of the state who owns and is operating a printing and job

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

office within this state to take a contract and have the work done outside the state, as it would be for an outsider to take the contract and have the work done outside the state. It would, on the other hand, be equally as lawful for a nonresident of the state to take such a contract and procure the work to be done within the county and state as if the contract was entered into with a resident who is operating a local office. In this view of the statute, we think there can be no element of interstate commerce entering into such a transaction, and the statute in no way interferes with interstate commerce or interstate transactions, and is not repugnant to the commerce clause of the federal Constitution.

[2] The next and more serious consideration is, Does the foregoing statute in any way contravene that part of section 1 of the fourteenth amendment, which ordains that no state shall "deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the laws." It is argued that the statute is obnoxious to the foregoing provisions of the federal Constitution, for the reason that it abridges the right to contract, and deprives manufacturers, laborers, and mechanics who are employed or engaged in business in other states from contracting with this state or any of the counties of the state doing printing and binding and stationery work for the state or the counties thereof. In support of this contention, counsel for petitioner cite *People v. Steele*, 231 Ill. 340, 83 N. E. 236, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep. 321; *People v. Coler*, 166 N. Y. 144, 59 N. E. 776; *Marshall & Bruce Co. v. City of Nashville*, 109 Tenn. 485, 71 S. W. 815; *People v. Hawkins*, 157 N. Y. 1, 51 N. E. 257, 42 L. R. A. 490, 68 Am. St. Rep. 736.

*People v. Steele* was a case where defendant was convicted of a violation of a statute forbidding the speculation in theater tickets. The statute of Illinois, it seems, provided that the manager of a theater should cause to be printed on all tickets placed on sale the words, "This ticket cannot be sold for more than the price printed herein," and that the statute further prohibited the demanding or receiving for such ticket any price or sum in excess of the advertising price as printed on the ticket. The statute was evidently enacted to prevent brokers procuring tickets to theaters and other places of amusements, and then selling them at a higher price than was charged for them when sold at the box office. The court held that such a statute was unconstitutional, in that it violated the personal and private rights of individuals to make contracts and to engage in business. That case is in no way parallel with the present case, and throws no light on the subject here under consideration.

*People v. Coler* involved the validity and

constitutionality of a statute of New York which prohibited the using for any municipal work within the state any stone that it was necessary to dress or carve for such use, unless the same had been prepared for use within the boundaries of that state, and also provided that a stipulation to that effect should be inserted in all municipal contracts for public buildings and public works. The court divided over the question. The majority held "that the statute was unconstitutional as depriving municipalities and those contracting therewith of the right to freely contract," and upon the further ground that it was "unconstitutional as in contravention of the federal Constitution vesting in Congress the right to regulate interstate commerce." Chief Justice Parker dissented from the majority opinion, and the reasoning of the learned Chief Justice in that case appeals to us as much the sounder doctrine. The majority opinion proceeds on two theories: First, that the state Legislature had no power or authority to direct the municipality as to the nature or character of the contract it should enter into or of the material it should furnish in any of its public works or of the place where such works should be done or performed, and that the municipal government was entirely independent of the state government in this respect. The other theory upon which the opinion proceeds is that, since the statute undertakes to prohibit the city or any of its contractors from using stone carved in another state, the Legislature was thereby interfering with the right to carry on commerce between the states. The Chief Justice in his dissenting opinion shows very clearly the fallacy in both of these theories. He says: "The statute does not attempt to interfere with the liberty of any citizen to have such stone as he may use cut and dressed where and by whom he shall choose. On the contrary, the statute is but an attempt on the part of a sovereign state to exercise the same function of choice in such regard as the Constitution secures to the citizen."

*Marshall & Bruce Co. v. City of Nashville* was one of the numerous cases that have arisen in this country during recent years involving the constitutionality of statutes and city ordinances requiring public printing and stationery to bear a union label of some of the allied trades council or typographical unions. The court held the ordinance violative of the provisions of section 1 of the fourteenth amendment to the federal Constitution, in that it tended to deprive those not using the label from freely prosecuting their avocation in so far as public printing was concerned. It was also held in that case that such an ordinance was contrary to public policy.

*People v. Hawkins* is another New York case, and the majority opinion was written by the same judge (Mr. Justice O'Brien) who wrote the majority opinion in *People v. Col-*



er. Three of the justices, including Mr. Chief Justice Parker, dissented from that case. That was a case which involved the constitutionality of a statute in the state of New York, which required that all goods made by convict labor should before being sold or offered for sale within the state of New York be stamped or labeled with the words "convict made," and the statute made it a crime for any one to sell or expose for sale any convict made goods within the state without the same being labeled as required by the statute. The majority of the court held that the statute was unconstitutional, for the reason that it was in conflict with the commerce clause of the federal Constitution, and it was held invalid upon the further ground that it was an excessive and undue exercise of the police power of the state.

Several other cases have been cited by counsel for petitioner which hold to the same general effect as the cases above reviewed, but we have cited and reviewed the foregoing cases for the reason that they are the strongest cases that counsel has presented in support of his contention in the case at bar.

Counsel for the state have called our attention to the case of *Tribune Printing & Binding Co. v. Barnes*, 7 N. D. 591, 75 N. W. 904, as the only case they have found that is directly in point on the statute now under consideration. That was an application for a writ of mandate against the board of county commissioners of Cass county, N. D. The plaintiffs were doing business under the firm name and style of the Tribune Printing & Binding Company in the city of Minneapolis, Minn. The board of commissioners had advertised for bids to furnish the county with blank books, printed blanks, and printed stationery, etc. The plaintiffs had presented a bid which the board of commissioners refused to consider on the grounds that the bidders were non-residents, and had their office and place of business beyond the confines of the state. The Tribune Company sought by writ of mandate to compel the board to open and consider their bid. The statute of North Dakota which was under discussion provided as follows: "All county printing shall be done in the state, and, if practicable, in the county ordering the same." After considering and construing the statute itself, the court passed to the constitutional question, and said: "Again, it is argued that if section 1807, *supra* [Rev. Codes 1895], is construed to prohibit county officials from procuring county supplies of printed matter from those who manufacture such supplies at places without the state, it would operate to violate section 8 of article 1 of the federal Constitution relating to commerce among the states. No authority is cited in support of this contention by counsel, and we are unaware of the existence of any such authority. Viewed as a question of principle, we are

unable to see why the state is forbidden to do what an individual certainly may do with impunity, viz., elect from whom it will purchase supplies needed in the discharge of its corporate functions. If such election may lawfully be made, it certainly is competent for the state to direct its officials by a mandatory statute to procure their office supplies from those who produce the same within its own limits, it having elected to purchase none others either for the use of the state, as such, or for the use of subordinate political bodies within the state." It will be noticed from the foregoing excerpt that the North Dakota court only considered the constitutional question in so far as the statute was supposed to run counter to the commerce clause of section 8 of article 1 of the federal Constitution, but did not consider the question as to whether the statute was in any manner violative of the fourteenth amendment.

[3] We are unable to see wherein the statute in question violates any provision of the federal Constitution. As we have above observed, it in no way involves interstate commerce. There is no attempt made to confine the purchase of material to residents or citizens of this state, or to any class of persons. The officers charged with the duty of making purchases may purchase from nonresidents the same as from residents. The only requirement is that the work which shall be done on the material furnished in order to especially adapt it to the uses for which it is purchased must be done within the county if practicable, and, if it cannot be done within the county, then within the state if it can be done in the state, otherwise wherever such work can be done. The officer or purchasing agent has no personal interest in the purchase or the labor to be done thereon. He is not called upon to pay the bill. He is acting only in an official and representative capacity. He receives his instructions from the lawmaking body of the state. The Legislature is authorized by the Constitution (section 6, art. 18) to prescribe the duties of county officers. It must be conceded that the Legislature could not direct the officer as an individual where he should have printing done as a citizen for his private use. The Legislature is speaking only for the sovereign. A statute of the kind and character of the one under consideration is not a public and general law in the ordinary sense of the term, in that it applies to all citizens and subjects of the state, but it is rather a general statute in the more limited sense that it directs the officers and agents of the state as to their duties in the discharge of certain of the business and proprietary interests of the whole people acting in their corporate capacity. The state is only a corporate name for all the citizens within certain territorial limits. The whole people acting as a public corporation have a right to enter

into contracts and make purchases. In doing so, however, they must act through some agency. In this instance they have chosen to act through the Legislature, which is the highest representative authority through which the people can act, and, so acting, they have directed their employes and purchasing agents as to where they shall have certain public work performed. They have said by this statute that all "printing, binding and stationery work" done for the public shall be done within certain territorial limits. We do not see any more objection to this than might be urged to the Legislature directing where a public building shall be erected, or where a public officer shall maintain his office for the transaction of the public business. No reasonable person would spend any time in arguing against the validity of a statute which specifies the location of a public building or the place where a public officer shall maintain his office and discharge the public business, yet it would be just as reasonable to say that the Legislature cannot do this as it is to say that they cannot direct the public officer as to where he shall have certain work done in order to fit up and supply his office for the discharge of his public duties. The fact that the state requires its public buildings to be built within the confines of the state, or that a county building be built within the territorial limits of the county, is certainly no interference with the commerce clause of the federal Constitution, nor is it any interference with the right of the citizens of the several states to contract, nor does it "deny to any person the equal protection of the law."

[4] It has also been argued by counsel for petitioner that this statute is contrary to public policy, and is calculated to encourage and establish a trust or monopoly in the matter of doing public printing and binding. There may be some foundation for this argument in so far as it has reference to the question of creating a trust or monopoly in this kind of work, and yet that possibility is rather remote and contingent. It is certainly not shown in this case to have attained such practical results as to furnish a basis on which a court could declare it void. On the other hand, there is nothing about the statute contrary to any principle of public policy that would justify a court in holding it void. To our minds the most objectionable feature to this statute, if it be objectionable at all, is on the side of public economy. It will be noticed that this statute does not require competitive bids, and furnishes no method whereby the officer or purchasing agent shall ascertain or be informed as to whether there are "practicable facilities" within the county for executing such work, or, if not within the county, then within the state, nor does the statute require that the work be let to the lowest bidder. In this respect our statute differs from the North

Dakota statute. There the statute requires that the officers call for bids. While these may be potent reasons to urge before the Legislature against the wisdom or expediency of such a statute, they are purely matters that address themselves to the lawmaking body rather than to the court. They do not go to the validity or constitutionality of the statute, but bear rather on the wisdom, economy, and expediency of such legislation. Of course, in the condition in which we find this statute, it will be necessary upon a trial that proof be made as to the practicable facilities available for doing the work and the knowledge or means of knowledge that the officer had of such facilities, the good faith with which the officer acted, and other similar questions which are left by the statute to the good faith and sound discretion of the officer making the contract.

The question has also been discussed as to the method of making proof whether there were practicable facilities within the county for executing the work, or, if not within the county, then within the state, and also as to the knowledge of the officer that the work would, in fact, be done outside the state rather than within the state. These are all questions going to the application and enforcement of the statute rather than its validity, and are not questions that we would be justified in discussing at this time. We find no constitutional objection to the statute under consideration.

The writ will be quashed, and the petitioner is hereby remanded to the custody of the sheriff of Latah county.

STEWART, C. J., concurs.

SULLIVAN, J. (dissenting). I am unable to concur in the conclusion reached by the majority of the court. I think that the provisions of sections 1475, 1476 and 1476a of the Revised Codes were passed for the purpose of and do create a monopoly or trust in favor of the printing establishments of the state, and are repugnant to the provisions of section 1, art. 14, of the Constitution. It is well known that in most of the counties of the state there are not more than two newspapers published, and it is equally well known that many of the records required by the county officers cannot be printed by such printing establishments now in this state; that the printing of certain county records, if let to any printer in the state, is sublet to printing houses outside of the state where the work is done. Certain lithographic work is required in the preparation of certain of the records, and it is a fact that there is no person, firm, or corporation that does lithographic work within this state. The witness Yost, who testified on the preliminary examination, admitted that some of the books referred to in his testimony and used by the assessor could not be printed in Latah county. He is one of the owners of the "Star-

Mirror," a newspaper published at Moscow, and had done certain printing for that county, and was asked on the preliminary examination whether Exhibits A and B, which were certain books required by the assessor, could be made in that county, and his answer was, "No, sir." He also testified that certain contracts that his firm got from the county were done by firms in Seattle, Portland, or Spokane.

The federal Constitution secures to the citizens of each state the privileges and immunities of the citizens of the United States, and prohibits any state from making or enforcing any law which shall abridge the privileges or immunities of the citizens of the United States. This section has reference in part to contracting and carrying on business. Section 1, art. 14, of the federal Constitution; 8 Cyc. 1036, and cases there cited. It was held in *Ward v. Maryland*, 12 Wall. 418, 25 L. Ed. 449, that state discrimination against citizens of other states in respect to commercial transactions violates the right of equal privileges and immunities. *Welton v. Mo.*, 91 U. S. 275, 23 L. Ed. 347; *Guy v. Baltimore*, 100 U. S. 434, 25 L. Ed. 743. In *Ex parte Case*, 116 Pac. 1037, this court held as follows: "A state Legislature by legislative enactment or otherwise has no authority to deprive a person of the right to labor at any legitimate business or to deny any person within the jurisdiction of the United States the equal protection of the laws, or to prohibit a corporation that has a right to do business in the state to employ any person, whether alien or native, in the prosecution of any legitimate business." See, also, *People v. Steele*, 231 Ill. 340, 83 N. E. 236, 14 L. R. A. (N. S.) 361, 121 Am. St. Rep. 321. In *People v. Coler*, 166 N. Y. 144, 59 N. E. 776, the court had under consideration the constitutionality of a statute of the state of New York which prohibited using in any municipal work within that state any stone that it was necessary to dress or carve for use, unless the same had been prepared for use within the boundaries of the state, and held said statute unconstitutional and void. It was held that said statute was unconstitutional as depriving municipalities and those contracting therewith the right to freely contract. In the course of the opinion the court said: "The citizens of this state have the right to enter the markets of every other state to sell their products, or to buy whatever they need, and all interference with the freedom of interstate commerce by state Legislation is void. Under the Constitution of the United States, business or commercial transactions cannot be hampered or circumscribed by state boundary lines, and that is the effect of the statute in question. We do not think it necessary to enter into any argument to establish these propositions, since the ground has been covered by the discussion in two recent cases in this court. *People v. Hawkins*, 157 N. Y. 1, 51 N. E. 257, 42 L. R.

A. 490 [68 Am. St. Rep. 736]; *People v. Buffalo Fish Co.*, 164 N. Y. 93, 58 N. E. 34 [52 L. R. A. 803, 79 Am. St. Rep. 622]." In that case the Legislature sought to create a monopoly or trust in favor of the stone cutters in the state of New York.

Conceding, for the sake of the argument, that said sections are constitutional and valid, section 1475 provides that all county printing, etc., shall be executed within the county for which said work is done when there are "practicable facilities" within said county for executing the same. Who is to determine that question? Of course, in the first instance, the officer authorized to procure the printing to be done must do so, and, if such officer determines that question according to his best judgment with honesty and good faith, he certainly is not criminally liable under the provisions of said sections. He is required to exercise his judgment in regard to letting the printing, and, when he is about to let printing that cannot be done in the state, he certainly is not criminally liable for letting it to parties to be done outside of the state. Certain printing was let to a newspaper firm in Moscow, and the record shows that they had it done outside of the state, and the law certainly does not make the officer a criminal if the one to whom he let the contract had the printing done outside the state.

Counsel for the state contend that said sections of the Code do not provide that the citizens of Idaho and citizens of other states may not deal freely with respect to their private business, even though that be printing, and also contend that said sections do not in any manner provide that citizens of other states cannot be awarded contracts for public printing, but that the printing must be done in the proper county. Requiring the printing to be done in a certain locality grants to the local printer an advantage over a printer of another state, and it grants the local printer an immunity and a privilege which is not granted to a citizen of another. It certainly requires child-like faith and simplicity to believe that requiring the printing to be done in a certain place where the local printer has a plant is not a discrimination against one who has a plant at another place. The Legislature might just as well require the paper of which public records and documents are made to be manufactured within the state as to require the printing to be done there as the manufacturing of the paper and the printing represent and require capital and labor. Said sections are shallow pretenses of requiring something to be done that is prohibited by the federal Constitution, and is also a great burden on the taxpayer by granting a monopoly to a very few.

In the majority opinion some stress is laid on the fact that the state is a sovereign, and may require its officers to enter into any kind of a contract it pleases in regard to the purchase of supplies for the several counties

of the state, and, because of such sovereignty, may require any work connected with such contract to be performed in a particular place. Idaho is a sovereign state, but the Legislature is not the state nor the sovereign. It is the servant of the people, and not their master. There are certain limitations placed by the Constitution on the otherwise plenary power of the Legislature in legislative matters. The people have reserved some rights by positive prohibitions contained in the Constitution and others by clear implication, and by section 21, art. 1, of the Constitution, the people have declared that the enumeration of the rights made in said article 1 shall not be construed to impair or deny other rights retained by the people, and one of these rights retained by the people is that the Legislature shall not enact laws for the conduct of the business of the state in making purchases for the counties of the state that will create a monopoly or trust, and require the people to pay much more for county printing and supplies than they would otherwise have to pay, and thus oppress the taxpayer by granting special favors or privileges to the few, as the cost of printing and public records amounts to thousands of dollars every year to the several counties of the state. When the state or county enters the field for the purchase of commodities such as are required for the several officers of the state and county, they should be held to the same rules of common honesty and fair dealing in the expenditure of the people's money as are citizens in their transactions with each other. The provisions of said sections of the Code are not only repugnant to the principles of fair dealing between the counties and the citizens of this state and of the United States, but clearly impinge on the provisions of said section of the federal Constitution and grant a special privilege to a very few people, and in effect deny it to the many, as every citizen of the state is barred from procuring such contracts unless he has a printing plant in the state where such printing can be done, or has the printing done within the county from which the contract is obtained.

But it is contended that such printing must be done for the county at the same charge usually made to private individuals "for the same kind and quality of work," and that prevents excessive charges for county printing. That expression in said section 1476 which provides that the charge for such printing, etc., shall not be "in excess of the charge usually made to private individuals for the same kind and quality of work," means nothing, as no private individual has such books and records made as are required by county officers. The statute says, "the same kind and quality of work." What private individual has a county warrant book or the books required by law to

be used by the county assessor printed? That provision is simply thrown in to make the statute appear fair on its face, and to indicate to the superficial and thoughtless that the county is not required to pay any more for such printing than private individuals are required to pay for printing they have done. As no private individuals have any such printing done, there is no standard by which such prices may be governed.

I refer to this matter only to show that the clear intent and purpose of this legislation was to discriminate, not only between citizens of this state, but citizens of the United States, and thereby deprive them of immunities and privileges of contracting prohibited by said section 1, art. 14, of the federal Constitution.

There appearing no legal cause for the imprisonment of the petitioner, he ought to be discharged, and given his liberty.

**PIONEER IRR. DIST. v. WALKER.**  
(Supreme Court of Idaho. Nov. 15, 1911.)

*(Syllabus by the Court.)*

**1. WATERS AND WATER COURSES (§ 216\*)—IRRIGATION DISTRICT—QUALIFICATIONS OF VOTERS—STATUTORY PROVISIONS—"MUNICIPAL CORPORATION."**

Irrigation districts organized under the laws of the state are quasi municipal corporations, and are governed by the general election laws of the state; and the qualifications prescribed by the Constitution for voters at elections apply to an election held in an irrigation district.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 216.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4620-4627; vol. 8, p. 7728.]

**2. WATERS AND WATER COURSES (§ 216\*)—IRRIGATION DISTRICT—SECRET BALLOT—CONSTITUTIONAL PROVISIONS.**

Section 1, art. 6, Const., which provides for a secret ballot, is applicable to elections held in an irrigation district under the laws of the state.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 216.\*]

**3. WATERS AND WATER COURSES (§ 216\*)—IRRIGATION DISTRICT—QUALIFICATIONS OF VOTERS—CONSTITUTIONAL PROVISIONS.**

Section 2, art. 6, Const., provides: "Every male or female citizen of the United States, twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector."

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 216.\*]

**4. WATERS AND WATER COURSES (§ 216\*)—IRRIGATION DISTRICT—QUALIFICATIONS OF VOTERS—PROPERTY QUALIFICATIONS.**

Section 20, art. 1, Const., provides that: "No property qualification shall ever be required for any person to vote or hold office, except in school elections or elections creating indebtedness."

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 216.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**5. ELECTIONS (§ 18\*)—QUALIFICATIONS OF VOTERS—POWERS OF LEGISLATURE.**

Section 4, art. 6, Const., provides: "The Legislature may prescribe qualifications, limitations and conditions for the right of suffrage additional to those prescribed in this article, but shall never annul any of the provisions in this article contained."

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 18.\*]

**6. WATERS AND WATER COURSES (§ 216\*)—IRRIGATION DISTRICT—SECRET BALLOT—CONSTITUTIONAL PROVISIONS.**

Section 1, art. 6, Const., provides: "All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the Legislature to enact such laws as shall carry this section into effect."

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 216.\*]

**7. WATERS AND WATER COURSES (§ 216\*)—IRRIGATION DISTRICTS—QUALIFICATIONS OF VOTERS—RESIDENCE.**

Section 2 of the act of March 6, 1911 (Laws 1911, p. 461), in prescribing residence within the state as sufficient to qualify a voter at an election within the district, is in violation of section 2, art. 6, Const.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 216.\*]

**8. WATERS AND WATER COURSES (§ 216\*)—IRRIGATION DISTRICT—QUALIFICATIONS OF VOTERS—RESIDENCE.**

Section 2 of the act of March 6, 1911 (Sess. Laws 1911, p. 461), wherein it is provided that a holder of land within the district who is a resident of the state is a qualified voter at an election held in the irrigation district, violates the provisions of section 2, art. 6, of the Constitution.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 216.\*]

**9. WATERS AND WATER COURSES (§ 216\*)—IRRIGATION DISTRICT—QUALIFICATIONS OF VOTERS—PROPERTY QUALIFICATIONS.**

Section 2 of said act of March 6, 1911 (Laws 1911, p. 461), also violates the provisions of section 1, art. 6, Const., in that it provides that each voter may vote and have his ballot marked according to acreage of land owned by him, and according to the number of inches of water used by him within the district.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 216.\*]

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action on an agreed statement of facts by the Pioneer Irrigation District against J. P. Walker to test the constitutionality of Act March 6, 1911, §§ 1-4. From a judgment holding such sections unconstitutional, defendant appeals. Affirmed.

Smith & Scatterday, for appellant. Rice, Thompson & Buckner, for respondent. Hugh E. McElroy and Richards & Haga, amici curiæ.

STEWART, C. J. This case was submitted to the district court of Canyon county upon an agreed statement of facts. It appears from the agreed statement of facts that application was made to the Pioneer Irrigation District, praying that certain lands should be annexed to said district;

that notice was given as provided by law and a hearing had upon the petition for annexation, and the board made an order that an election should be held to determine whether the boundaries of the district should be changed so as to include the lands described in the petition. The question arose with the board whether the election should be held under the provisions of section 2379, Rev. Codes, as amended by an act approved March 6, 1911, and whether sections 1, 2, 3, and 4 of said act are constitutional, or whether the election should be held under the provisions of section 2379 before amendment.

Upon this statement of facts there was submitted to the district court the following questions:

(1) Shall said board of directors of said irrigation district in calling said election appoint registrars under section 2379 of the Revised Codes of Idaho, and shall such registrars be governed in the performance of their duty in reference to said election by said section?

(2) In conducting said election, shall the judges hand the electors a ballot with an indorsement made thereon by one of the judges showing the number of votes which may be cast by said elector by means of said ballot, and shall such elector be permitted to cast more than one vote in said election?

(3) In conducting said election, shall persons be permitted to vote who do not reside within the boundaries of said district at the time of said election, and are not qualified electors under the laws of the state of Idaho for the county within which said district is situated?

(4) Shall parties be permitted to vote at said election who are not electors of the state of Idaho?

(5) Shall electors be permitted to cast ballots at said election which have been marked or identified by judges of election?

(6) Are sections 1, 2, 3, and 4 of said act of the Legislature approved March 6, 1911, constitutional?

In answer to these inquiries submitted to the court, the court made certain findings of fact, adopting the agreed statement of facts as such findings, and made the conclusion of law that sections 1, 2, 3, and 4 of the act of March 6, 1911, were unconstitutional, and that the board of directors of the said Pioneer Irrigation District in calling said election should appoint registrars under section 2379 of the Revised Codes before amendment, and such registrars should be governed in the performance of their duties by said section. Judgment was rendered accordingly, and this appeal is from the judgment.

It is urged upon this appeal by the respondents that sections 1, 2, 3, and 4 of the act approved March 6, 1911 (Sess. Laws of 1911, p. 461), are unconstitutional for the fol-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lowing reasons: First, that such sections fix a property qualification for voters at elections other than school elections or elections creating indebtedness in violation of section 20, art. 1, Const.; (2) that such sections extend the right to vote to persons who own lands within the district, although such persons may be nonresidents of the district and county where the district is located, and therefore violate the provisions of sections 2 and 4 of article 6 of the Constitution; (3) that such sections provide for the use of a ballot which contains distinguishing marks and is not a secret ballot, and by reason of such fact such sections are in violation of the provisions of section 1, art. 6, Const.; (4) that said sections also violate the provisions of sections 2, 4, art. 6, Const., and section 20, art. 1, Const., in providing that a voter is entitled to vote after such irrigation works are built and in operation according to inches of water he is entitled to use from such irrigation works, and also in certain cases may vote as many votes as he has acres of land.

These are the principal reasons argued by counsel representing the parties directly interested in this controversy and other counsel who have been permitted to appear and make argument and file briefs as amici curiæ. The several sections of the Constitution referred to and involved in this case are as follows:

[4] Section 20, art. 1: "No property qualification shall ever be required for any person to vote or hold office, except in school elections or elections creating indebtedness."

[3] Section 2, art. 6: "Except as in this article otherwise provided, every male or female citizen of the United States twenty-one years old, who has actually resided in this state or territory for six months, and in the county where he or she offers to vote, thirty days next preceding the day of election, if registered as provided by law, is a qualified elector."

[5] Section 4, art. 6: "The Legislature may prescribe qualifications, limitations and conditions for the right of suffrage, additional to those prescribed in this article, but shall never annul any of the provisions in this article contained."

[6] Section 1, art. 6: "All elections by the people must be by ballot. An absolutely secret ballot is hereby guaranteed, and it shall be the duty of the Legislature to enact such laws as shall carry this section into effect."

Section 2 of the act of March 6, 1911, among other things, provides: "Every person over the age of twenty-one years, who shall be a citizen of the United States, and a resident of the state of Idaho, and who shall be, at the time of the election at which he offers to vote, the holder of land embraced in any district, or proposed district, and

which is irrigated from works owned by said district, or which is to be irrigated from the works proposed to be purchased or built, shall be entitled to vote at any election held under the provisions of this title. And at all such elections held after such irrigation works are built and in operation, or when the irrigation works to be purchased are being operated, every person having the qualifications hereinbefore prescribed shall have the right to cast one vote for each inch of water and a proportionate vote for each fraction of an inch of water which he is entitled to use from such irrigation works for the irrigation of lands held by him and embraced in said district, and, in the election of directors, he shall have the right to cast the full number of votes to which he is entitled for as many persons as there are directors to be elected at said election; the word 'inch' of water as herein used, means the equivalent of one-fiftieth of one cubic foot of water per second of time; Provided, that when it is proposed in the petition to build new irrigation works, and until such works are in operation, all persons having the qualifications hereinbefore prescribed shall be entitled to vote at all elections held under the provisions of this title, one vote for each acre of land held by him and embraced in said district, and a proportionate vote for each fraction of an acre so held.

\* \* \* Provided, further, that in all elections held under the provisions of this title, ballots printed upon white paper shall be prepared and furnished to the judges of election in each precinct upon which shall be printed in black ink and so arranged as to be easily voted the question or questions to be submitted to the voters, with blank lines upon which the voter shall write the name or names of the person or persons for whom he desires to vote for directors, together with a blank line upon which to write the number of votes which each voter is entitled to vote. \* \* \* When any person shall apply to vote at any election, one of the judges of election shall deliver to the voter a ballot and shall, at the same time, write thereon, in the proper place, in figures, with ink, the number of votes which such person is entitled to vote, as shown by the registrar's list, and the voter shall immediately and without leaving the room where such election is being held, prepare the ballot by crossing out either the word 'Yes' or the word 'No' as he may desire to vote upon any question or questions submitted, and also by writing on the lines prepared therefor on said ballot the name or names of the person or persons for whom he desires to vote for directors, and shall then return his ballot to the judges of election, who shall deposit it in the ballot box."

[1] The first and most important question in this case is, Do the sections of the Con-

stitution above quoted apply to elections held in irrigation districts created under the laws of this state? The Constitution of this state was adopted by the people of the entire state and was for the government of the people of the state, and the provisions therein found are intended to apply to the entire state, unless otherwise provided, and to every legal subdivision thereof, whether created by the Constitution or the Legislature. The provisions of the Constitution with reference to the qualification of voters were intended to apply not only to state elections, but to elections held by the legal subdivisions of the state.

[2] There is no separate or distinct qualification provided by the Constitution for voters at elections held in counties, cities, villages or other municipalities. To all such elections sections 1 and 2 of article 6 apply.

In the case of *Hertle v. Bail*, 9 Idaho, 193, 72 Pac. 953, this court held that irrigation districts were public corporations, and that the general election laws of the state providing for contesting elections applied to contests of elections for directors held in an irrigation district. In the case of *Hettinger v. Good Road District No. 1*, 19 Idaho, 313, 113 Pac. 721, this court had under consideration the validity of an act providing for the organization of a good roads district, and in the course of that opinion this language was used: "It is general in its application, and applies alike to all sections of the state where the taxpayers thereof are willing to assume the burden of additional taxation for the purpose of improving the roads within such section, and applies to all good road districts within the state, and relates to all of a class, and is like in its operation to the organization of cities and villages within the state, irrigation districts, and other municipalities, which are provided for by a general law. *Boise Irrigation Co. v. Stewart*, 10 Idaho, 381 [77 Pac. 25, 321]." In the case of *City of Nampa v. Nampa, etc.*, *Irrigation District*, 19 Idaho, 779, 115 Pac. 979, this court, in discussing the status of an irrigation district, said: "An irrigation district is a public quasi corporation, organized, however, to conduct a business for the private benefit of the owners of land within its limits. They are the members of the corporation, control its affairs, and they alone are benefited by its operations." In the case of *In re Bonds of the Madera Irrigation District*, 92 Cal. 296, 28 Pac. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106, the Supreme Court of California had under discussion the legal status of an irrigation district under the Wright law of California, and in the opinion in that case very exhaustively discusses the legal status of such districts, and says: "That an irrigation district organized under the act in question becomes a public corporation is evident from

an examination of the mode of its organization, the purpose for which it is organized, and the powers conferred upon it. It can be organized only at the instance of the board of supervisors for the county—the legislative body of one of the constitutional subdivisions of the state. Its organization can be effected only upon the vote of the qualified electors within its boundaries. Its officers are chosen under the sanction and with the formalities required at all public elections in the state, the officers of such election being required to act under the sanction of an oath, and being authorized to administer oaths when required for the purpose of conducting the election, and the officers, when elected, being required to execute official bonds to the state of California, approved by a judge of the superior court. The district officers thus become public officers of the state. When organized, the district can acquire, either by purchase or condemnation, all property necessary for the construction of its works, and may construct thereon canals, and other irrigation improvements; and all the property so acquired is to be held by the district in trust, and is dedicated for the use and purposes set forth in the act, and is declared to be a public use, subject to the regulation and control of the state. For the purpose of meeting the cost of acquiring this property, the district is authorized, upon the vote, of a majority of its electors, to issue its bonds; and these bonds, and the interest thereon, are to be paid by revenues derived under the power of taxation, and for which all the real property in the district is to be assessed. Under this power of taxation, one of the highest attributes of sovereignty, the title of the delinquent owner to the real estate assessed may be divested by sale, and power is conferred upon the board of directors to establish equitable by-laws, rules, and regulations for the distribution and use of water among the owners of said lands, and generally to perform all such acts as shall be necessary to fully carry out the purpose of the act. Here are found the essential elements of a public corporation, none of which pertain to a private corporation. The property held by the corporation is in trust for the public, and subject to the control of the state. Its officers are public officers chosen by the electors of the district, and invested with public duties. Its object is for the good of the public, and to promote the prosperity and welfare of the public. 'Where a corporation is composed exclusively of officers of the government, having no personal interest in it, or with its concerns, and only acting as organs of the state in effecting a great public improvement, it is a public corporation.' *Ang. & A. Corp. § 32.* 'A municipal corporation proper is created mainly for the interest, advantage, and con-

venience of the locality of its people. The primary idea is an agency to regulate and administer the interior concerns of the locality in matters peculiar to the place incorporated, and not common to the state or people at large.' 15 Amer. & Eng. Enc. Law, p. 954. 'Public corporations are such as are created for the discharge of public duties in the administration of civil government.' Lawson, Rights, Rem. & Pr. 332."

In the case of *Fogg v. Perris Irrigation Dist.*, 154 Cal. 209, 97 Pac. 316, the court, in discussing the legal status of irrigation districts, says: "The proceedings for the organization of the district, as we have seen, were regular on the face of the record. The district thereby became prima facie a quasi municipal corporation, with defined boundaries established and recorded. \* \* \* And, again, the court says: "The name of the district, it having by that name a prima facie legal existence as such, evidenced in the manner prescribed by law by the necessary official record of the proceedings and order upon which it was declared organized, was a sufficient identification of its boundaries. It constituted a prima facie political subdivision of the state for the purpose of an irrigation district, and all persons were required to take notice of the facts shown in the record of its organization." 1 McQuillin, Municipal Corporations, c. 2. In article 12 of the Constitution of this state, an article entitled "Corporations, Municipal" section 3 provides, "The state shall never assume the debts of any county, town or other municipal corporation"; and section 4, among other things, provides: "No county, town, city or other municipal corporation by vote of its citizens or otherwise," etc. While these sections of the Constitution do not by name designate irrigation districts as municipal corporations, yet the sections clearly recognize that there may be other municipal corporations than those specifically named in the Constitution; in other words, that there may be municipal corporations other than county, town, or city. "Other municipal corporations," as used in the Constitution, must necessarily have reference to such municipal corporations as may be created by law in addition to counties, towns, or cities, and, where the Legislature provides for the organization of an irrigation district in the manner provided by the irrigation law of this state by a vote of the qualified electors of the proposed district, and officers are provided for and chosen with the formality usually required for public officers, and such officers are required to qualify as other public officers qualify, and to execute official bonds, and such districts are given power to acquire by condemnation property for the construction of its improvements, and such property is held in trust and dedicated to the use and purposes for which the district is organized, and is a

public use, and assessments are provided for upon the property in the district, and a board of directors are authorized to establish rules and regulations for the distribution of the waters among the owners of land within the district, and where every material and essential element of a public corporation, such as cities, towns, and villages, is given such district, such district certainly becomes a public corporation, and is a political subdivision of the state. If, then, an irrigation district is a political subdivision of the state, similar in kind and character to a county or city in its general form or government, and is a quasi municipal corporation, then there can be no question but that the provisions of the Constitution in relation to the qualification of voters within such district is applicable, and that all elections held within such district must be conducted within the limits of the constitutional provisions, and that the Legislature in creating such district and providing for elections therein cannot prescribe qualifications for electors except within the limitations and provisions of the Constitution.

[7, 8] A comparison between the provisions of the Constitution cited in this opinion and the statute in controversy clearly shows that the statute provides qualifications for voters at elections held within an irrigation district after its organization, which are directly in conflict and in violation of the provisions of the Constitution, and are necessarily void. The residence provided for by the statute—that is, a residence within the state—is not a residence of 6 months within the state and 30 days within the county as required by the provisions of the Constitution, and is in conflict with the provisions of the Constitution, and this provision must necessarily be void for that reason. The qualification of a holder of land or the user of water prescribes a property qualification, and in that respect violates the provisions of the Constitution which prohibits such a qualification.

In the case of *In re Bonds of the Madera Irrigation Dist.*, in discussing this provision of the Constitution of California with reference to the qualification of voters in an irrigation district, the court said: "It is no more than exists in every popular vote which involves the creation of a municipal debt or the adoption of a municipal organization. The fact that the owners of the lands are nonresidents within the district, and not allowed a voice in the proceedings, is of the same character. Property qualification for voting, either in amount or character, is expressly forbidden by article 1, § 24, Const., which declares: 'No property qualification shall ever be required for any person to vote or hold office.' And, however much nonresidents may be affected by the acts and vote of the community, only those who are inhabitants of the district can by



the Constitution be permitted to vote at any election. Article 2, § 1." In re Bonds of the Madera Irrigation District, 92 Cal. 296, 28 Pac. 272, 14 L. R. A. 755, 27 Am. St. Rep. 106. It is plain, therefore, that section 2 of the act of March 6, 1911, clearly violates the provisions of the Constitution in prescribing a qualification for voters.

[9] A secret ballot is also provided for by the Constitution, while the section under review provides that: "When any person shall apply to vote at any election, one of the judges of election shall deliver to the voter a ballot and shall, at the same time, write thereon, in the proper place, in figures, with ink, the number of votes which such person is entitled to vote, as shown by the registrar's list, and the voter shall immediately and without leaving the room where such election is being held, prepare the ballot by crossing out either the word 'Yes' or the word 'No' as he may desire to vote upon any question or questions submitted, and also by writing on the lines prepared therefor on said ballot the name or names of the person or persons for whom he desires to vote for directors, and shall then return his ballot to the judges of election, who shall deposit it in the ballot box." This section also clearly violates the provisions of the Constitution in permitting a voter to vote in accordance with the number of acres of land owned by him and the inches of water used, and having his ballot so marked by a judge of election, for by such a method there is an identification of the particular vote cast, and the secrecy of the ballot is completely annulled and a publicity given of such vote. This court held in the case of *McGrane v. County of Nez Perce*, 18 Idaho, 714, 112 Pac. 312, 32 L. R. A. (N. S.) 730, that: "Now, in the first place, the Constitution of this state (section 1, art. 6, supra) guarantees to the electors 'an absolutely secret ballot,' and counsel argue that the Legislature could not constitutionally enact an election law which would provide for and authorize the numbering of ballots. \* \* \* In the outset it is perfectly safe to say that the Legislature would have no authority under this constitutional guaranty to require the numbering of the ballots. The authorities to that effect are quite uniform." These various sections, 1, 2, 3, and 4, all relate to elections and the method of voting under the provisions of the statute, and are so closely related and connected that, if one fails, they all must fail, and, as such provisions are clearly a violation of the Constitution, this court is forced to the conclusion that such sections are unconstitutional, and that the judgment should be affirmed.

The judgment is affirmed, with costs awarded to the respondent.

AILSHIE and SULLIVAN, JJ., concur.

## STATE v. VANCE.

(Supreme Court of Utah. Nov. 16, 1911.)

### 1. HOMICIDE (§ 340\*)—INSTRUCTIONS—EVIDENCE—OBJECTIONS.

A conviction for assault with intent to murder under an information charging murder will not be set aside on the ground that the court erred in submitting the issue of murder because of insufficiency of the evidence to present the question.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.\*]

### 2. INDICTMENT AND INFORMATION (§ 189\*)—CONVICTION OF OFFENSES INCLUDED IN OFFENSES CHARGED.

Under Comp. Laws 1907, § 4893, authorizing the jury to find accused guilty of any offense the commission of which is necessarily included in the offense charged, or of an attempt to commit the offense, one charged with murder by the combined effects of kicking, beating, and bruising decedent, and from the administration of poison, may be convicted of assault with intent to murder, though in a charge of murder by poison without violence an assault is not included.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-595; Dec. Dig. § 189.\*]

### 3. CRIMINAL LAW (§ 1180\*)—LAW OF THE CASE.

A decision of the Supreme Court on appeal in a criminal case is the law of the case on a subsequent trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3002-3004; Dec. Dig. § 1180.\*]

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Thomas Vance was convicted of assault with intent to murder, and he appeals. Affirmed.

J. F. Tobin, F. T. McGurrian, A. J. Weber, and S. A. Maginnis, for appellant. A. R. Barnes, Atty. Gen., for respondent.

FRICK, C. J. Appellant was charged with the crime of murder in the first degree, and upon a trial the jury found him guilty of "an assault with intent to murder." Judgment was duly entered upon the verdict, and the appellant asks us to reverse the judgment upon the following assignments of error: (1) That the court erred in refusing the request of appellant to direct a verdict of not guilty; (2) that the verdict "is against the evidence"; (3) that "the verdict of the jury is contrary to law"; and (4) that the court erred in submitting the case to the jury upon the charge of murder "because there was insufficient evidence in the case to present that question to the jury."

This is the second appeal of this case. Our opinion on the former appeal is found in 110 Pac. 434. The information filed against the appellant is set forth in our first opinion. Barring the fact that appellant's children who testified against him at the former trial changed their testimony at the present one, and testified that their former testimony

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with respect to what they said about appellant kicking and beating their mother was not true, the evidence upon the part of the state at the last trial, with unimportant exceptions, was substantially the same as upon the former one. For this reason we shall not refer to the evidence in detail, but refer to the opinion aforesaid for a complete statement of facts.

As appears from our first opinion in this case, the information contained three counts. The state elected to try the appellant upon the third count, in which it was, in substance, charged that he on the 26th day of November, 1907, did make an assault upon one Mary Vance, and he did then and there "willfully, unlawfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, and with the specific intent to take the life of the said Mary Vance," strike, kick, beat, and bruise her, and that on the 27th day of November appellant "willfully, unlawfully, deliberately, premeditatedly, feloniously, and of his malice aforethought, and with the specific intent to take the life of the said Mary Vance," did mix and mingle a fatal quantity of a deadly poison with a certain quantity of water which the said Mary Vance was then and there about to drink, and did drink, and that by reason of "the striking, kicking, beating, and bruising of the said Mary Vance by the said Thomas Vance as aforesaid, and the drinking of the water and poison as aforesaid, the said Mary Vance became mortally sick and distempered in her body, and the said Mary Vance of the beating, kicking, and bruising aforesaid, and of the poison aforesaid so by her taken, drank, and swallowed as aforesaid, and of the mortal sickness and distemper occasioned thereby, from the 27th day of November, A. D. 1907, until the 8th day of December, 1907, continually languished, and so languishing on the 8th day of December, 1907, \* \* \* of said mortal sickness occasioned by the said beating, kicking, bruising and poisoning aforesaid died, and so the said Thomas Vance the said Mary Vance, in the manner and form aforesaid, willfully \* \* \* did kill and murder." On the former appeal we held that in the third count upon which the appellant was tried he was charged with causing the death of his wife by a combination of two causes operating jointly. In other words, that the means described in the information which, it was alleged, produced death was the effects of the kicking, beating, and bruising inflicted upon the body of the deceased on the 26th day of November, and that such effects, operating in conjunction with the effects of the poison which it was alleged appellant administered to her on the following day, and nothing else, caused her death. Under the foregoing charge, we accordingly held that, in order to find the appellant guilty of murder, the jury had to find that both causes operated together to produce death, and that the court erred

in charging the jury that they could find the appellant guilty of murder, although they found that the deceased died from the effects of the kicking and beating alone, or from the effects of the poison alone. We also held that, for the reasons just stated, the third count charged but one offense.

We will now proceed to consider the assignments of error. In answer to the first assignment, it is sufficient to say that for the reasons hereafter appearing the court did not err in refusing to take the case from the jury upon appellant's request.

[1] The fourth assignment is sufficiently answered by the verdict of the jury. In view that the jury failed to find the appellant guilty of murder, they must have found that the evidence in their judgment was insufficient to sustain that charge. The only other assignment is to the effect that the verdict and judgment are contrary to law. As already stated, the jury found the appellant guilty of having assaulted the deceased with the intent to murder her. No exception was taken to the court's charge in which the jury were directed that, under the information, they might find the appellant guilty of an assault as aforesaid, if the evidence warranted such a finding beyond a reasonable doubt. For the purposes of this decision, we shall assume that the question now to be considered is properly presented for review, either under the first or the third assignment or under both.

[2] Upon the question raised by the foregoing assignments, we think that the provisions of Comp. Laws 1907, § 4893, are material. That section reads as follows: "The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offense."

Notwithstanding the foregoing provision, counsel for appellant strenuously argue that the offense of which appellant was found guilty by the jury is not included within the offense with which he was charged in the third count of the information, the material parts of which we have already set forth. This squarely presents the question of what offense, if any, is necessarily included within the charge of murder as contained in the third count of the information. As we understand counsel for appellant, they contend that, if the appellant had been charged with having committed the alleged murder by kicking, beating, and bruising alone, then an assault with intent to murder might be said to be included within the charge, but, inasmuch as appellant stands charged with having committed the murder by the combined effects of the kicking, beating, and bruising and from the administration of poison, therefore an assault with intent to murder is not included. This conclusion is based upon two grounds: (1) That in the charge of murder by the administration of poison without vio-

lence no assault is present; and (2) that inasmuch as it is charged that death was caused by a combination of two causes, in one of which there was no violence, therefore the two causes did not combine in the assault, and, unless they did so, the assault which is a part of the offense of which appellant is found guilty cannot legally be included in the charge contained in the third count of the information. We are unable to grasp the logic of this contention. Even though it be conceded that in a charge of murder by poison without violence an assault is not included, yet in a charge of violently kicking, beating, and bruising another an assault is necessarily included. It is true that it was charged that the alleged murder was committed, or that death was caused by the combined effects of two distinct causes, but it is also true that the jury in their verdict must also have found that the death did not ensue from the combined effect of those causes, and hence that the acts of appellant did not cause death at all, but that the deceased died from some other cause or causes. The appellant was thus found not guilty of murder, but was found guilty of having assaulted the deceased with the intent to murder her. In being charged with an assault, and kicking, beating, and bruising the deceased, the appellant certainly was charged with having committed a violent assault upon her person. No one can successfully dispute this. Moreover, the evidence in support of that charge practically stands undisputed. What difference there is between the witnesses upon this point merely relates to the extent of the violence used by the appellant, and to the seriousness of the injuries that he inflicted upon the person of the deceased. In view of this, how can it be seriously contended that the offense of an assault with intent to murder was not included in the third count of the information? The fact that it was necessary for the jury to find that it was the combined effect of the kicking, beating, and bruising and the poison that caused death before the appellant could be found guilty of murder has nothing to do with the lesser offense of an assault with intent to murder. The combination of the foregoing causes had to be found to exist and co-operate before the appellant could be found guilty of murder because it was charged that he committed the murder by the use of those means and by no other.

But, when the jury repudiated the charge of murder, then the only question left was whether an assault with intent to commit murder could legally be carved out of the principal offense charged, which was murder. We think that all of the authorities agree that where violence is a necessary ingredient in committing the offense, and is contained in the charge of murder, then the lesser offense, namely, an assault with intent to murder, is necessarily included in the

principal charge—that of murder. To say that in this case the lesser offense would have been included if the appellant had been charged with murder by kicking and bruising and beating the deceased, but that it is not included because it was also charged that something else had combined and co-operated with the foregoing in producing death, therefore it is no longer included, is to say that the lesser is not included within the greater. This, to our minds, is no more logical in law than it is in physics. The violent assault which it is alleged appellant made upon the deceased is just as much a part of the charge of murder after he is charged with the administration of poison as it was before the latter charge was added to the former. If this be so, then the assault with intent to murder must be included within the principal charge. The jury were thus authorized to find that, while the evidence fell short of establishing the fact that the appellant had administered any poison to the deceased, and that she died from the combined effects of the poison and the kicking, beating, and bruising yet that they from the evidence were satisfied beyond a reasonable doubt that appellant had kicked, beat, and bruised the deceased, and that he had done so with the intent of killing her. The jury may thus have found that he failed to accomplish his purpose but that he nevertheless made an assault upon the deceased with the specific intent to kill her.

It seems to us that the authorities under statutory provisions like ours leave little, if any, room for doubt that the offense of which the appellant was convicted is legally included within the charge contained in the third count of the information. In the case of *Ex parte Curnow*, 21 Nev. 33, 24 Pac. 430, Mr. Justice Hawley reviews the subject, and in his characteristic lucid style shows that an assault with intent to commit murder is necessarily included within the principal charge of murder in case that acts of violence are included within the charge. The same conclusion is reached by the Supreme Court of Iowa in the case of *State v. Parker*, 66 Iowa, 589, 24 N. W. 225. To the same effect are the cases of *Thomas v. State*, 125 Ala. 45, 27 South. 920; *Peterson v. State*, 12 Tex. App. 655; *Davis v. State*, 45 Ark. 464; *Bush v. Commonwealth*, 78 Ky. 268, and other cases that it is unnecessary to cite. Under a statute like ours, we have been unable to find a well-considered case that holds to the contrary.

[3] The contention that the third count of the information contained two distinct offenses was passed on in the former opinion adversely to appellant's contention, and hence is the law of the case. In any event, however, there is in our judgment no merit to this contention.

We have carefully examined the cases cited by counsel for appellant, and in doing

so have been forced to the conclusion that they have no application to the case at bar.

The judgment is affirmed, with costs.

McCARTY, J., concurs.

STRAUP, J. It is with some reluctance that I concur in the result affirming the judgment. As has been stated, the defendant was charged with assaulting and beating the deceased on the 26th day of November by striking her with his clenched fists and by kicking her, and on the 27th day of the same month with administering to her a deadly poison, and that she from the combined effects of both causes died on the 8th day of December. The court instructed the jury that the defendant could not be found guilty of murder unless they found that the death was the result of a combination of both causes. The court further charged that the offenses of an assault with intent to commit murder, assault and battery, and simple assault, were offenses necessarily included in the charged offense of first-degree murder, and that the defendant could under the information be convicted of any one of them. The jury convicted the defendant of an assault with intent to commit murder. He now contends, not that the offense of an assault with intent to commit murder is not necessarily included in some charged offenses of first-degree murder, but that it is not included in the particular charged offense of first-degree murder. This contention is based on the theory that in a charged offense of murder by poisoning alone the offense of an assault with an intent to commit murder is not included.

There are very respectable courts which so hold. Then it is argued that, since an assault with intent to commit murder is not included in a charged offense of murder by poisoning, the former offense is also not included in a charged offense of murder where, as here, poisoning is alleged as an essential of the charged offense of murder, even though it is not alleged as a sole but a co-operating cause of the death. Hence it is claimed that the court erred in charging the jury that the defendant could under the information be convicted of an assault with intent to murder.

It is alleged that the defendant on a day named unlawfully, willfully, premeditatedly, feloniously, and of his malice aforethought did strike, beat, and kick the deceased with the specific intent to take her life; that on the next day he willfully, etc., administered to her a deadly poison; and that from both causes she died. Now, the question here is not so much whether an assault with an intent to commit murder is, generally speaking, necessarily included in a charged offense of first-degree murder, but whether it necessarily is included within the direct and specific averments set forth in the information. When that portion of the information charg-

ing a willful, etc., beating, with malice aforethought, and with an intent to take the life of the deceased, is looked to, I am readily persuaded that the offense of an assault with intent to murder is necessarily included within those averments.

There is, however, another assignment which in my judgment presents a more difficult question—insufficiency of the evidence to sustain the verdict. In many particulars the evidence on this trial is similar to that on the first trial. That is especially true in respect of the general surroundings of the case. The evidence that the defendant administered poison to the deceased, or that she died of mercurial poisoning, the only poison claimed by the state that the defendant administered to her, is not even as strong on this as it was on the former trial. The evidence, however, I think, indisputably shows that the deceased died from some kind of poisoning. That, I think, is clearly shown by the described symptoms of the deceased's ailment, the character of her complaints and sufferings, and by the irritated, inflamed, and congested condition of the membranes of the stomach and intestines of the deceased as disclosed by the autopsy, and as testified to by the physicians and chemists. The state contended that the defendant administered to the deceased bichloride of mercury in water, and that that, together with his beating her on the previous day, was the cause of her death. The defendant contended that she died from an overdose of oil of savin taken by her to relieve a suppressed menstruation. As testified to by the experts both bichloride of mercury and oil of savin are irritant poisons. From an autopsy and a chemical analysis of portions of the deceased's internal organs no trace of mercury was found. The described ailments and suffering of the deceased, and the congested and irritated condition of her internal organs, are, as testified to by all the physicians, as readily traceable to a poison of oil of savin as bichloride of mercury. Even the experts for the state would not venture an opinion that the congested and irritated condition of the deceased's organs was due to mercurial poisoning, or that she died from such a cause. All that they testified to in that regard was that bichloride of mercury would produce the conditions found by them; but they also testified that an overdose of oil of savin would produce the same conditions. And there was as much, if not more, evidence tending to show that the deceased herself took an overdose of oil of savin, as that the defendant administered to her bichloride of mercury. But I need not go into details of that, for the jury evidently were satisfied that the evidence was not sufficient to justify them in finding that the defendant administered to the deceased bichloride of mercury, or that she died from such a cause. I have referred to the matter only for the purpose of showing that the deceased died from

some kind of poisoning. The jury, evidently reaching the conclusion that the evidence would not justify them in finding that the defendant administered poison to the deceased, naturally turned to a consideration of the further question of an assault with an intent to kill. And the determination of the question of whether the verdict rendered by them is supported by the evidence involves a review of the evidence with respect to the beating and kicking of the deceased by the defendant on the 26th day of November.

The most important evidence on that question is the dying declaration of the deceased, made but a short time before dissolution, and while she was very weak, and made in the presence of the county attorney and a deputy sheriff in response to questions propounded to her, and subsequently reduced to writing and signed by her. The language in the statement was not her language, but that of the county attorney in propounding questions to her, and to which she made responses yes or no. The statement signed by her is that: The "said Thomas Vance did on the 26th day of November, 1907, sit down to a meal, and, seeing that his coffee was filled too full, addressed this affiant as follows: 'God damn you, I'll bust your head with this. I'll learn you to pour me so much coffee.' And said Thomas Vance then and there threw said coffee and the cup holding the same at this affiant. That said cup did not strike this affiant, whereupon said affiant (defendant) seized this affiant, and began violently to beat her upon the head with his fists, knocking her to the floor. That she thereupon arose, started for the door, but that the said Thomas Vance again seized her, and then and there said to this affiant, 'Now, God damn you, I'll kill you this time,' whereupon said Thomas Vance shook this affiant by the neck in a violent manner, causing her body to strike the stove, and he then and there slammed her body against the floor repeatedly, thereby causing affiant to lose consciousness. That the following named children of this affiant and said Thomas Vance were present while said Thomas Vance was beating this affiant as aforesaid, to wit: Lena Vance, Edward Vance, Florence Vance, and Albert Vance."

An Assyrian woman, an itinerant peddler, testified that she, while peddling on the 26th day of November, called at the back door of the deceased and the defendant's house, and rapped at the door. The door was partly opened, and she then saw the deceased lying on the floor near the stove, and that the deceased spoke to her something like "police" or "please police," that the defendant stood near the deceased and kicked her once, and then slammed the door shut. She did not state with what force or violence the defendant kicked the deceased, nor was she able to state with any certainty upon what portion of the body the deceased was kicked.

Another witness, a neighbor of the deceased, testified that she saw the deceased come out of the house, and that she told the witness to telephone for the police. When asked what for, she said "that brute which I call my husband is killing me," and that then "she tried to go in the door. It slammed, and she had to force her way in," where the defendant was, and from whence she had just come.

The two oldest children of the defendant, about twelve and eight years of age at the time of the alleged assault, and about fourteen and ten at the time of the trial, testified that their parents on the 26th day of November had some trouble at the dinner table. When the deceased brought the defendant coffee, he asked her not to fill the cup. She did not hear him, and brought the cup too full. He said: "Didn't I tell you not to fill my cup full?" She said: "I didn't hear you." He: "You better say you did." She: "Well, I won't do it, for I never heard you." Then he jumped up, and threw the coffee at her, and then the cup, but did not hit her with it. Then he picked up a chair. She said: "Tom, don't you hit me with that. You set it down." He set the chair down, and then ran to her and shoved her down near the stove. She jumped up and ran out of doors on the back porch. He tried to shut her out, but she got back in before he could get the door closed, and that that was all that happened. They further testified that the defendant did not kick nor strike her, but that he took hold of her and threw or shoved her to the floor, and that he made no threat to kill her. These children on the former trial testified that the defendant struck the deceased with his fists, that he kicked her, and one of them, that he said, "God damn you, I'll kill you"; but much evidence was adduced, and some by wholly disinterested witnesses, to show that the testimony of the children on the former trial was induced and influenced by a sister of the deceased, in whose charge they were most of the time from the death of the deceased to the time of the first trial, and that she coached them and rehearsed their testimony, and told them that, if they would not testify as directed, they, too, like their father, would be imprisoned. That sister was a witness for the state, and hostile to the defendant. She was thoroughly impeached. The testimony of the children on the former trial, of course, was not evidence on this trial to establish the facts so formerly testified to by them. It was evidence only affecting their credibility and the weight of their testimony with respect to the facts testified to by them on this trial.

The evidence, without dispute, shows that there were no marks, nor bruises, nor wounds found on the deceased's body, and that there were no external or internal indications that

any violence had been committed upon her except the testimony of the sister, who testified that on the 27th she saw a black place swollen up under the right thigh of the deceased, about even with the lower portion of the vagina, and the attending physician who testified that some time after the deceased was removed to the hospital he found a black and blue mark—a discoloration of the skin—on the upper part of the inside right thigh. But the physician also testified that the discoloration was not indicative of any serious injury, and that, as testified to by all other physicians, the death was not due to violence, and could not be attributed to such a cause. Other physicians, the undertakers, and other witnesses who had carefully examined the body at the morgue with a view of ascertaining whether any violence had been committed on the deceased, testified that they did not even find the black and blue mark testified to by the sister and the attending physician.

The evidence undoubtedly shows that the defendant committed an assault and battery on the deceased. Of course, an assault with intent to kill may be inferred from the character and degree of violence of an assault, though unaccompanied by threats. But, to justify the inference, the natural and probable consequences of the committed acts of the assault must be such as to cause death or do great bodily harm. That is to say, the inference would not be justified from a mere slap of the hand, or ordinarily from striking with the clenched fist, nor even from a kick, unless the circumstances and the degree of violence attending it are such as to show that the committed act naturally and probably tended to cause, or was intended to produce, great bodily harm. When the evidence independently of the dying declaration is considered, it is very doubtful if there is sufficient evidence to show that the defendant assaulted the deceased with intent to kill her. When so considered, the only evidence to show the assault is the testimony of the peddler that the defendant kicked the deceased once while she lay on the floor, of the children that he in a quarrel took hold of her and shoved or threw her down, but that he neither struck nor kicked her, and the fact that a black and blue mark was found on the upper part of the inside of the thigh of the deceased. Of course, it shows the defendant to be a bad man, and guilty of cruelty and battery. That a jury, however, from such acts alone may also infer an intent to kill, I think is very doubtful. From the statements contained in the dying declaration that the defendant violently beat the deceased on the head with his fist, that he knocked her down, that, when she arose, he seized, and violently threw her against the stove, and slammed her body repeatedly on the floor with such violence that she lost

consciousness, and that the committed acts were accompanied with a threat to kill, I think an intent to kill may be inferred. But it should be remembered that by an unbroken line of authorities dying declarations are receivable in evidence only in cases of homicide and where the death of the declarant is the subject of the charge of homicide and the circumstances of his death are the subjects of the declaration. Now, the dying declaration of the decedent was properly admitted in evidence, for, under the charge in the information, the death of the declarant and the circumstances and the cause thereof were the subjects of the charge of homicide; and it was receivable and applicable to the prosecution for homicide in whatever degree, first or second degree murder, or manslaughter. Query: Was it also applicable to the prosecution of an offense not amounting to homicide, an assault, an assault and battery, or assault with intent to kill? Clearly, under the authorities, had the defendant been charged with only the offense of an assault with intent to murder, the dying declaration of the deceased would not have been applicable to that kind of a prosecution, and would in such case have been inadmissible. Now, the jury, upon all the evidence adduced, including the dying declaration, finding that the alleged cause of the death was not sustained, and finding the defendant not guilty of homicide in any degree or of any kind, could they then consider the dying declaration applicable to the prosecution or charge of an assault with intent to murder? If so, then why would not dying declarations be receivable and applicable in a prosecution where an assault with intent to murder, with its included lesser offenses, was the sole charge? It is just as probable that the jury, undirected as they were, considered the dying declaration applicable to the included offense of an assault with intent to kill as to the charged offense of homicide, or any included offense of homicide. And I am inclined to think, unless warned or directed not to do so, they had the right to so consider it, or, more properly speaking perhaps, the aggrieved party could not complain if it was so considered, he not having requested that the consideration of the evidence should be restricted or limited to the charged or an included offense of homicide, and to the cause of the death of him who was the subject of the charge of homicide; for the rule is well settled that if evidence is properly admissible for one purpose, but may be improperly applied by the jury for another, the party who may be aggrieved by such misapplication should seasonably request the court to direct the jury to properly restrict it. This the defendant did not do. So, even though it should be held that the dying declaration should have been restricted to a consideration of the charged or an in-

cluded offense of homicide, and to the cause of the death of the declarant who was the subject of the charge of the homicide, and should not have been considered by the jury as applicable to the offense of an assault with intent to kill or any lesser offense, still, the evidence being let to the jury without objection and without request that a consideration of it be restricted, I am inclined to the opinion that I, on a review of the evidence to determine its sufficiency to support the verdict, should consider it as it was so let to the jury. I am not disposed on a review of sufficiency of evidence to support a verdict to determine that question from a consideration of evidence only which I think was properly admitted or which only should have been considered by the jury, and discard the rest in the absence of an exception and assignment challenging the ruling which let the improper evidence in or misdirected the jury in the application of it. Hence, when the whole of the evidence, including the dying declaration, is considered, I am of the opinion that the evidence is sufficient to support the verdict. True, the statements of the deceased were somewhat weakened because made at a time when she was very feeble and could only with difficulty respond to questions propounded to her, and because there were no marks or bruises or wounds found on her body, except the black and blue mark on her thigh, and no other external or internal indications that any violence had been committed on her. It may be said with considerable force that, if the violence had been inflicted on her head and body as described by her, some marks or bruises or wounds other than that found on the thigh would have been found. But I think these were matters for the consideration of the jury. It was within their province to determine the truth of the statements contained in the dying declaration and the weight to be given them. They evidently believed the statements to be true, and I am not prepared to say that they had not the right to so believe and to find the facts as therein stated.

I therefore concur.

#### STRATTON v. ROTROCK.

(Supreme Court of Kansas. Dec. 9, 1911.)

On rehearing. Former opinion (84 Kan. 198, 114 Pac. 24) adhered to.

**PER CURIAM.** The questions presented in this case have been reargued and carefully reconsidered, and the court adheres to the former decision therein. 84 Kan. 198, 114 Pac. 224.

**JOHNSTON, O. J.** (dissenting). The findings of the trial court do not, in my opinion, warrant this court in directing that judgment be entered in favor of the appellant.

**BURCH, J.**, is of the same opinion.

#### ROACH v. SKELTON.†

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

#### APPEAL AND ERROR (§ 1032\*)—REVIEW—HARMLESS ERROR.

To justify the reversal of a judgment, rendered in accordance with a verdict, on the ground that irrelevant evidence was admitted, it must appear that the evidence was not only irrelevant, but was also prejudicial to the rights of the complainant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.\*]

Appeal from District Court, Trego County.

Action by H. Roach against J. W. Skelton. Judgment for defendant, and plaintiff appeals. Affirmed.

David Ritchie, for appellant. W. S. Roark and Lee Monroe, for appellee.

**SMITH, J.** The appellant, as plaintiff, alleges that in March, 1908, he bought of appellee a herd of about 56 head of cattle, about 46 of which he alleges were registered Herefords; that as a part of the consideration for the purchase price of the cattle the appellee agreed to deliver to him proper certificates of registration for each of said cattle, and further agreed that within a reasonable time after the delivery of the cattle he would go to appellant's place of residence, where said cattle were kept, and would designate each of said animals to which the respective certificates of registration related; that the appellee has, ever since the delivery of the cattle, failed, neglected, and refused to designate the cattle as agreed; that by reason of such failure the appellant was damaged in the sum of \$700.

The appellee admits the sale of the cattle, but denies that he ever agreed to identify them, or point out any of them, or ever became obligated so to do. He also alleges that more than one-half of said cattle were at the time of the sale plainly marked with identification metal tags, attached to the ear, which were fully pointed out and explained to appellant at or shortly after the time of sale. Appellee further contends that a portion only of the cattle were registered Herefords, and a portion had not been registered; that for more than 60 days after the sale he remained in the neighborhood where the cattle were kept, and again returned to the neighborhood in the fall of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

† Rehearing denied.

1908, and remained there several months. And, although under no obligation to do so, he, on divers occasions offered to appellant to designate and assist him in marking such of the animals as the appellant was unacquainted with and desired to have identified, but the appellant evinced no desire or willingness to avail himself of such services, and failed and neglected to afford the appellee any reasonable opportunity to make any further identification of the cattle until they had become so altered and changed in appearance that a further identification of them by the appellee had become impossible.

The evidence shows that an attempt was made to identify the cattle in December, 1908; that two or three were examined; and that appellee failed to identify them. The evidence was quite conflicting as to the circumstances. The appellee testified that he requested that the cattle be kept together and run through a chute; that the appellant declined to put the cows through the chute for fear of injury, and that the cattle were scattered on either side of a river; that when the cattle were brought into the corral the fence was insufficient to keep them in, and the tags could not be examined, unless the animals were kept still. This evidence was not disputed, and there is no proof of a request to identify the cattle at any other time.

The court erroneously permitted evidence to be introduced, over the objection of the appellant, that the cows had to some extent run with scrub or grade bulls the season before the sale in question. The only claim for damages was the alleged failure of appellee to designate which particular animal then in being was referred to in each particular certificate of registration, and no damages are asked on account of the breeding of the prospective increase. This evidence had no bearing on the issues in the case, but it is not apparent that it was prejudicial to the rights of appellant.

The principal question of controversy seems to be whether the appellant used reasonable diligence in attempting to identify the cattle, and whether he allowed the appellee a fair opportunity to identify the cattle at the time the attempt to identify was made.

The appellant had full opportunity to produce his evidence, and had several witnesses, and the case was submitted to the jury under instructions in which there is no substantial error. The jury returned answers to the following special questions of fact:

"No. 1. Did the plaintiff buy said cattle with the intent and purpose of handling them as pure bred, registered cattle for breeding purposes? Answer: No.

"No. 2. Did the defendant at the time of the sale inform the plaintiff that the cattle were mixed? Answer: Yes.

"No. 3. Did the plaintiff exercise all reasonable diligence to identify the cattle that were marked? Answer: No.

"No. 4. Did the plaintiff at the time he purchased the cattle know that a portion of them would be difficult and doubtful of identification? Answer: Yes."

The jury also returned a general verdict in favor of the appellee, which was approved by the court, and judgment was rendered accordingly.

The judgment is affirmed. All the Justices concurring.

#### ROBERTSON et al. v. BOARD OF COM'RS OF RAWLINS COUNTY.

(Supreme Court of Kansas. Dec. 9, 1911.)

On rehearing. Modified and affirmed.

For former opinion, see 84 Kan. 52, 113 Pac. 413.

PER CURIAM. Ratcliff was made a trustee of the Banta title against his will (Robertson v. Rawlins Co., 84 Kan. 52, 113 Pac. 413), because the county took the benefit of his voluntary services. So far as Ratcliff's purchase of that title was concerned, the county is placed in the same position as if he had been authorized at the beginning to conduct the negotiations. For that reason, and for no other, the county should reimburse him for his legitimate expenditures in the transaction with Mrs. Banta. The county thereby discharges its legal duty to reimburse its agent, and his protection should be concomitant with the confirmation of the county's title. The subject is one which necessarily attaches to the relief granted to the county, and the judgment ought to be modified to include it.

The Creveling claim, however, stands on an entirely different footing. The county has never accepted or adopted or ratified its purchase by the plaintiffs, and is under no obligation to do so. That claim was purchased pending the litigation in a hostile effort to defeat the county, and the ratification of Ratcliff's services in the interest of the county in one matter does not include or compel a ratification of subsequent action by him and his assignee against the county's interest in a separate and independent matter. The validity of the Creveling claim has never been established, its character and amount are uncertain, and, whatever it may be, the plaintiffs simply stand, with respect to it, in Creveling's shoes. Whatever rights she had the plaintiffs bought, and whatever remedies she had passed to them. But the county is not bound by any stronger "equity" to respect the claim in their hands than if Creveling still owned it. As shown by the original opinion (84 Kan. 62, 113 Pac. 413), the district court was well within its power in refusing to permit new issues on the Creveling matter to be introduced at the



very end of the trial. That is precisely what this court would be requiring, if it should now direct the trial court to proceed as the plaintiffs demand.

Therefore the judgment will be modified no further than has already been indicated.

**CUNNINGHAM et al. v. CITY OF IOLA et al.†**

(Supreme Court of Kansas. Dec. 9, 1911.)

*(Syllabus by the Court.)*

**1. GAS (§ 14\*)—CHARGES—REASONABLENESS.**

An ordinance, enacted by a city furnishing natural gas to its inhabitants, is not presumptively unreasonable, because it requires a minimum charge of 50 cents a month, regardless of the amount of gas used, a rental of 20 cents a month for meters furnished for the use of tenants, and also provides that owners of tenant property, and not their tenants, will be dealt with, unless separate service pipes are supplied for each tenant using gas.

[Ed. Note.—For other cases, see Gas, Cent. Dig. §§ 10, 11; Dec. Dig. § 14.\*]

**2. JURY (§ 28\*)—RIGHT TO JURY TRIAL—WAIVER.**

In a suit to enjoin the city from shutting off gas from plaintiffs' office building, the answer, in addition to certain defenses, set up a counterclaim for installing meters, rent thereof, and for gas used in the building. No objection was made, and no demand for a jury, but after a full trial an exception was taken to the judgment. *Held*, that the plaintiffs waived the right to a jury, and cannot now be heard to complain.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 176-196; Dec. Dig. § 28.\*]

Appeal from District Court, Allen County. Action by R. M. Cunningham and M. N. Beckey against the City of Iola and others. Judgment for defendants, and plaintiffs appeal. *Affirmed*.

Frank R. Forrest, for appellants. Travis Morse and G. E. Fees, for appellees.

**WEST, J.** The plaintiffs owned an office building in Iola, and prior to January 1, 1910, had been paying for natural gas a flat rate of 15 cents a month for each light and \$2 a month for each heating stove. December 30, 1909, the city enacted an ordinance, taking effect January 1, 1910, providing for a charge of 20 cents per 1,000 cubic feet for gas, and a minimum charge of 50 cents per month, whether 50 cents worth were used or not.

Section 1 provides that consumers shall be required to use such meters as shall be approved by the city; and that but one meter shall be furnished by the city for service pipe taken from the mains, except: "Where two or more houses use gas from the same line in which case a meter shall be installed for each house, all meters shall be set between the stop box and the distributing pipe under the supervision of the city gas inspector. \* \* \* Where two or more independ-

ent users use gas from the same service pipe, except as above provided, the city will look to the property owner and not to the independent user for gas rates. All meters furnished under this section shall be furnished by the city free of rent therefor but the applicant shall pay the expense of installation." Section 2 provides that, where any building is owned by two or more owners, each owning separate parts, each part shall be considered separate property, and a meter shall be furnished under section 1 for each separate part. Section 10 provides that: "The city will furnish extra meters to an individual for his tenants for the monthly rental of 20 cents per meter per month, applicant to pay the cost of installation."

Plaintiffs alleged that their building was piped in pursuance of an ordinance of 1904, calling for flat rates, and that the ordinance of 1910 is void in the respects already mentioned, because unreasonable and discriminating, and prayed that the city might be enjoined from shutting off the gas from their building, and from the enforcement of the ordinance. The defendant answered, setting up the ordinance, and alleging that it was reasonable and proper; that the premises of plaintiffs consist of business houses with 6 or more separate business rooms upon the lower floors, and a large number of offices and other rooms in the upper story, whose occupants go and come without knowledge or control of the city; that under section 1 the city installed 3 meters, at the request of plaintiffs, for metering gas to the premises, for the use of the occupants, for which meters no rental was charged; that at plaintiffs' request the city furnished 17 smaller meters for use of their tenants, for which plaintiffs agreed to pay 20 cents per month rental per meter, which was alleged to be a reasonable charge; also setting up a counterclaim for \$127.60 for installing meters, rent thereof, and gas used in the building, alleged to be due from plaintiffs to defendant. The reply contained a general denial, an allegation of invalidity of the ordinance, and an allegation that each of the tenants was able and willing to pay for the gas consumed by him according to the meter readings. A trial was had by the court, and after considering the evidence the temporary injunction was dissolved, and a judgment rendered in favor of the defendant for the amount of the counterclaim. Plaintiffs appeal, and complain that the court erred in not holding the ordinance invalid on account of its provision making appellants liable for the gas used by their tenants, on account of the 50-cent minimum charge, on account of the 20-cent meter rental, and in holding for the defendants upon the counterclaim.

None of the evidence is brought up. The question, therefore, is whether, in the ab-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† For opinion on petition for rehearing, see 119 Pac. 1135.

sence of the evidence, we should say that the ordinance is void for the reasons specified. Appellants in their brief say that if the city has the power to prescribe rules and regulations governing the use of gas they must be reasonable, just, lawful, uniform, and equitable, and not discriminatory, and we take it that the question of power to enact the ordinance, if reasonable, is conceded; certainly it is not contested in the appellants' brief. It is argued that no power exists to require a payment for gas, not actually used; and that to withhold gas from tenants amounts to a discrimination against them, because they are tenants; and that to require tenants to pay a meter rental of 20 cents a month is another discrimination against them, because they are tenants.

[1] While no specific statutory authority is cited for the enactment of an ordinance fixing rates, we shall assume, as appellants apparently have done, that such power existed by implication and under the general power vested in cities of the second class to make contracts and enact ordinances. The council evidently deemed it proper and reasonable to collect 50 cents a month from each patron, whether he used gas amounting to that sum during the month or not, on the theory that this minimum sum would pay for reading meters and other services performed by the city in connection with the service, although the amount of gas used in one month might not entitle the city to this sum.

The provision regarding service pipes was manifestly inserted upon the theory that the city could not afford to keep track of numerous tenants as well as the owner of the property could afford to do, unless he chose to provide for separate service pipes.

The 20-cent rental for meters placed in buildings for the purpose of enabling the landlord to know how much gas each tenant used was doubtless deemed a reasonable compensation for the service and expense on the part of the city. What the exact circumstances were, and what facts may have justified or failed to justify the council in these supposed views, we do not know. No provision appears, requiring any one to purchase or procure meters from the city, the provision merely being that those used must be approved by the city inspector; and if, instead of purchasing 17 meters for their tenants, the plaintiffs saw fit to rent them of the city we see no reason why the required rental should not be paid.

As it is impossible to know how much gas any tenant would use during any given month, or how frequently the amount would be less than 2,500 cubic feet, it would be a mere matter of speculation as to whether the 50-cent minimum charge would operate as a material burden upon any consumer or not, and, in the absence of any showing to that effect, we cannot say that it would, or that the ordinance is in this respect unreasonable. This provision would apply only

to the three meters used for metering gas to the premises; and there is nothing to indicate that less than 2,500 feet would pass through either one of these in a month.

The requirement that a landlord either provide separate service pipes, or be responsible for all the gas used in his building, is said to be a discrimination against tenants, merely because they are tenants, although they be ready, able, and willing to use and pay for the gas desired by them. Plaintiffs cite as authorities upholding this contention *Thornton on Oil & Gas*, §§ 526 and 536, and *State ex rel. Milsted v. Butte City Water Co.*, 18 Mont. 199, 44 Pac. 966, 32 L. R. A. 697, 56 Am. St. Rep. 574, which holds that the refusal of a water company to supply water to a tenant in the possession of a house, when he is ready to pay for it in advance, cannot be justified by a by-law, declining to contract for water, except with owners or their authorized agents. But that was the case of one tenant in possession and occupancy of a house, and not one in which a tenant in an office building demanded the service. It is not deemed, however, that this provision was made for the purpose of discriminating against tenants, but rather for the purpose of treating tenant property as a whole, and dealing with the owner, who can be found, and who can more reasonably look after his tenants than can the gas company, or the city. If, for instance, in the property here involved, there are 17 tenants, coming and going, it is not unreasonable to require the landlord, who has full control over the question as to who shall occupy his rooms, to attend to the matter of gas service; and it is not less reasonable than to require the city, which has no such control, to furnish to and collect from every tenant who for a time, long or short, may desire to use gas. True the city might partially protect itself by requiring advance payment, but it does not follow that it must resort to this sort of protection only. If tenants should find that landlords will not arrange for gas service, the natural result would be a loss of their patronage, and their selection of a landlord who would insure them gas service, so that practically it cannot be said that they are left at the mercy of the property owner. In *Kelsey v. Board of Fire & Water Commissioners of Marquette*, 113 Mich. 215, 71 N. W. 589, 37 L. R. A. 675, the Michigan Supreme Court held that when the municipal charter provided for furnishing water to the owners or occupants of houses and other buildings, and the rules provided for dealing with owners and not with tenants, the duty of furnishing water to each tenant separately, and collecting for it, could not by the owner be imposed on the board of water commissioners. It was there held to be a reasonable regulation to deal directly with the owner, and decisions of other courts holding similarly were cited. Here the gas goes to the building through 3 service pipes, each sup-

plied with a meter. In case a tenant using one of the 17 small meters should refuse to pay, the city could not shut off his gas, except by shutting off one of the 3 service pipes, and thereby cutting off the supply of several other tenants; while, if the landlord had provided a separate service pipe for each tenant, each could then be required to pay, or be deprived of gas, without interfering with the supply of any other tenant. The regulation being one contained in an ordinance, it is presumptively reasonable until the contrary is shown, or unless it is unreasonable or discriminatory on its face. Having none of the evidence before us, and it not appearing *prima facie* unreasonable, but reasonable, it must for the purposes of this case be upheld.

[2] The complaint that a counterclaim was considered and passed upon without the intervention of a jury, and in an injunction suit, is fully answered by the fact that no objection or request for a jury appears to have been made. There was an exception to the judgment, but this was too late. Civil Code, § 296 (Gen. St. 1909, § 5890) provides that in actions arising on contract a jury may be waived by written consent, filed with the clerk, or by oral consent in open court, entered in the journal. In *Cavanaugh v. Fuller*, 9 Kan. 234, cited by plaintiffs, a demand for a jury was refused. *Beery v. Naylor*, 65 Kan. 368, 69 Pac. 347, is also cited, which holds that in an action on a creditor's bill, where no second judgment was prayed for, it was error to render a money judgment. It was expressly decided in *State v. Cutler*, 13 Kan. 131, that, where the parties try an action before a judge at chambers, without any objection or exception to the action of the judge in trying the case without a jury, they will be held to have waived a jury trial. The general rule is that the waiver may be by any conduct or acquiescence inconsistent with an intention to insist on a jury trial. 24 Cyc. 154. Plaintiffs are presumed to have known their rights, and having failed to assert them at the proper time they cannot be heard to do so now.

The judgment is affirmed. All the Justices concurring.

GIBSON v. WALTERS et al.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

1. TAXATION (§§ 662, 685\*)—SHERIFF'S SALE—NOTICE.

There is no statutory provision requiring proof of publication of a sheriff's sale notice by the affidavit of the printer. The sheriff's return should show publication, and the confirmation of the sale is an adjudication that notice was duly published. The record may be supplemented by the evidence of the publisher or

printer, and by the files of the newspaper, showing such publication.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1842, 1875; Dec. Dig. §§ 662, 685.\*]

2. TAXATION (§ 769\*)—TAX DEED—CORRECTING DEFECTS IN FORMER DEED—EFFECT.

The taking out of a second tax deed for the purpose of correcting defects in a former tax deed has the effect of reopening the question of the validity of both deeds and of the regularity of the tax proceedings, unless the first deed was one which fully complied with the statute, and notwithstanding the defects in the first deed may have been otherwise cured by the lapse of five years from the time it was recorded.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1533-1536; Dec. Dig. § 769.\*]

3. TAXATION (§ 734\*)—TAX DEED—DEFECTIVE DESCRIPTION.

A tax deed which is assailed within two years from the time it was recorded is held void upon the proof showing that the tax roll of the year for the taxes of which it was sold described the land as less than a full quarter section, and gave the number of acres, and the delinquent tax sale notice, as published, described the land as a full quarter section, without any mention of the acreage.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 734.\*]

Appeal from District Court, Meade County.

Action by Charles E. Gibson against Amos Walters and others. Judgment for plaintiff, and defendants appeal. Affirmed.

R. W. Griggs and B. F. Milton, for appellants. Scates & Watkins, for appellee.

PORTER, J. Ejectment for the possession of a quarter section of land. Plaintiff had judgment, and defendants appeal.

[1] The appellants sought to impeach a sheriff's deed in appellee's chain of title, on the ground that the jurat was omitted from the affidavit of the printer attached to the sale notice, and that the affidavit therefore failed to show notice of sale. The court admitted proof, showing that the notice was duly published. It is claimed that this was error. There is no statutory provision requiring proof of publication of the notice of sale by the affidavit of the printer. The return of the sheriff should show publication; and the confirmation of the sale is an adjudication that the sale was regular in all respects, and that notice was duly published. It is competent to prove the fact, as the appellee did, by the evidence of the publisher and by the files of the newspaper.

The appellant claims by virtue of a tax deed issued to Amos Walters, September 5, 1898, and possession under it for more than five years. It appears, however, that on March 8, 1907, the clerk issued to Amos Walters a second tax deed upon the same tax sale, for the purpose, as expressed therein, of correcting the former deed. The second deed was duly recorded. The appellee contends and the court held that all rights

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

under the first deed merged in the second, and as this action was brought within two years after the second was recorded the court permitted the appellee to show that the tax proceedings were irregular and the deed void. The appellants rely solely upon the first deed, and insist that it was valid, and that there was no excuse for issuing the second; that the second was void, because the power of the clerk to issue any further deed upon the same sale was exhausted when the first was issued. The statute provides: "In all cases where different or successive tax deeds upon the same sale shall be put on record by the same party, or in interest therewith, it shall be deemed and held that all rights which might otherwise be claimed under all or any tax deeds prior to the last one put on record shall be deemed and held to be waived, and considered as merged in such last tax deed so put on record; and in all cases where several tax deeds shall be put on record by the same party, or in interest therewith, that the party claiming to own the same land may maintain an action for the recovery of the possession thereof, or to set aside any or all such tax deeds, at any time within two years from \* \* \* the time of putting on record the last of such tax deeds." Laws 1879, c. 40, § 1; Gen. Stat. 1909, § 9485.

[2] We think it is clear that the first deed was not in substantial compliance with the law, and could have been attacked for irregularity. It did not show the exact date of the tax sale upon which it was based, and disclosed other defects which could be cured only by the aid of presumptions and inferences after the lapse of five years from the date the deed was recorded, and then only where the tax title holder had been in possession during that time. It was therefore so defective as to authorize the clerk at any time, upon demand of the tax title holder or those in interest, to issue a second deed. It appears that the appellants had been in possession for more than five years after the deed was recorded, but that fact, of course, did not appear in the record title. The holder of such a deed might prefer to have a deed regular on its face, even after the expiration of five years, rather than to be put to the trouble of proving the fact of his possession. At all events, a second deed to correct the first would give him a better record title.

"If all the proceedings up to the execution of a tax deed are regular and legal, the holder of the certificate is entitled to a deed in legal form, and carrying that prima facie evidence of the regularity of all prior proceedings which belongs to a statutory deed; and if through mistake or inadvertence a different deed, and one substantially departing from the statutory form, has been executed the county clerk can be compelled by mandamus, and may without it, execute and

deliver a deed in correct and statutory form. In other words, neither the power nor the duty of the county clerk is exhausted by the execution of an irregular and improper deed." *Douglass v. Nuzum*, 16 Kan. 515, 525.

The appellants cite *Corbin v. Robinson*, 28 Kan. 532, and *Hewitt & Rounds v. Storch*, 31 Kan. 488, 495, 2 Pac. 556, holding that where the first deed is in substantial compliance with the statute the clerk has no power to issue the second, and their contention is that the second deed in this case is a nullity, and that it was error to admit it in evidence. They rely solely upon the first deed, which they insist is valid. In the *Corbin* Case, supra, it is said in the opinion that, the first deed being in substantial conformity to the statute, the power of the clerk to issue another deed upon the same sale was exhausted. The language must be considered with reference to the facts in that case. There the tax title holder had neglected to take possession under the first deed, and procured the issuance of the second in order to avoid the statute of limitations; and it was held that, there being nothing wrong with the first deed, he could not secure an advantage and extend the period of limitations by procuring the execution of an unnecessary deed, which the clerk had no power to issue. In the present case, no question of limitation is involved.

In *Hewitt & Rounds v. Storch*, supra, it was ruled in the syllabus that: "Where the tax deed describes the premises as fully as the tax records authorize, the power of the county clerk is exhausted on the execution of the deed containing such description, if in other respects the deed is in correct and statutory form." *Hewitt & Rounds v. Storch*, 31 Kan. 488, 2 Pac. 556, Syl. par. 2.

There would be force in the claim of appellant that his first deed, accompanied, as it was, by possession for more than five years, gave him a title unassailable, were it not for the fact that the only construction of which the statute is susceptible makes the issuance of a second deed have the effect of reopening the question of the validity of both deeds and of the regularity of the tax proceedings, unless the first deed was one which fully complied with the statute.

[3] The tax proceedings were defective, and the deed was void. The proof showed a variance in the description of the land as it appeared on the tax roll of 1894 and the delinquent tax sale notice. The tax roll described less than a full quarter section, and gave the number of acres; the notice described a full quarter section, without any mention of the acreage. The statute requires that the notice shall describe "such lands and town lots as the same are described on the tax roll." Laws 1876, c. 34, § 106; Gen. Stat. 1909, § 9441. We think the variance in the two descriptions is sufficient to avoid

the deed, where the objection is raised as in this case, within two years from the time of recording the deed.

The judgment must be affirmed. All the Justices concurring.

**CENTRAL LUMBER CO. et al. v. ARKANSAS VALLEY LUMBER CO.†**

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

**1. SALES (§ 418\*)—FAILURE TO DELIVER—REDUCTION OF DAMAGES BY BUYER.**

If, before the time for delivery arrives, the seller notify the buyer that a portion of the goods will not be delivered, it is the duty of the buyer to mitigate damages by going into the market and buying other goods, if he is able to do so.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.\*]

**2. SALES (§ 415\*)—FAILURE TO DELIVER—ACTION BY BUYER—REDUCTION OF DAMAGES.**

In an action by the buyer for damages occasioned by the seller's refusal to deliver, the burden rests upon the seller to show that, after notice that the contract would not be filled and before delivery, the buyer might have protected himself from loss by purchasing other goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1170; Dec. Dig. § 415.\*]

**3. SALES (§ 418\*) — FAILURE TO DELIVER GOODS—DAMAGES.**

In the absence of proof by the seller of the character just stated, the damages should be assessed as of the date when, under the contract, the goods should have been delivered.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 418.\*]

**4. SALES (§ 174\*) — DELIVERY — DEFAULT OF BUYER.**

Under a contract contemplating delivery in several car load lots, to be paid for in part on receipt of the invoice for each car, and the balance on receipt of the car, the seller is not obliged to make further delivery when the buyer is in default, which has not been waived, in his payments for previous shipments.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 434; Dec. Dig. § 174.\*]

**5. SALES (§ 101\*)—RESCISSION—DEFAULT BY SELLER.**

If the seller has been guilty of the first breach of the contract, and be himself in default, which has not been waived, he cannot claim the right to rescind, because payments for deliveries subsequent to his default have been withheld.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 267, 268; Dec. Dig. § 101.\*]

**6. SALES (§ 418\*)—DEFAULT OF SELLER—RIGHTS OF BUYER.**

If, in an action for damages for refusal to deliver, the buyer elect to plead default and repudiation of the contract by the seller on a specified day, he is bound by his pleading. He waives previous defaults on the part of the seller, and the seller is entitled to the benefit of the rule stated in paragraph 4.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 418.\*]

Appeal from District Court, Sedgwick County.

Action by the Central Lumber Company and

others against the Arkansas Valley Lumber Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Holmes & Yankey, for appellant. Foulke & Matson, for appellees.

BURCH, J. The plaintiff sued the defendant for a balance due on an open account for shingles, and lumber sold and delivered to the defendant. The defendant admitted the correctness of the account, and asked damages for a breach of the contract of sale, relating to the shingles. The plaintiff recovered, and the defendant appeals.

The plaintiff resides in the state of Washington. The defendant resides in the city of Wichita, Kan. The contract was made by communications, partly by telegraph and partly by mail, in September, 1906. The court interpreted the writings, and advised the jury that the contract called for five car loads of shingles. It may be assumed that this interpretation was correct; but as early as November, 1906, the plaintiff took the position that it was not bound to deliver more than three car loads, and has ever since adhered to that view. No specific date for delivery was fixed, but the plaintiff undertook to make reasonably prompt shipment, provided it could obtain the cars, which were then very hard to secure on the Pacific Coast. On November 7th the plaintiff wrote the defendant that it had three car loads of shingles at the mill ready for shipment, but that it might be some time before it could get the necessary cars. The letter further stated that those were all the shingles the plaintiff would be able to furnish. On December 1, 1906, one car load of shingles was shipped, which arrived in Wichita on January 31, 1907. The invoice was received by the defendant about January 6th, and according to the contract it was then the defendant's duty to deduct the freight and remit 90 per cent. of the price at once; the balance of 10 per cent. to be paid when the car was received and its contents checked out. The defendant made a mistake in computing the freight, so that its remittance for the advance payment on this car was too large by \$114.63. On March 4th the plaintiff sent a check to the defendant for this amount, to correct the error. On December 12, 1906, a second car was forwarded, which reached Wichita on March 27, 1907. The advance payment was made, but the balance due after the arrival of the car, amounting to \$37.10, was not paid. On May 21, 1907, the plaintiff wrote the defendant that if it was ever able to secure another car the third car load of shingles which had been promised would be forwarded, but stated that no more would be shipped. On July 9, 1907, the defendant still being in default, the plaintiff wrote the defendant, declining to make further delivery, because

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the payments on former shipments were withheld. The defendant in its answer elected to claim that the plaintiff's default occurred through a repudiation of the contract on July 9, 1907, and proved its damages as of that date; the price of shingles then having advanced \$1 per thousand. Some evidence was also introduced of the price in May, 1907.

[4] The court instructed the jury that the plaintiff was not bound to make further delivery while the defendant was in default, unless the default had been waived, and as a natural consequence the defendant's claim for damages was disallowed by the jury. The principle of law stated in the instructions is sound. *Stage Co. v. Peck*, 17 Kan. 271; *Bennett v. Taylor*, 72 Kan. 598, 84 Pac. 533; *Bailey v. Gas Co.*, 82 Kan. 746, 109 Pac. 411.

[5] The defendant contends, however, that because the plaintiff had declined, as early as November 7, 1906, to ship more than three cars, and because more time was taken to ship even the two cars which were delivered than the contract allowed, the plaintiff itself was in default, and consequently was not entitled to the benefit of the rule stated in the instruction. The principle of law which furnishes the basis for this contention is also sound. "It is generally true that the party who is guilty of the first breach of a contract can neither found a right of action upon such contract, nor make it the basis of defense to an otherwise just claim." *Stage Co. v. Peck*, 17 Kan. 271. See, also, *Richardson v. Swartzel*, 70 Kan. 773, 79 Pac. 660; *Fairchild, etc., Co. v. Southern, etc., Co.*, 158 Cal. 264, 110 Pac. 951; *Hull Coal & Coke Co. v. Empire Coal & Coke Co.*, 113 Fed. 256, 51 C. C. A. 213. The principle is stated in 35 Cyc. 133, as follows: "When payment of the price is to be made in advance of or concurrent with delivery, it is of the essence of the contract, and a failure to pay is such a breach of the contract as will justify a rescission, and this is true, although the amount withheld is small. But the seller himself must not be in default."

[1, 2] The defendant, however, deprived itself of the benefit of this rule by its answer, in which it alleged, and repeated in the most positive terms, that the plaintiff's default occurred on July 9, 1907. This allegation was very material, because it fixed the date at which damages were provable, and enabled the defendant to take advantage of the high price of shingles at that time. If the defendant desired to stand at all on the notification of November, 1906, that the contract would not be fulfilled the duty rested upon it to mitigate damages by then going into the market and buying shingles, if it were able to do so. In that event, the plaintiff might have shown that the defendant could have supplied its needs at prices

much below those prevailing the next July, and, in the absence of such proof, damages were still assessable, not as of July 1, 1907, but as of the true date when, under the contract, the shingles were to be delivered.

[3] In the case of *Mercantile Co. v. Lusk*, 45 Kan. 182, 25 Pac. 646, the syllabus reads as follows: "In an action by the buyer against the seller for breach of contract for the delivery of corn, the measure of damages is, as a general rule, the market value of the corn at the time and place of delivery, less the contract price. In such case, when the seller, after his contract of sale is made, notifies the buyer that he will not fill the contract, held that, in the absence of any evidence on the part of the defaulting seller that the buyer, after notice that the seller would not fill the contract, and before date of delivery, could have purchased corn in the market of the place of delivery upon such terms as to have mitigated his loss, the measure of damages remains the same."

[6] The case made by the pleadings, therefore, is entirely different from what it would have been if the defendant had not chosen to ignore the letter of November 7, 1906, and the contract date of delivery; and manifestly the defendant cannot make use of those dates for the purpose of putting the plaintiff in default, and then choose a much later date for the purpose of assessing damages. No application was made to amend the pleadings, or for instructions based upon the evidence, both within and without the issues, or for release in any other way from the allegations of the answer. Therefore the defendant is remediless here.

The claim is made that the defendant was not in default on the second car load of shingles, because the plaintiff had in its possession the overpayment on the first car, which might have been applied on the account. This overpayment was returned, however, on March 4th, and the second car did not arrive until March 27th.

The judgment of the district court is affirmed. All the Justices concurring.

#### SUNDGREN v. STEVENS.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

#### 1. ASSAULT AND BATTERY (§ 40\*)—DAMAGES—INSUFFICIENCY.

In an action for damages for assault and battery, the testimony showed that the defendant, without legal justification, struck plaintiff in the face, causing some injury to the nose and profuse bleeding therefrom, followed for over two months by pain and clogging up of the nose. The defendant admitted the assault, and introduced no evidence. The court instructed the jury that if they found that the plaintiff had been unlawfully assaulted and beaten they should allow reasonable compensation. The jury found for the plaintiff and assessed his damages at \$1; 50 cents for phys-

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cal pain, and 50 cents for insult and indignity. Held, that the verdict should be set aside for inadequacy.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 55; Dec. Dig. § 40.\*]

2. EVIDENCE (§ 588\*)—WEIGHT OF EVIDENCE—QUESTIONS FOR JURY.

While the jury are the exclusive judges of the credibility of the witnesses, they are not authorized arbitrarily, or from partiality or caprice, to disregard uncontradicted and unimpeached testimony, or facts shown beyond question, both by testimony and by admission.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.\*]

Mason and Burch, JJ., dissenting.

Appeal from District Court, Saline County.

Action by J. P. Sundgren against John Stevens. Verdict for plaintiff for less than the amount claimed, and he appeals. Reversed and remanded.

Z. O. Millikin, for appellant. Burch & Litowich, for appellee.

WEST, J. Plaintiff, Sundgren, went to see his neighbor, Stevens, about helping fix a fence between their farms, which adjoined. Stevens and his son were in the feed lot. It was just at dusk. Stevens claimed that plaintiff had told him he would not stand by some arrangement he had made, to which plaintiff replied that he did not do that—that he never backed out—to which Stevens replied that plaintiff was calling him a liar (which plaintiff denied), and jerked a whip from a buggy, but did not strike. Later in the conversation plaintiff again said that he always stood by his arrangements, when Stevens struck him in the face, and he fell against a spring wagon or buggy. Plaintiff sued for damages for assault and battery, and the defendant answered, denying the allegations of the petition, but admitting that he struck the plaintiff at the time alleged, and claimed that plaintiff had come upon his premises with intention to provoke a quarrel, and was an intruder and trespasser, and came for the purpose of disturbing his peace, and had made repeated statements that defendant was falsifying facts. The defendant was present, but did not testify or offer any evidence.

The testimony of plaintiff was that the defendant struck him on the nose and eye, bruising and breaking his nose and cracking his lip; that his lip was split, and he fell against a spring wagon or buggy; that he was not angry, but spoke kindly, and did not intend to fight, or go for that purpose; that as he rode away the defendant told him if he said anything more about the matter he would knock him off his horse, and "beat the stuffin' out of him"; that after the blow the defendant asked him to go into the house and wash, which he refused to do, the defendant stating that he was sorry he had hit him, but that plaintiff had aggravated

him until he did it; that it was a straight blow, as hard as the defendant could strike; that plaintiff went home, and then to the justice of the peace, and made complaint; that his nose bled profusely; that he suffered a great deal of pain and clogging up of the nose, and had pain in his nose for over two months, and at the time of the trial, some 10 months afterwards, it still pained him occasionally; that after seeing the justice plaintiff came by a store, where there were three or four men, and where there was some conversation about the affair; that he did not wash the blood from his nose until he finally returned, after his visit to the justice and stop at the store. The doctor who was consulted two days later testified that the nasal bone was broken; that there was no displacement; that he did not remember any injury to the lip, but his impression was that the eyes were still discolored; that he noticed no bruises on the forehead. What he saw was with his hands; that he examined the nose, and found crepitation of the bone, thus detecting the fracture; that no charge was made, and no treatment given; that he told plaintiff to be careful about blowing his nose, and not to get any displacement, and it would be all right; that the nasal bones were separated, but not displaced. The wife testified that when plaintiff came home from his call on the justice he was covered with blood, his nose still running with blood; that there was a bruise over the eye; that his eye was turned blue on both sides of his nose, and his nose was swollen up for a day or so "about three times as big," and was bleeding every time he would wipe it for three days. He seemed kind of weak. Another witness testified that he saw the plaintiff in the evening at the store; that his face was bloody; that his clothes were covered with blood, and one of his eyes looked as though it were swollen some; that his lip was bleeding, and appeared to be cut.

The defendant was fined \$5 by the justice and 95 cents costs, and he directed the justice to notify the plaintiff that if he ever came upon the place he would beat the life out of him.

The court instructed the jury that provocative words or acts, if any, constituted no justification for an assault, and could only be considered, if at all, in mitigation of punitive damages, and that if they found that the defendant had unlawfully assaulted and beaten the plaintiff they should allow reasonable compensation, not exceeding \$500. The jury returned a verdict for \$1; 50 cents for physical pain, and 50 cents for insult and indignity. Plaintiff appeals, and claims that a new trial should be granted, for the reason that the jury violated the instructions and awarded damages palpably inadequate.

It is suggested by the defendant that the plaintiff not only took pains to exhibit his

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

alleged wounds and his bloody condition, but that he and his wife so exaggerated their testimony that they were disbelieved by the jury; that the question of damages was one for the jury, and could not be measured by any fixed standard; and that before a new trial could be granted it should appear that the jury were misled by mistake, or influenced by prejudice or passion. The case of *Pritchard v. Hewitt*, 91 Mo. 547, 4 S. W. 437, 60 Am. Rep. 265, is cited as an example of numerous cases holding that in actions of this kind inadequacy of damages is not a ground for a new trial, unless the verdict appears to have been the result of passion, prejudice, or partiality. In this decision by the Supreme Court of Missouri is found a quotation from *Graham on New Trials*, to the effect that the reason for refusing to disturb verdicts in cases of this kind is that there is no scale by which the damages are to be graduated with certainty; that the law presumes the jury to have done their duty; and until the result of their deliberation appears in a form calculated to shock the understanding and impress no dubious conviction of their prejudice and passion their verdict will not be disturbed.

The plaintiff insists that, the assault being admitted and the court having instructed to award compensation, a verdict for nominal damages was a disobedience of the instruction and contrary to the evidence, and cites numerous authorities in support of his contention. Whatever may have been the manner or appearance of the plaintiff and his wife upon the stand, it was shown beyond dispute, in addition to the admission of defendant, that, without legal justification, he struck plaintiff in the face, the effect of which at least was to separate the nasal bones, and to cause profuse bleeding of the nose; to a charge of assault, he pleaded guilty. Whether the plaintiff was mistaken in his statement that the blow was straight from the shoulder, or whether he was mistaken in stating that the one blow injured his nose, split his lip, and bruised his forehead, it does appear that his lip was injured, and that his eye was discolored. It was held, in *Lonergan v. Small*, 81 Kan. 48, 105 Pac. 27, 25 L. R. A. (N. S.) 976, that: "An assault upon another is an intentional infringement upon the absolute right of personal security, for which the law gives a right of action against the wrongdoer, in which damages for mental suffering which is the proximate and natural result of such wrong may be awarded, although there was no battery or bodily injury inflicted."

Whenever it is manifest that the jury have found against the clear weight of the evidence, and that the party asking for a new trial has not in all probability had a fair trial, nor received substantial justice, it is an imperative duty to set aside the verdict and grant a new trial. *Coal & Mining Co. v. Stoop*, 56 Kan. 426, 43 Pac. 766. In *Noftz-*

*ger v. Moffett*, 63 Kan. 354, 65 Pac. 670, the evidence showed that the attorney suing for compensation was entitled to a substantial recovery, and it was held that the court erred in holding that he was not entitled to recover anything. In *Thompson v. Burtis*, 65 Kan. 674, 675, 676, 70 Pac. 604, evidence was offered as to the extent and value of the legal services for which compensation was sought, which was not contradicted or impeached, and which showed a right to recover a substantial amount, if anything. The jury awarded the nominal sum of \$1, and this was held to involve an inconsistency, and not to be sustained by the testimony. In the opinion, Chief Justice Johnston said: "The jury, it is true, was not obliged to accept as conclusive the opinions of experts as to the value of legal service, but they could not overlook competent testimony that was unimpeached." "In some way the jury were warped from the direct line of duty, and, instead of awarding a substantial sum, gave the mere nominal amount of one dollar. This was error."

In *Harrod v. Latham*, 77 Kan. 466, 95 Pac. 11, a verdict was directed for the plaintiff. Evidence of certain facts was uncontradicted, but it was there said that the facts sought to be proven by such evidence were in issue. "When, therefore, there is no dispute as to the ultimate facts upon which the right of recovery depends, the court may direct a verdict." It was, however, further said: "Whenever the testimony must be weighed and conclusions deduced therefrom, the jury alone must take the deductions in the first instance." And the directing of the verdict was held to be erroneous.

In *Saindon v. Morrell*, 78 Kan. 53, 95 Pac. 1056, it was held that a judgment would not be reversed for the reason only that the evidence "might seem to justify" the recovery of a larger sum. That was an action for damages for assault and battery, in which only \$15 was awarded. It was held that if, as a question of law, all the undisputed testimony of the witnesses was to be taken as true the plaintiff was entitled to a larger verdict, but that it was the province of the jury to determine, in the first instance, the credibility of the witnesses, and what their testimony proved, though they were not contradicted; and that the judgment would not be reversed, because the evidence would seem to justify a larger verdict. But no such admission and no such instruction as those now under consideration were discussed in the opinion. In *Heineken v. Benton Township*, 84 Kan. 881, 115 Pac. 592, it was held that the verdict could not be set aside for inadequacy, not being for nominal damages, not inconsistent with the facts, and not showing passion or prejudice.

In *Miller v. Miller*, 81 Kan. 397, 398, 105 Pac. 544, 545, an action to recover the value of personal services, it was not disputed that services of substantial value were rendered;



but it was claimed that they were to be gratuitous, which was disputed. The jury found for plaintiff, assessing his damages as \$1. The verdict was set aside, on the ground that the recovery was too small. In the opinion it was said: "By finding for the plaintiff, the jury determined the issue in his favor, and it only remained to award reasonable compensation. This is not a case for nominal damages, such as are allowed for the breach of a legal duty which has caused no material loss. Such an award is permissible, in a proper case, to vindicate a right where damages are possible, but have not been suffered."

In *Bressler v. McVey*, 82 Kan. 341, 843, 108 Pac. 97, 98, there was no dispute that the plaintiff was entitled to the amount claimed, if entitled to recovery at all. The jury found in his favor, awarding one-half the amount claimed. It was held that such verdict should be set aside at the instance of either party. In the opinion Mr. Justice Mason said: "The jury were called upon to determine which condition existed, but instead of doing so they assumed to settle the controversy by allowing one half of the claim and disallowing the other half, no doubt with the idea that 'splitting the difference' was a fair method of compromising the dispute. But in this they mistook their function."

In *Jackson v. Humboldt*, 84 Kan. 445, 113 Pac. 1047, an action to recover for assault and battery, the evidence tended to show that the plaintiff had been grievously wounded, his face disfigured, his sight permanently impaired, and that he had suffered great pain, lost considerable time, and incurred material expense. The jury found in his favor, assessing his damages at \$1. This was held to be erroneous, and that a new trial should have been ordered.

The fact that the provision of the former Code, forbidding a new trial for smallness of damages, was omitted from the present Civil Code is an indication that the Legislature deemed inadequacy a proper ground for a new trial; it having been said in *Railway Co. v. O'Neill*, 68 Kan. 253, 74 Pac. 1107, that: "The rule may be hard, and in some cases may be productive of injustice, but that is a consideration to be addressed to the lawmakers, and not to the interpreters."

In *Miller v. Delaware, L. & W. R. Co.*, 58 N. J. Law, 428, 33 Atl. 950, a woman sued for damages, caused by the company's neglect to provide a bench for her to alight on. There was considerable evidence showing the serious character of the hurt, and that it was painful and chronic, and there was no evidence to the contrary. The jury rendered a verdict for six cents, and the Supreme Court of New Jersey said: "This result of the trial in this case cannot be explained on any ground that will harmonize it with justice or with common sense."

In speaking of a verdict resulting from

passion, prejudice, or partiality, or a mistake or failure to take into consideration the proper elements of damage, it was said, in *McDonald v. Walter*, 40 N. Y. 551: "But, when the case does plainly show such a result, justice as plainly forbids that the plaintiff should be denied what is his due, as that the defendant should pay what he ought not to be charged." In *Tathwell v. City of Cedar Rapids*, 122 Iowa, 50, 97 N. W. 96, the Supreme Court of Iowa held that, the unimpeached testimony of the plaintiff having shown him entitled to a much greater sum than that awarded by the jury, the trial court rightfully set the verdict aside because inadequate under the evidence. In *Leavitt v. Dow*, 105 Me. 50, 53, 72 Atl. 735, 736 (134 Am. St. Rep. 534), it was said: "And it is now held, both in England and in courts of the United States, that no reason can be given for setting aside verdicts because of excessive damages which does not apply to setting them aside for inadequacy of damages."

It was held by the Supreme Court of New York, in *Lewis v. New York City Ry. Co.*, 50 Misc. Rep. 535, 99 N. Y. Supp. 462: "The positive testimony of an unimpeached, uncontradicted witness cannot be disregarded by a court or a jury arbitrarily or capriciously. \* \* \* The rights of the people would have no safeguard, and the courts of justice would afford no forum for the redress of wrongs, if the unimpeached and uncontradicted testimony of a witness can be overthrown without reason."

In *Newton v. Pope*, 1 Cow. (N. Y.) 109, 110, it was said: "But there is no difficulty in saying that where (as in this case) the witness is unimpeached, the facts sworn to by him, uncontradicted, either directly or indirectly, by other witnesses, and there is no intrinsic improbability in the relation given by him, neither a court nor jury can, in the exercise of a sound discretion, disregard his testimony. It is no less the duty of a court than jury to decide according to evidence. But it is mockery to talk of evidence, if it is discretionary with the tribunal to which it is addressed to disregard it, upon the vague suggestion, unsupported by proof, of the bias of the witness."

In *Lionberger v. Pohlman*, 16 Mo. App. 392, 398, it was said by Judge Thompson: "But, after mature deliberation, we are of opinion that the correct rule is that, where the testimony offered in support of the allegations of the party who sustains the burden of proof is, if believed, sufficient to make out his case, and is clear, consistent with itself, delivered by an unimpeached witness, and no circumstance is developed tending to cast suspicion upon it, and no substantial countervailing evidence is offered by the other party, if the jury nevertheless disregard it, and return a verdict against it, it will be the duty of the trial court on a motion for a new trial, and of an appellate

court on appeal or error, to set it aside as being the result of a manifest mistake."

The Supreme Court of Wisconsin, in *Engmann v. Estate of John Immel, Deceased*, 59 Wis. 252, 18 N. W. 183, said: "The jury might as well in their arbitrary and sovereign pleasure render a verdict without evidence as against evidence." Lord Stowell, in *Elwes v. Elwes*, 4 Eng. Ecc. 401, thus states the matter: "If witnesses come unimpeached in point of general integrity, if they depose with characters of fairness in their particular narrations, the facts must be received, or there is an end of all judicial inquiry." See, also, *Hughey v. Sullivan* (C. C.) 80 Fed. 72; *Barrette v. Carr et al.*, 75 Vt. 425, 56 Atl. 93; *Ford v. Minneapolis & St. L. R. Co.*, 98 Minn. 96, 107 N. W. 817, 8 A. & E. Ann. Cas. 903, and note; *Brown v. Peterson*, 25 App. Cas. (D. C.) 359, 4 A. & E. Ann. Cas. 980.

[2] The rule, founded upon justice and reason, and supported by the weight of authority, is that in cases of this kind, if the verdict is so inadequate as clearly to indicate partiality, passion, or prejudice on the part of the jury, or failure to heed the evidence and facts actually shown, it should be set aside; that, while the jury are the exclusive judges in the first instance of the weight of the evidence and the credibility of the witness, this means that they are in fact judges thereof, acting with reason and fairness, and not from partiality or caprice, or arbitrarily.

[1] With the facts before them that beyond any question of doubt the assault was made without legal justification, that it was of sufficient violence to cause profuse bleeding at the nose and a separation of the nasal bones, and with the direction by the court to return such a verdict as would amount to compensation, the conclusion seems inevitable that the jury, either from partiality or caprice, or from failure to obey the instruction of the court, returned a verdict, not for compensatory, but for nominal damages. Men are to be commended for seeking legal redress in court, instead of taking vengeance into their own hands. Common sense and the common instincts of humanity revolt at the notion that for the physical pain and humiliation caused by the assault, \$1—50 cents for each—could be otherwise than farcical.

The judgment of the trial court is reversed, and the cause remanded, with directions to grant a new trial.

JOHNSTON, C. J., and SMITH, PORTER, and BENSON, JJ., concurring.

MASON, J. (dissenting). The petition alleged that the defendant struck the plaintiff, and thereby inflicted certain specified injuries. The answer contained a general denial, admitting the striking, thereby, as it seems to me, denying that the plaintiff

had received any substantial injury, and placing upon him the burden of proof in that regard. If he had offered no evidence, he would have been entitled to a verdict for nominal damages for the invasion of his legal right, but to nothing more. The jury obviously disbelieved his entire evidence as to the extent of his injury, and rendered the only verdict conformable with that belief. The trial court approved the verdict. The rule is that this court will not set aside a verdict, merely because it is in conflict with oral testimony which no witness contradicted. The decision seems to proceed upon the theory that the facts were as testified to by the plaintiff's witnesses, and that the defendant had admitted as much. I think the defendant admitted nothing beyond a technical assault, and that it was the province of the jury to say whether anything more was committed.

BURCH, J. (dissenting). There is nothing about which the plaintiff was more positive than that all his claimed injuries proceeded from one straight blow. He described it in words several times, always the same, and he described it, as the record shows, by an indicating gesture. If, however, that were true, the claimed results were incredible. The opinion of the court recognizes this difficulty, and recognizes the necessity of eliminating some portions of the plaintiff's story. So the opinion picks out what is certainly true, and make the palliative suggestion as to a mistake on the part of the plaintiff as to one or other of two incompatible sets of statements. The jury did precisely the same kind of work in the exercise of what has heretofore been believed to be its proper function, and the law in such cases is clearly as stated by Mr. Justice MASON.

What about damages for humiliation? The evidence is open to the interpretation that the plaintiff repeated and repeated statements which the defendant regarded as an impeachment of his veracity, and so aggravated the defendant into striking him. The defendant was immediately sorry for his act, and wanted to do what he could to repair it. The plaintiff had a nosebleed, and seemed to regard it as a very valuable asset. He would not wash at the defendant's house, or permit the defendant to send some water out to him for the purpose, and went home. He would not wash himself there, but carried his ensanguined front to the home of a neighbor living north of him, where he inquired for the justice of the peace. After making this exhibition of his humiliation, he went to the justice of the peace. The plaintiff lives a mile and a half north of Kipp, and the justice lives west and north of Kipp. After initiating his criminal proceeding, the plaintiff went to Kipp. He said he had no business there, but he went to the store and paraded his humiliation there, meantime having wiped the blood over his face. Then he went home. In

view of this and other peculiar testimony, the jury doubtless concluded that the plaintiff was simply trying to lay the foundation for a big lawsuit, and that substantial damages for genuine humiliation of feelings were not established.

Then what about personal injuries? The defendant was present in court, and the jury could estimate his physical strength. The plaintiff said the defendant struck him a straight blow as hard as he could. Yet the plaintiff was not knocked down. Despite his story of cut lip, contused forehead, black eyes, and broken nose, when he went to the doctor two days afterward, visible traces of injury had substantially, if not entirely, disappeared. The doctor's only positive testimony was this: "Do you recall what you saw? A. Yes, sir. Q. What did you see? A. What I saw, I saw with my hands." By taking hold of the nose a crepitation was perceptible, indicating a separation of the nasal cartilage from the cheek bone. The cartilage was not cracked, and there was no displacement; no treatment was necessary; none was given; and no charge was made. The doctor has nothing whatever to say of exhibited pain or discomfort of any kind, and the defendant lost no time, except it be in getting his lawsuits under way. The result is the defendant was discredited by his doctor, as well as in other ways, and upon all the evidence the jury concluded that the result of the blow was really inconsequential, and not worthy of more than nominal damages. Because the jury, after seeing and hearing all the witnesses, inferred falsification where the court infers mistake, threw out what it believed to be the product of falsification, and exercised its judgment in a matter respecting which even the opinion of the court vouchsafes no standard of measurement, I am not willing to brand the jury as arbitrary, capricious, partial, etc., nor willing to convict the trial judge, who, with advantages which this court does not possess, approved the verdict, of sanctioning a farce against which common sense revolts.

In the case of Heineken v. Benton Township, 84 Kan. 881, 115 Pac. 592, almost the entire amount of the plaintiff's claim of \$4,500 was for physical injuries, impaired health, doctor's bills, and the cost of medicine. He told how he, together with his team and buggy, went over an embankment, and how his head was driven into the sand in the bottom of the creek. He claimed that his health failed, that he was under the doctor's care for a long time, and that he spent much money in an effort to restore his health. Nobody saw the remarkable occurrence upon which he based his claim for these damages, and the jury, disbelieving his story respecting it, allowed him nothing. The jury did allow him \$45 for injury to his buggy and \$5 for injury to his harness.

Had these items not been included, the case would be exactly parallel in principle to this one.

STATE ex rel. FAULCONER, Co. Atty., v.  
BOARD OF COM'RS OF COWLEY  
COUNTY et al.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

COUNTIES (§ 190\*)—TAXATION—LIMITATION—  
"CURRENT EXPENSES."

The limit of 1.12 mills for current expense fixed by section 5 of chapter 245, Laws of 1909, does not apply to a road levy of 1 mill under section 33 of chapter 248, Laws of 1911; the maintenance of a road, designated a "county road," under the latter act not being a part of the current expense of the county, within the meaning of the previous limiting act.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 190.\*

For other definitions, see Words and Phrases, vol. 2, p. 1792.]

Appeal from District Court, Cowley County.

Action by the State, on the relation of Albert Faulconer, County Attorney, against the Board of County Commissioners of Cowley County and others. Order sustaining demurrer, and plaintiff appeals. Affirmed.

Albert Faulconer, Co. Atty., John S. Dawson, Atty. Gen., and Hackney & Lafferty, for appellant. G. H. Buckman, S. C. Bloss, C. W. Roberts, F. L. Richardson, C. W. Wright, J. Mack Love, and O. P. Fuller, for appellees.

WEST, J. By section 5 of chapter 245 of the Laws of 1909, Cowley county, for current expenses, is limited to a levy of 1.12 mills. Pursuant to the provisions of section 33 of chapter 248, Laws of 1911, the county board levied a 1-mill road tax in addition to the levy for current expenses. This suit was brought to enjoin the collection of this tax, and the plaintiff taxpayers assert that the levy was void and in excess of the limit fixed by section 5 of the act of 1909; in other words, that a road tax is a part of the current expense tax, and is not one in addition thereto. This is the vital and pivotal question on which the case turns.

Chapter 245 contains 31 sections, the first 11 of which in express terms limit the power of the county board to levy for current expense. Section 12, however, fixes a specific limit on the power granted by section 6036 of the General Statutes of 1901, and reduces the limit there fixed from three mills to one mill. Section 13 reduces the limit fixed by section 6071 of the General Statutes of 1901 from two mills to four-tenths of a mill. The remaining sections cover other matters, including high schools, cities, and boards of education; the latter clause of section 28 providing: "And nothing in this act shall be construed to limit the levy provided by any special act heretofore passed for the con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

struction of roads, and under which any county is now operating." It is true that section 12 was rendered inoperative by the act of 1911, by repealing section 6036; and that section 13 has reference to roads established by vote of the people in certain counties, and does not apply to Cowley county. It is plain, however, that the act of 1909 is not confined to the mere limit of levy for county purposes, but in the way indicated expressly limits certain road levies, and includes many other matters of taxation.

The act of 1911 (chapter 248) relates to roads and highways, and repeals many former acts. It provides that certain roads may be designated by the board of county commissioners as "county roads," which shall, as "near as practicable," connect cities and market centers, whether both such cities or centers are within the county, or one be within and the other without such county. All county and state roads are required to be maintained at the expense of the county; and section 18 provides that all roads designated as county roads under the provisions of chapter 198 of the Laws of 1909, and established as such at the time of taking effect of chapter 248, shall be and remain county roads, and shall be maintained under the provisions of the later act. Chapter 198, here referred to, authorized the county engineer to classify certain roads as county roads. It does not appear, however, that any road was thus classified in Cowley county under that act. Section 27 of chapter 248 provides, among other things, that the county engineer shall have general supervision of all the county roads and bridge work in the county under the authority of the board of county commissioners; and section 30 authorizes the engineer and the board of county commissioners to direct where road work shall be done on state and county roads. Section 31 authorizes the engineer, with the approval of the board, to determine what county roads shall be dragged, and to arrange for their dragging upon such terms as the board and engineer may direct. Section 32 provides that the taxes assessed for construction and maintenance of public roads and highways shall be paid in cash, and collected as provided for in relation to other taxes; and that the treasurer shall pay the proportion to be used upon township roads or city streets to the treasurer of the township or the city from which such taxes are collected.

Section 33 provides that the county commissioners may, at the time prescribed for levying county taxes, "levy a road tax for county and state roads and bridges of not more than one mill on the dollar on all taxable property in their respective counties and the same shall be collected as are other taxes, and when collected shall be expended upon the building, repairing, maintenance and improvement of the state and county roads of such county by and under the di-

rection of the county commissioners and the approval of the county engineer; provided, that if a majority of the electors voting at an election called for that purpose in such county, shall vote to increase the tax levy herein, such board of county commissioners shall levy a tax for road purposes not to exceed three mills for such road purposes; provided that the board of county commissioners shall, within the limit prescribed of one mill on the dollar, keep all state and county roads within their respective counties in first class condition."

Section 53 is that no provision of the act shall be construed to repeal or supersede any special act now in force in any county.

An inspection of this statute carries the conviction that it is a new departure as to the matter of roads and highways, and changes the old system of county roads, at the expense of the local municipalities, to one by which certain roads designated by the county board as state or county roads are to be maintained at the expense of the county—a condition which did not exist previous to the enactment of this statute. Manifestly one object sought to be accomplished is the betterment of roads leading across counties, which may apparently be designated and provided for by the board one at a time, as in this case, or more than one at a time, in the discretion of the county commissioners. In a county of the size and importance of Cowley, if the levy for current expense of 1.12 mills may, as claimed by the plaintiffs, rightfully include 1 mill for road purposes, then for all other general expenses of the county .12 of a mill would be the limit, and we hesitate to impute to the Legislature a design thus to restrict the levy for current expense in such a county. On the other hand, it is plain that the levy for county road purposes cannot, without a vote of the people, exceed 1 mill whether one road or many roads are to be maintained at the county's expense.

It is true, as suggested by plaintiffs, that certain other acts of 1911 expressly provide that the taxes therein mentioned may be levied in addition to those already authorized by law, but we cannot concede that therefore it was the intention of chapter 248 to include the maintenance of state and county roads within the current expense of the county, or that the failure to express the intention that the road levy should be in addition thereto is controlling, in view of the general scheme of the act.

It is suggested that repeals by implication are not favored, and this is true; but a later enactment, giving express authority to levy for a given purpose, does not repeal by implication a former enactment, fixing a limit, unless it appears clearly that the purpose in each act is the same in scope and character; and in order for this rule to be applicable it must be made to appear that the road levy provided by chapter 248 is circumscribed

within the same limits as "current expense" contained in the act of 1909. In *State ex rel. v. County of Marion*, 21 Kan. 434, it was held that current expenses "include such charges and expenses as are incidental in conducting the business of the county government for the current year;" and that a tax to build county buildings does not come under that phrase. In *Board of Com'rs of Osborne County v. Blake*, 25 Kan. 357, it was held that a tax levied to pay a judgment against a county was a part of the current expense, because the statute provided that such tax should be collected "as other county charges." In *A., T. & S. F. R. Co. v. Wilhelm, Treasurer*, 33 Kan. 206, 209, 6 Pac. 273, 275, a tax levied for the support of the poor was held to be a current expense of the county; the court saying: "Therefore, in our opinion, the 'poor fund' is simply one of the items which the county board takes into consideration in levying a tax for county expenses, or for current expenses." It was also said, "The poor always ye have with you," and that the expense for the support of the poor is an expense to be figured every year; in other words, an expense of the current year; and that the statute permitting such levy was adopted in 1862.

While the analogy of this opinion is at first blush strong, still a moment's reflection will show that there the usual and habitual burden and expense were under consideration, while here a new and previously unknown burden and expense upon the county were provided for two years after the enactment of the statute limiting the levy for current expense. The very fact that the amount expressly authorized for this purpose was almost equal to the amount authorized for current expense under the limiting statute previously enacted is significant. Suppose it be conceded that a road tax is a part of the county current expense, and suppose the levy authorized had been 1.12 mills, instead of 1 mill. We would then have this strange situation: The most the board could levy for current expense, including roads, would be 1.12 mills, but it might levy this rate for roads alone, under an act which requires (section 33) that when collected it shall be expended "upon the building, repairing, maintenance and improvement of the state and county roads," thereby leaving nothing at all for all other current expenses.

Plaintiffs also cite *A., T. & S. F. R. Co. v. Com'rs of Atchison County*, 47 Kan. 722, 28 Pac. 999, which held that a levy of a one mill tax for building county bridges, the cost of which was payable out of the current revenue fund, was void, where the limit for county expenses had already been reached; but there the statute expressly provided that the expense of building a bridge costing less than \$200 should be paid out of the money in the treasury for county expenses, and if costing more than \$200 it could not be built at all without a vote of the people;

hence the decision sheds no light on the question at issue.

*A., T. & S. F. R. Co. v. Woodcock, Treasurer*, 18 Kan. 20, is also referred to. It was there held that the county board, having levied up to the limit for current expense, could not levy above the limit to meet a deficiency of previous current expense; and such levy being void it could not be validated by a curative act.

*Howard v. Hulbert*, 63 Kan. 793, 798, 66 Pac. 1041, 1048 (88 Am. St. Rep. 267), referred to by plaintiffs, holds that a special act permitting a given county to levy 5½ mills for current expenses is repealed by a general act forbidding the commissioners of any county to levy more than 5 mills; the rule there being cited: "That where two statutes are in any respect, in both language and meaning, irreconcilably repugnant, the provisions of the statute last enacted repeal those of the former, with which they conflict."

*Stewart v. Town County*, 50 Kan. 553, 558, 32 Pac. 121, 122, involved a levy by a city of the second class. The statute authorized but 10 mills for general revenue purposes, and it was decided that such purposes included expenses for water, electric light, and fire department. The levy, including these, having exceeded 10 mills, was held void as to the excess. It was further held that the statute fixing a limit of 40 mills for all purposes, except school taxes, vested no power to levy, and that the express authority to levy 10 mills for general purposes precluded the levy of a greater rate. It was said: "Supplies of water, light, and for the fire department are among the daily necessities of the city, and naturally fall within the class of expenses which are to be paid out of the general revenue fund." We think this could not be said of a road, designated a county road, under the act of 1911, or that the expense of its maintenance could be held to have been intended by the limiting act of 1909 two years in advance of a law providing for such road and such expense.

Our attention is called to sections 643 and 655 of the General Statutes of 1909 and chapter 70 of the Laws of 1911. Section 643 was enacted in 1867, and provided that the commissioners should determine what bridges should be built and repaired at the expense of the county, and what by the road district. Section 655 was enacted in 1879 and amended in 1909 (Laws 1909, c. 63), and authorized the board to make an appropriation, not exceeding \$4,000, for the building or repairing of bridges, but that not more than 20 per cent. of the tax levy for general purposes should be used therefor, and providing for a vote of the people when it exceeded this sum. Chapter 70, referred to, simply amends chapter 643, by adding thereto a provision touching counties having a population of less than 10,000, and authorizes the board in such counties to pay for

bridges out of the county expense fund. This section, as amended, still remains a part of the same act referred to in *Railway Co. v. Com'rs of Atchison County*, 47 Kan. 722, 28 Pac. 999, already referred to.

It is urged that a bridge is of necessity a part of a road, and that this legislative authority to build certain bridges out of the general expense fund is an indication that a similar legislative intention exists as to roads. But, while in a certain sense a bridge is a part of a road, it is still true that the Legislature has in various acts made provision for bridges entirely separate from the roads of which they formed parts. Chapter 145 of the laws of 1911 empowers boards and counties having an assessed valuation of more than \$40,000,000 and less than \$50,000,000 to create a county fund, to be used in the erection and building of county bridges, which fund is to be used for no other purpose whatever. Chapter 71 authorizes the boards in counties of not less than 39,000 nor more than 45,000 population; containing a city of certain class and population, to levy a bridge fund in addition to all levies now authorized by law. If bridges are to be regarded as portions of highways, then these enactments would seem to indicate no intention to confine the cost of highways to the current expense fund. The decisions cited from other states will be briefly noticed.

*State ex rel. Burgess v. Kansas City, St. J. & C. B. R. Co.*, 145 Mo. 596, 47 S. W. 500, involved a levy for road taxes in a Missouri county, and the court held that taxes levied for road purposes were county taxes, and so recognized by the Constitution, and the limit therefor could not be increased by a pretended township levy for the same purpose. In *Webster v. Fish*, 5 Nev. 190, it was held that under the act there in question the construction and repair of public roads and bridges might properly be considered such a county expenditure as could properly be met by moneys in the general fund. There the statute appears to have authorized the board to apportion all moneys coming into the treasury into special funds, two-thirds of which should go into the general county fund. It was held that the purpose of this fund, though nowhere defined by the law of Nevada, might properly be used for the construction and repair of public roads and bridges. In *Frederick v. Northern Alabama Ry. Co.*, 130 Ala. 407, 30 South. 426, it was decided by the Supreme Court of Alabama that, the Constitution having limited the levy for county purposes, the commissioners could not add a sum for working the public roads under a statute providing therefor. The Constitution limited the entire levy for the year to five mills, except when authorized by law to pay a debt for certain purposes, and it was held that by a special act the Legislature could not authorize this amount to be exceeded. In

*State ex rel. Hill v. Wabash R. Co.*, 169 Mo. 563, 70 S. W. 132, the Supreme Court of Missouri held that under the Constitution, limiting the rate of taxation to 40 cents on the \$100, and permitting a larger tax for certain purposes on assent of two-thirds of the voters, the Legislature could not authorize the circuit court to empower the board to increase this levy. In none of these cases do we find any extended discussion or decision as to the meaning of the phrase "current expenses," or any similar expression. Other decisions are cited, and we find that most of them go simply to the extent of holding that a constitution or statutory limit cannot be exceeded. Three, however, will be referred to.

*Grand Island & W. C. R. Co. v. Dawes County*, 62 Neb. 44, 86 N. W. 934, involved a statute of Nebraska which authorized a levy of nine mills for general fund purposes. This the board levied, and then added a levy to meet outstanding indebtedness, which was held to be in excess of its power. This was substantially what was decided in *Osborne County v. Blake*, supra. *Fremont, E. & M. V. Ry. Co. v. Pennington County*, 20 S. D. 270, 105 N. W. 929, decided that a statute of South Dakota, providing for a levy to be so manipulated as to evade the legislation and payment of the county's bonded debt, was void, because it impaired the obligation of its contract. There a separate levy of six mills for general county purposes and support of the poor was authorized, also a levy of two mills for county roads; and no question like the one now under consideration was considered or decided. However, in *Combs et al. v. Letcher County*, 107 Ky. 379, 54 S. W. 177, the Court of Appeals of Kentucky held that a statute authorizing a levy for "current and necessary expenses" was not violated by a levy to accumulate a fund with which to pay for a courthouse when erected in future, the same statute authorizing "a comfortable and convenient place for holding court at the county seat," in view of the later act which authorized a levy "to erect and keep in repair necessary public buildings, secure a sufficient jail and a comfortable and convenient place for holding court at the county seat." There was no limit in the Constitution, except that each county should live within its income and create no indebtedness in any year beyond its income, unless authorized by a vote of the people. It was said that the creation of a courthouse fund by levies was, within lawful limits, a "necessary expense," within the meaning of the former act—a doctrine which has not been followed in this state.

It was urged in *Hill v. Johnson County*, 82 Kan. 813, 820, 109 Pac. 163, 166, that the limitation of three-fourths of a mill for township purposes was violated by a provision of the rock road law (Gen. Stat. 1909, §§ 7359-7369), that one-fourth of the cost might be paid by the township, and "raised

in the manner now provided by law for raising taxes for all township purposes." But Mr. Justice Porter said: "This provision refers to the method of raising the tax for one-fourth of the cost of the improvement, and does not make the tax thus levied a tax for township purposes." Likewise it may be said that a tax for the maintenance of the new creation, known as county roads, is not for current expenses.

After a careful examination of the statutes involved, we have no hesitation in holding that the intention of the Legislature in enacting chapter 248 was that a tax for roads, designated "county roads," may be provided for by the board in addition to the tax for current expenses; that such road tax was not deemed a current expense; and that the levy was therefore valid.

The order sustaining the demurrer to the second amended petition is affirmed. All the Justices concurring.

#### FULLER et al. v. HAYNES et al.

(Supreme Court of Kansas. Dec. 9, 1911.)

Appeal from District Court, Wilson County. Action by Whitfield Fuller and Julia A. Kehrer against Anna B. Haynes and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

E. D. Mikesell, for appellants. Lapham & Brewster, for appellees.

**PER CURIAM.** This is an action for the partition of land. The former owner, under whom all the parties claim, died intestate, leaving a brother and sister of the full blood, two sisters and a brother of the half blood, and a stepmother, his sole heirs at law. It is insisted that the district court erred in holding the rule of descent to be as declared in *Russell v. Hallett*, 23 Kan. 276, followed in *Tays v. Robinson*, 68 Kan. 53, 74 Pac. 623, and we are asked to reconsider the subject and adopt a different rule; but the former decisions are adhered to.

Error is also predicated upon the finding of the district court that no parol agreement had been made between the parties for a different division of the land. It was asserted by part of the heirs that such an agreement had been made, and by the others that such an agreement had not been made. Upon conflicting evidence the district court found the issue against the appellants. Following numerous decisions of this court, the finding cannot be disturbed.

The judgment is affirmed.

#### CUTLER et al. v. WASHINGTON et al.

(Supreme Court of Kansas. Dec. 9, 1911.)

Appeal from District Court, Scott County. Action by F. M. Cutler and others against W. B. Washington and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

M. B. Nicholson and W. J. Pirtle, for appellants. R. D. Armstrong, for appellees.

**PER CURIAM.** The action was one in equity to cancel the \$525 note, the renewal note,

and the securities given in connection with them. It was so commenced, so tried, and so determined. The jury was called merely for the purpose of advising the court, as the practice in such cases allows. The question submitted went to the heart of the controversy. The jury was properly instructed, and the answer returned by the jury and adopted by the court is sustained by the law and by the evidence. The defendant had a trial before the court as a court, was not entitled to another trial after the special verdict came in, and the case of *Vickers v. Buck*, 65 Kan. 97, 68 Pac. 1081, has no application whatever. Judgment affirmed.

#### DONNELLY et al. v. CUHNA.

(Supreme Court of Oregon. Dec. 12, 1911.)

##### 1. WATERS AND WATER COURSES (§ 152\*)—PRIOR APPROPRIATION—EVIDENCE.

In an action to determine conflicting water rights, evidence held to warrant a finding that defendant had conducted water from the stream, through a slough, prior to plaintiff's appropriation, and that defendant's right was therefore prior to that of plaintiff.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 152.\*]

##### 2. WATERS AND WATER COURSES (§ 143\*)—APPROPRIATION—PRIORITY—AMOUNT.

The amount of water that may be taken by a prior appropriator for irrigation depends on the number of acres of irrigable land susceptible of cultivation, the degree of sterility of the premises, the most profitable crops that can be raised by artificial application of moisture, and the quantity of water necessary to produce the harvest by careful husbandry.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 152; Dec. Dig. § 143.\*]

##### 3. WATERS AND WATER COURSES (§ 152\*)—PRIOR APPROPRIATION—AMOUNT.

In a suit to determine water rights, evidence held to show that defendant, under a prior appropriation, was only entitled to 100 inches of water as against plaintiff.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 152.\*]

Appeal from Circuit Court, Umatilla County; H. J. Bean, Judge.

Suit by Frank Donnelly and another against Joseph Cuhna. Judgment for defendant, and plaintiffs appeal. Modified and affirmed.

This is a suit to enjoin interference with the flow of water. It is alleged in the complaint, in effect, that the plaintiffs, Frank Donnelly and Wm. H. Daughtrey, own at Echo, Or., a gristmill, which is operated by water taken from the Umatilla river and conducted in a race whereby a prior appropriation of the water of that stream was made to the extent of 36 second feet, which quantity has been used in propelling the machinery of the mill and in irrigating about 60 acres of alfalfa land lying under the race, and that the defendant, Joseph Cuhna, unlawfully diverted the water from the river above plaintiffs' dam that deflected the water into the race, thereby preventing the op-

eration of the mill. The answer denies the material averments of the complaint, and alleges that defendant's predecessors in title and interest made a prior appropriation of the water of the river, at a place above plaintiffs' dam, whereby 400 inches, miner's measurement, was diverted and has been constantly used under a claim of right for more than 10 years prior to the commencement of this suit, adversely to all persons. The reply put in issue the averments of new matter in the answer, and, the cause having been tried, findings of fact and of law were made conformable to the averments of the answer, except that defendant was entitled to only 150 inches of the water as a prior right, and, a decree having been given in accordance therewith, the plaintiffs appeal.

R. R. Johnson (Carey & Kerr, Harrison Allen, R. R. Johnson, and Frederick Stelwer, on the brief), for appellants. J. H. Raley (Raley & Raley, on the brief), for respondent.

MOORE, J. (after stating the facts as above). The testimony shows that plaintiffs' predecessor in title, J. H. Koontz, in 1883 built a dam across the Umatilla river near the southeast corner of the S. W.  $\frac{1}{4}$  of section 22, in township 3 N., of range 29 E., in Umatilla county, and dug a ditch part of the way and constructed a flume the remainder of the distance of about two miles northwesterly, on the east side of the river, to Echo, where, in 1885, he built a flourmill, the motive power of which was furnished by water flowing in the ditch and flume. The mill was destroyed by fire in 1889, but was rebuilt the next year. The United States reclamation service occupied for a short period the line of the mill race, but at all other times since the mill was originally built it was operated, and the land lying under the ditch has been irrigated when there was sufficient water for that purpose. From October 1st of any year, until July or August of the next year, there is an abundance of water in the river to supply all reasonable demands; but between August and October of each year that quantity diminishes, and contests ensue for the use of water.

The title to the land owned by Cuhna and his alleged right to appropriate water for irrigation from the river at places above the plaintiffs' dam were derived as follows: John Dickey was the owner of 160 acres of land lying on the west side of the stream and above the line where the dam now diverting water into the mill race was subsequently placed, and in 1879 he commenced near the southeast corner of his land to dig a ditch from a slough, following the foot of a rock bluff, northwesterly across his premises, in which undertaking he was assisted by James Taylor, who extended the ditch to and upon his lands, four 40-acre tracts of which lie west and two 40-acre pieces are situate north of the line of the Dickey lands, and water

was thereby diverted and used for irrigation. Dickey conveyed his premises to Taylor, who in 1887 dug a new ditch, commencing below the old ditch, but above the dam now owned by plaintiffs, and extended the conduit across his lands, using the water flowing therein for irrigation, and thereafter abandoned the old ditch. Taylor died, and his widow, having remarried, conveyed the Taylor and Dickey lands to Cuhna, who continued to use water through the new ditch for irrigating such premises.

Koontz secured, from persons who owned lands bordering on or through which the Umatilla river flows, quitclaim deeds conveying the right to divert from the natural channel of that stream, between the places of intake and the termination of the mill race, such quantity of water as might be necessary for irrigation along the line of the ditch and flume, and also to propel any mill that he, or his heirs or assigns, might erect at or near Echo. Taylor, being owner of 80 acres of riparian land situate below the line of the dam built by Koontz, granted to the latter December 21, 1883, the right to divert from such premises and appropriate water by the mill race. At that time it will be remembered that Taylor and Dickey had an old ditch that tapped a slough on the west side of the river some distance above the dam built by Koontz. Taylor's deed conveyed only the right to divert water affecting his lands lying below the intake of the mill race, and did not diminish his right to take water by the old ditch for irrigation, nor prevent him from moving his place of diversion to that of the new ditch.

It is maintained by plaintiffs' counsel that the old ditch referred to was dug by Taylor and Dickey to drain their lands, and that no water flowing in that conduit had ever been used for irrigation. The fact thus asserted to have been established is deduced from testimony which shows that levees were built by Dickey and Taylor to keep the freshets caused by melting snow from overflowing their lands. Two sons of John Dickey testified that in 1871 their father and Taylor built levees along the slough to protect the lands from overflow, but that in 1879 the old ditch was dug through such embankment.

[1] We think it satisfactorily appears that after the sudden floods subsided, and the river reached its ordinary stage, water was diverted from the slough by the old ditch and used for irrigation; the quantity being annually increased as the lands were leveled and put in cultivation, the limit of which area has been reached by Cuhna. His claim to the use of the water by the new ditch is prior to plaintiffs' appropriation, and therefore superior to their right, and the only question remaining is the quantity of water to which he is reasonably entitled.

[2] The defendant's attorney, invoking the rule adopted in *Coventon v. Seufert*, 23 Or.



548, 32 Pac. 508, that the capacity of the ditch at the smallest place affords the measure of the right, insists that the quantity of water awarded by the decree was a just distribution. The principle announced in the case referred to is not now controlling, when more careful methods of irrigation have been discovered, so that water is not wasted, and a larger area of land is adequately moistened, thereby promoting a greater and better development of the country. The adaptability of arid lands to the growth of particular crops by careful irrigation furnishes the test of the quantity of water reasonably necessary for that purpose. The number of acres of such land that is susceptible to cultivation, the degree of sterility of the premises, the most profitable crops that can be raised by artificial application of moisture, and the quantity of water reasonably necessary to produce the harvest on an acre by careful husbandry, are elements to be considered in determining the measure of an appropriation.

[3] Keeping this rule in view, the testimony will be examined as to the area of the defendant's cultivable land that can be irrigated by his ditch. L. M. Canfield, a surveyor, as plaintiffs' witness, stated upon oath that he accurately measured such lands, to determine the acreage and topography of the premises, and from the notes of such survey and a plane table sheet he made a map, which was received in evidence. He was then directed as follows: "You may take up this Cuhna land section by section in your own way, and tell the court how much alfalfa land, orchard land, grain land, irrigated and non-irrigated land, you found in making your survey of the same." He replied: "The S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 21; I will say all of this land of Joseph Cuhna's is in township 3 N., range 29 E. of the Willamette meridian. In section 21 there are 10.46 acres grain. There is no alfalfa and no orchards. In the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 22 there is .54 acres of alfalfa, no orchard, and 55.5 acres of grain; that being all the land in 22. In the N. E.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 28, there is 2.70 acres of alfalfa, no orchard, and 9.36 acres of grain; this being all the land in section 28 that is irrigated by the Joseph Cuhna ditch and land in cultivation. In section 27, the N. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , there is 32.96 acres, and there is 2.12 acres of orchard, and .9 acres of grain, and 1.29 acres being leveled. In the S. W.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 27 there is 2.6 acres of alfalfa, no orchard, no grain. In the N. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 27 there is 1.20 acres of alfalfa, 2.20 acres of orchard, and 9.91 acres being leveled at this time. In the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 27 there is 15.47 acres in alfalfa, no orchard, or no grain. In the S. W.  $\frac{1}{4}$  of the N. E.  $\frac{1}{4}$  of section 27 there is 7.2 acres

of alfalfa, no orchard, or no grain; this being all the land that is under the Joseph Cuhna ditches, or that is in cultivation."

It will be observed that Canfield's testimony as taken and reported by the stenographer makes him say, respecting the irrigable land in the S. W.  $\frac{1}{4}$  of the S. W.  $\frac{1}{4}$  of section 22: "There is .54 acres of alfalfa, no orchard, and 55.5 acres of grain." As the area thus noted would make a 40-acre tract contain 56.04 acres, it is very evident the stenographer made a mistake in the decimal point. The sum of the areas of the irrigable land on the various tracts as noted is 154.23 acres. In awarding to defendant 150 inches of water, it is believed the trial court took the area thus computed as the basis of the quantity reasonably required for irrigation. By moving the decimal point one integer to the left, changes the 55.5 acres to 5.55, thereby reducing the irrigable land to 104.28 acres as the proper sum of the several tracts. This view is confirmed by an examination of the map prepared by Canfield from his measurements of the land, which shows a very small part of the 40-acre tract referred to as susceptible to irrigation.

Predicated upon the award made by the court as applicable to 154.23 acres, the actual area would be entitled to 101.41 inches, and we believe 100 inches is sufficient properly to irrigate the defendant's land.

The determination of the lower court will therefore be modified, and 100 inches of water will be given as the measure of the defendant's right; but in all other respects the decree is affirmed.

BEAN, J., took no part at the hearing, or in the consideration of this cause on appeal.

#### WILLIAM HANLEY CO. v. COMBS.

(Supreme Court of Oregon. Dec. 12, 1911.)

#### 1. SALES (§§ 103, 104\*)—CONTRACTS—RESCISSI- SION.

Where defendant, contracting to deliver to plaintiff 600 head of cattle of a kind and quality described, presented about 500 head of cattle, a portion of which were not up to the standard of the contract, and plaintiff accepted only 225 head, defendant could not rescind the contract and keep the money advanced by plaintiff, without showing a disposition to substantially comply with the contract by producing the required number of cattle for inspection and passing.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 239-273; Dec. Dig. §§ 103, 104.\*]

#### 2. APPEAL AND ERROR (§ 1195\*)—LAW OF THE CASE.

All questions which could have been raised and adjudicated on appeal are deemed adjudicated, and on a subsequent trial a motion for judgment on the pleadings comes too late; the pleadings being in the same condition as they were on the first appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4661-4665; Dec. Dig. § 1195.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Appeal from Circuit Court, Grant County; Geo. E. Davis, Judge.

Action by the William Hanley Company against J. B. Combs. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

See, also, 48 Or. 409, 87 Pac. 143.

M. D. Clifford (Clifford & Correll, on the brief), for appellant. A. A. Smith (Cattanach & Wood, on the brief), for respondent.

McBRIDE, J. [1] The evidence does not show or tend to show any abandonment of the contract by Hanley, plaintiff's agent. Combs was to present to Hanley at Bear Valley 600 head of steers of the kind and quality described in the contract. He presented something over 500 head, and a portion of these confessedly not the proper age and quality, and when he and Hanley disagreed as to the number that came up to the standard of the contract defendant declared the contract rescinded, and proposed to keep all the money advanced. Before defendant could rescind the contract and keep the money advanced, he should have shown a disposition to substantially comply with the contract, and have offered to comply by producing the required number of cattle for inspection and passing. He admits that his actual damages were less than \$500, and yet claims that because plaintiff's agent refused to pass more than 225 head of the 578 presented that he is entitled to rescind the contract and keep all the money advanced. There is nothing in the evidence which tends to show that Hanley intended to substantially abandon the contract. In fact, he signified a willingness to take 225 head, which he claimed came up to the contract standard, but defendant was determined that he should be governed by the judgment of himself and his hired men as to the quality of the stock. Under the circumstances, defendant could not rescind the contract without returning the money advanced.

[2] The motion for judgment on the pleadings came too late to avail plaintiff anything. As to the matters raised by the motion, the pleadings are in the same condition now as they were on the first appeal, and if they are defective now they were defective then. All questions which could have been raised and adjudicated on that appeal are res adjudicata. 3 Cyc. 398; Smith v. Seattle, 20 Wash. 613, 56 Pac. 389; Smyth v. Neff, 123 Ill. 810, 17 N. E. 702; Dilworth v. Curtis, 139 Ill. 508, 29 N. E. 861.

The general principles of law applicable to this case are so well settled in the former able opinion of Mr. Justice Bean that it is unnecessary to discuss this case further. To permit the judgment to stand would be a gross injustice, and it is therefore reversed, and a new trial ordered.

# MERCHANTS' NAT. BANK v. McKEOWN et al.

(Supreme Court of Oregon. Dec. 12, 1911.)

## 1. MINES AND MINERALS (§ 38\*)—ADVERSE CLAIM—FORFEITURE—PLEADING.

The general rule that forfeiture as a defense must be specially pleaded does not necessarily obtain in a proceeding to determine adverse claims to a mining location under Rev. St. U. S. § 2326 (U. S. Comp. St. 1901, p. 1430), where the title of each party is in issue, and neither can recover without proof of title.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 97; Dec. Dig. § 38.\*]

## 2. APPEAL AND ERROR (§ 194\*)—OBJECTIONS NOT MADE AT TRIAL—ANSWER.

In a suit to determine adverse claims to a mining location, plaintiff could not object for the first time on appeal, in the absence of evidence that any work was done subsequent to the date specified and prior to defendants' location, that the answer did not charge a forfeiture for failure to do assessment work for a certain year.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1241-1246; Dec. Dig. § 194.\* Pleading, Cent. Dig. §§ 1375-1394.]

## 3. MINES AND MINERALS (§ 38\*)—ASSESSMENT WORK—BURDEN OF PROOF.

Where, in a suit to settle adverse claims, defendants established that no work had been done on the claim in controversy in the year 1907 prior to defendants' location which was admitted by plaintiff, the burden was shifted to plaintiff to establish that work done outside the claim was for the benefit of such location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 101; Dec. Dig. § 38.\*]

## 4. MINES AND MINERALS (§ 23\*)—ASSESSMENT WORK—EMPLOYMENT OF WATCHMAN.

Whether the employment of a watchman and the payment of services as such constituted annual assessment work on a mining claim depends on the necessity of a watchman, and whether the expense was sufficient to satisfy the required amount.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 51-59; Dec. Dig. § 23.\*]

## 5. MINES AND MINERALS (§ 23\*)—ASSESSMENT WORK—SERVICES OF WATCHMAN.

Where, on the termination of a work of a corporation on a mining location, they leave the superintendent in charge as watchman, the corporation was not entitled to charge the latter's salary as superintendent and the value of the services of his wife as cook and of his son as assessment work for the ensuing year, but could at most charge the value of his services as watchman.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 23.\*]

Appeal from Circuit Court, Grant County; Geo. E. Davis, Judge.

Action by the Merchants' National Bank against David A. McKeown and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wm H. Packwood, Jr. (John L. Rand, on the brief), for appellant. J. E. Marks (Hicks & Marks, on the brief), for respondents.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

EAKIN, C. J. This is a suit instituted to establish an adverse right to a mining claim, for which defendants have applied to the United States' Land Department for a patent. The Golden Star claim is one of a group of mines originally owned by the Copperopolis Copper Company, in Grant county, Or., to whose title plaintiff has succeeded. On January 2, 1908, defendants relocated it as the Argonaut quartz mining claim.

It is conceded that the Copperopolis Copper Company did no annual labor, as required by section 2326, U. S. Rev. St. (U. S. Comp. St. 1901, p. 1430), upon the Golden Star claim for the year 1907. But plaintiff asserts that until June, 1906, it was performing labor in excavating a tunnel, and was erecting machinery upon the Protection & Oregon Bell claims, being patented claims in a group with the Golden Star, known as the "Home Group," for its development, and had constructed more than 600 feet of tunnel and had several thousand dollars' worth of machinery and buildings thereon; that for lack of funds it had ceased work thereon in June, 1906, and its superintendent, W. W. Gibbs, his wife, and son, had remained upon the property as keepers of the property until June, 1907. Gibbs' salary as superintendent was \$150 per month. The son's salary as chore boy and the wife's as cook was \$40 each per month. Plaintiff relied on these expenditures to constitute the annual labor for the 10 unpatented claims in that group. Defendants allege in the answer the forfeiture by plaintiff's grantors of the Golden Star claim as follows: "That on the 2d day of January, 1908, the plaintiff or its grantors or predecessors in interest had performed no work or improvements upon said Golden Star quartz claim as the annual labor and assessment work for the year 1907, and all rights or interest under or by virtue of said pretended location and amended location were forfeited and the said premises so attempted to be located were forfeited on account of the failure to do said annual work, and the same was on the 2d day of January, 1908, unappropriated public domain of the United States, and subject to be located as such."

[1] Plaintiff now for the first time insists that the answer does not sufficiently allege a forfeiture, in that it does not state that work on the claim had not been resumed in 1908. Generally forfeiture as a defense must be specially pleaded, but it is stated in 2 Lindley on Mines, § 643, that this rule does not necessarily obtain in a proceeding to determine adverse claims under U. S. Rev. St. § 2326, where the title of each party is in issue, and neither can recover without proof of title. See, to the same effect, Willson v. Cleveland, 30 Cal. 192; Trevaskis v. Peard, 111 Cal. 599, 44 Pac. 246; Steel v. Gold Lead M. Co., 13 Nev. 80, 86, 1 Pac. 448.

[2] Furthermore, there is not a total ab-

sence of allegation thereof; it being alleged that on January 2, 1908, plaintiff had performed no work or improvements as annual labor or assessment work for the year 1907, and the same was on January 2, 1908, unappropriated public domain, subject to location, and that defendants located it on that day. This may be a defective statement of the fact that work was not resumed, but not an omission. There was no contention at the trial that work was resumed in 1908, prior to defendants' location, and it is too late to raise that question in this court for the first time. A pleading unobjected to until after trial will be liberally construed. *Patterson v. Patterson*, 40 Or. 560, 67 Pac. 664.

The only other contention of plaintiff is that the evidence established the fact that plaintiff's grantors performed the annual labor for the year 1907 as required by the United States statute. It is not contended by plaintiff that any labor was performed on the Golden Star claim during that year, but that, it being a part of the "Home Group," work done and improvements made on the Protection and Oregon Bell claims prior to 1907, which was for the development of all claims, inured to the benefit of the Golden Star, and that the work of the watchman above mentioned in 1907 should be taken as the annual labor for those claims.

[3] When defendants established that no work had been done upon the Golden Star claim for the year 1907, which was admitted by plaintiff, the burden shifted, and was upon plaintiff to establish the fact that work done outside of the claim was for its benefit. 2 Lindley, § 630; *Dyer v. Brogan*, 70 Cal. 136, 11 Pac. 589; *Hall v. Kearney*, 18 Colo. 505, 33 Pac. 373; *Sherlock v. Leighton*, 9 Wyo. 297, 63 Pac. 590, 934. It appears from the evidence that in June, 1906, the Copperopolis Copper Company ceased operation upon the group and the men were discharged except Gibbs, a stockholder and officer of the company and superintendent of the operation, who remained upon the properties in the employ of the company, until June, 1907, as watchman or keeper. The improvements upon the Protection and Oregon Bell claims consisted of two engines and boilers, concentrating tables, two gigs, a gasoline engine, a dynamo, an ore crusher, an air compressor which was used in operating a drill in the tunnel, a ventilating system, operated in the tunnel by the gasoline engine. A part of this plant was obtained only to experiment on the ore from the Oregon Bell claim, and was not used more than a month or two. The only work done at any time which tended to develop the Golden Star claim was the tunnel which had reached within a few hundred feet of the claim; and the only machinery or improvements that related to it was such as were used in extending the tunnel. When the mine was shut down in June, 1906, the

company had evidently no immediate prospect of resuming work. It ceased work for the reason that it had no money and was making an effort to sell the mine. Thereafter, in June, 1907, the property was attached for debt and placed in the hands of a receiver, and through such proceeding the property was transferred to this plaintiff.

[4] It is not contended that there was any work done on any of the group that could constitute development work for the year 1907, other than the expense of the watchman from January 1 to June 1, 1907, and the sufficiency of that expense to constitute the annual work for the Golden Star claim depends upon the necessity for the watchman, and whether the expense was sufficient for that purpose.

[5] During that period Gibbs was upon the property as keeper, but the services of the son in cutting wood for the house and caring for the team of horses and those of the wife as cook were not necessary; nor was the company justified in paying a superintendent's salary for a watchman. There is no evidence as to the value of the services of a watchman, but it does appear that McClerman during the same time was performing annual assessment work upon the Kinbell group, belonging to the same company, at \$3 a day, and paid his own board, and the expense of the watchman should be no more. Therefore if the expense of the watchman from January 1 to June 1, 1907, was necessary and was for the advantage of the Golden Star claim equally with the others, it would be insufficient to equal the annual labor required upon the 10 claims, and but a small part of the property to be cared for related to the group other than the two patented claims. The expense of the keeper is only allowable as annual labor when the mine is temporarily idle and the work is to be resumed again, the watchman being necessary

to preserve the property needed when the work is resumed, and cannot be so applied from year to year indefinitely as a substitute for the annual labor. This is the holding in *Hough v. Hunt*, 138 Cal. 142, 70 Pac. 1059, 94 Am. St. Rep. 17, where it is said: "The cases must be rare in which it can justly be said that such money is expended in prospecting or working the mine. There may be cases where work has been temporarily suspended, and there are structures which are likely to be lost if not cared for, and it appears that the structures will be required when work is resumed, and that the parties do intend to resume work in which money expended to preserve the structures will be on the same basis as money expended to create them anew. But this could not go on indefinitely. As soon as it should appear that this was done merely to comply with the law and to hold the property without any intent to make use of such structures within a reasonable period, such expenditures could not be said to have been made in work upon the mine." This case is cited with approval in *Gear v. Ford*, 4 Cal. App. 562, 88 Pac. 600; 2 Lindley, § 629; *Fredricks v. Klauser*, 52 Or. 110, 96 Pac. 679. See, also, *Kinsley v. New Vulture Min. Co.*, 11 Ariz. 68, 90 Pac. 438, 110 Pac. 1135; *Morrison on Mining Rights* (14th Ed.) 118. The application of the expense of the keeper to the annual work in the case before us is excluded by the terms of the language quoted. Evidently the company was insolvent and had no intention of immediately resuming work, and the keeper was there to preserve the property, to aid in its sale, and not in the development of the mine. Even if it is conceded that the whole of the expense of the keeper should be credited as annual labor upon the ten unpatented claims, it is insufficient in value for that purpose. The decree of the lower court is affirmed.

**HAFER v. MEDFORD & C. L. R. CO. et al.  
DAVIS v. REDDY.**

(Supreme Court of Oregon. Dec. 19, 1911.)

**APPEAL AND ERROR (§ 327\*)—ADVERSE PARTIES—STOCKHOLDERS.**

An appeal from a judgment disallowing a claim against a corporation in the hands of a receiver appointed at the suit of a stockholder praying for the dissolution of a corporation, and contesting the allowance of the claim, is not a separate proceeding against the receiver, but is a proceeding against the fund involved in the suit, and the stockholder is an adverse party to the claim.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 327.\*]

On petition for rehearing. Denied.

For former opinion, see 117 Pac. 1122.

**EAKIN, C. J.** This is a petition by defendant A. A. Davis for a rehearing upon the motion to dismiss the appeal, urging that the court is in error in holding that Hafer, the plaintiff, who was not served with a notice of the appeal, is an adverse party in the decree or order from which the appeal is taken. Hafer brought this suit as a stockholder, who, with certain others, have paid par value for their stock in the sum total of \$21,000, and alleges irregularity in the organization and management of the company, showing a state of facts that indicate that it is insolvent, asks for a receiver to take charge of the property of the company to enforce the payment of stock subscription, and that the company be dissolved, alleging that Davis is one of the delinquent stockholders, who has presented to the court a claim for \$21,753 against the corporation for payment from the assets in the custody of the court, which, if allowed, will diminish the amount for distribution among the stockholders. The appeal is from the order of the court disallowing the claim of Davis.

This is not a separate proceeding against the receiver, as contended by counsel, but is against the fund involved in the suit. Counsel says in his brief that no objection was ever made to the claim of Davis by any person. This is error. The supplemental abstract shows that Hafer and other stockholders filed written protests and appearances in the proceeding for the purpose of contesting the claim. The claim was contested before the court in which Hafer and these stockholders were recognized by the court and conducted the defense. It is stated in *Fagan & Osgood v. Boyle Ice Mach. Co.*, 65 Tex. 324, 330: "Who may attend before the master is determined upon the most enlightened and liberal principles of abstract justice. If the fund being administered is not sufficient to pay all, each creditor or distributee is directly interested in the justice of every demand of a degree equal to, or greater than, his own. \* \* \* Every creditor whose claim has been recognized or es-

tablished in any of the modes pointed out by the decree becomes a quasi party, and may resist, before the master, the allowance of any claim of a dignity equal to, or greater than, his own. If not satisfied with the action of the master, he may, upon leave as of course, except to the master's report. \* \* \*

The proceeding in the case before us is not a proceeding against the receiver, but is a claim by a defendant in the suit against the fund, the distribution of which is the ultimate purpose of the suit, and, if there is a party in the suit who is an adverse party to the claim, it is plaintiff. The receiver is a trustee for all the parties, including Davis and Hafer (High on Receivers, 208), and although the creditors cannot compromise the claim without the receiver's consent, as stated by some of the authorities, he cannot prevent the party, or even one who is not a party if he is a creditor or distributee and has the consent of the court, from contesting claims, the allowance of which will prejudice their rights. This rule is generally recognized (High on Rec. 208; *Medynski v. Theiss*, 36 Or. 397, 59 Pac. 871; *Thompson v. Huron Lbr. Co.*, 4 Wash. 600, 607, 30 Pac. 741, 31 Pac. 25), and is the only just and equitable one. In such a proceeding a claim is presented to the court, and it must determine whether it shall be allowed (34 Cyc. 341); and it is not necessary that a formal issue be presented when the claim is presented to the court for allowance in the original suit. 17 Ency. Pl. & Pr. 794.

The rehearing is denied.

**A. C. BOHRNSTEDT CO. et al. v.  
SCHAREN.**

(Supreme Court of Oregon. Dec. 19, 1911.)

**1. EASEMENTS (§ 36\*)—PRESCRIPTION—PRIVATE WAY.**

Where a way has been established by consent of the owner of the fee, evidence to substantiate a prescriptive right to continue the easement must be clear and conclusive.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 88-93; Dec. Dig. § 36.\*]

**2. HIGHWAYS (§ 7\*)—PRIVATE WAY—IMPROVEMENT.**

Where a way was originally private, it would be presumed that slight improvements made thereon were made with the desire to make the way passable, and was therefore insufficient to impart to the owners of the fee notice of an intention to assert an adverse use so as to convert the way into a public road.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 10, 12-14; Dec. Dig. § 7.\*]

**3. HIGHWAYS (§ 7\*)—PRIVATE WAY—OBSTRUCTION.**

Where a lane originally established as a private way was a cul-de-sac, it was not incumbent on the owners of the fee to place obstructions therein, or to notify persons using it that the license, pursuant to which the travel was first permitted, was revocable, since the burden devolved on persons using the lane to unmistakably notify the owners of the fee that

they claimed an adverse right of use in order to initiate a prescriptive right.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 10, 12-14; Dec. Dig. § 7.\*]

Appeal from Circuit Court, Lane County; Lawrence T. Harris, Judge.

Suit by the A. C. Bohrnstedt Company and others against W. J. Scharen to enjoin the obstruction of an alleged public road. From a decree dismissing the suit, plaintiffs appeal. Affirmed.

S. P. Ness, for appellants. Wm. G. Martin, for respondent.

MOORE, J. It appears from the testimony that about the year 1883 William R. Dillard held the legal title to land in Lane county. Joining a part of his premises on the east, his brothers Luther and George then owned undivided interests in land that extended east a mile to a north and south county road. The land so held in common was partitioned, and Luther Dillard obtained a strip off the north end about 59 rods wide, and George Dillard secured the remainder. In locating the boundary thus determined, it seems that the line was placed too far north. William R. Dillard having no road to his land, the brothers mentioned agreed with him that he should have a passageway along such division line, and, pursuant to the stipulation, fences were built forming a lane in the center of which the boundary was supposed to have been. No deed or other writing was ever executed to evidence the way, nor did Luther Dillard or his successors in interest ever plat or sell any of the north strip with reference to the lane. The west end of the way was closed with a gate through which William R. Dillard and persons who lived west of his premises and their successors in interest passed and traveled along the lane to and from the county road for more than 10 years prior to any interference with the way, and without objection from any person or notice that the lane was private property. Several persons who thus used the lane joined in repairing it occasionally, but no public money or labor was ever expended thereon.

The William R. Dillard land is now owned by M. R. Hastings. The defendant is in possession, under a contract to purchase, of the premises formerly owned by Luther Dillard. The Bohrnstedt Company, having secured a deed of the George Dillard land, caused it to be surveyed and platted into small tracts which are being cultivated, and fruit trees set out thereon with a view of selling the orchards. The corporation's entire tract has passageways extending from the south boundary on each side of double tiers of small tracts to the lane. The plaintiffs Olson, Settenrich, and Sloan have secured from the Bohrnstedt Company con-

tracts for the purchase of orchard lands and Pirie, Gay, and Jordan had formerly traveled along the lane. A public highway has been established from the county road on the north boundary of the land of which the defendant is in possession, thence west across the premises owned by Hastings, and by other persons to and terminating at a north and south county road. The premises on which such east and west highway is located were conveyed by the respective owners to the county, the grantors agreeing with each other that, when the road was opened, they would relinquish to Scharen whatever interests they may have had in or to the lane. The cross-road was opened for travel about October, 1909, whereupon the defendant began to obstruct the lane precipitating this suit which resulted as hereinbefore indicated.

Some controversy exists as to whether or not William R. Dillard paid any consideration to his brothers for the use of the way evidenced by the lane. This question, however, is not regarded as important, for it seems to have been conceded by the defendant that the way was an appurtenant which passed by mesne conveyances to Hastings, who relinquished all interest therein in consideration of securing the establishment of a public highway across his land. No evidence was offered tending to show either an express or an implied dedication of the way, or to prove any privity of contract or estate between any of the persons traveling in the lane and the owners of the fee thereof. If the right to use the way has not been secured by prescription, the grantors whose lands are situate west of Hastings' premises had no interest in the lane to abandon, as a consideration for the establishment of the public highway, and the plaintiffs have no rights in or to the way which they can enforce. Whatever privileges William R. Dillard may have secured from his brothers, the way which he was permitted to use was unquestionably private, and it has not by any act of Luther Dillard or his successors in interest constituting an estoppel been converted into a public road so far as the lane extends upon the premises formerly owned by him. If the easement which he secured had been established and maintained without the consent of the owner of the fee for the time specified, it would probably be presumed that the use was pursuant to a claim of right, and adverse, thereby imposing on such owner the burden of proving that the way had been enjoyed by license or privilege. *Coventon v. Seufert*, 23 Or. 548, 550, 82 Pac. 508. In that case, however, it was inadvertently said the presumption was "conclusive" when the qualifying word "disputable" should have been used. As further illustrating the legal principle thus announced, see *Pierce v. Cloud*, 42 Pa. 102, 82 Am. Dec.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

496; *Chollar v. Potosi M. Co. v. Kennedy*, 3 Nev. 361, 93 Am. Dec. 409.

[1] Where a way has been established by consent of the owner of the fee, evidence to substantiate a prescriptive right to continue the easement ought to be clear and conclusive. In *Hall v. McLeod*, 2 Metc. (Ky.) 98, 74 Am. Dec. 400, 402, Mr Justice Simpson, discussing a feature of this rule, says: "It cannot be admitted that, where the proprietor of land has a passway through it for his own use, the mere permissive use of it by other persons for half a century would confer upon them any right to its enjoyment. So long as its use is merely permissive, it confers no right; but the proprietor can prohibit its use or discontinue it altogether at his pleasure. A different doctrine would have a tendency to destroy all neighborhood accommodation in the way of travel; for if it were once understood that a man by allowing a neighbor to pass through his farm without objection over the passway which he used himself would thereby, after a lapse of 20 or 30 years, confer a right on him to require the passway to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue." To the same effect, see *Stacey v. Miller*, 14 Mo. 478, 55 Am. Dec. 112. "A private way," says a noted author, "may doubtless be transformed into a public one, but, in order that this may result without legal proceedings, it must appear that the owner fully consented to the change, or there must be some element of estoppel to deprive him of his rights as the owner of the fee. Where a way is laid out and used as a private way, the mere fact that the public also makes use of it without objection from the owner will not make it a public way. If the use by the public is not clearly declaratory of the right to use it as a highway, and is not so understood by the owner of the fee, the public will not acquire the free right of passage, nor will it be burdened with the duty of making it safe and convenient for passage." *Elliott, Roads and Streets* (3d Ed.) § 5.

[2] In the case at bar the way was originally private, and its use by William R. Dillard and his successors in interest was by permission, and the only evidence offered at the trial tending in any manner to prove the assertion of an adverse right is that a little voluntary work was done by the persons using the lane so as to render it passable. It would reasonably be implied from such improvement that a desire to make the way better prompted the repairs, for it cannot be supposed that the persons traveling along the lane would expect the owner of the fee to bear all the burden of maintaining it for their accommodation. The repairs that were made consisted of a few loads of sand that were hauled on the way, and such improvement was not, in our opinion, sufficient

to impart to the owners of the fee notice of an intention to assert an adverse use so as to convert a private way into a public road.

[3] It will be remembered that the lane is a cul-de-sac, and originally established as a private way. Such being the case, it was not incumbent upon the owners of the fee to place obstructions in the lane or to notify persons using it that the license pursuant to which the travel was at first permitted was revocable. If it were sought to initiate a prescriptive right so as to change a private way into a public road, it devolved upon the persons using the lane unmistakably to notify the owners of the fee affected thereby of their claim. The Bohrnstedt Company by moving its north fence a few feet to the south can establish a way on its own land, thereby accommodating all the plaintiffs who have no other manner of reaching a county road.

Believing that no error was committed by the trial court, the decree is affirmed.

## BACHELORS' CLUB v. CITY OF WOODBURN et al.

(Supreme Court of Oregon. Dec. 12, 1911.)

### 1. INTOXICATING LIQUORS (§ 10\*)—MUNICIPAL REGULATIONS—VALIDITY—"REGULATE."

Under Woodburn Charter (Sp. Laws 1899, p. 538) c. 4, § 5, authorizing ordinances deemed expedient to suppress intemperance and to regulate the sale or disposition of liquors, an ordinance restricting the right to sell intoxicants to registered pharmacists upon bona fide prescriptions for disease is a valid "regulation" and not a "prohibition."

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 7-12; Dec. Dig. § 10.\*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6041-6047; vol. 8, p. 7782.]

### 2. INTOXICATING LIQUORS (§ 146\*)—"SALES"—WHAT CONSTITUTES—CLUBS.

Transactions whereby an incorporated club issues coupon books to its members at a fixed price redeeming the coupons in liquors carried by the club constitute sales, though no profits result to the club, since it is no defense to a charge of unlawfully disposing of liquor that the sale was made at a loss.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 146.\*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

### 3. INTOXICATING LIQUORS (§ 15\*)—VALIDITY OF ORDINANCE.

An ordinance, providing punishment for conducting places where liquors are unlawfully sold or disposed of, and defining such places to be disorderly houses, is a valid regulation.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 15.\*]

### 4. MUNICIPAL CORPORATIONS (§ 589\*)—ORDINANCE—SEARCHES AND SEIZURES.

An ordinance of the city of Woodburn, authorizing search for and seizure of property kept for unlawful use, is void for want of charter authority.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 589.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Action by the Bachelors' Club against the City of Woodburn and others. Decree for plaintiff, and defendants appeal. Partly reversed and partly affirmed.

Plaintiff claims to be a social club incorporated for the mutual benefit and social enjoyment of its members, and brings this suit to enjoin the city of Woodburn from enforcing certain city ordinances, respecting the traffic in intoxicating liquors, on the alleged ground that they are void and not authorized by the charter. The provisions of the charter germane to the issues here presented are as follows:

"Sec. 3. At the first regular election under the charter the legal voters of the city of Woodburn may vote upon the question of licensing the sale of intoxicating liquors, but the same shall not be voted upon unless petitioned therefor by at least fifty resident freeholders of said city. At such election the ballot used shall be printed in the following form: 'City of Woodburn—Election to authorize licensing of saloons. For..... Against..... The voter at such election shall express his will by putting a mark or cross in the appropriate space on said ballot;' provided, however, that after the question of issuing such license shall have been once determined by the legal voters of said city it shall not be submitted again unless petitioned for by at least fifty resident freeholders of the said city of Woodburn; provided, further, that if a petition as above provided be presented to the common council of said city signed by at least fifty resident freeholders asking that the question of issuing such license be again submitted to the legal voters of the city of Woodburn, the common council shall submit the question to the legal voters at the next general municipal election following the presentation of the petition for that purpose, and if at any of said elections a majority of the legal voters, as defined by this act, be in favor of such license to issue it shall be the duty of the common council forthwith to issue such license to any applicant therefor; provided, however, that such applicant shall pay the amount required for such license and present to the common council a good and sufficient bond in the sum of \$1000 with two or more sufficient sureties to be approved by the council, conditioned that such applicant will keep an orderly house and that he will comply with all the requirements of this act and of the ordinances of the city of Woodburn and the laws of the state of Oregon."

Section 4 of chapter 10 reads as follows:

"Sec. 4. Any person who shall violate any of the provisions of this act, or the ordinances hereunder, for the violation of which no punishment has been provided herein, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by fine

not to exceed \$100, or he may in default of the payment of such fine be imprisoned in the city jail one day for every \$2.00 of such fine."

By section 5, c. 4, of the charter of Woodburn (Sp. Laws 1899, p. 538) the council is given power to pass such ordinances as it shall deem expedient for the suppression of vice and intemperance, and to license and regulate the vending or disposing of intoxicating liquors. On February 7, 1911, the city council adopted the following ordinance, which is ordinance No. 287:

"Section 1. That it shall be unlawful for any person, firm, company, corporation, club or society, or any agent or employé of any person, firm, company, corporation, club or society or any member of any firm, corporation or society, directly or indirectly to keep, sell, give or furnish any spirituous, vinous, malt, liquors, hard cider, near beer or other like so called soft drinks to any person within the corporate limits of the city of Woodburn, or to keep the same in any lodge rooms, club house, club rooms, or any other place within the city of Woodburn, than at a drug store and by a licensed pharmacist, and the same shall not be sold, given or furnished by such pharmacist to any person for any purpose other than medicinal, scientific or sacramental purposes, nor shall the same be sold, given or furnished only upon the prescription of a licensed and practicing physician, or ordained minister for sacramental purposes.

"Sec. 2. That it shall be unlawful for any person falsely to represent himself or any other person to be sick or afflicted with any disease whatever, for the purpose of obtaining a prescription, or that he is an ordained minister, for the purpose of obtaining any of the intoxicating liquors or beverages mentioned in this ordinance.

"Sec. 3. Any person violating any of the provisions of this ordinance upon conviction thereof before the recorder's court of the city of Woodburn, Oregon, shall be fined not less than \$50.00, nor more than \$100.00, in default of the payment of such fine, be confined in the city jail until such fine be paid, not to exceed one day for each two dollars of such fine.

"Sec. 4. That ordinance No. 284 entitled 'An ordinance prohibiting the sale, giving, or furnishing intoxicating liquors, hard cider, and near beer to any person within the corporate limits of the city of Woodburn, and to provide a punishment therefor,' passed by the council January 3, 1911, be and the same is hereby repealed.

"Sec. 5. Inasmuch as there is urgent need of the foregoing legislation for the protection of the peace, safety and health of the city of Woodburn, an emergency is hereby declared to exist, and this ordinance shall be in full force and effect from and after its approval by the mayor."



On March 21, 1911, ordinance No. 307 was adopted and reads as follows:

"Section 1. That it shall be unlawful for any person, firm, company or corporation, or the agent, or employé of any person, firm, company or corporation, directly or indirectly, to keep, run or operate or to abet, aid or assist in keeping, running or operating any house, room, or building where illegal gaming or gambling is carried on, or where persons congregate or frequent for the purpose of drinking alcoholic or intoxicating liquors, or where any illegal act is promoted, indulged, carried on, tolerated, sanctioned or acquiesced in within the corporate limits of the city of Woodburn, Oregon. Any person violating any of the provisions of this ordinance shall be deemed guilty of maintaining a disorderly house, and upon conviction thereof before the recorder's court of the city of Woodburn, Oregon, shall be fined not less than \$50.00 nor more than \$100.00 and in default of the payment of such fine be confined in the city jail until such fine be paid, not to exceed one day for each two dollars of such fine. Provided that this ordinance shall not apply to druggists selling, giving or furnishing alcoholic or intoxicating liquors for medicinal purposes upon the prescription of a practicing physician or to an ordained minister for sacramental purposes.

"Sec. 2. Inasmuch as the city of Woodburn is in urgent need of the foregoing legislation for the protection of the peace, safety, and health of the city, an emergency is hereby declared to exist and this ordinance shall take effect and be in force from and after its approval by the mayor."

On April 7, 1911, ordinance No. 309 was adopted, and it reads as follows:

"Section 1. The recorder of the city of Woodburn, Oregon, is hereby authorized to issue a search warrant, directed to the marshal or any peace officer of the city of Woodburn, Oregon, commanding him to search for personal property at any place within the city of Woodburn, and bring it before the recorder. When the property is in the possession of any person, with intent to use it to commit a violation of any provision of any ordinance of the city of Woodburn, where a fine is provided for such violation, or in the possession of another to whom he may have delivered it, for the purpose of concealing it or preventing its being discovered, in which case it may be taken on the warrant from the possession of such person, or of the person to whom he may have so delivered it, or from any house or other place occupied by them or under their control, or either of them.

"Sec. 2. A search warrant cannot be issued but upon probable cause, shown by affidavit, naming or describing the person, and describing the property and the place to be searched.

"Sec. 3. The recorder must, before issuing

the warrant, examine on oath the complainant and any witness he may produce, and take their deposition in writing, and cause them to be subscribed by the parties making them.

"Sec. 4. Thereupon if the recorder be satisfied that there is probable cause to believe in the existence of the grounds of the application he must issue the warrant, which may be in substantially the following form: In the Name of the City of Woodburn, Oregon: To the Marshal or any Police Officer of the City of Woodburn, Oregon, Greeting: Information on oath having been this day laid before me (stating the particular grounds of the application, according to section 1) you are therefore hereby commanded, at any time in the day or night, to make immediate search on the person of A. B. (or in the house situated, describing it or in any other place to be searched, with reasonable particularity, as the case may be) for the following property (describing it with reasonable particularity), and if you find the same, or any part thereof, to bring it forthwith to me at (stating the place). Dated at Woodburn, Oregon, this — day of —, 19—.

"Sec. 5. When complaint is made on oath or affirmation before the recorder, that the complainant believes, and has reasonable cause to believe, the ordinances in relation to cruelty to animals has been or is being violated, in, at, or near any particular building, place or location, such recorder shall, if satisfied that there is reasonable cause for such belief, issue a search warrant, authorizing the marshal or any police officer of the city of Woodburn, Oregon, to search such building, place or locality.

"Sec. 6. In the execution or service of a search warrant, the officer has the same powers and authority in all respects, to break open any door or window, to use all necessary and proper means to overcome any forcible resistance made to him, or to call any other person to his aid, that he had in the execution or service of a warrant of arrest, or that he or any sheriff or constable has in the execution or service of a warrant of arrest under the laws of the state of Oregon.

"Sec. 7. When the officer takes property under the search warrant, he must give a receipt for the property taken, specifying it in detail, to the person from whom he takes it, or in whose possession it is found, or in the absence of any such person he must leave it in the place where he found the property.

"Sec. 8. When the officer to whom the warrant is delivered takes property under the warrant he must retain it in his possession, subject to the order of the recorder to whom he is required to return the proceeding.

"Sec. 9. A search warrant must be executed and returned to the recorder within ten days from its date, unless the recorder, before the expiration of such time, shall by

indorsement thereon, extend the time for five days. After the expiration of the time herein prescribed, the warrant unless executed is void.

"Sec. 10. The officer must forthwith return the warrant to the recorder and deliver to him a written inventory of the property taken made publicly or in the presence of the person from whose possession it was taken, and of the applicant for the warrant, if they be present, 'I, A. B., the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of all the property taken by me on the warrant.'

"Sec. 11. The recorder must thereupon, if required, deliver a certified copy of the inventory to the person from whose possession the property was taken and to the applicant for the warrant.

"Sec. 12. If the person from whose possession the property was taken controvert the grounds of issuing the warrant, the recorder must proceed to examine the matter by taking testimony in relation thereto.

"Sec. 13. If it satisfactorily appear that the property taken is not the same property as that described in the warrant, or that there is no probable cause for believing the existence of the grounds on which the warrant was issued, the recorder must cause it to be restored to the person from whom it was taken.

"Sec. 14. When a person charged with violating any provision of any ordinance of the city of Woodburn, Oregon, is supposed by the recorder before whom he is brought to have upon his person a dangerous weapon or anything which may be used as evidence of the commission of a violation of any provision of any ordinance, the recorder may direct him to be searched in his presence and direct the weapon or other thing to be retained, subject to his order.

"Sec. 15. When any goods or things are taken on a search warrant the manufacture, sale or use of which are prohibited by any of the ordinances of the city of Woodburn, Oregon, the recorder before whom they are brought must direct the officer to destroy them, which direction the officer must obey, and make return thereof on the warrant.

"Sec. 16. Inasmuch as there is urgent need of the foregoing ordinance for the immediate preservation of the peace, health and safety of the city of Woodburn, Oregon, an emergency is hereby declared to exist, and this ordinance shall take effect and be in full force from and after its approval by the mayor."

On February 11, 1911, ordinance No. 300 was adopted. It is as follows:

"Section 1. That it shall be unlawful for any person, corporation or common carrier, or any agent of any person, corporation or common carrier to deliver within the corporate limits of the city of Woodburn, Oregon, any spirituous, vinous, fermented or malt

liquors or hard cider or near beer to any person, firm or corporation, except to a registered pharmacist. Any person, or agent of any person, firm, or corporation or common carrier violating any of the provisions of this section, upon conviction thereof before the recorder's court of the city of Woodburn, Oregon, shall be fined not less than \$25.00 nor more than \$100.00 and in default of the payment of such fine be committed to the city jail until such fine be paid, not to exceed one day for each two dollars of such fine.

"Sec. 2. Inasmuch as the city of Woodburn is in urgent need of the foregoing legislation for the protection of the peace, health and safety of the city, this ordinance shall be in full force and effect from and after its approval by the mayor."

The complaint alleges that, pursuant to ordinance No. 287, Stangel, the recorder, has repeatedly convicted and fined the officers of the club, and their cases are now pending in the circuit court upon appeal; that under ordinance 300, upon the complaint of the mayor and upon a warrant issued by the recorder, an organized force of police officers and informers with force and violence entered the clubrooms and ejected the officers and members, seized the property and effects of plaintiff, took the same into the possession of the city, and threaten further proceedings of a like nature, whereby plaintiff will be vexed and annoyed and its property rendered valueless, and it and its officers will be vexed and harassed by a multiplicity of suits. Defendants answered substantially justifying under the ordinances above quoted and by denials as to other matters, among other things denying the bona fides of the organization of the club and alleging that its principal object is the unlawful sale of liquors. On the trial there was a decree for plaintiff, and defendants appeal.

H. Overton and Geo. G. Bingham, for appellants. Thomas Brown (Carson & Brown, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). [1] Previous to November, 1900, the sale of intoxicating liquors was licensed in the city of Woodburn. At the election then occurring the city in common parlance voted "dry," and thereafter such sales were prohibited. Existing licenses expired in January, 1910, and coincidentally with their expiration a number of citizens were suddenly seized with a desire to improve their social and mental condition by means of a social club, and the "Bachelors' Club" was incorporated, ostensibly for that purpose. Whether or not its membership was confined to unmarried men, as the name would seem to indicate, the club became at once an exceedingly popular institution and soon attained a membership of about 80 persons. The method of initiation was simple. A person

desiring membership signed an application blank, and his qualifications were passed upon by the trustees, and if found worthy he paid a fee of \$6 and was admitted. Of this amount \$1 was for membership and the other \$5 was for a book of coupons, entitling the holder to receive a certain quantity of any refreshments the club might have in stock. A room on the ground floor of a building formerly used as a saloon was rented, a bar established, and stewards provided, and last but not least a stock of liquors, cigars, and soft drinks laid in for the comfort and delectation of the members. The club secured a United States' internal revenue license for the sale of liquors and proceeded to furnish its members with liquors, cigars, and other refreshments, when called for. There is no evidence that the club ever did anything toward the moral or mental improvement of its members, beyond furnishing them liquors, cigars, and soft drinks in exchange for coupons, and we conclude from the testimony that the principal object of the corporation was the disposal of liquors to its members. It is claimed that the provision of the charter authorizing the council to license and regulate the sale or disposal of intoxicating liquors does not include the power to prohibit their sale. Whether this is correct or not is of no moment in this case, as the council has not attempted by this ordinance to prohibit the sale of liquors in Woodburn, but has confined the right to make such sales to registered pharmacists and upon a bona fide prescription for disease. This is not prohibition, but regulation. Taking this in connection with the plenary power granted the council, by section 5, *supra*, to pass and enact such ordinances as it shall deem expedient to suppress intemperance, we are of the opinion that the ordinance is valid.

[2] The contention that these sales were not sales of liquors, but that it was the property of the members of the club, cannot be sustained. The club is a corporation and is itself an artificial person and, as such, owns the liquors purchased by it. The act of taking a member's money in gross, and allowing him to spend it for liquors in detail as his appetite may require, does not alter the fact that in its ultimate analysis the transaction is a sale; nor does the fact that no profit is made by the transaction alter its nature. It is not a defense to a charge of unlawful disposal of liquor for the seller to show that he sold it for less than it cost him.

[3] Ordinance No. 307 is not void. A house where the unlawful sale or disposition of intoxicating liquor is carried on is a disorderly house. *People v. Clark*, 1 Wheel. Cr. C. (N. Y.) 288; *Cheek v. Commonwealth*, 79 Ky. 359.

[4] Ordinance No. 309 is void. The right of the citizen to be protected against un-

reasonable search and seizure is a very valuable one, and we have been cited to no provision of the charter of Woodburn that confers upon the municipality the right to exercise this high prerogative. Ordinance No. 300 is confessedly void, both for want of authority in the charter to enact it, and because it interferes with interstate commerce. It does not appear, however, that any attempt has been made to enforce it, and we are not, therefore, required to make any order in relation to it.

The decree of the circuit court enjoining prosecution under ordinances 287 and 307 is reversed, but the decree will stand as to No. 309. The appellant will recover costs and disbursements in this court, and neither party will recover costs and disbursements in the circuit court.

#### UNITED STATES NAT. BANK OF VALE v. FIRST TRUST & SAVINGS BANK OF BROGAN.

(Supreme Court of Oregon. Dec. 5, 1911.)

##### 1. BANKS AND BANKING (§ 109\*)—CASHIER—DELEGATION OF AUTHORITY.

A cashier of a bank cannot delegate to an officer of another bank authority to accept drafts in such cashier's name.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 109.\*]

##### 2. BANKS AND BANKING (§ 109\*)—OFFICERS.

Drafts on a state bank were presented at a national bank, and the vice president of the national bank, with the authority of the cashier of the state bank, executed a written acceptance in the name of the cashier of the state bank. Held that, as one person cannot be an agent and a party at the same time except with the full knowledge and consent of the principal, the acceptance by the vice president was not authorized, and hence was not evidence of a written acceptance under L. O. L. § 5965, requiring the acceptance of a bill to be in writing and signed by the drawee.

[Ed. Note.—For other cases, see *Banks and Banking*, Dec. Dig. § 109.\*]

##### 3. BILLS AND NOTES (§ 513\*)—DRAFTS—LIABILITY.

Where a bill of exchange is drawn upon one bank in favor of another, evidence that the bank upon which the bill was drawn could have obtained sufficient of the drawee's funds for payment was immaterial in an action on the bill, for L. O. L. §§ 5960, 6022, provides that a check or bill does not operate as an assignment of any part of the funds of the drawer, and that the payor is not liable until acceptance.

[Ed. Note.—For other cases, see *Bills and Notes*, Dec. Dig. § 513.\*]

##### 4. PLEADING (§ 387\*)—THEORY OF CASE—ALTERNATION.

Where a complaint based the right to recover upon certain grounds, plaintiff cannot recover upon others, for a party may not alter his theory of action.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1300-1304; Dec. Dig. § 387.\*]

Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Action by the United States National Bank

of Vale against the First Trust & Savings Bank of Brogan. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

This is an appeal by defendant from a judgment upon the verdict of a jury for \$280.47. This action is based upon two inland bills of exchange for \$120.47 and \$160, respectively, upon which the plaintiff charges defendant as an acceptor; the first, with the alleged acceptance, being in the following form: "Brogan, Oregon, Nov. 22, 1910. No. ——. First Trust & Savings Bank: Pay to the order of U. S. National Bank (\$120.47) one hundred & twenty 47/100 dollars. Morrison & Son. O. K. by Tschirgi, Cashier, 11/22/10." The second bill is in the same form, except as to amount and name of payee.

The complaint alleges the corporate existence of the plaintiff and defendant; the execution of the bills and the delivery thereof to plaintiff; the presentment of the bills to defendant and its due acceptance of the same in writing, upon the face thereof, as follows: "O. K. Tschirgi, Cashier." At said time, E. L. Tschirgi was cashier of the First Trust & Savings Bank, of Brogan, Or. Plaintiff, relying upon said bills and their acceptance by defendant, then and there paid to the drawer, Morrison & Son, the amount of the bills. November 29, 1910, plaintiff presented the bills to defendant for payment, which was refused. Two causes of action are separately stated in substance as above. As to the alleged acceptance as it appears upon the face of the bills in evidence, it is noticed that the word "by" is omitted in the complaint. Defendant by its answer denies the acceptance of the bills, or that they were presented for acceptance, and admits that defendant refused to pay the same, and avers that Morrison & Son, at the time, had no funds deposited with defendant with which to pay them. The reply puts in issue the new matter of the answer, and avers that at the time of the transaction defendant held certain assignments of accounts, and expected to get returns from certain consignments of alfalfa seed belonging to Morrison & Son.

G. W. Hayes (Hayes & Crandall, on the brief), for appellant. J. W. McCulloch (H. C. Eastham and McCulloch, Soliss & Duncan, on the brief), for respondent.

BEAN, J. (after stating the facts as above). It appears from the evidence, which is all contained in the record, that Mr. J. P. Dunaway, at the time the transaction occurred, was the vice president and acting cashier of the plaintiff bank, at Vale, Or.; and Mr. E. L. Tschirgi was the cashier of the defendant bank at Brogan, Or. At the date mentioned on the bills, W. J. Morrison, of the firm of Morrison & Son, gave the plaintiff the two bills in payment of a note, and for \$160 in cash.

Mr. J. P. Dunaway testified that he called

Mr. Tschirgi up over the telephone, a few minutes after he had taken the bills or checks of Morrison & Son, and told him that Mr. Morrison had stated that he had arranged with Mr. Tschirgi to take care of his checks, and he wanted to know if he would do so if the checks were presented. Mr. Tschirgi answered "that they would not"; that Mr. Morrison was looking for a remittance from Welser, and, if the same were received, he would take care of the checks, but unless the money came he could not accept them.

After Mr. Dunaway phoned to the commission company in regard to the remittance, and reported to Mr. Tschirgi that he was informed that the remittance had been mailed, and after Mr. Morrison talked over the phone to Mr. Tschirgi, Mr. Dunaway said to the latter, "I'll mark the checks O. K. by you and send them to Boise for clearance," and Mr. Tschirgi said, "All right," and he so marked the checks. To the question, "It was at that time that Mr. Tschirgi told you to sign his name on that check?" Mr. Dunaway answered: "I didn't say that. I told him what I would do, and he said, 'All right.'" On cross-examination, to the question, "You knew as a banker, after they (the checks) were certified, that the bank would be holden?" Mr. Dunaway answered: "Yes, sir; then I knew it was customary, if the cashier said it would be paid, it would be paid."

The other evidence on the part of plaintiff tended to corroborate Mr. Dunaway's testimony; but there was no other proof of any authority given to the latter to accept the checks for the Bank of Brogan.

At the close of plaintiff's case, defendant's counsel moved the court for a nonsuit, which was denied. We will, however, pass this and consider the whole record under section 3, art. 7, of the Constitution, as amended by Laws 1911, p. 7, which among other things, provides that: "Until otherwise provided by law, upon appeal of any case to the Supreme Court, either party may have attached to the bill of exceptions the whole testimony, the instructions of the court to the jury, and any other matter material to the decision of the appeal. If the Supreme Court shall be of opinion, after consideration of all the matters thus submitted, that the judgment of the court appealed from was such as should have been rendered in the case, such judgment shall be affirmed, notwithstanding any error committed during the trial; or if, in any respect, the judgment appealed from should be changed, and the Supreme Court shall be of opinion that it can determine what judgment should have been entered in the court below, it shall direct such judgment to be entered in the same manner and with like effect as decrees are now entered in equity cases on appeal to the Supreme Court."

The evidence on behalf of defendant tended to show that E. L. Tschirgi, as cashier of the Brogan Bank, informed Dunaway that Morrison & Son had no funds in the Bank of

Brogan; that their account was overdrawn, and the firm was at that time owing the bank on some other paper; that his bank therefore could not pay the checks unless the funds were there; but that they would take care of the checks if a certain remittance in full came from Weiser; that he did not empower Mr. Dunaway to accept the checks for defendant; that the checks were not paid for want of funds on deposit by Morrison & Son.

[1] Numerous errors are assigned, among them the introduction of the checks and the testimony relating to the making of the memorandum "O. K. by Tschirgi, Cashier," and the instructions of the court submitting the same to the jury, to all of which exceptions were duly reserved by defendant's counsel. Giving to the notation, "O. K. by Tschirgi, Cashier," on the face of the checks, all the meaning that may be claimed on account thereof, we do not think that this memorandum purports to be signed by the Bank of Brogan or by Tschirgi, its cashier. At the most it appears to be a notation made by Mr. Dunaway, cashier of the Bank of Vale, indicating that Tschirgi, cashier of the Bank of Brogan, had approved the checks verbally over the telephone. Tschirgi, as such cashier, had no implied authority to authorize Mr. Dunaway to accept the checks for the Bank of Brogan, and there is no evidence in the record that the defendant bank, or any officer thereof, ever empowered Tschirgi to delegate such authority to Mr. Dunaway. Tschirgi, cashier of the Bank of Brogan, was its agent, and the general rule is that an agent in whom trust or confidence is reposed, or who is required to exercise judgment, may not intrust the performance of his duties to another. 31 Cyc. 1425; *Dorchester & Milton Bank v. New England Bank*, 1 Cush. (Mass.) 177; *Emerson v. Providence Hat Manufacturing Company*, 12 Mass. 237, 7 Am. Dec. 68.

[2] Mr. Dunaway, at the time of the alleged acceptance of the checks, was the vice president and acting cashier of the Bank of Vale. One cannot be a party, and, in the same transaction, an agent of the opposite party, except with the full knowledge and consent of such principal. It was incompatible for the cashier of the plaintiff to act as agent of the defendant in accepting the checks in question. *Mechem on Agency*, §§ 66, 68. Neither is there any evidence in the record to the effect that the plaintiff ratified or adopted as its own the act of Mr. Dunaway in making the indorsement on the checks. Our negotiable instruments law requires that the acceptance of a bill must be in writing and signed by the drawee. L. O. L. § 5965. There being no competent evidence tending to show that the defendant bank signed an acceptance of the checks, we think it was er-

ror for the trial court to admit the memorandum on the checks in evidence.

[3] We come now to the question of the liability of the defendant, independent of the acceptance of the checks. There was much evidence introduced as to the condition of Morrison & Son's account at the Bank of Brogan; and the opportunity of the defendant bank to obtain funds from the sale of seed and hay whereby it would be recompensed for the payment of Morrison & Son's checks, which were presented for payment November 29, 1910; and as to the arrangement claimed to have been made by Morrison & Son with the Bank of Brogan to honor the checks. At the close of the evidence, counsel for defendant requested the court to instruct the jury to return a verdict in favor of defendant. Section 6018, L. O. L., provides that: "A check is a bill of exchange drawn on a bank payable on demand. Except as herein otherwise provided, the provisions of this act applicable to a bill of exchange payable on demand apply to a check." The legislative enactment now in force in this state provides that a check or bill does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies to the check. Section 6022, L. O. L. And section 5960, L. O. L., makes a like provision in regard to a bill of exchange. This renders the testimony referred to immaterial. In the absence of an acceptance or certification of the checks involved, the defendant bank was not liable. This is now the law in those states that have adopted the negotiable instruments law (*Sealover on Neg. Inst. Law*, § 98), and in our opinion is decisive of this feature of the case.

[4] However, the complaint alleges the acceptance of the checks by defendant as the basis of this action, and the plaintiff must proceed upon this theory until the end, and recover, if at all, upon this asserted right of recovery. *Mescall v. Tully*, 91 Ind. 96; *Toledo, St. Louis & Kansas City Railroad Company v. Levy*, 127 Ind. 168, 26 N. E. 773; *Whitten v. Griswold* (Or.) 118 Pac. 1018, decided November 21, 1911.

After a careful consideration of all the matters submitted in this case, we are of the opinion that there was no evidence produced to sustain the allegations of the complaint or to be submitted to the jury, and that the circuit court erred in not instructing the jury to return a verdict for defendant.

Therefore the judgment of the lower court is reversed, and the cause will be remanded, with directions to enter a judgment of the same force as upon a verdict, in favor of defendant, in accordance with this opinion.

## STATE v. SETSOR.

(Supreme Court of Oregon. Dec. 12, 1911.)

## 1. HOMICIDE (§ 313\*)—MANSLAUGHTER—VERDICT—SUFFICIENCY.

A verdict convicting of "involuntary manslaughter" is sufficient as a general verdict convicting of "manslaughter," under L. O. L. §§ 1897-1902, defining manslaughter in its various phases, and section 1905, imposing the same penalty on them all.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 671-675; Dec. Dig. § 313.\*]

## 2. CRIMINAL LAW (§ 893\*)—VERDICTS—SUFFICIENCY.

A verdict should be reasonably construed, and not be held insufficient, unless it is doubtful, or finds upon immaterial issues, or manifestly tends to work injustice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2069; Dec. Dig. § 893.\*]

## 3. HOMICIDE (§ 34\*)—"INVOLUNTARY MANSLAUGHTER."

"Involuntary," as applied to manslaughter, means that the killing was committed by accident, or without intention to take life (quoting 4 Words and Phrases, p. 3762).

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 34.\*]

Appeal from Circuit Court, Baker County; William Smith, Judge.

George Setzor was convicted of manslaughter, and he appeals. Affirmed.

Wm. H. Packwood, Jr. (John L. Rand, A. A. Smith, and Wm. H. Packwood, on the brief), for appellant. C. C. McColloch (W. S. Levens, Dist. Atty., on the brief), for the State.

BEAN, J. The defendant was indicted for the crime of murder in the first degree for the killing of one John Thomas. He pleaded not guilty, and upon trial by a jury was convicted and sentenced to a term of from one to fifteen years in the penitentiary, with a fine of \$1,000, for manslaughter, from which judgment he appeals.

The jury returned a verdict in the following form: "We, the jury, duly impaneled to try the above-entitled cause, find the defendant, George Setzor, guilty of involuntary manslaughter. [Signed] R. R. Palmer, Foreman." Counsel for defendant moved the court to set aside the verdict and discharge defendant, for the reason that by the return of the verdict and the discharge of the jury thereafter the defendant had been acquitted of the crime of murder in the first degree, murder in the second degree, and manslaughter; and that the jury was not authorized to return a verdict of guilty of involuntary manslaughter, or any other verdict, except not guilty.

The defendant assigns as error the overruling of the motion and the judgment of sentence. He does not ask for a new trial, and, as we understand the brief and oral agreement of counsel for defendant, the only question raised for the determination of this

court is whether or not the judgment appealed from is void, and whether the defendant should be discharged, for the reason that the verdict of the jury was not in legal form under the statute of this state, and did not authorize the trial court to pass judgment.

Our statute, making provisions for trials in criminal actions as to the verdict, is, in effect, as follows: "The jury may either find a general verdict, or where they are in doubt as to the legal effect of the facts proven, they may find a special verdict." Section 1543, L. O. L. "A general verdict upon a plea of not guilty, is either 'guilty' or 'not guilty,' which imports a conviction or acquittal of the crime charged in the indictment." Section 1547, L. O. L. "A special verdict is one by which the jury finds the facts only, leaving the judgment to the court. It must present the conclusions of fact, as established by the evidence." Section 1548, L. O. L. "The special verdict must be reduced to writing by the jury, or in their presence, under the direction of the court, and agreed to by them, before they are discharged. It need not be in any particular form, but is sufficient if it present intelligibly the facts found by the jury." Section 1549, L. O. L. "In all cases, the defendant may be found guilty of any crime, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit such crime." Section 1552, L. O. L. "When there is a verdict found, in which it appears to the court that the jury have mistaken the law, the court may explain the reason for that opinion, and direct the jury to reconsider their verdict; but if after such reconsideration they find the same verdict, it must be received." Section 1554, L. O. L.

The section of our statute which is especially applicable in determining whether or not a verdict is in legal form and should be received is as follows: "If the jury find a verdict which is neither a general nor a special verdict, as defined in sections 1547 and 1548, the court may, with proper instructions as to the law, direct them to reconsider it; and the verdict cannot be received until it be given in some (form) from which it can be clearly understood what is the intent of the jury, whether to render a general verdict or to find the facts specially, and to leave the judgment to the court." Section 155, L. O. L.

[1] We think it is clear from the verdict rendered in this case that the jury intended to, and did render a general verdict; therefore the only contention is in regard to the description of the crime of which the defendant was found guilty, namely, involuntary manslaughter. Under our statute, the general description of the crime for which defendant was sentenced is manslaughter.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

If the adjective "involuntary," contained in the verdict, can be given a signification indicating an excuse or justification, or any degree of crime less than manslaughter, or any crime, not included in the indictment, then it would seem that the position taken by the defendant's counsel is correct. On the other hand, if the word "involuntary" does not have any such signification, then the conclusion must be to the contrary.

Sections 1897 to 1902, inclusive, L. O. L., define the crime of manslaughter; section 1897, L. O. L., as follows: "If any person shall, without malice express or implied, and without deliberation, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, voluntarily kill another, such person shall be deemed guilty of manslaughter." And section 1898, L. O. L., in these words: "If any person shall, in the commission of an unlawful act, or a lawful act without due caution or circumspection, involuntarily kill another, such person shall be deemed guilty of manslaughter."

Section 1905, L. O. L., makes the only provision for the punishment of such crime, to wit: "Every person convicted of manslaughter shall be punished by imprisonment in the penitentiary not less than one nor more than fifteen years, and by a fine not exceeding \$5,000."

Mr. Bishop says: "The language of the verdict, being that of 'lay people,' need not follow the strict rules of pleading, or be otherwise technical. Whatever conveys the idea to the common understanding will suffice. And all fair intentions will be made to support it." 1 Bishop's New Criminal Procedure, § 1005.

[2] Verdicts should have a reasonable intentment and receive a reasonable construction, and should not be avoided, unless from necessity, originating in doubt as to their import, from immateriality of the issue found, or their manifest tendency to work injustice. 29 Am. & Eng. Enc. of Law (2d Ed.) p. 1002. "The test of the sufficiency of a verdict is this: Is it so certain that the court can give judgment upon it?" 29 Am. & Eng. Enc. of Law (2d Ed.) p. 1025, citing *Burton v. Bondies*, 2 Tex. 204. "The verdict is good if its meaning can be reasonably ascertained, and it can be legally carried into effect; otherwise not." 1 Bishop's New Criminal Procedure, § 642.

We find in the notes to the case of *People v. Sullivan* (N. Y.) 63 L. R. A. 353, on page 404, that it has been held that it is competent and proper for the jury in a prosecution for murder to negative the proposition that the defendant intended to kill the decedent; and a verdict that he did not design or intend the death of the decedent, but he unlawfully killed him while engaged in the commission of some felony, is proper, and constitutes a verdict of murder in the third

degree, under Wis. Rev. Stat. c. 164, §§ 1, 2, citing *State v. Hammond*, 35 Wis. 315. And a conviction for involuntary manslaughter in the commission of an unlawful act may be had under an indictment charging voluntary manslaughter, citing *Isham v. State*, 38 Ala. 213.

Where a verdict was of manslaughter in the second degree, no such degree of manslaughter being specified by the statute, a conviction for manslaughter was sustained; the words relating to the degree being rejected as surplusage. 1 McClain on Criminal Law, § 392.

The verdict should be regarded from the standpoint of the jury's intention, when this can be ascertained; if consistent with legal principles, such effect should be given to their findings as will most nearly conform to their intent, and should be construed and applied reasonably in the light of all the proceedings. 29 Am. & Eng. Enc. of Law (2d Ed.) p. 1023.

What, then, is the meaning of this verdict of the jury, finding the defendant guilty of involuntary manslaughter? Mr. Wharton defines the crime as follows: "Involuntary manslaughter is where one doing an unlawful act, not felonious or tending to great bodily harm, or doing a lawful act without proper caution or requisite skill, undesignedly kills another. According to the old writers, it is where death results unintentionally, so far as the defendant is concerned, from an unlawful act on his part, not amounting to felony, or from a lawful act negligently performed." Wharton on Homicide, § 6.

[3] In Words and Phrases (volume 4, p. 3762) we find: "'Involuntary,' as applied to manslaughter, means that the killing was committed by accident, or without any intention to take life"—citing *United States v. Outerbridge* (U. S.) 27 Fed. Cas. 390, 391. We find here several definitions of involuntary manslaughter, taken from various opinions and different statutes. Many, if not all of which are identical with the crime mentioned in sections 1898 and 1902, L. O. L.

The trial court instructed the jury, as to manslaughter, according to the provisions of sections 1897 and 1902, L. O. L., and in addition thereto in part as follows: "A homicide is manslaughter, even though committed in doing an act lawful in itself, if the defendant was guilty of gross or culpable negligence, and such negligence was the cause of the death."

Mr. Justice Moore, in discussing a kindred question—the description of a crime in an indictment—in the case of *State v. Ayers*, 49 Or. 67, 88 Pac. 654 (10 L. R. A. [N. S.] 992, 124 Am. St. Rep. 1036), makes this apt illustration in regard to defining a crime: "If our statute, \* \* \* had delineated the commission of an offense and prescribed a punishment as follows: 'If any person shall purposely, and of deliberate and premeditated

ed malice, kill another, such person, upon conviction thereof, shall be punished with death"—the elements of the common law could undoubtedly be examined to ascertain the name anciently given to the classification of such crime"—citing *State v. DeWolfe*, 67 Neb. 321, 93 N. W. 746. Applying this rule and illustration to the case at bar, it would seem proper for the jury in their verdict to designate a crime by a well-known name, as defined by the text-writers, courts, and statutes; and if such crime is included in the indictment, as well as in the statute, then it is clear what the jury intended, and a judgment upon such verdict would not be void.

In *Spriggs v. Commonwealth*, 113 Ky. 724, 68 S. W. 1087, it is shown that the statute of that state subdivided the common-law offense of manslaughter by carving out of it the statutory crime of voluntary manslaughter, for which a different penalty was prescribed than for involuntary manslaughter; the latter being dealt with as a common-law offense. The jury, in rendering its verdict, swung the pendulum the other way from that in the case now under consideration, and found defendant guilty of manslaughter, without designating whether voluntary or involuntary, as they should have done under the law in that state. In that case, as in this, counsel for defendant asked for his discharge, and did not ask for a new trial. The court, while clearly of the opinion that there was prejudicial error in the instructions, said: "Technical rules must exist, and must be applied in cases which come literally and logically within their scope. What we decide is that they will not be applied to cases, not within their purview, and that it is not logical to construe a verdict that a man has been guilty of two offenses into a verdict of not guilty of any offense. There are numerous cases in which the court instructed the jury erroneously, either as to constituent elements of the offense, or as to the punishment to be inflicted. In such cases this court has granted a reversal. It has awarded the defendant a new trial, but it has not discharged him from custody as acquit. \* \* \* The judgment in this case was clearly within the jurisdiction of the court upon the offense charged in the indictment. Nor is it necessary for us to consider whether the verdict may be helped or cured by intentment. We think the instruction was erroneous, and, if a reversal had been sought, it would have been granted. But the defendant has carefully precluded himself from that relief, in the effort to obtain total immunity"—and overruled the motion to discharge.

Counsel for defendant cites the case of *State v. Stephanus*, 53 Or. 135, 141, 99 Pac. 428, where the jury submitted a verdict for what was assumed to be another offense, which had no legal status, differing from the

case at bar, which clearly describes a crime included in the indictment, as well as in the statute. Our statute, it will be seen, defines both voluntary and involuntary manslaughter. The one is no lower degree of crime than the other. They are designated under the one name of manslaughter, and the statute provides the same penalty therefor. While it is unnecessary for the jury to specify in their verdict the particular kind of manslaughter defendant is guilty of, we do not think that such specification renders the verdict uncertain, or the judgment void. The word "involuntary" in the verdict, from a legal standpoint, adds nothing thereto, and detracts nothing from the meaning thereof. It might with propriety be claimed that this verdict verges toward the mongrel in type, and we do not approve it as a model. We again mention that we do not consider whether there were any prejudicial errors in the trial of the cause or not, or even consider the instructions, except in so far as to discern if the verdict is in conformity therewith, as the learned counsel do not request a new trial.

There was no error in overruling the motion to discharge the defendant, and the judgment of the lower court should be affirmed, and it is so ordered.

#### MacMAHON v. HULL.

(Supreme Court of Oregon. Dec. 12, 1911.)

##### 1. APPEAL AND ERROR (§ 837\*)—NOTICE OF APPEAL—DESCRIPTION OF JUDGMENT.

The undertaking on appeal may be examined to identify the judgment appealed from, to sustain the sufficiency of the notice of appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 837.\*]

##### 2. APPEAL AND ERROR (§ 417\*)—NOTICE OF APPEAL—DESCRIPTION OF JUDGMENT.

A notice of appeal which fails to specify the party securing the judgment appealed from or the party against whom the judgment was rendered is sufficient when aided by the undertaking on appeal, which designates the party against whom the judgment was secured and the party in whose favor it was rendered.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 417.\*]

##### 3. APPEAL AND ERROR (§ 622\*)—TRANSCRIPT ON APPEAL—TIME TO FILE.

Where notice of appeal was served within six months from the judgment appealed from, and no objection was taken to the undertaking filed at the same time, the appeal, under L. O. L. § 550, became perfected five days later, and a transcript filed within 30 days from that time was filed within the time prescribed by section 554.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2732-2735; Dec. Dig. § 622.\*]

##### 4. APPEAL AND ERROR (§ 639\*)—ABSTRACT OF RECORD—DEFECTS.

Where the failure of appellant to attach to the abstract a table of its contents, as required by rule of court, is not willful, and a rea-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes.



sonable excuse is made for the omission, appellant may be relieved of his default.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 639.\*]

Appeal from Circuit Court, Tillamook County; Wm. Galloway, Judge.

Action by Lois O. MacMahon against Robert S. Hull. From a judgment for defendant, plaintiff appeals. Motion to dismiss appeal denied.

H. T. Botts and H. K. Sargent, for appellant. Oak Nolan, for respondent.

MOORE, J. This is a motion to dismiss an appeal and to strike an abstract from the files. It is contended that the notice of appeal is insufficient to confer jurisdiction. Omitting the formal parts, the paper adopted to secure a transfer of the cause is as follows: "Notice is hereby given that the plaintiff, Lois O. MacMahon, appeals to the Supreme Court of the state of Oregon from the whole of the judgment and order entered in the above-entitled court and cause on April 28th, 1911, and appearing on the journal of said court at page 183 of Journal Number 5 thereof." It will be seen that neither the party who secured the judgment nor the one against whom it was rendered is specified in the notice of appeal.

[1] In order to identify a judgment, the undertaking on appeal may be examined for that purpose. *Moorhouse v. Donica*, 13 Or. 435, 11 Pac. 71; *Saiem Traction Co. v. Anson*, 41 Or. 562, 67 Pac. 1015, 69 Pac. 675. The condition of the undertaking filed here reads: "Whereas Lois O. MacMahon, the plaintiff in the above-entitled action, appeals to the Supreme Court of the state of Oregon from the whole of the judgment and order made against her in the said action in the said circuit court in favor of the defendant in said action on the 28th day of April, 1911."

[2] Considering without deciding that the requirements of the statute (L. O. L. § 550, sub. 1) were not observed in framing the notice of appeal, the reference in the undertaking to the judgment sought to be reviewed aids the notice, rendering it sufficient to initiate a transfer of the cause. *Keady v. United Rys. Co.*, 100 Pac. 658. The notice of appeal and the undertaking therefor were served October 16, 1911, and filed two days thereafter, and as the transcript was not filed in this court until October 30, 1911, or more than six months after April 28, 1911, when the judgment was rendered, the question to be determined is whether or not the transcript was filed within the time prescribed. An appeal to the Supreme Court may be taken by serving and filing the notice of appeal within six months from the entry of the judgment appealed from. L. O. L. § 550, sub. 5. Within ten days from the service of such notice, the appellant shall cause to be

served on the adverse party or his attorney an undertaking and file the same with proof of service indorsed thereon with the clerk. Within five days after service of such bond, the adverse party or his attorney shall except to the sufficiency of the sureties in the undertaking, or he shall be deemed to have waived his right to do so. Id. § 550, sub. 2. From the expiration of the time allowed to except to the sureties in the undertaking, or from the justification thereof if excepted to, the appeal shall be deemed perfected. Id. § 550, sub. 4. Upon the appeal being perfected, the appellant shall, within 30 days thereafter, file with the clerk of the appellate court a transcript or such an abstract as the rules of the appellate court may require. Id. § 554.

[3] It will be remembered that the undertaking on appeal was served October 16, 1911. No objections appear to have been interposed to the sufficiency of the surety thereon, and hence the appeal became perfected October 21, 1911, within 30 days from which date the transcript or an abstract was required to be filed in this court. The transcript on appeal complies with rule 1 of this court (56 Or. 614, 117 Pac. ix), and was filed with the clerk hereof October 30, 1911, and within the time expressly limited therefor.

It is contended that the abstract that was filed is false in some particulars. Respondent's counsel evidently considering such abridgement unfair filed an additional abstract as authorized by rule 7 of the Supreme Court. 56 Or. 616, 117 Pac. x.

[4] It appears, however, that an index to appellant's abstract was omitted, and her counsel, insisting that the oversight in this particular was occasioned by inadvertence, asks leave to supply the deficiency. The failure to attach to an abstract a table of its contents as required by rule of court is not a matter of jurisdiction, and, where the nonobservance of such command is not willful and a reasonable excuse is made for the omission, the party should be relieved of his default.

Permission will therefore be granted to correct the error which may be rectified by pasting into the abstract a typewritten index of its contents at any time prior to the hearing of the cause on its merits.

The motion should be denied, and it is so ordered.

#### BARTON v. RECORDER'S COURT OF VALE et al.

(Supreme Court of Oregon. Dec. 5, 1911.)

#### 1. MUNICIPAL CORPORATIONS (§ 111\*)—ORDINANCES—VALIDITY.

An emergency clause in an ordinance, declaring an emergency and providing that the ordinance shall be in force from and after its

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

approval by the mayor, affects only the time the ordinance shall go into operation, and its invalidity does not render the ordinance void, and one violating the ordinance after it took effect without an emergency clause may not attack the ordinance on the ground of the invalidity of the emergency clause.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 248; Dec. Dig. § 111.\*]

## 2. MUNICIPAL CORPORATIONS (§ 111\*)—ORDINANCES—VALIDITY—RIGHT TO QUESTION.

One charged with a violation of an ordinance prohibiting the sale of intoxicating liquors without a license may not question the validity of other parts of the ordinance creating a monopoly in the liquor traffic by placing the business in the hands of one person.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 248; Dec. Dig. § 111.\*]

## 3. MUNICIPAL CORPORATIONS (§ 111\*)—ORDINANCES—PARTIAL INVALIDITY.

Valid provisions of an ordinance forbidding the sale of intoxicating liquors without a license are not affected by invalid provisions placing the liquor business in the hands of one person.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 248; Dec. Dig. § 111.\*]

## 4. MUNICIPAL CORPORATIONS (§ 107\*)—ORDINANCES—PASSAGE—APPROVAL BY ACTING MAYOR.

An ordinance regularly passed by the council of a city while the mayor thereof was absent, and approved by the president of the council empowered by the charter (Laws 1905, p. 133, § 36) to perform the duties of the mayor in his absence, becomes a binding law 30 days after its approval.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 229-236; Dec. Dig. § 107.\*]

Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Writ of review by T. A. Barton to review a judgment of the Recorder's Court of Vale, and others, Recorder and Marshal of the City of Vale. From a judgment denying relief, plaintiff appeals. Affirmed.

Geo. W. Hayes (Brooke & Tomlinson, on the brief), for appellant. R. M. Duncan (McCulloch, Soliss & Duncan, on the brief), for respondents.

EAKIN, C. J. This is an appeal from a judgment of the circuit court in a proceeding to review a judgment of the recorder's court of the city of Vale, Or., wherein plaintiff was found guilty of selling intoxicating liquors within the city, without having obtained a license therefor.

It appears that prior to the general election of 1910 the sale of intoxicating liquors was prohibited within the city of Vale, and the result of that election was against prohibition; that, the city being without an ordinance governing the subject of the sale of intoxicating liquors, the common council on December 15, 1910, for the purpose of perfecting some plan by which the council could dispose of licenses for the sale of, and the

traffic in, intoxicating liquors, adopted a resolution that the council proceed at once to receive open competitive bids for liquor licenses for the ensuing two years and award a license to the best bidder, reserving the right to reject any and all bids. Thereupon there was introduced by Councilman H. H. High an ordinance covering "the liquor question," which was read before the council. The council then adjourned until 7:30 o'clock p. m. of the same day, at which time the mayor announced that the council was ready to receive bids, and Mr. Thomas bid \$5,000, which bid was accepted. Thereupon the rules were suspended and the ordinance above referred to was passed. The ordinance fixed \$5,000 per annum as the price for liquor license in the city of Vale.

The foregoing is all that is disclosed in the record as to the ordinance or its terms. It was not approved by the mayor nor vetoed until at least after the 19th of December, 1910. As disclosed by the record, the council on December 19, 1910, met, pursuant to the call of H. H. High, president of the council, who was acting as mayor, Mayor Clark being absent from the city, and stated that the object of the meeting was to consider, pass, or reject an ordinance regulating the sale of intoxicating liquors and to grant a license for the sale of the same in the north precinct of the city of Vale. After the ordinance was read before the council, which had been submitted to it at a previous meeting by Councilman H. P. Osborne, some changes and amendments were made, and it was passed and approved by the acting mayor. A copy of the ordinance appears in the record, and is referred to therein as ordinance No. 68. On December 27, 1910, Mayor Clark filed with the recorder a message to the council vetoing ordinance No. 68, referring to the one passed December 15, 1910.

Section 1 of Ordinance No. 68, being the one passed on December 19th, provides: "That no person, firm or corporation, shall within the corporate limits of the city of Vale, directly or indirectly, in person or by another, sell, barter, exchange, deliver, or give away, with the purpose of evading this ordinance, \* \* \* any spirituous, malt or vinous liquors, without first obtaining a license therefor, as hereinafter provided in this ordinance." And it proceeds to provide for the issuing of licenses under certain circumstances and conditions; how a saloon shall be conducted and requiring a bond for the faithful performance of the terms of the ordinance; and provides penalties for violation of any of the provisions of the ordinance, and that the license shall be issued for the term of two years.

The assignments of error involve four questions.

[1] First, it is contended that the ordi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

nance is void because it contains a clause declaring an emergency and providing that the ordinance shall be in force from and after it is approved by the mayor. Whether an emergency clause in a statute is valid or not affects only the time it shall go into operation, and if invalid does not render the statute void. This is the effect of the holding in *Sears v. Multnomah County*, 49 Or. 42, 88 Pac. 522, and the defendant's violation of the ordinance occurred long after it would have taken effect without an emergency clause. Therefore that objection is without merit.

[2] The second question is whether the ordinance creates a monopoly of the liquor traffic in Vale, and is thereby rendered void. The petitioner is not in a position to raise that question. There is no controversy here as to his right to a license. He was charged with the violation of the ordinance in selling liquor within the city without a license, and he can only question the validity of that provision of the ordinance which prohibits the sale without a license.

[3] The third question is whether the ordinance as a whole is void, because it creates a monopoly. If that provision of the ordinance is void, it does not thereby render void the independent portions thereof that are not void in themselves.

In *State v. Wiley*, 4 Or. 184, 187, Mr. Justice McArthur quotes with approval from Mr. Sedgwick as follows: "The principle that a statute is void, only so far as its provisions are repugnant to the Constitution, that one provision may thus be void and this not affect other provisions of the statute, has been frequently decided." And quoting from *Fisher v. McGirr*, 1 Gray (Mass.) 22, 61 Am. Dec. 381, he says: "That where a statute has been passed by the Legislature under all the forms and sanctions requisite to the making of laws, some part of which is not within the competency of the legislative power, or is repugnant to any provision of the Constitution, such part thereof will be adjudged void and of no avail, whilst all other parts of the act not obnoxious to the same objection will be held valid and have the force of law."

Mr. Justice Burnett, in *Fleischner v. Chadwick*, 5 Or. 152, quotes with approval from *Commonwealth v. Hitchings*, 5 Gray (Mass.) 485: "That where part of a statute is unconstitutional, that will not authorize the court to declare the remainder of the statute void, unless all the provisions are connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected in meaning that it cannot be presumed that the Legislature would have passed one without the other."

Section 1 of the ordinance forbids the sale or barter of intoxicating liquors without

first having obtained the license therefor, and section 9 provides for the punishment of every person who violates the provisions of section 1. These sections are valid and enforceable, independently of whether the provisions, placing the liquor business in the hands of one person, are valid, and which we deem is unnecessary to decide here.

[4] As to the fourth objection, that the ordinance is invalid by reason of the veto of Mayor Clark, it appears that Mayor Clark was out of the city on December 19th. How long he had been away or remained away does not appear. It does appear that the president of the council was properly acting as mayor when ordinance No. 68 was passed and approved by him. By section 36 of the charter (Laws 1905, p. 133) the president of the council, in the absence of the mayor, has the power to perform all the duties of the mayor. Therefore in approving ordinance No. 68 he was acting within that power. Mayor Clark did not attempt to veto the ordinance passed December 19th. The affidavit of the city recorder states that the message of the mayor vetoed the ordinance passed by the council on the 15th day of December, 1910, and it is not contended by either plaintiff or defendant that that ordinance ever became a law, and therefore it has no bearing upon the issue here. So far as the record discloses, the ordinance passed December 19th was regularly passed, and was approved by the acting mayor, and became a law 30 days after its approval, viz., January 19, 1911.

We find no error in the ruling of the circuit court, and the judgment is affirmed.

NORDMAN v. RAU et al.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

1. VENDOR AND PURCHASER (§ 231\*)—BONA FIDE PURCHASER—RECORD—VOID CONVEYANCE.

A conveyance which has not been acknowledged or proved, so as to be entitled to record, but which has in fact been recorded in the office of the register of deeds, is void as to one who subsequently buys the land with actual knowledge of the contents of the record, if he is otherwise an innocent purchaser for value.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 513-539; Dec. Dig. § 231.\*]

Mason and Porter, JJ., dissenting.

(Additional Syllabus by Editorial Staff.)

2. NOTICE (§ 2\*)—"ACTUAL NOTICE."

"Actual notice" does not mean that which, in metaphysical strictness, is actual in its nature, because it is seldom that ultimate facts can be communicated in a manner so direct and unequivocal as to exclude doubts as to their existence or authenticity. Actual notice means, among other things, knowledge of facts and circumstances so pertinent in character as to enable reasonably cautious and prudent persons

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to investigate and ascertain as to the ultimate facts.

[Ed. Note.—For other cases, see Notice, Cent. Dig. § 2; Dec. Dig. § 2.\*

For other definitions, see Words and Phrases, vol. 1, pp. 160-163; vol. 8, p. 7564.]

Appeal from District Court, Rush County.

Action by Johanne Nordman against Jacob Rau and others. Judgment for plaintiff, and defendant S. A. Webb appeals. Reversed and remanded.

W. H. Vernon, W. H. Vernon, Jr., and W. H. Russell, for appellant. J. W. McCormick, for appellee.

MASON, J. Johanne Nordman brought an action to enforce her rights as to a tract of land under a mortgage given by Jacob Rau. S. A. Webb, a defendant, claimed to be the absolute owner of the land as an innocent purchaser, without notice of the mortgage. Findings of fact were made to the effect that the mortgage was executed and, in fact, recorded in the office of the register of deeds of the county where the land was situated but was never acknowledged; that while matters were in this situation a personal judgment was rendered against Rau, an execution was issued and levied on the land as his property, and it was sold to Webb at a sheriff's sale, which was duly confirmed, and under which a deed was subsequently made to him; that the resident attorney, who acted for Webb in bidding in the land at the sheriff's sale, knew of the existence and contents of the record of the unacknowledged mortgage. The trial court gave judgment for the owner of the mortgage, holding it to be valid as to Webb, because his agent knew of the actual state of the record. Webb appeals.

The appellant argues that, inasmuch as the attorney who bid in the land for Webb represented him only in that particular transaction, and had no other connection with him, the knowledge of the agent was not equivalent to the knowledge of the principal. It fairly appears, however, that the attorney gained his knowledge of the state of the record after having been employed to attend the sale, and before bidding in the property, and that in this aspect of the matter the case falls within the rule that "a principal is affected with knowledge of all material facts of which the agent receives notice or acquires knowledge while acting in the course of his employment." 31 Cyc. 1587. A purchaser at a sheriff's sale is entitled to the protection of the recording act. *Lee v. Bermingham*, 30 Kan. 812, 1 Pac. 73, 21 L. R. A. 32, note.

[1] It is therefore necessary to decide whether an unacknowledged mortgage, which has been copied into the record book of the register of deeds, is void against one who buys the property, knowing the contents of the record, but as otherwise an innocent purchaser for value. An instrument affecting real estate is

entitled to record only when it has been acknowledged or proved as provided by the statute. And, where such an instrument is recorded without having been so acknowledged or proved, the record does not impart notice to any one. *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 28 Am. Rep. 784; *Wiscomb v. Cubberly*, 51 Kan. 580, 589, 33 Pac. 320. The statute, relating to the effect of a failure to record instruments affecting real estate, reads: "No such instrument in writing shall be valid, except between the parties thereto, and such as have actual notice thereof, until the same shall be deposited with the register of deeds for record." Gen. Stat. 1868, c. 22, § 21; Gen. Stat. 1909, § 1672.

[2] The precise question involved is whether one who has seen and read in the records in the office of the register of deeds what is in fact a copy of an existing unacknowledged instrument is to be regarded as having "actual notice" of the instrument itself, within the meaning of the statute. In Massachusetts and in Indiana, "actual notice" is interpreted as equivalent to actual knowledge (*Webb, Record of Title*, § 222, p. 356, note 3); but the general rule is that evidence of facts and circumstances sufficient to put upon inquiry amount to actual notice. *Id.*, note 4. "Actual notice does not mean that which, in metaphysical strictness, is actual in its nature, because it is seldom that ultimate facts can be communicated in a manner so direct and unequivocal as to exclude doubts as to their existence or authenticity. Actual notice means, among other things knowledge of facts and circumstances so pertinent in character as to enable reasonably cautious and prudent persons to investigate and ascertain as to the ultimate facts." *Pope v. Nichols*, 61 Kan. 230, 236, 59 Pac. 257. "Actual notice may be either express or implied; that is, it may consist of knowledge actually brought personally home, or it may consist of knowledge of facts so informing that a reasonably cautious person would be led by them to the ultimate fact. \* \* \* Actual notice is implied only when the known facts are sufficiently specific to impose the duty to investigate further, and when such facts furnish a natural clue to the ultimate fact." *Faris v. Finnpup*, 84 Kan. 122, 124, 113 Pac. 407.

This court is of the opinion (not shared by the writer) that one who has seen the record of an unacknowledged instrument is not deemed, because of that fact, to have actual notice of the instrument itself, upon these grounds: To charge him with such notice is to require him to assume, without proof and without competent evidence, that a valid conveyance is in existence, corresponding to the unauthorized copy. If he is required to give any attention to the matter at all, he may, with equal or greater reason, suppose the parties to have abandoned whatever intention they may have had to execute such a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

conveyance from the fact that they failed to have a certificate of acknowledgment attached. To charge him with actual notice of the existence of a conveyance, because he has seen a copy of it which, without legal authority, has been written in a book of public records, is essentially to give such copy the force of a valid record. To hold that the record of an unacknowledged conveyance, if known to a prospective buyer, amounts to actual notice of the instrument, is to compel him to give it force as evidence, which the court itself would refuse it. This view is thus elaborated in *Kerns v. Swope*, 2 Watts (Pa.) 75, 78:

"The registration, being without authority of law, was the unofficial act of the officer, which could give the copy no greater validity than the original, deprived of legal evidence of execution, nor even so much; for an original deed exhibited to a purchaser would affect him, though it were unaccompanied with the evidence of its execution. But here the registry was no better than a copy made by a private person in a memorandum book, from which a purchaser would be unable to determine whether there was, in fact, an indorsement on the deed, or whether it had been truly copied, especially when neither the copy, nor an exemplification of it, would be legal evidence of the fact in a court of justice. Unquestionably a purchaser would not be affected by having seen the copy of a conveyance among the papers of another, or an abstract of it in a private book. The whole effect of a registry, whether as evidence of the original, or as raising a legal presumption that the copy thus made equivalent to the original had been actually inspected by the party to be affected, is derived from the positive provisions of the law; and when unsustained by these a registry can have no operation whatever. Stripped of artificial effect, it is but the written declaration of the person who was the officer at the time that he had seen a paper in the words of the copy which purported to be an original. But, to say nothing in this place of the incompetency of such a declaration as evidence of the fact, on what principle would a purchaser be bound to attend to the hearsay information of one who is not qualified to give it?"

The same view was indicated in *Banister v. Fallis*, 85 Kan. 320, 116 Pac. 822, where it was said of the record of an unacknowledged instrument: "The instrument itself, if there was one, had no validity, except between the parties and those having actual notice, not of what was on record, but of the instrument itself."

The judgment is reversed, and the cause remanded, with directions to render judgment upon the findings, quieting the title of Webb.

JOHNSTON, C. J., and BURCH, SMITH, BENSON, and WEST, JJ., concurring.

119 P.—23

MASON, J. (dissenting). My own view of the question presented is this: Where a prospective buyer of land sees upon the record what purports to be the copy of an instrument bearing no certificate of acknowledgment (or a defective one, for the rule would necessarily be the same), the inference which he would naturally and almost necessarily draw would be that the record was made at the instance of the grantee; and that the grantee claimed to have an interest in the land under an instrument in the language of the copy. The record would not be competent legal evidence that such an instrument had been executed, but it would suggest that probability so strongly that a prudent person having knowledge of it would be put upon inquiry. It would give him a definite and tangible clue which, if diligently followed up, would ordinarily bring the truth of the matter to light. In the present case, if an inquiry had been prosecuted with reasonable diligence, the existence of the mortgage would necessarily have been developed.

In *Banister v. Fallis*, 85 Kan. 320, 116 Pac. 822, the purchaser of land objected to the title, because the record contained what purported to be a copy of a contract affecting it. The objection was held untenable because, the contract not having been acknowledged, the record was not evidence of its execution, and no other evidence on the subject was offered; and because the contract could not constitute a cloud in any event, inasmuch as it purported to be made by a stranger to the title. An additional reason was stated in the language quoted in the foregoing opinion: "The instrument itself, if there were one, had no validity, except between the parties and those having actual notice, not of what was on record, but of the instrument itself." I do not regard that decision as a definite determination of the question here involved. I think the only case involving the exact question and supporting the decision here made is *Kerns v. Swope*, 2 Watts (Pa.) 75, cited in the opinion. That case is disapproved in the *American notes to White & Tudor's Leading Cases in Equity*, vol. 2, p. 152.

In 24 A. & E. Encycl. of L. 142, it is said: "If an instrument be not entitled to record because of its defective execution or a failure to comply with some of the prerequisites to recordation, the record thereof will be a mere nullity, and will not operate to give constructive notice. \* \* \* But, \* \* \* of course, such record may be instrumental in giving actual notice of the rights claimed under the instrument, where the knowledge of its existence is brought home to the party claiming against such instrument." Of the four cases cited in support of this text, these three are directly in point: *Rooker v. Hoofstetter*, 26 Can. Sup. Ct. 41; *Woods v. Garnett*, 72 Miss. 78, 16 South. 390; *Musgrove v. Bonser*, 5 Or. 313, 20 Am. Rep. 737. To these may be added *Walter v. Hartwig*, 106 Ind.

123, 6 N. E. 5, and *Hastings v. Cutler*, 24 N. H. 481, which are directly in point, and *Gilbert v. Jess*, 31 Wis. 110, and *Musick v. Barney*, 49 Mo. 458, which are substantially so. The New Hampshire case is the leading one on the subject. The grounds of the decision are shown by this extract from the opinion, which is typical of the reasoning in the other cases: "As the deed in this case was not executed according to the statute, the registration as such is inoperative; that is to say, the registration is not constructive notice of the conveyance. But, if by means of that registration of the defective deed the defendants had actual notice of the plaintiff's title, they are charged with the notice, as in other cases. The defendants, when they found the copy of the plaintiff's deed on record, must have understood that the intended record was to give information that such a deed had been made, and that the plaintiff claimed the land under it. This must be regarded as actual notice, such as every reasonable and honest man would feel bound to act upon." 24 N. H. 483.

A writer in the Central Law Journal, in discussing the source from which "actual notice" should come, says: "It is not essential in every case that the notice should come from a party in interest, but that it should come from some one who is capable, not only of informing the party of the adverse claim, but who can give such definite information as to details as will lead to the acquisition of full knowledge of the facts. If this is a correct deduction, then the copy of a deed, even though it were defectively acknowledged, would amount to actual notice of a higher degree than mere oral information of the existence of such deed, even though the copy was made by a third party, and the oral information came from a prior grantee. Hence the registry of a defectively acknowledged deed would amount to notice of the conveyance, provided it were either admitted or proved that the subsequent purchaser saw and examined the record where the deed was transcribed." 4 Cent. Law J. 293.

The author of *Wade on Notice*, in an article published in the American Law Review in 1885, said: "Registration of a deed, void for informalities, as constructive notice, coming to the knowledge of the subsequent purchaser, puts him in the direct line of inquiry, and is actual notice of every fact to which that inquiry would lead." 19 Am. Law Rev. 88.

PORTER, J. (dissenting). I concur in the foregoing dissent, and believe that the decision, especially when applied to recorded instruments which have defective acknowledgments, may work great injustice to innocent persons, and will produce results which the Legislature in adopting the recording act never intended.

## ANDERSON v. ROBERTS.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

BOUNDARIES (§ 54\*)—ESTABLISHMENT—SURVEY—APPEAL "FILED."

Under a statute (Laws 1891, c. 89, §§ 9, 10 [Gen. St. 1909, §§ 2274, 2275]) requiring a county surveyor to make a written report of a survey, and file it in his office, and allowing an appeal therefrom to be taken within 30 days from the time the report is filed, such report, as to any person having knowledge of the facts, is deemed to be filed from the time it is completed, dated, certified to be correct and signed by the surveyor, and placed among the reports of a similar nature in his office, subject to public inspection, although at the request of the attorney for such person he omits at that time to indorse it as filed, and afterwards places an indorsement upon it indicating that it was filed a few days later (citing 3 Words and Phrases, 2764-2770.)

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 268-277; Dec. Dig. § 54.\*]

Appeal from District Court, Trego County.

In the matter of the appeal of C. J. Anderson from the report of Hudson Harlan, County Surveyor of Trego County. From an order of the district court dismissing the appeal, Anderson appeals. Affirmed.

David Ritchie and John A. Nelson, for appellant. Lee Monroe and W. S. Roark, for appellee.

MASON, J. On May 10, 1909, C. J. Anderson filed with the county surveyor a notice of his intention to appeal from the report of a survey, and gave a bond, approved by the clerk of the district court, conditioned for the payment of the costs if the report should be affirmed. The district court dismissed the appeal on the ground that it was not taken within the time allowed by the statute, and Anderson appeals from the order of dismissal. The statute involved reads as follows:

"The surveyor shall proceed to make the survey. \* \* \* He may \* \* \* take the evidence of any witness who may be produced to prove any point material to such survey, which testimony shall be reduced to writing and subscribed and sworn to by the witness, and together with an accurate plat and field notes of such survey shall be filed in the office of the county surveyor within thirty days after the completion of such survey." Laws 1891, c. 89, § 9 (Gen. Stat. 1909, § 2274).

"Upon the filing of the report of each survey, any person interested in the same can at any time within thirty days thereafter appeal to the district court, by filing with the county surveyor a notice of his intention to appeal, and by giving a bond, to be approved by the clerk of the district court, conditioned for the payment of costs of the appeal if the report of the county surveyor shall be affirmed by the court. Upon the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

filing of such notice the county surveyor shall certify the appeal to the clerk of the district court, and shall file with said clerk a certified copy of the report appealed from, including the affidavits, if any, filed therewith." Laws 1891, c. 89, § 10 (Gen. Stat. 1909, § 2276).

There was evidence to this effect: The surveyor, on April 9, 1909, wrote out his report of the survey, and attached to it a certificate that it was correct, concluding with these words, preceding his signature: "Witness my hand, this 9th day of April, A. D. 1909, at the said county of Trego, Kansas." He then at once placed the report in his desk among his other reports, where it was, with the others, available to the public for inspection, and where it would necessarily have been found by any one looking for it. One of Anderson's attorneys requested him not to put the file marks upon the report until the 12th. In compliance with that request he omitted to indorse upon the report a notation that it had been filed, until April 12, when he took it out, marked it as filed on that date, and replaced it.

If the report is regarded as having been filed on April 9th, the appeal was taken too late, if it is regarded as having been filed on April 12th, the appeal was taken in time. Ordinarily a paper is properly said to be "filed" in a particular office, whenever it is placed there as a part of the records of the office. The indorsement upon the paper of the time of its reception is not, strictly speaking, a part of the operation of filing; it is a mere memorandum serving as evidence of the fact. *State v. Heth*, 60 Kan. 560, 57 Pac. 108; 8 Words & Phrases Judicially Defined, 2764, 2765, 2768; 19 Cyc. 530, note 55; 13 A. & E. Encycl. of L. 16, note 1.

Where a public officer himself prepares a paper, and then preserves it as a record in his own office, the situation is different from that presented where some one else delivers him a paper for filing. In the former case, as no one but himself would necessarily know the exact facts, the presumption might be stronger that the date shown by the filing mark was correct. But in either case the indorsement would only be a matter of evidence. An officer who is required to prepare and to file a paper cannot, after its completion, pursue an equivocal course and thereby cause the question, whether at a particular time it had or had not been filed, to turn upon his undisclosed mental attitude concerning it. If everything has been done which is essential to the filing, he has no option to treat it as still unfiled. Here there was evidence that on the 9th of April the report had been entirely completed; that the surveyor had affixed to it a certificate, reciting that on that date he had signed it as a correct report; and that he had then

placed it among the other completed reports on file in his office, subject to the inspection of the public. The trial court was warranted in finding that the report was actually filed on the 9th of April, although the surveyor had omitted to indorse it as filed on that date. Such omission was merely to make a complete and formal record of an existing fact.

Doubtless any one who has in good faith relied upon the time of filing indorsed upon a paper by the officer who has prepared it would be protected against a showing that it had in fact been filed at an earlier date. But here the trial court has found upon sufficient evidence that the appellant was not misled, but knew the actual state of the case. The fact that a document, certified to as a completed report under the date of April 9th, was among the other reports on file in the surveyor's office seems sufficient to have afforded notice of a filing at that time, even although a specific indorsement to that effect was omitted. But here constructive knowledge need not be relied upon. The notice of appeal prepared and filed by the appellant, upon which he founds his action, recites that the report appealed from was filed in the office of the county surveyor on April 9th. These circumstances justified the finding that the appellant knew that the report had been filed on the 9th, and voluntarily delayed taking an appeal until 30 days from that time had expired.

The judgment is affirmed. All the Justices concurring.

#### OIL WELL SUPPLY CO. v. AJAX PORTLAND CEMENT CO.

(Supreme Court of Kansas. Dec. 9, 1911.)

CORPORATIONS (§ 432\*)—PURCHASE OF GOODS—ACTION FOR PRICE—SUFFICIENCY OF EVIDENCE.

In an action on an account for oil well supplies, evidence held to sustain a verdict for plaintiff on the ground that the supplies had been furnished to the defendant corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 432.\*]

Appeal from District Court, Chautauqua County.

Action by the Oil Well Supply Company against the Ajax Portland Cement Company. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Sproul and J. A. Ferrell, for appellant. E. J. Lambert and C. J. Sloop, for appellee.

PER CURIAM. The Oil Well Supply Company obtained a judgment against the Ajax Portland Cement Company, a corporation, upon an account for oil well supplies alleged to have been sold to it. The defendant introduced no evidence. It appeals, upon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the ground that there was no evidence that any sale was made to it, or that it in any way became liable upon the account.

There was evidence tending to show these facts: The supplies were furnished upon the order of one A. M. Clark, by whose direction the plaintiff charged them to the defendant. The defendant is an Arizona corporation, which has not filed a statement showing the names of its officers, as the statute requires of foreign corporations doing business in this state. Clark was a partner in a firm doing an oil and gas business under the name of Canterbury & Braley. Prior to the sale of the goods in question, the members of this firm had transferred to the defendant a number of oil leases, receiving in return stock in the corporation, amounting to a controlling interest. The goods were furnished for use in a well being drilled on land covered by one of these leases after its transfer to the defendant. Braley, who was a director in the corporation, wrote several letters to the plaintiff regarding the account sued upon, treating it as a valid claim against the defendant.

We think these facts, with the inferences fairly to be drawn from them, warranted a judgment for the plaintiff, especially in view of the defendant's failure to produce any evidence in denial or explanation.

The judgment is affirmed.

**DUNCAN v. ATCHISON, T. & S. F. RY. CO.**  
(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

**1. EVIDENCE (§ 472\*)—OPINIONS—MATTERS DIRECTLY IN ISSUE.**

A bridge where a brakeman lost his life was so described and photographed that the jury could thoroughly understand its character and condition. Railway employes were permitted, over objection, to give their opinions as to such bridge being a safe place to work. *Held* error, as the jury could not from such opinions have received any assistance in arriving at a proper conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195; Dec. Dig. § 472.\*]

**2. EVIDENCE (§ 539½\*)—OPINIONS—SPECIAL KNOWLEDGE.**

Opinions of railway employes, as to which side of a freight train it was proper for a brakeman to alight in order to give signals, were properly received; this being a question calling for special knowledge or experience.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2350-2352; Dec. Dig. § 539½.\*]

**3. MASTER AND SERVANT (§ 144\*)—INJURIES TO SERVANT—ACTIONS—SUFFICIENCY OF EVIDENCE.**

A printed rule of the railway company, requiring brakemen to be on top of the train when approaching and passing stations, was shown to have been habitually violated with knowledge of those whose duty it was to report such violations. *Held*, that the jury were

justified in finding that such rule was waived by the company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 287; Dec. Dig. § 144.\*]

**4. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.**

The mere use on the cab of an engine of a stirrup of the kind used on box cars, instead of the standard step generally used on such engines, does not of itself show negligence as a matter of law. To render its use negligent, such stirrup must in some way be shown to be unsafe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001-1050; Dec. Dig. § 286.\*]

**5. NEGLIGENCE (§ 134\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.**

When circumstances are relied on to show negligence, they must be of such significance and relation one to another that a reasonable conclusion of negligence can be founded thereon; and, while reasonable inferences may be drawn from the facts and conditions shown, they cannot be drawn from facts or conditions merely imagined or assumed.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 267-273; Dec. Dig. § 134.\*]

Appeal from District Court, Sumner County.

Action by M. A. Duncan against the Atchison, Topeka & Santa Fé Railway Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with directions to grant new trial.

W. R. Smith, O. J. Wood, and A. A. Scott, for appellant. Ed. T. Hackney, for appellee.

WEST, J. F. E. Duncan was an employe on defendant's road, was 28 years of age, and earning \$4 a day. On the night of March 9, 1908, he was head brakeman on a freight train coming east through the station of Noel, Okl., where, on the south side of the track, are an elevator and switch, and on the north side a switch stand, and about 78 feet east of the latter a bridge, about 56 feet in length, over a ravine. On the north side, this bridge was provided with a runway and hand-rail so that brakemen could cross in safety. On the south side, there was neither hand-rail nor runway; the end of the ties being but 18 inches from the south rail of the track. The train was drawn by 2 engines, the second of which (No. 134) had on the north side the ordinary steps leading up to the gangway, but on the south side, instead of such steps, was one stirrup of metal, about 1½ inches wide, such as ordinarily used on freight cars. It was not shown how long the engine had been in this condition, nor whether Duncan had knowledge thereof at the time. On the night in question, at about 11 o'clock, it being moonlight, with some clouds, as the train approached Noel, Duncan was standing in the gangway of the second engine with a lantern in his hand, receiving signals from the rear of the train and passing them to the engineer on the front engine, who controlled the air and the movement of the train. It was neces-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



sary to cut off the caboose and switch certain cars to the side track, and Duncan was receiving and passing signals given for this purpose. As the second engine was crossing the bridge in question, Duncan was seen by the engineer to be falling from the gangway, and was found under the bridge on the roadway beneath, unconscious and injured, from which injury he died the next day. His widow sued to recover damages, alleging as negligence on the part of the company the defective condition of the engine with respect to the step on the south side, failure to have the south side of the bridge in question provided with a runway, and failure to keep a switch light burning; no evidence being introduced on the latter point. The answer was a general denial and allegation of contributory negligence and assumption of risk. At the close of the plaintiff's testimony, a demurrer thereto was overruled, and after the close of evidence the jury returned a verdict for the plaintiff, and answered a large number of special questions, on which a judgment was moved for by the defendant and denied; a motion for a new trial being also refused.

The jury found, among other things, that just prior to the injury Duncan was standing in the gangway of engine No. 134; that he fell out of the gangway; that he was found just after the injury on the south side of the bridge, which was 15 feet from the ground; that on the north side of the bridge was a plank walk 5 feet from the outside of the rail, and a railing 3 feet high; that the step on the right side of the engine was similar to those used on box cars, with handholds on each side in good condition; that Duncan had a lighted lantern in his hand, and had just given a signal to one of the trainmen; that the negligence of the defendant which caused his death was defective step on engine No. 134, and lack of runway and handrail on the south side of the bridge; that if the defendant had used reasonable care and precaution to prevent the fatal injuries to Duncan his death would not have occurred; that he had been over the bridge in question, while acting as fireman, 28 times in the 6 or 8 months prior to the injury, and had been over it within the 48 hours next prior thereto; that a printed rule of the company provided that freight brakemen must be on top of their trains in approaching and on passing stations, and that if Duncan had been on top of his train he would not have been injured; that at the time the engineer was receiving signals from the conductor through Duncan that the train was moving about 6 miles an hour; that Duncan would have been injured if he had waited till the train stopped before getting off; that no one directed him to get off near the switch while the train was moving; that, aside from hurrying the work a little, the only advantage in getting off before the train stopped was to give signals; that Duncan intended to step down on the south side of the bridge at the time in question; that the move-

ment of the train crossing the bridge would make a distinct and noticeable rumble or sound to one paying heed thereto; that the evidence did not show that Duncan forgot where he was, or took time and precaution to learn or to observe or examine as to location before getting off.

Testimony of various men who had worked for defendant showed that the printed rule, requiring brakemen to be on top of a train when approaching a station, was commonly unheeded and violated. Testimony of former employes was given to the effect that, in their opinion, the bridge in its condition was not a safe place to work. Testimony was also introduced, showing that for the purpose of giving signals the south side of the engine was the proper one from which to alight. Defendant appeals, and assigns as error the refusal of the trial court to sustain a demurrer to the evidence, its refusal to enter judgment on the findings, its denial of a motion for a new trial, and error in instructions and in ruling upon the introduction of evidence.

It is argued that there was a failure to show what actually caused the death of Duncan, and that the conclusion that it was caused in the way found by the jury arises from mere speculation. Also that Duncan was bound by the rule requiring him to be on top of the train, and that, instead of being there, he had voluntarily assumed a place of danger, and thereby relieved the defendant of responsibility; that the opinion of the railroad men as to the safety of the bridge was improperly received, not being within the rule permitting expert evidence; and that the testimony showing the violation of the rule regarding the location of brakemen was improperly received, and erroneously found by the jury to show a waiver by the company. Also that there was no evidence that the step or stirrup was defective, or that Duncan was in the line of his duty when the injury occurred.

[3] It is argued that the court erred in charging that disobedience of a reasonable rule, requiring Duncan to be on top of the train, would preclude his recovery, if such disobedience caused or contributed to the injury, unless the jury found that such rule was habitually disregarded, with the knowledge of those superior in authority, whose duty it was to report such violations, to such an extent as to show a tacit or express consent by the defendant to such disregard of such rule. Presumptively a rule of this kind is made for the purpose of being heeded; but, when it is so continuously or habitually disregarded as to convince fair-minded jurors that it has been waived, it is not only sense and justice that they may so conclude, but it is the law. *K. C., Ft. S. & G. R. Co. v. Kier*, 41 Kan. 661, 671, 21 Pac. 770, 13 Am. St. Rep. 311; *U. P. Ry. Co. v. Springsteen*, 41 Kan. 724, 21 Pac. 774. In *Railroad Co. v. Slattery*, 57 Kan. 499, 505, 46 Pac. 941, 943, it was said by Chief

Justice Johnston: "Ordinarily, the willful disobedience of a rule should be held to constitute negligence; but where the rule is habitually disregarded, and a different course has long been pursued by employes with the knowledge and approval of the managing officers of the company, the rule must be regarded as inoperative."

It was held by the Court of Appeals of the Seventh Circuit, in *Cleveland, C. O. & St. L. Ry. Co. v. Baker*, 91 Fed. 224, 38 C. O. A. 468, that the habitual disregard of such rule, with the knowledge of those whose duty it is to report violations thereof, presents a question for the jury whether the rule has been waived by the company. This is substantially the same as the rule announced in the *Springsteen Case*, supra, where an instruction quite similar to the one given in the case now under consideration was approved. Plaintiff asserts that as the defendant did not plead this rule it had no right to introduce evidence thereof. But, as the answer appeared to be a general allegation of contributory negligence and assumption of risk, the plaintiff could have required the specific facts to be set forth by motion (*Price v. Water Co.*, 58 Kan. 551, 558, 50 Pac. 450, 62 Am. St. Rep. 625), and, not having made such motion, it was not error to permit the introduction of the testimony.

[1] The defendant complains that evidence was received of the opinion of witnesses that the bridge was a dangerous place to work. These questions, propounded to employes of the defendant who were familiar with the bridge in question, called for their opinions as to whether it was a safe structure to couple and uncouple cars and to switch trains on the side track, or a safe structure for the brakeman and conductor to use in coupling and uncoupling and switching trains from that station from the east end of the switch. This was objected to as calling for an opinion of a witness who had not shown himself competent, and that it was a matter on which opinion evidence was not competent, the safety of the bridge being a question for the jury.

The alleged negligence of the company respecting the bridge was the failure to equip it with a runway on the south side, no mention being made of a handrail on that side; and the testimony very clearly showed that the cab of engine No. 134 must have projected over the south end of the bridge, and that there was neither runway nor handrail on that side, and a photograph was introduced, giving a very clear picture of the structure. In view of this condition of things, the jury were as well able to say as any one else whether the bridge was a safe place for train operatives to work; it being remembered that there was no complaint concerning such bridge, except as to its south side. In *Murray v. Woodson County*, 58 Kan. 1, 3, 48 Pac. 554, 555, it was

held proper to refuse to permit witnesses, experienced in the building of bridges like the one there in question, to describe its method of construction and claimed defects, and to give their opinion as to its safety. It was there said: "Where all the facts from which an opinion can be formed as to the safety of travel on a public highway are stated by those who have knowledge of them, and the matter is one within the comprehension of the jury upon explanation of such facts, it is the province of the jury to form such opinion, and not of witnesses, although experts, to express theirs." In *Erb v. Popritz*, 59 Kan. 264, 52 Pac. 871, 68 Am. St. Rep. 362, certain witnesses, without railroad experience, had been permitted to give their opinion as to the cause of a certain derailment, and this was held error on the ground, not only that the witnesses had no expert knowledge, but that the appearance of the wreck could have been easily and adequately described to the jurors, so that they could have formed an opinion as readily as the witnesses. Had the structure and situation been such that the witnesses by their railroad experience were able to afford the jury any assistance in addition to that furnished by an explanation of the facts and the photograph of the bridge, it would have been proper to receive their opinions. *Railway Co. v. Merrill*, 61 Kan. 671, 60 Pac. 819; *Railroad Co. v. Blaker*, 68 Kan. 244, 75 Pac. 71, 64 L. R. A. 81; *United States Smelting Co. v. Parry*, 166 Fed. 407, 92 C. C. A. 159; *Central Coal & Coke Co. v. Williams*, 173 Fed. 337, 97 C. C. A. 597; *Gila Valley, G. & N. R. Co. v. Lyon*, 203 U. S. 465, 27 Sup. Ct. 145, 51 L. Ed. 276.

It is impossible to see, however, why the jury were not entirely competent to judge as to the safety of the bridge, or how they could in any wise have been assisted by the opinions of others. In addition to this, the questions were too broad, and, if proper at all, should have been restricted to the duties of a brakeman in giving signals, and should not have included the duties of others in switching and uncoupling. It is suggested that the error, if any, was harmless, as the jury would have reached the same conclusion, regardless of the opinions of others. But the matter presented by these opinions was, not that the absence of a runway on the south side of the bridge made it dangerous for Duncan to assist in switching by giving signals, but was the broad proposition that the bridge as a whole, for use by the train crew generally, was an unsafe place to work, and this might well have induced the jury to find the specific negligence, claimed as one item, embraced within the general negligence thus sought to be shown.

[2] Complaint is also made that railroad men were permitted to testify as to which side the brakeman should get off, in order to operate the train and give and receive proper signals. We see no reason why this

was not competent, however, for jurors are not supposed to understand the proper method of operating railroad trains. *Railway Co. v. Merrill*, supra.

Instruction No. 15 charged that the law did not require that Duncan should know of defects, if any existed, in the tracks, switches, or engines, nor require him to make an inspection to ascertain if any such existed. In the same instruction, the jury were told that if any such defects existed and were known to him it was his duty to exercise ordinary care to avoid injury and danger caused thereby, and this is criticised. It was improper to include within this instruction tracks and switches, as the engine and bridge were the only alleged negligent matters about which evidence had been introduced; however, it is not seen that this expression could have in any wise prejudiced the jury or harmed the defendant.

[4] The railway company insists that it devolved upon the plaintiff to show that the absence of a standard step on the south side of the engine, or the absence of a platform on the south side of the bridge, was the proximate cause of Duncan's death; that there was an utter failure of proof in this respect, because the evidence did not show whether he attempted to use either steps or platform, and, even if it had so shown, there was nothing to indicate that he looked before he leaped; and therefore the company could not be held responsible. Also that the evidence failed to show that Duncan had any duty to perform upon the ground or upon the bridge, or in giving signals from the front of the train, and that if he was performing the unnecessary act of repeating signals he could have done that as well in the gangway as on the bridge. It is also argued that no statute or rule of law required any particular kind of step on the engine, and that the stirrup on the south side of No. 134 was not shown to be defective in any particular; the only complaint being that it differed in design from the standard step in general use on engine cabs of defendant, such as were on the north side of the engine in question. In her petition, plaintiff alleged, among other things, that the bridge had been constructed some 20 years; that the defendant well knew the dangers attendant upon switching in a yard with an open trestle; that Duncan either attempted to step to the ground, or take a position on the steps of the engine, and fell through the trestle or bridge; that the engine in question had been injured prior to the accident by having its steps torn off on the south side, which had been two in number, with a curtain behind to keep employes from slipping through, and that the superintendent of repairs and the repairing force had caused to be placed thereon the single iron step, about 1½ inches wide, about like the steps on freight cars, without any protection at the back to keep employes from slipping through; that

the defendant well knew such step was not safe, but that it was liable to cripple or kill employes while in discharge of their duties.

The only testimony regarding the step showed that it was not the kind generally used on such engines; that they usually have two steps; that it was protected behind and on each side; that there were the usual handholds on both sides of engine No. 134; that they were in their usual position and firmly set; that the steps on both sides were solid; the one on the north side being firm and solid and similar to the ones on box cars. There was no evidence to show whether Duncan attempted to alight by the use of the stirrup, or whether he simply fell from the gangway; the only direct evidence being by his own engineer, who said, "I seen him falling." Assuming for the moment that the jury rightfully inferred from the circumstances shown that the deceased attempted to alight by using what he supposed were standard steps, and met his death because instead there was this stirrup, can it be said, as a matter of law, that the stirrup itself must be considered negligent equipment, or that the engine thus equipped must be considered, as a matter of law, an unsafe place for an employe to work, regardless of whether he knew that such stirrup was there or not? It would seem that a brakeman used to similar stirrups on freight cars would not be endangered by one on an engine, if he knew it was there. There is nothing to show, and we cannot assume, that such a stirrup would be more dangerous on an engine cab than on a freight car, or that it would be dangerous on either. In the absence of any testimony beyond the fact that such engines generally had steps, instead of stirrups, it cannot be said that the defendant was shown to be guilty of negligence in this respect. In *Jackson v. K. C., L. & S. K. R. Co.*, 31 Kan. 761, 763, 3 Pac. 501, 503, it was alleged that the step of an engine was defective, causing an injury to the conductor. It was said: "The step, however, was not really defective, but was simply of a different pattern from those often used on railroad engines; and the plaintiff admits in his brief that the evidence does not show such a defective or unsafe condition of the step as to preclude its use. And he also admits that, except for the reversal of the engine, he would not have fallen or been injured. Besides, there was no necessity for the plaintiff to use the step at the time he did; and we certainly think that no negligence can be imputed to the railroad company on account of the use of said step by the plaintiff at the time he used it. Probably neither the plaintiff nor the railroad company was guilty of negligence in using said step."

[5] While the jury were warranted in drawing fair and reasonable inference from the facts and conditions shown, it was only from those shown, and not from those imagined or inferred, that such inference could

rightfully be drawn. They found that the negligence which caused the death was, "Defective step on engine No. 134, and lack of runway and handrail on the south side of bridge," and also that the train was moving about six miles an hour, and that Duncan would have been injured if he had waited until the train stopped before getting off. Had he thus waited, he would have been well beyond the bridge, which was 56 feet in length; and hence an injury at the point then reached could not have been caused by a defect in the bridge. A mere accidental falling from the engine, without fault of the company would not render it liable; and therefore, in order to make the bridge a contributing cause of the injury, it must appear otherwise than by speculation that the fall itself was attributable to the negligence of the company. It is largely a case of circumstantial evidence, in which the circumstances shown must be of such significance and relation one to another that a reasonable conclusion of negligence can be founded thereon. In *Railway Co. v. Rhoades*, 64 Kan. 553, 68 Pac. 58, it was held that to establish a theory by circumstantial evidence the known facts relied on must be of such nature and so related to one another that the only reasonable conclusion to be drawn therefrom is the theory sought to be established. In *Hart v. Railroad Co.*, 80 Kan. 690, 102 Pac. 1101, it was shown that a passenger fell from a vestibule train. The door of one vestibule was open, but there was no testimony to show where or how it was opened; and it was argued that the presumption of negligence on the part of the company, or of suicide on the part of the defendant, were the only ones to be indulged, and, the latter being unreasonable, the former alone remained. But it was held that no facts were presented upon which it could be safely assumed that the deceased lost his life because of any negligence upon the part of the defendant. In *Brown v. Railroad Co.*, 81 Kan. 701, 705, 106 Pac. 1001, 1002 (29 L. R. A. [N. S.] 808), a passenger was found two or three hundred feet east of the depot, lying close to the track, his dismembered legs between the rails, and many bruises and wounds on his body. The ground indicated that the body had been dragged 25 or 30 feet. The train upon which he had been riding was a vestibule passenger train. It was held that the negligence of the company was not established, and it was said: "The circumstances do not, however, indicate how the person happened to fall under the train, or whose fault occasioned the fall, if it be the fault of any one."

In *Duncan v. Railway Co.*, 82 Kan. 230, 232, 106 Pac. 101, a brakeman named Duncan was standing upon the stirrup of a freight car, raising the lever which would uncouple the next car. The uncoupling had

been made, and the train had parted, and Duncan was seen to roll out from under a car in the rear from the opposite side of the train. Blood was found upon the ties outside of the rail from the opposite side of the track where he had last been seen, and also upon one of the cars. The engineer testified that he saw him upon the stirrup; that he was leaning over in the car and giving signals to go forward. The brake beam of the car was found to be defective, and in stepping upon it, for some reason not shown, it would sink down. The plaintiff claimed that the lever of the coupling device was disconnected and failed to work, and for that reason the deceased had to lean over between the cars to lift the coupling pin, and in so doing his foot slipped on the defective brake beam, which caused him to fall. The jury found that the ladder, handhold, and stirrup were in good order, but that the brake beam and coupling appliances were not in proper condition. The finding as to the coupling appliance was based entirely upon circumstances shown in evidence; direct testimony having been given that it was in good condition. In the opinion, Mr. Justice Benson said: "It is first presumed that the brakeman was doing his duties properly, which is a fair presumption; it is next presumed that he could not lift the pin by use of the lever; it is presumed from this that the appliance was out of order, and because of this defect it is presumed that he stepped upon the defective brake beam, thereby losing his life. \* \* \* The lamentable death of this man may have been caused by some mischance after the uncoupling was effected. It may have been caused in the manner claimed by the plaintiff. Possibly one conjecture is as reasonable as another, but the evidence does not reveal the cause of his fall. In the absence of such evidence, there can be no recovery."

In view of the doctrine announced by these decisions, we find it impossible to hold that the evidence justified the jury in all of their conclusions.

The judgment is reversed, and the cause remanded, with directions to grant a new trial. All the Justices concurring.

STATE ex rel. STUBBS, Governor, v. DAWSON, Atty. Gen.†

(Supreme Court of Kansas Dec. 9, 1911.)

(Syllabus by the Court.)

1. STATES (§ 41\*)—EXECUTIVE POWER.

The provision of article 1, § 3, of the Constitution, which vests the supreme executive power in the Governor, implies that the Governor is the highest in authority in the executive department, with such power as will secure a faithful execution of the laws in the manner, and by the methods prescribed by the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes  
† Rehearing denied.

Constitution and statutes, enacted in harmony with that instrument.

[Ed. Note.—For other cases, see States, Dec. Dig. § 41.\*]

**2. ATTORNEY GENERAL (§ 7\*)—OFFICERS—POWERS AND DUTIES.**

The statute, making it the duty of the Attorney General, when required by the Governor, to appear for the state and prosecute in any court or before any officer, in any cause or matter, civil or criminal, in which the state may be a party or interested, is mandatory.

[Ed. Note.—For other cases, see Attorney General, Dec. Dig. § 7.\*]

**3. ATTORNEY GENERAL (§ 7\*)—OFFICERS—POWERS AND DUTIES.**

A proceeding for the examination of witnesses under the provisions of the prohibitory law (Gen. St. 1909, § 4366) is a matter before an officer, in which the state is interested; and when required by the Governor the Attorney General has no discretion to refuse to prosecute in such a proceeding.

[Ed. Note.—For other cases, see Attorney General, Dec. Dig. § 7.\*]

**4. ATTORNEY GENERAL (§ 7\*)—POWERS AND DUTIES.**

In such a proceeding as that referred to in the above paragraph, and in the situation shown by the facts in this case, it is within the authority of the Governor to name the witness to be subpoenaed and examined.

[Ed. Note.—For other cases, see Attorney General, Dec. Dig. § 7.\*]

Porter and West, JJ., dissenting.

*(Additional Syllabus by Editorial Staff.)*

**5. ATTORNEY GENERAL (§ 7\*)—"PROSECUTE."**

The word "prosecute," within Gen. St. 1909, § 8906, providing that the Attorney General shall appear for the state in certain cases, implies the commencement, as well as the continuance, of a proceeding; and the term is so used in common speech, as well as in legal parlance.

[Ed. Note.—For other cases, see Attorney General, Cent. Dig. §§ 8-10; Dec. Dig. § 7.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5734, 5735.]

Original proceeding by the State, on the relation of W. R. Stubbs, Governor, for mandamus to John S. Dawson, Attorney General. Heard on demurrer to answer to application. Demurrer sustained.

S. D. Bishop, for plaintiff. S. N. Hawkes and S. M. Brewster, for defendant.

**BENSON, J.** This is an action in mandamus to require the Attorney General to prosecute a proceeding under a section of the prohibitory liquor law, which authorizes the Attorney General and prosecuting attorneys who may be notified, or who have knowledge of the violations of that act, to issue subpoenas and examine witnesses touching its violation. Gen. Stat. 1909, § 4366.

The application for the writ states the following facts: In June, 1911, a newspaper writer, residing in Topeka, wrote a letter to a syndicate of newspapers, published throughout the state, containing the following statement: "The writer spent a portion of an

evening in a club in a small Kansas town not long ago. The town is in territory supposed to be strictly dry. Still they were selling beer openly over a bar. With these conditions prevailing everywhere, why shall all the odium of the situation be hung on Cherokee and Crawford counties?"

On July 1st following, the Governor directed the Attorney General to subpoena the writer of the letter, and hold an inquiry, as provided in section 4366 of the General Statutes of 1909, as shown by the following communication: "Dear Mr. Dawson: In a recently published newspaper article signed by J. E. House, of Topeka, Kansas, appears the statement that he spent a portion of an evening in a club in a small Kansas town not long since where they were selling beer openly over a bar. He also asserted that the cities of Lawrence and Emporia are overrun with bootleggers, and that the situation at Leavenworth, Wichita and Topeka were such, and nobody conversant with the situation believes there is not law violation. Judging from this public admission, I am constrained to believe Mr. House to be in possession of evidence of law violation that would serve to speedily and justly punish the guilty. Therefore you are hereby directed to subpoena the said J. E. House, hold an inquisition, and take his testimony relative to this violation of the prohibitory liquor law, and from such testimony, if specific, base a prosecution of the violators. I will appreciate a prompt action upon the part of your department."

The Attorney General answered as follows:

"Your Excellency: Your letter of July 7, erroneously dated July 1, at hand. In it you call my attention to the signed newspaper article of J. E. House, junior editor of the Topeka Capital. That article stated, among some general and indefinite allegations relating to violations of the prohibitory law, that Mr. House has recently attended a dinner at a private club in a small town at which liquors were sold. I had already taken up this matter on June 30th by correspondence with Mr. House, and obtained such information as he cared to give. Perhaps this occasion is a good time for your excellency and myself to understand our relative positions concerning matters of this sort. You 'directed' me to subpoena Mr. House and make him tell what he knows about the matters contained in his article. That 'direction' is not within the scope of your authority; neither was your telegram of some time ago that I should subpoena Judge Sapp and make him come to Topeka on a similar errand. These are matters left to my discretion. The law authorizes the Senate of the state of Kansas, or the House of Representatives or the Governor to 'direct' the Attorney General to prosecute or

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defend any case of public concern, but such 'direction' must give the Attorney General the facts concerning the specific subject-matter to be litigated, the parties to the litigation, and the names of the witnesses by whom the facts can be proven. Anything less definite than this is not a 'direction' at all; anything more is beyond the scope of your authority. I trust that you will believe that this letter is written in the most kindly and courteous spirit, and is only done to set your excellency right as to the relationship of our respective departments and to avoid misunderstanding in the future. As heretofore, my department will prosecute or defend any specific case in which your excellency is interested, but I must have the facts and the witnesses in all such cases, for only in such manner and by such means can any litigation be successful."

Thereupon the Governor replied, calling attention to certain constitutional provisions, quoting the statement contained in the letter as copied above, and saying: "In your reply of the 7th you say: 'I had already taken up this matter on June 30th, by correspondence with Mr. House, and obtained such information as he cared to give.' Under the Constitution of this state I am held responsible for the execution of the laws of the state. I am not satisfied to accept 'such information as he cared to give.' I request that you subpoena Mr. J. E. House, under the provisions of paragraph 4366 of the General Statutes of 1909, and compel him under oath to disclose all the information and knowledge he has regarding the incident referred to, and all other information he has respecting the violation of the laws of this state relating to intoxicating liquors; and I further request that this be done at once, and such proceedings instituted as the evidence so secured warrants."

The Attorney General responded, saying that his attention was first called to the article referred to on June 30th, and that he had that day addressed a letter to the writer (Mr. House), setting out a copy, and adding: "His reply was strictly of a personal nature and I do not think it proper to furnish it. But in addition to his written reply I took the matter up with him personally and learned what I surmised, which was that Mr. House, being a guest and a stranger, did not know who were selling liquors nor the persons who were buying liquors, and he had nothing to tell of any consequence, nor upon which to base a prosecution. So, too, his general statements that Wichita, Leavenworth, Topeka and Lawrence were overrun with bootleggers. Mr. House only knows such matters by mere hearsay and on that subject he is possessed of no information that would be of the slightest assistance to a prosecuting officer."

The Governor in another letter then called attention to the positive nature of the statement contained in the article published in

newspapers over the state, and said: "It is impossible for me to conceive of ordinary social functions where 'they were selling beer openly over a bar.' Likewise it is impossible for me to conceive of an answer to your official communication as Attorney General calling for information respecting infractions of the prohibitory law of this state being 'of so strictly a personal nature' that you do not think it proper to furnish it to the chief executive officer of the state, whose duty it is under the Constitution to see that the laws are faithfully executed. Your letter was signed in your official capacity. It would be impossible to reply thereto in a manner that would be so 'strictly personal' as to be improper to be seen." References were again made in this letter to the Constitution and certain statutory provisions, followed by the statement: "For the purpose of enabling me to faithfully execute the laws of this state, it is necessary that a proceeding be instituted and that Mr. J. E. House be subpoenaed to testify and give information as to the city and the building wherein he was present when intoxicating liquors were sold over a bar, and also that he be required to give the names of any persons who were present, known to him; that he give under oath a full statement of persons who have told him of the violations of law, to the end that such persons may be subpoenaed. \* \* \* If these statements made by Mr. House over his signature are pure fabrication and without foundation, I want the world to know it, in order that the good name of this state may be protected. \* \* \* I therefore once again request that you institute proceedings of inquiry, and that you subpoena Mr. J. E. House of Topeka, Kansas, to appear before you at a time and place to be designated in the subpoena, then and there to testify under oath concerning any violations of the provisions of the prohibitory law of this state."

This letter indicated the purpose of the Governor to apply to this court for a writ of mandamus. The Attorney General responded: "Yours of to-day at hand. I am entirely willing to arrange a test case in the Supreme Court to determine whether the subpoenaing of witnesses by the Attorney General is left to his discretion or to the Governor, and therefore, and for that purpose, for the present I most respectfully decline to issue a subpoena for Mr. J. E. House."

The application states that Mr. House has knowledge and information that would enable the Attorney General to prosecute suits to suppress violations of the law referred to, which cannot be obtained from him otherwise than by proceedings under the section referred to, and which it is alleged, it is the duty of the Attorney General to institute; wherefore the relator prays that he be compelled by mandamus to so proceed as requested, and to furnish to the Governor a

copy of the testimony when taken. The defendant answered the application without the issuance of an alternative writ, the relator demurred to the answer, and thus the issue is presented.

The answer admits the material facts stated in the application, but denies that the writer referred to has knowledge or information concerning violations of the prohibitory law which could be of value to a prosecuting officer in the prosecution of suits to suppress such violations. The answer also sets out various reasons why the Attorney General believed it unwise to comply with the Governor's requirement, and avers that he has acted in entire good faith in the matter. Among the reasons so given, it is stated, in substance, that he had proceeded in another way to investigate the transaction referred to in the newspaper article; that from such investigation he believed the writer of the latter was mistaken as to the intoxicating quality of the beverage; that Mr. House, through his weekly letters to Kansas newspapers, reaches a circulation of 150,000; that the writer of the letter has heretofore criticised the Attorney General; and that the exercise of the power as requested might appear to be for political purposes, but that he would nevertheless have faced this dilemma, had it not been for his confidence that the necessary information could be obtained by less drastic methods. The answer avers that the investigation so begun has not been concluded, and contains the following averment: "That he [the Attorney General] has at all times acknowledged the right of the Governor to direct the Attorney General to prosecute or defend any action in which the state is interested or a party, and defendant has always complied therewith; but defendant denies the right of the Governor to dictate the management of any such a cause, and alleges that any such cause must be prosecuted according to the judgment and discretion of one trained in the profession and practice of law." It is not believed to be necessary to set out the answer more fully. The Attorney General in his brief says: "The Attorney General, believing that no good would be accomplished by subpoenaing [the witness], declined to do so." The real question, then, to be determined is whether the Attorney General is subject to the direction of the Governor with respect to the matter concerning which he was required to act, or whether he may in his discretion refuse to comply with such requirement. If it be a matter within his discretion, the answer is sufficient; otherwise it is not. The good faith and zeal of that officer is not questioned.

[1] The Constitution declares: "The supreme executive power of the state shall be vested in a Governor, who shall see that the laws are faithfully executed." Article 1, § 3. "He may require information in writ-

ing from the officers of the executive department, upon any subject relating to their respective duties." Article 1, § 4. "The officers of the executive department, and of all public state institutions, shall, at least ten days preceding each regular session of the Legislature, severally report to the Governor, who shall transmit such reports to the Legislature." Article 1, § 16. We do not find that the meaning of the phrase, "the supreme executive power" as contained in our Constitution and the Constitutions of many other states of this Union, has ever been precisely defined, although the matter is referred to in some decisions. Perhaps the term itself, taken in connection with the context, is sufficiently explicit. An executive department is created, consisting of a Governor and the other officers named, and he is designated as the one having the supreme executive power; that is, the highest in authority in that department. In the same connection, it will be noticed that the other executive officers are required to furnish information upon subjects relating to their duties, and to make annual reports to him, and withal he is charged with the duty of seeing that the laws are faithfully executed. It is manifest from these various provisions that the term "supreme executive power" is something more than a verbal adornment of the office, and implies such power as will secure an efficient execution of the laws, which is the peculiar province of that department, to be accomplished, however, in the manner and by the methods and within the limitations prescribed by the Constitution and statutes, enacted in harmony with that instrument. "When a Constitution gives a general power, or enjoins a duty, it also gives, by implication, every particular power necessary for the exercise of the one, or the performance of the other. The implication under this rule, however, must be a necessary, not a conjectural or argumentative one. And it is further modified by another rule, that, where the means for the exercise of a granted power are given, no other or different means can be implied, as being more effectual or convenient." *Field v. People*, 3 Ill. (2 Scam.) 79, 83.

[2] In harmony with the provisions of the Constitution, and to provide the Governor with means to execute the laws as required by that instrument, the Legislature has declared that he may require the Attorney General to prosecute or defend for the state in any cause or matter in which the state is interested. The statute declares: "The Attorney General shall appear for the state, and prosecute and defend all actions and proceedings, civil or criminal, in the Supreme Court, in which the state shall be interested or a party, and shall also, when required by the Governor or either branch of the Legislature, appear for the state and prosecute or defend, in any other court, or before any

officer, in any cause or matter, civil or criminal, in which this state may be a party or interested." Gen. Stat. 1909, § 8906.

[3] This provision is mandatory in its terms; but it remains to be considered whether the proceeding referred to under the prohibitory law is a cause or matter within the purview of the statute; whether the duty to prosecute includes the commencement of such proceedings, and whether it also includes the duty to summon and examine a particular individual, when so directed, in the circumstances appearing in this case. That such a proceeding is "a matter" in any court, "or before any officer, \* \* \* in which this state may be a party or interested," is too clear to admit of serious debate. It would be difficult to find language more comprehensive reaching to all public official proceedings in which the state has an interest.

[5] The word "prosecute" implies the commencement, as well as the continuance, of a proceeding, and the term is so used in common speech, as well as in legal parlance, and it was so held in *State v. Bowles*, 70 Kan. 821, 79 Pac. 728, 69 L. R. A. 176, where a prosecution, instituted by an indictment signed by an Assistant Attorney General, who acted under the direction of the Governor in pursuance of this statutory provision, was upheld. Construing a statute of Wisconsin of the same import, it was held, in *Emery and Another v. State*, 101 Wis. 627, 646, 78 N. W. 145, 151: "So that the Attorney General rightly appeared and assisted in the prosecution of this case does not admit of question. It was not within his discretion to comply or refuse to comply with the Governor's request, or within the discretion of the circuit court to permit or refuse to permit him to participate in the trial." This construction is in harmony with the decision in the *Bowles* Case, and with the constitutional declaration that the supreme executive power is vested in the Governor.

[4] The remaining question is whether the designation of the witness is fairly incidental to the authority of the Governor to direct a proceeding under this statute, not whether the Governor, in an ordinary trial or proceeding, may direct what particular witnesses shall be examined, nor whether the executive may control the ordinary details of judicial proceedings. Such controversies will be infrequent, and when they do arise will probably be considered in the light of the emergency disclosed by the facts of the particular case. We are not required to explore and delimit the frontiers of the supreme executive power upon this general subject, but only to decide the question presented upon this record. The determination of a single controversy arising within the circle of a co-ordinate department of government will not be used as an opportunity

to foreshadow opinions upon possible controversies which may never arise.

The section of the statute under which the Governor directed the prosecution to be instituted provides for a distinct proceeding quite unlike ordinary actions or proceedings, where the examination of witnesses is merely incidental. Here the examination of a witness constitutes the proceeding. It is instituted for that purpose. It provides that: "If a county attorney, Attorney General or Assistant Attorney General \* \* \* shall be notified \* \* \* of any violation of any of the provisions (of this law) it shall be his duty forthwith diligently to inquire into the facts of such violation, and \* \* \* is authorized to issue subpoenas for such persons as he shall have reason to believe have any information concerning or knowledge of such violation." Gen. Stat. 1909, § 4366.

The Attorney General, having been notified, was bound to investigate, and he did so by correspondence and otherwise, but refused to institute the proceeding, or prosecute in the definite matter, as required. This could be done only by examining the particular witness. The witness and the incident to which he referred in the newspaper article were not to be separated in the proceeding ordered by the Governor. The proceeding, or, as the statute designates it, the matter in which he was directed to prosecute, was the examination of that witness. Suppose after the Governor had directed the prosecution referred to in *State v. Bowles*, supra, the Attorney General had concluded to investigate the subject in some other way, and, instead of presenting the matter to the grand jury, had called the witnesses to his office, and upon inquiry thus made had determined to proceed no further, would such disposition have been permissible? If it was within the Attorney General's discretion to do so, and thus finally dispose of the matter, there is little virility in the statute which in express terms gives the Governor the power to require prosecutions. The conclusion is that the matter, to use the statutory term, which the Attorney General was required to prosecute was the examination of the witness as provided in the statute, and it was the duty of the Attorney General to do so.

While, as pointed out in his brief, manifold and arduous duties rest upon the Attorney General, the Governor is charged with the execution of the law, and this can only be done through means provided by the Constitution and laws. Among these is the assistance of the Attorney General, and, in the enforcement of the prohibitory law, the power of that officer to examine witnesses touching its violation. If the Governor may not invoke that power, then he is denied recourse to means which the Legislature believed to be necessary to its enforcement.

The question decided arises upon the interpretation of constitutional and statutory



provisions. We have not found it necessary to go far afield for authorities, although many have been considered. It may be added, however, that the recent case of *State ex rel. Haskell, Governor, v. Huston, Judge, et al.*, 21 Okl. 782, 97 Pac. 982, has been found illuminating and instructive. A statute of Oklahoma contains a provision like our own, requiring the Attorney General to prosecute and defend actions, and proceedings when requested by the Governor. Construing this statute, and the constitutional provisions that the Governor shall cause the laws to be faithfully executed, it was held that the Governor of Oklahoma, under the Constitution and statutes of that state, had the power to dismiss an action, brought by the Attorney General in the name of the state, and that he might himself maintain an action in the name of the state to prohibit the Attorney General from carrying on the action brought by that officer. Whether under our laws the Governor would have this power of dismissal does not arise here, but the decision cited is instructive concerning the principles involved, and reviews many authorities.

For the reasons stated, the answer is held insufficient, and the demurrer thereto is sustained.

JOHNSTON, C. J., and BURCH, MASON, and SMITH, JJ., concurring. PORTER and WEST, JJ., dissenting

WEST, J. (dissenting). The state government is not modeled on the cabinet system. On the contrary, the Constitution expressly provides (article 1, § 1) that the executive department shall consist of a Governor, Lieutenant Governor, Secretary of State, Auditor, Treasurer, Attorney General, and Superintendent of Public Instruction. These officers are all chosen by the people, all under like oath, and alike subject to impeachment. Each has a field of official discretion which cannot be invaded by any other officer. It is the unquestioned and unchanging law that official discretion cannot be controlled by mandamus. As said in *Martin, Governor, v.ingham*, 38 Kan. 651, 17 Pac. 168: "The only acts of public functionaries which the courts ever attempt to control by either injunction or mandamus are such acts only as are in their nature strictly ministerial; and a ministerial act is one which a public officer or agent is required to perform upon a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, and without regard to his own judgment or opinion concerning the propriety or impropriety of the act to be performed." Here, in order to form the basis for the issuance of the writ, it has been necessary to rule that the act directed to be done is one clearly ministerial and outside the pale of discretion. This conclusion is founded on a provision of the statute that the Attorney Gen-

eral shall, "when required by the Governor or either branch of the Legislature, appear for the state and prosecute or defend, in any other court, or before any officer, in any cause or matter, civil or criminal, in which this state may be a party or interested." Section 8906. This section vests no other or greater power in the Governor than in either branch of the Legislature, and the effect of the decision is that the requirement by the latter would be compulsory upon the Attorney General to subpoena before himself or some other officer any certain witness which either house of the Legislature should deem requisite.

While the word "prosecute" does doubtless imply the commencement, as well as the continuance of a proceeding, it is well to notice the language of the statute under which inquisitions may be held. Section 4366 of the General Statutes of 1909 provides that it shall be the duty of the Attorney General, upon proper notification, forthwith diligently to inquire into the facts of the alleged violation of the prohibitory law, and for that purpose he is "authorized" (not required) to issue subpoenas for such persons as he shall have reason to believe have any information, etc. The same section expressly provides that: "If the testimony so taken shall disclose the fact that an offense has been committed, \* \* \* the Attorney General \* \* \* shall prosecute the person or persons committing such offense." Hence, under this statute, the duty to prosecute, and the beginning of a prosecution, can arise only after the testimony has been taken, and the taking of such testimony is not a prosecution, or the beginning thereof, but a mere step preparatory thereto. A mere preliminary step, taken in view of a possible future prosecution, cannot, without wresting language from its ordinary meaning, be held to be included in the section requiring the Attorney General to appear for the state and prosecute or defend in any cause or matter. In an inquisition, the Attorney General is not defending any one, and is not prosecuting any one, but is merely procuring testimony in order to see whether a prosecution shall be instituted.

In a county where the county attorney fails or refuses to enforce the law, section 4378 makes it the duty of the Attorney General to enforce it himself. "And for that purpose he may appoint as many assistants as he shall see fit." Would it be contended that any other officer can dictate to him who his appointees shall be, or whom he shall "see fit" to appoint? He is merely authorized to make such appointments, as he is by the other section authorized to subpoena witnesses. There is no mandatory requirement contained in either. If once the domain of discretion is invaded, if the Attorney General cannot be permitted to exercise in good faith his own judgment touching the steps preliminary or preparatory to a prosecution,

no reason suggests itself why he should be permitted to exercise it in respect to the witnesses he shall call during a trial, the order in which they shall be introduced, the questions he shall propound, or the policy to be pursued. Any one who has had experience in conducting prosecutions arising out of the prohibitory law knows that caution and tact, as well as good judgment and legal learning, are necessary, and it is often essential that the prosecutor, instead of putting a hostile witness in position to warn the culprit, let not his left hand know what his right hand doeth. To require by mandamus the performance of an act so manifestly within the realm of official discretion, one at most authorized, but not required, by the statute, sets, in my judgment, a dangerous precedent, and departs from the theory upon which the executive department of the government has heretofore been conducted.

PORTER, J. I concur in the foregoing dissenting opinion of Mr. Justice WEST. I think it is due to the Attorney General to say that no pretense is made that he has been or is opposed to the enforcement of the prohibitory law, or that he has even been lukewarm in the performance of his duties in that respect. On the contrary, the record in this case discloses, what every person familiar with public affairs knows to be true, that the Attorney General has devoted a very large portion of his time and energies since he took his office to the vigorous enforcement of the liquor law in every part of the state where it has been violated. It is to be regretted that this court has been called upon to give serious and grave consideration to what turns out to be a mere "tempest in a teapot." From the correspondence between the two officials, which was conducted entirely through the public press, instead of in the usual and ordinary course, it seems to be the desire of one of the parties to have a certain person compelled to testify as a witness concerning his knowledge of alleged violations of the prohibitory law. If the only purpose of the Governor was to bring about the prosecution of some person or persons supposed to have violated the law, it seems quite obvious that all that was necessary for him to do in the discharge of his supreme executive duty of enforcing the law was to direct the Attorney General to investigate the alleged violation, and to prosecute the guilty persons, furnishing such information as he possessed as to names of witnesses, and leaving it to that officer to use his own judgment and discretion as to the means to be employed in such prosecution. The statute prescribes what the duties of the Attorney General are when he has been notified that the law has been violated. It authorizes, but does not require, him to issue subpoenas for

such witnesses. If, in his judgment, he has sufficient information to warrant the filing of an information, he may proceed at once, without causing any witness to be examined before an officer.

Ample means are provided by the Constitution for removing from office an unfaithful constitutional officer. If the Attorney General fail to perform his duty or act corruptly, he can be removed by impeachment; but we have no right to compel him to perform any act which is discretionary. This court has in a number of instances ousted from office a county attorney who so neglected the prosecution of criminal cases as to forfeit his right to the office; but no one has ever supposed the court could by mandamus compel a county attorney to perform an act which involves his discretion; for instance, to call a particular witness to the stand, or to conduct a prosecution in a particular way. The effect of the decision in this case is that at the suit of the Governor, this court can by mandamus compel the Attorney General to conduct the prosecution of any criminal or civil proceeding in the way the Governor has directed, and to call to the stand any witness whom the Governor, for any purpose of his own, may desire to have testify, and without regard to whether to do so would, in the judgment and discretion of the chief law officer, prejudice the best interests of the state. If the Governor has this authority, he necessarily has the power to direct when the examination of such witness shall end, what questions shall be asked, and may direct and control the conduct of any prosecution which the Attorney General has instituted for the enforcement of any law.

MRS. A. K. ROSS & CO. v. GERMAN ALLIANCE INS. CO. OF NEW YORK.  
(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

1. INSURANCE (§ 662\*)—ARBITRATION—AWARD—VALIDITY.

In an action upon an insurance policy, where the issue was upon the validity of an award of arbitrators chosen under the terms of the policy, the fact that the amount of the loss, as found by the court upon the trial, greatly exceeded the amount found by the arbitrators, while not deemed sufficient proof of prejudice on the part of an arbitrator, is a circumstance to be considered, together with his conduct during the proceedings, and all the attendant circumstances, in determining whether the award was fairly made.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 662.\*]

2. INSURANCE (§ 665\*)—AWARD OF ARBITRATORS—VALIDITY.

Upon an examination of the evidence tending to show misconduct on the part of the arbitrator appointed by the defendant, his long-continued services in such business for this and other insurance companies, the great dif-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ference between the amount awarded and the actual loss as found by the court upon the trial, the refusal to examine part of the goods remaining after the fire, and the attendant circumstances, it is held that a finding of the district court upon which the award was held invalid cannot be set aside.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 685.\*]

Johnston, C. J., and Porter, J., dissenting.

Appeal from District Court, Crawford County.

Action by Mrs. A. K. Ross & Co. against the German Alliance Insurance Company of New York. Judgment for plaintiffs, and defendant appeals. Affirmed.

Fyke & Snider, E. S. Quinton, and F. B. Wheeler, for appellant. O. T. Boaz and L. W. Johnson, for appellees.

BENSON, J. This action was for the recovery of a loss upon a fire insurance policy issued upon a stock of millinery. The policy contained an arbitration clause. A fire occurred, causing damage to the goods insured, and appraisers were chosen, one being named by each party, who selected an umpire. An award was made, signed only by one appraiser and the umpire. The company offered to pay the amount awarded, and pleaded that offer in defense. The plaintiff alleged that the appraiser chosen by the company was incompetent and not a disinterested person, and charged unfair and fraudulent conduct in making the appraisal and award. A jury having been waived, the court found for the plaintiff, and gave judgment for an amount largely exceeding the award.

Questions arising in the district court upon the sufficiency of the plaintiff's pleadings are determined adversely to appellant's contention in *Ross v. Insurance Co.*, 84 Kan. 572, 114 Pac. 1054. The question to be determined here is whether there was competent evidence to sustain the finding. The policy contained a stipulation that: "In the event of disagreement as to the amount of loss the same shall, as above provided, be ascertained by two competent and disinterested appraisers, the insured and this company each selecting one, and the two so chosen shall first select a competent and disinterested umpire; the appraisers together shall then estimate and appraise the loss, stating separately sound value and damage, and, failing to agree, shall submit their differences to the umpire; and the award in writing of any two shall determine the amount of such loss."

The evidence of what occurred at the arbitration is conflicting. There was evidence tending to prove the following facts: After the two appraisers had proceeded for about two days in examining the remaining stock and remnants, and in endeavoring to determine what had been destroyed, they disagreed upon the number of hats that

had been burned up, and later they disagreed upon the damage to a bunch of ribbons. Thereupon Mr. Potts, the appraiser named by the company, brought in the umpire. Mr. Potts and the umpire then proceeded with the examination and appraisal. Mr. Anderson, the other appraiser, remained in the store for a time observing, but taking no part in, the proceedings, except to talk with the others about the value of some furs, upon which no conclusion was reached. After a short time he left, and, although requested by the others, refused to return, or to take any further part in the arbitration, because, as he testified, the appellees were not getting a square deal. He believed that the umpire was out of his place in acting before there was a disagreement; that it was wrong to proceed with the appraisal without consulting him; and that the appraisers ought to have tried to come to an understanding before the umpire acted. The storeroom in which the fire occurred was 24 feet wide. Many of the hats destroyed were in a closet on the north side of this room. Hats and other goods were on tables along the middle of the room, badly smoked and mildewed. Some articles were on racks on the north side, and other goods were in boxes and cases on shelves on the south side. The fire originated in the closet, where the goods were practically all destroyed by the fire, as were some goods near the closet, and other goods were damaged by water, smoke, and heat. While making their examination, Mr. Potts declared to Mr. Anderson that the company was not liable for damages from water, mildew, or smoke, but for visible damages only, and, when asked by appellees to examine the contents of boxes and cases on the south side of the room where the goods the most valuable were kept, said he would not consider it. Mr. Potts had been a real estate agent at Kansas City for the preceding 8 years. Before that time, he was in the tailoring business at Kansas City. Twenty-five years ago he was in the general merchandise business in Vermont, and then knew the values of millinery goods. For the past 20 years he has served as appraiser, upon the appointment of various insurance companies, including the appellant, acting upon about 3 losses per year. There was no evidence of incompetency of the other appraiser or of the umpire.

The arbitration agreement contained the following: "John Anderson and H. A. Potts shall appraise and ascertain the sound value of and the loss upon the property damaged and destroyed by the fire of July 8th, 1909, as specified below: Provided, that the said appraisers shall first select a competent and disinterested umpire who shall act with them in matters of difference only. The award of any two of them, made in writing,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in accordance with this agreement, shall be binding upon both parties to this agreement as to the amount of such loss."

The award, made by Mr. Potts and the umpire, fixed the sound value of the goods at \$4,000, and the loss at \$838.02, and the appellant's portion of the loss so found (other insurance having been taken) was \$98.60. With reference to the estimate of sound value, the umpire testified: "We didn't invoice the stock and measure every piece and count every dozen buttons, or every bolt of ribbon, but after sizing the things up we came to that conclusion. It was the value, as near as we could come to it, without taking accurate invoice of the entire stock. I wasn't called in to take an invoice. We partly examined the contents of the boxes, not all."

Mrs. Ross testified that "they [Anderson and Potts] never at any time examined the contents on the south side. I spoke to Potts about it, and he told me to attend to my own business; he said he wouldn't consider it." Mr. Anderson testified that no examination was made of the goods on the south side of the room. Mr. Potts testified that they made no report of the goods on the south side of the room, and did not count any of the merchandise on that side at all; that he did not remember to have examined any of these boxes with Mr. Seymour (the umpire). As there was other insurance to the amount of \$4,000 upon the stock, and the district court gave judgment for \$500, the full amount of the policy sued upon, it follows that the court found the loss to be at least \$4,500. While some difference of opinion might be expected concerning the loss upon such a stock, it is difficult to see how a difference so great as that between the loss found by the award and by the judgment can be accounted for upon the assumption that both were fairly determined.

[1] Little need be said concerning the competency of Mr. Potts. It is true he was not an expert in the values of millinery, but exact personal knowledge was not required. It was only necessary that he should have such general knowledge and understanding as would enable him, upon reasonable investigation, inquiry, and examination, to form a candid judgment and make a fair appraisal. *Bangor Savings Bank v. Insurance Co.*, 85 Me. 68, 26 Atl. 991, 20 L. R. A. 650, 35 Am. St. Rep. 341. The mere fact that the award was greatly less than the court found to be the actual loss is not deemed sufficient proof of bias or prejudice on the part of an arbitrator, but is a circumstance proper to be considered in connection with the conduct of the appraisers, and other attendant circumstances, in determining whether an award was fairly made. *Strome v. Assurance Corp.*, 20 App. Div. 571, 47 N. Y. Supp. 481, affirmed in 162 N. Y. 627, 57 N. E. 1125; *Perry v. Insurance Co.*, 137 N.

C. 402, 49 S. E. 889; *Royal Ins. Co. v. Parlin & Orendorff Co.*, 12 Tex. Civ. App. 572, 34 S. W. 401; *Davis v. Guardian Assurance Co.*, 87 Hun, 414, 34 N. Y. Supp. 332; *Morse on Arbitration and Award*, 539; *Stemmer v. Insurance Company*, 33 Or. 65, 49 Pac. 583, 53 Pac. 498; 3 Cyc. 749.

In the *Perry Case* the jury assessed the damages to the property at \$750, while the award was for only \$73.50. In *Bradshaw et al. v. A. Ins. Co.*, 137 N. Y. 137, 32 N. E. 1055, the verdict was for \$2,750, and the award was for \$1,700.31, and the court considered this a very large difference in such a total, and a circumstance to be considered in finding whether an appraiser named by the insurance company was disinterested. In the opinion in that case, weight was also given to the fact that the appraiser appointed by the insurance company had been employed by the company about 10 times in the preceding 2 years in appraising losses, and by that and other companies 15 times in the preceding 3 years. It is true that the evidence of partisanship was stronger in that case than in this; still it must be held here that the long-continued similar service of Mr. Potts, although not a disqualification, was a proper matter for the court to consider, along with his hasty call of the umpire, his declaration against the allowance of incidental damage from smoke and mildew, and his refusal to consider damage to the contents of the south side. That damage from smoke and water should be considered in such cases is too well established to admit of the supposition that he believed it was not proper. 1 *Wood on Fire Insurance*, § 106. Besides, it was not for the appraisers to determine the liability of the insurer; their duty was to determine the sound value and the loss upon the property caused by the fire.

Another circumstance should be noticed. The appraiser, when one of the owners spoke to him about the goods on the south side, not only refused to consider the matter, but told her "to mind her own business." It was entirely proper for her to call attention to these goods, and the sharp rebuke was not indicative of a dispassionate mind, seeking all proper sources of information. 3 Cyc. 748. In *Kaiser v. Hamburg-Bremen Fire Ins. Co.*, 59 App. Div. 525, 69 N. Y. Supp. 344, affirmed in 172 N. Y. 663, 65 N. E. 1118, a somewhat similar case, it was said: "We think it is a fact that may be taken judicial notice of that it is usual and customary for the owner or his representative to make statements to the appraisers, and their failure in this instance to listen to such statements is some evidence in support of the contention that *Venderwerf* was not an unprejudiced, unbaised, and disinterested appraiser." See *Insurance Co. v. Payne*, 57 Kan. 291, 46 Pac. 315.

It should also be noted that the arbitra-

tion agreement provided that the umpire should act with the appraisers "in matters of difference only." While the appraiser appointed by the appellant testified that there was a disagreement on practically everything, the other appraiser testified, as we have seen, to the contrary, and his testimony, in view of the general finding, must be taken as true. When the umpire came in, he, with Mr. Potts, proceeded to make the appraisal of the whole stock, ignoring Mr. Anderson, as he testified, although afterwards requesting him to return and act with them. It appears that no effort was made to find the sound value before the umpire was called in.

[2] Upon a careful examination of the abstracts, it cannot be held that the finding of the district court against the sufficiency of the award is not sustained by competent evidence, and, although there was evidence to the contrary, that finding must prevail. The weight of the evidence was for that court to determine. "Whether, in any given case, there has been such misconduct as to require the award to be set aside, will generally be a mixed question of law and fact, mostly of fact \* \* \* in regard to which the finding of the trial court will, of course, be final." *Farrell v. German-American Ins. Co.*, 175 Mass. 340, 56 N. E. 572.

With the award set aside, as it was by the general finding and judgment, there was sufficient evidence to sustain the further finding of the amount of the loss, and the judgment rendered thereon is therefore affirmed.

BURCH, MASON, SMITH, and WEST, JJ., concurring.

PORTER, J. (dissenting). The parties agreed to an appraisal. Each selected an appraiser, and the two appraisers, as provided by the terms of the policy, selected an umpire, who was to act in case of disagreement. There was a disagreement as to the amount of the loss, and the umpire was called in. Afterward the appraiser named by the insured came to the conclusion that he was being ignored by the others, and, without any lawful excuse, withdrew from the appraisal, and refused to have anything further to do with it. The appraisal went on with the knowledge of the insured, and without objection on her part, and the award was made and signed by the other appraiser and the umpire. The agreement for appraisal provides that in case the umpire is called in the award of any two of the three shall be binding.

There is not much left in this case to decide, except whether the appraiser appointed by one of the parties can break up the appraisal by arbitrarily withdrawing. If he can, then either appraiser may act, so long as he considers that the party appoint-

ing him is getting an advantageous award; and the moment he is dissatisfied with any decision made by the other two upon a disputed matter he may end the arbitration by simply withdrawing and refusing further to act. This can hardly be the law for reasons too obvious to require discussion. The insured was present while the other appraisers were proceeding with the appraisal, and knew that Anderson (the one appointed by her) had refused to act with them. She made no objection to their continuing with the appraisal, and appeared before the umpire and the other appraiser and endeavored to get them to allow damages for certain goods which she claimed had been destroyed, and to increase the amount of the award. A party cannot be permitted to speculate upon the result of such an appraisal, and to stand by it, provided it is favorable to him, and refuse to be bound by it if it prove to be unfavorable. "Where a party to an arbitration learns facts which make an arbitrator incompetent, but thereafter proceeds with the hearing without objection to his incompetency, and takes the chances of a favorable decision, he will be deemed to have waived his objection, and will not be permitted to raise the same after an award has been made." *Anderson v. Burchett*, 48 Kan. 153, 29 Pac. 315, Syl. par. 3.

The opinion proceeds upon the theory that if the appraiser appointed by the insurance company is shown to have served in that capacity for the company on previous occasions, or for other insurance companies, that fact, and the further fact that the court, upon the evidence submitted on the trial, finds the loss to be greater than the amount of the award, will justify the court in holding the award invalid. The opinion concedes that neither of these facts is of itself sufficient to warrant the court in setting aside the award. In my opinion, both taken together are not sufficient. The courts encourage the settlement of controversies involving the values of property by arbitration. The rules upon which an award will be set aside are well established. The fact that one of the parties may be able to satisfy a court or jury that he should have been allowed more, or that the other should have been allowed less, is no ground for holding the award void, in the absence of fraud or misconduct on the part of the appraisers. Nor does an honest error of the arbitrators in applying the rules of evidence render the award invalid. *Stemmer v. Insurance Co.*, 33 Or. 65, 49 Pac. 588, 53 Pac. 498. As said in 3 Cyc. 673: "Courts do not travel out of their way for the purpose of overturning awards; but, on the other hand, they will refrain from exact and technical interpretation, and will indulge every reasonable presumption, whenever there is any room for such indulgence, in favor of the finality and validity of an award."

If sufficient grounds existed for setting aside the award, the finding of facts by the trial court would be conclusive; but the facts relied upon to avoid the award are not, in my opinion, sufficient. Unless fraud or misconduct on the part of the appraisers was clearly established, the court could not inquire into the actual loss, and set the award aside because, in the judgment of the court, the amount allowed by the arbitrators was inadequate.

The judgment should be reversed and the court directed to sustain the award.

JOHNSTON, C. J., concurs in this dissent

#### SHERMAN v. HAVENS et al.

(Supreme Court of Kansas. Dec. 9, 1911.)

##### 1. LIMITATION OF ACTIONS (§ 100\*)—ACCRUAL OF RIGHT OF ACTION—FRAUD—DISCOVERY.

A cause of action, founded on fraud, for damages is deemed to have accrued when the fraud was discovered.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 480-493; Dec. Dig. § 100.\*]

##### 2. LIMITATION OF ACTIONS (§ 84\*)—ACCRUAL OF CAUSE OF ACTION—ABSENCE.

Where defendant, against whom a cause of action for fraud accrued, was at that time absent in another state, limitations did not begin to run as to him until his return to this state.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 439-448; Dec. Dig. § 84.\*]

Appeal from District Court, Leavenworth County.

Action by Nellie A. Sherman against Ernest F. Havens and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Floyd E. Harper, for appellants. B. F. Endres, for appellee.

PER CURIAM. On November 20, 1907, Nellie A. Sherman filed a petition in the district court of Leavenworth county against Ernest F. Havens and Arthur B. Havens, asking a money judgment on the ground of fraud, which was alleged to have been discovered January 17, 1906. A summons was at once issued to the sheriff of that county, who made a return, showing that he had served Ernest F. Havens, and was unable to find the other defendant. An alias summons was issued to the same sheriff, May 15, 1908, and a return was made on that day, showing personal service upon Arthur B. Havens. Each defendant filed a demurrer to the petition, which was overruled. They filed a joint answer, and upon trial a judgment was rendered against both. They appeal, and ask a reversal, on the ground that as to Arthur B. Havens the two-year statute of limitations had barred a recovery before the action was begun.

At the time the petition was filed, the two years from the date of the discovery of the

fraud had not expired, and there was no occasion for inserting therein any allegation as to the suspension of the statute of limitations as to either defendant. Whether, under these circumstances, a demurrer by the defendant Arthur B. Havens could raise the question as to the operation of the statute need not be determined, because it is a fair inference from so much of the record as is presented by the abstracts that when the demurrer was argued before the trial court no such question was suggested. Moreover, there was evidence justifying a finding that in fact the statute had not run as to the defendant last served; and therefore it was not material whether the ruling on the demurrer was technically correct.

[1, 2] The plaintiff testified that when she began negotiations with Arthur B. Havens he lived in Kansas City, Mo., and that when she discovered that a fraud had been practiced upon her he still had an office there. He relies upon his own testimony, given April 28, 1909, that he had resided in Kansas City, Kan., for 2½ years, which would be since October 28, 1906. To have been strictly in point his testimony should have had relation to his personal presence in the state, rather than to his residence therein, especially in view of the reference to the location of his office. But, assuming that in saying that he had been a resident of Kansas ever since October 28, 1906, he meant that he had been continually in the state after that time, his evidence still fails to establish his defense. The cause of action is deemed to have accrued against him January 17, 1906, but, as he appears then to have been in Missouri, the statute of limitations did not begin to run as to him until his removal to Kansas, October 28, 1906. Before two years from that date had expired, he was served with summons. The judgment is affirmed.

#### TUTTLE et al. v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

##### 1. RAILROADS (§ 481\*)—OPERATION—FIRES—ACTION—ADMISSIBILITY OF EVIDENCE.

In an action against a railway company for damages by fire alleged to have been caused by the operation of the road, proof of other fires along the right of way occurring at or near the same time under similar conditions is competent as a circumstance tending to show, not only that the railway company was negligent in the operation of its road, but also as tending to show that the fire complained of was caused in the manner alleged.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1719-1723; Dec. Dig. § 481.\*]

##### 2. TRIAL (§ 194\*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

In a case like the one mentioned, it is error to instruct the jury that "evidence on the part of the defendant that its engine and appliances were in perfect condition, and that the engine was handled in a careful and skillful manner

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index—

by a competent engineer and fireman, overcomes the *prima facie* evidence of the plaintiffs, and that "in order to entitle the plaintiff to recover he must show by affirmative evidence to your satisfaction that the defendant was negligent."

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 194.\*]

Appeal from District Court, Greenwood County.

Action by W. E. Tuttle and others against the Missouri Pacific Railway Company. From a judgment for defendant, plaintiffs appeal. Reversed, and new trial ordered.

D. B. Fuller, for appellants. C. E. Benton and W. P. Dillard, for appellee.

PORTER, J. This is an action against a railway company for damages by a fire alleged to have been caused by the negligence of the company in the operation of its road. The plaintiffs were the owners of 130 tons of prairie hay stored in a barn which stood about 75 or 90 feet from the right of way of the company, near the limits of the city of Eureka. The barn and contents were destroyed by a fire. The petition alleged that the fire was set out in the operation of the railroad and by either a passenger or a freight engine, but that plaintiffs were unable to state by which one; that neither engine was provided with the latest and best improved spark arresters or with any spark arrester or with proper fire box and smoke-stack; that the company failed to use due care in operating the engines, by reason of which fire escaped therefrom and destroyed plaintiffs' hay. It was also alleged that the company had failed to protect its right of way by burning sufficient fire guards to prevent fire from escaping to the premises of plaintiffs. On the trial the jury found generally for the defendant. The court approved the verdict, denied the motion for a new trial, and rendered judgment for the defendant for costs. The plaintiffs appeal.

The plaintiffs' evidence tended to show that the fire occurred about 5 o'clock on the afternoon of October 7, 1909, very soon after a passenger train, followed by a freight train, had passed going east. A witness for plaintiffs testified that he saw the smoke of the fire from three to five minutes after the freight train passed, and it is admitted that the passenger train preceded the freight by about ten minutes. There was no evidence showing that the passenger engine as it passed the barn was throwing sparks; but one witness testified that the freight engine was throwing sparks, and another witness said that it was a heavy train and was puffing as it passed. No witness testified that either engine started the fire, and most of the witnesses who saw the fire soon after it started said that it seemed to start on the inside of the barn. There was no witness who testified that there was any fire

in the weeds and grass between the right of way until after fire was communicated thereto from the burning barn. No attempt was made by the plaintiffs to prove that either engine was defective, or to show the kind or character of appliances used upon them, or that the defendant had failed to protect its right of way by burning fireguards. Except that the fire occurred almost immediately after these trains had passed, and that the freight engine was throwing sparks, there was no testimony as to the origin or cause of the fire. The defendant's evidence tended to show that both engines were equipped with screens and spark arresters of improved pattern and with other efficient apparatus for preventing fires, that the employes in charge of both engines were capable, efficient, and competent, that it had protected its right of way by burning fireguards, and that neither engine caused or set out the fire which destroyed plaintiffs' property.

[1] The plaintiffs offered testimony showing that a few minutes after the barn was discovered to be on fire another fire occurred on or near the defendant's right of way about a mile and a half east of Eureka and almost immediately after the same passenger and freight trains had passed. The court sustained an objection to this testimony, and the first question to be determined is: Was the ruling error? The plaintiff did not claim to be able to show by direct evidence that the second fire was set out by either of the engines, but claimed the right to prove the fact that the second fire occurred as a circumstance tending to show that one or the other of the two engines caused the fire which destroyed the plaintiffs' hay. In passing upon the question, the court stated the rule to be that, before evidence of other fires occurring about the same time is admissible the plaintiff must first produce "positive" testimony that the fire complained of was caused in the operation of the defendant's road. Counsel for the railway company concede that the word "positive" was inappropriate to characterize the kind of testimony which the plaintiff must first produce, but contend that the ruling was correct, and that the court really intended to say that first there must be direct evidence showing that the fire complained of was caused by the operation of defendant's railroad before evidence of other fires is admissible, and they make the further contention that such evidence is never admissible unless it is shown that the other fires were in fact caused by the operation of the road. Their contention is that the only purpose for admitting evidence that other fires were caused by the same engines at or near the same time is to establish that the railway company was negligent in the operation of its road; and that since 1885, when the statute

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was passed making the fact that a fire is caused by the operation of the road prima facie evidence of negligence, there is no occasion for the plaintiffs to offer evidence of other fires.

The statute makes the fact that the fire was caused by the operation of the road prima facie evidence that the company was negligent; but it does not make other evidence of negligence incompetent. The plaintiff may still offer evidence of other fires occurring at or near the same time and under similar conditions, for the purpose of establishing negligence. He is not obliged to rest his contention that the defendant was negligent upon the prima facie showing or presumption afforded by the statute. In the case of *Lillard v. Railroad Co.*, 79 Kan. 25, 98 Pac. 213, it was said that it would not have been error for the court to instruct that the jury might infer negligence from the occurrence of a series of fires of a similar nature at or about the same time, although it was held that the refusal so to instruct in that case was not error. The logic of the decision, however, is that evidence of such other fires is competent, at least, for the purpose of proving negligence; and, if proper for that purpose, it should have been admitted. We also think that, without direct proof that the alleged fire was caused by the defendant in the operation of its road, he should be permitted to show the occurrence of other fires at or near the same time, as a circumstance tending, to some extent at least, to show that the fire complained of was caused by an engine of the defendant. Counsel, however, insist that evidence of other fires is never competent unless it is shown by direct evidence that such other fires were caused by the operation of the road; that the plaintiff cannot, by circumstantial evidence, prove a fact as a circumstance tending to prove the main issue. Suppose, without being able to produce direct evidence, that the fire complained of was set out by the company in the operation of its road, the plaintiff proved that the fire started almost immediately after a certain train had passed, and then offered to show that the progress of this train across the country on that day was followed by a trail of fires starting in the same manner; would not the evidence be admissible as a circumstance having some tendency to establish that the same engine set out the fire which destroyed plaintiff's property?

"Where a fire starts upon a right of way belonging to a railway company soon after a train has passed the point where the fire started, whether the fire originated from the locomotive engine of such train or not is a question of fact, which may be determined from circumstantial evidence." *Railroad Company v. Noland*, 75 Kan. 691, syl. par. 2, 90 Pac. 273.

Evidence respecting the second fire should

have been admitted as a circumstance tending to prove the plaintiffs' case. The weight of the evidence was for the jury to determine.

[2] Another error complained of is an instruction as follows: "I further instruct you that proof by the plaintiff that the fire was occasioned by the operation of defendant's road is prima facie evidence of the negligence on the part of the defendant, but that evidence on the part of the defendant that its engine and appliances were in perfect condition, and that the engine was handled in a careful and skillful manner by a competent engineer and fireman, overcomes the prima facie case made, and in order to entitle the plaintiff to recover he must show by affirmative evidence to your satisfaction that the defendant was negligent in the construction of its engine and appliances, or that the same were at the time out of repair, or that said engine was at the time handled in a careless and negligent manner, and, unless the plaintiff has shown by affirmative evidence to your satisfaction such to be the case, he would not be entitled to recover, and your verdict in such case will be for the defendant."

The objection to this instruction is that the court invaded the province of the jury in charging that "evidence on the part of the defendant that its engine and appliances were in perfect condition and that the engine was handled in a careful and skillful manner by a competent engineer and fireman overcomes the prima facie case" made by the plaintiff. The court could not declare as a matter of law that evidence offered upon a certain issue establishes anything, or that it overcomes a prima facie case. Whether the evidence of the defendant upon the particular issue is sufficient to overcome the prima facie showing made is exclusively for the jury to determine. If one witness for the defendant testified that the engine was equipped with a certain kind of appliance for arresting sparks, or that the company was not negligent in the operation of its trains, is the prima facie case afforded by the statute overcome, whether or not the jury believe the witness? If the jury disbelieved the witnesses produced by the defendant upon that question, it is clear that the prima facie case was not overcome. The instruction tells the jury that the production of any evidence on the part of the defendant upon a certain issue overcomes the presumption of negligence; and yet the jury are the exclusive judges of the weight of the evidence and the credibility of the witnesses. The instruction was erroneous. As was said in *Jevons v. Railroad Co.*, 70 Kan. 491, 497, 78 Pac. 817, 819: "Strong evidence to that effect was presented by the defendant, some of which was not denied in express terms, if at all; but this was offered in support of an affirmative defense, the burden



of proving which was upon defendant, and it cannot be said, as a matter of law, that the jury were bound to accept the evidence as true, even if not contradicted." In that case the burden of proof rested upon the defendant, here upon the plaintiff; but the decision is in point upon the proposition that the jury is not bound, as a matter of law, to accept evidence as true, and that the court cannot instruct that the mere production of evidence by one party necessarily overcomes the evidence offered by the other party. In *Cobe v. Coughlin*, 83 Kan. 522, 525, 112 Pac. 115, 117, 31 L. R. A. (N. S.) 1128, it was said: "It is true that no testimony was offered in behalf of appellee; but a court or jury is not required to accept a statement of a witness as conclusive, although there may be no direct evidence contradicting his statements, and hence the court could not direct the verdict."

Practically the same question was before the court in the case of *Railway Co. v. Geiser*, 68 Kan. 281, 283, 75 Pac. 68, 69. There the railway company contended that the trial court erred in refusing an instruction to the effect that, the statutory presumption of negligence having been rebutted by positive evidence on behalf of the defendant, the plaintiff could not recover. In the opinion, after showing that the statute makes the setting out of the fire prima facie evidence of negligence, not a mere presumption, the court says: "If it is a question of evidence against evidence, or of a conflict of evidence, upon what theory would the court be authorized to take the decision out of the hands of a jury and pronounce, as a matter of law, that the railway company's witnesses were in all respects to be believed, and that their conclusions as to the condition of the engine and the skill of the employees were beyond the pale of contradiction?" It was therefore held "that the entire question is one of fact to be submitted to the jury with proper instructions." At page 287 of 68 Kan., at page 70 of 75 Pac.

In the present case the question was in a sense submitted to the jury; but the instruction was not proper because the court undertook to inform the jury what character of evidence on the part of the defendant would overcome the prima facie case, and might as well have instructed that the prima facie case was overcome by the evidence of the defendant, and that it need not therefore be considered by the jury.

In the *Geiser* Case, supra, it was ruled that "the fact of setting out of fire by the operation of a railroad is evidence, not merely presumption, of negligence, and as such must be met and overcome by evidence to the satisfaction of the jury" (syl. par. 2)—not, as declared by the instruction in the present case, merely by evidence.

The instruction is objectionable in another

respect. It charges that, after the prima facie evidence is overcome by the defendant's evidence, the plaintiffs, in order to recover, "must show by affirmative evidence to the satisfaction of the jury" that the engine and appliances were out of repair, or that the engine was handled in a careless and negligent manner, and that unless the plaintiffs established such facts by affirmative evidence the verdict must be for the defendant. It is not clear just what is meant by the expression "affirmative evidence" as used in the instruction. In *Gates v. Hughes*, 44 Wis. 332, 337, the expression "affirmative proof" in an instruction was said to be "strictly meaningless," unless in that case it was intended to mean that the proposition must be established by direct or positive proof and not by circumstantial evidence. Giving the expression "affirmative evidence" the same meaning it erroneously limited the character of proof upon which the plaintiff might rely to rebut the evidence of the defendant, for, obviously, the plaintiff might offer circumstantial evidence to show that the company was negligent.

There was no error in admitting testimony offered by the defendant to the effect that the barn where plaintiffs' hay was stored was much frequented by tramps. The other assignments of error are not well taken, nor are they of sufficient importance to require comment.

The judgment will be reversed, and a new trial ordered. All the Justices concurring.

ARNOLD v. CHICAGO, R. I. & P. RY. CO.  
et al.†

(Supreme Court of Kansas. Dec. 9, 1911.)

1. PLEADING (§ 52\*)—DECLARATION—SEPARATE STATEMENT—JOINT LIABILITY.

In an action against a milling company and a railroad company for joint obstruction of a river to plaintiff's damage, caused by separate works of the defendants, it was error to require plaintiff to separately state and number his causes of action against the two defendants, since, if two or more parties, acting jointly, injure another, they are jointly and severally liable, and the injured party may at his option sue one or all of those contributing to the injury.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 113; Dec. Dig. § 52.\*]

2. WATERS AND WATER COURSES (§ 62\*)—OBSTRUCTION—EXEMPLARY DAMAGES.

Exemplary damages are recoverable for wanton and grossly negligent obstruction of a water course to the injury of another.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 52; Dec. Dig. § 62.\*]

Appeal from District Court, Dickinson County.

Action by L. D. Arnold against the C. Hoffman & Son Milling Company and the Chicago, Rock Island & Pacific Railway Company. Judgment dismissing the action, and plaintiff appeals. Reversed and remanded.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes  
† Rehearing denied.

E. O. Little, for appellant. G. W. Hurd and Charles Crawford, for appellees.

**PER CURIAM.** Action by Arnold to recover damages resulting from the overflow of his land and the destruction of his crops, alleged to have been caused by the joint action and wrong of the defendants.

After some preliminary motions and rulings Arnold filed an amended petition, alleging that he owned land on the Smoky Hill river; that the defendants had illegally obstructed the flow of the water and threw it back on his farm; that the railway company, in building a bridge below his farm, constructed an embankment, and placed about 100 car loads of stone in the river, which operated to dam the river, and that the other defendants built a dam near the same place, at a height not allowed by law, thus obstructing the flow of the river and creating a nuisance. It is alleged that on a certain date these acts of the different parties and these obstructions, operating jointly and contemporaneously, caused the river to overflow its banks and to destroy plaintiff's crops. It is also alleged that the conduct of the defendants in this respect was wanton and negligent, and showed a willful indifference to the rights of the plaintiff, for which punitive damages were asked. The court, on motion of defendants, ruled that the allegations in regard to willful and wanton negligence and punitive damages should be stricken out, and that plaintiff be required to separately state his cause of action against the railway company and his cause of action against the remaining defendants. The plaintiff refused to comply with the order, but elected to stand upon his amended petition, whereupon the court dismissed the action.

[1] The ruling requiring plaintiff to separately state and number the causes of action was not warranted, and cannot be affirmed. If two or more parties, acting jointly, wrong and injure another, they are jointly and severally liable for the consequences, and the injured party may at his option sue one or all of those contributing to the injury. *Westbrook v. Mize*, 35 Kan. 290, 10 Pac. 881; *Land Co. v. Brady*, 53 Kan. 420, 38 Pac. 728; *Kansas City v. Slangstrom*, 53 Kan. 431, 38 Pac. 706; *Kansas City v. File*, 60 Kan. 157, 55 Pac. 877; *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491.

The amended petition, fairly interpreted, is to the effect that the negligent acts of the defendants combined to throw the water back upon plaintiff's land, and to cause the destruction of his crops. If it turns out that there was no concurring negligence, or that the act of one did not proximately contribute to the injury, there is no joint liability. The averments, in effect, are that the misfeasances charged against each operated jointly and contemporaneously in producing the

overflow. The substance of the allegations is that the acts of the parties jointly conducted to the injury, and the plaintiff was therefore entitled to sue all for the joint tort.

[2] Neither was the court warranted in striking out the allegation charging that the acts of the defendants were wantonly done, and that they showed gross negligence and a wanton and willful indifference to the rights of the plaintiff. If these averments should be established by the evidence, exemplary damages might be awarded. The other questions presented are not material.

The judgment is reversed, and the case remanded for further proceedings.

#### MENSING v. WRIGHT et al.

(Supreme Court of Kansas. Dec. 9, 1911.)

##### 1. DAMAGES (§ 40\*)—ELEMENTS OF COMPENSATORY DAMAGES—LOSS OF PROFITS.

Damages for the loss of profits for 26 days of suspension of the business of a skating rink were neither speculative nor uncertain, where the rink was profitable before such interruption, and continued to be profitable thereafter, though subject to added competition.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 72-88; Dec. Dig. § 40.\*]

##### 2. EVIDENCE (§§ 171, 471\*)—BEST AND SECONDARY EVIDENCE—OPINION EVIDENCE.

Where plaintiff, seeking damages for an interruption of the business of his skating rink, showed that he was in personal charge of the business, and knew its details, and what his receipts and expenses were, and had his bank books in court, he was qualified to testify directly as to amounts, and his summaries were not objectionable, either as secondary or as conclusions.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 460, 528; Dec. Dig. §§ 171, 471.\*]

##### 3. TORTS (§ 28\*)—ACTIONS—VERDICT.

It does not indicate that a verdict against one tort-feasor is wrong, because the jury excuses another who, under the evidence and instructions, was also liable.

[Ed. Note.—For other cases, see *Torts*, Dec. Dig. § 28.\*]

Appeal from District Court, Leavenworth County.

Action by O. F. Mensing against John W. Wright and others. From a judgment for plaintiff, defendants appeal. Affirmed.

C. P. Rutherford and Lucian Rutherford, for appellants. Lee Bond, J. H. Wendorff, W. W. Hooper, Hawn & Flynn, and M. N. McNaughton, for appellee.

**PER CURIAM.** None of the law questions involved in this appeal are new, and they have all been sufficiently discussed in former decisions of the court.

[1] The plaintiff's skating rink was profitable before his business was interrupted, and continued to be profitable when resumed after the interruption. The only change in conditions was that competition was added, and still the business was profitable. Conse-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

quently, profits for the 26 days of suspension were neither speculative nor uncertain, and proof of what they were for representative periods of time before and after the suspension formed a fair basis upon which to estimate them.

[2] The evidence shows clearly enough that the plaintiff was in personal charge of his business, knew the details of it, and knew what his receipts and expenses were, and had his bank books in court. This qualified him to testify directly to amounts, and his summaries were not objectionable, either as secondary or as conclusions. An item of \$2,386 was recently sustained on the same kind of testimony, in the case of Larrabee v. Railway Co., 85 Kan. 214, 218, 116 Pac. 901.

The instructions to the jury were correct, and were clear enough. The plaintiff could not recover on account of the digging of the cellar, which was done in a sufficiently careful manner, but only for excavating under his foundation. Due care in going under his foundation, however, required such an excavation of the cellar, and such other precautions as would prevent the building from collapsing.

The amount of the verdict does not indicate passion or prejudice. It is simply mistakenly too large. As reduced, it fairly represents the plaintiff's damages, and a new trial will not be granted to reassess them.

[3] It does not indicate that the verdict against one tort-feasor is wrong, because the the jury excuses another who, under the evidence and instructions, was also liable.

Judgment affirmed.

ABRAHAMS v. MEDLICOTT, County Treasurer, et al.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

TAXATION (§ 356\*)—DEDUCTIONS—"CREDIT."

Stock issued by a building and loan association was divided into classes. One class consisted of prepaid stock, upon which interest is payable out of the earnings of the association at a rate not exceeding 6 per cent. per annum. The holders have the right to withdraw the amount paid in upon conditions stated in the by-laws, and the association has the right to retire the stock upon notice. The holders are members of the association, eligible to vote and hold office therein as stockholders. It is held that the stock is not a "credit," within the meaning of the taxing laws, and that a holder thereof is not entitled to a deduction of the amount of debts owing by him from the value of such stock in the assessment thereof for taxation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 596; Dec. Dig. § 356.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1711-1713; vol. 8, p. 7622.]

Appeal from District Court, Shawnee County.

Action by John V. Abrahams against Stanley Medlicott, Treasurer of Shawnee County,

and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Wheeler & Switzer, A. M. Harvey, and J. E. Addington, for appellant. E. R. Simon, for appellees.

BENSON, J. The appellant is the owner of stock in the Capitol Building & Loan Association, organized under the laws of this state. This stock is subject to taxation, and a statement of the amount thereof was included as credits in the personal property statement of the owner, made to the assessor for the year 1908. The statement also contained the amount of certain debts to be deducted from such credits. The deduction claimed was refused, and taxes were charged on the value of the stock. A tender was made of the amount of other taxes; the appellant paid the tax assessed against the stock under protest, and brought this suit to recover that amount.

The debts set out in the statement were owing in good faith, and the only question is whether the stock is a credit from which debts should be deducted under the statute, which provides that: "Debts owing in good faith by any person, company or corporation may be deducted from the gross amount of credits belonging to such person, company or corporation." Gen. Stat. 1909, § 9222.

Credits are the subject of taxation. The word "credits" was defined by the former tax laws, but is not by the one now in force, the definition having been omitted from the Revision of 1907; but credits are still taxable. Williams v. Osage County, 84 Kan. 508, 114 Pac. 858. The definition referred to was: "The term 'credit,' when used in this act, shall mean and include every demand for money, labor or other valuable thing, whether due or to become due, but not secured by lien on real estate." Gen. Stat. 1901, § 7503. Appellant states that this definition, except that part referring to a credit secured by real estate, expressed the generally accepted definition of the term. No question of real estate securities being involved here, further inquiry into the general meaning of the term is unnecessary to this decision, and it only remains to inquire whether the stock in question is a credit, as so understood.

The capital stock of the corporation is divided into classes, as installment, prepaid, full-paid, deposit, and permanent. The full-paid stock is further designated as class C, and the appellant's holding is in this class, concerning which the by-laws provide: "Class C. Full-paid stock shall be issued upon payment of the sum of \$100.00 in full payment of each share; such certificates, however, may be issued in fractional shares of \$25.00 or its multiple. Such certificates may be withdrawn at a discount not exceeding one per cent., sixty days notice being required. After

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

three years, withdrawal is permitted upon thirty days notice, without discount. Such stock shall be paid interest out of the earnings of the association at a rate not exceeding 6 per cent. per annum from the date of issue, payable semiannually at the association's office on the 15th day of January and July."

The by-laws further provide that no more than one-half of the receipts in any month shall be used to pay withdrawals, and that the directors may, upon six months notice, call in any certificate of stock, not borrowed on, which shall thereupon be surrendered and paid at its actual value. The appellant as such stockholder was entitled to vote and did vote at stockholders' meeting. He was on March 1, 1908, and still remains, a director of the corporation.

The term "personal property," as used in the tax law, includes the capital stock of corporations (Gen. Stat. 1909, § 9215), and the cash withdrawal value of shares of stock in building and loan associations is assessed for taxation against the individual holders. Gen. Stat. 1909, § 9246. Credits are also to be assessed (Gen. Stat. 1909, §§ 9214 and 9223), and the statutory form of the property statement to be made by the taxpayers includes an item of credits, showing legal deductions and balance taxable. Gen. Stat. 1909, § 9226, subd. 20. The legal deductions are debts owing in good faith, referred to in section 9222, quoted above; but such deductions cannot be made from money on hand, nor from loans secured by mortgages (*Life Association v. Hill*, 51 Kan. 636, 33 Pac. 300), nor from shares in a national bank (*Dutton v. National Bank*, 53 Kan. 440, 36 Pac. 719), but only from credits.

The certificates of stock in question are in the following form: "This certifies that \* \* \* is the owner of \* \* \* Class C, 3 year shares of the capital stock of the Capitol Building & Loan Association, transferable only on the books of the corporation by the holder hereof, in person or by attorney, upon surrender of this certificate properly endorsed."

The contention of the appellant is that this stock does not represent an interest in the corporation, as stock in a national bank does, or as the permanent stock in this association does; that it is a demand for money, falling under the designation of a credit; that this credit represents savings as against indebtedness; and that the indebtedness should therefore be deducted in assessing the credit. On the other hand, it is insisted by the appellees that class C stock is simply preferred stock; that, as the holder is a member of the association, entitled to represent his shares at meetings of the corporation, sharing in its management, responsibilities, and liabilities, the stock is not regarded as a credit.

It will be noticed that the by-laws under which this stock was issued limits the hold-

er's shares of earnings to 6 per cent. per annum, and that the holder may withdraw his money on 60 days notice. But the payment of this 6 per cent. interest (so called in the body of the certificate, but called "dividends" in the form attached for receipts) is contingent upon income, since it is only payable out of earnings; and the right of withdrawal at any particular time is contingent upon the amount of receipts, since only one-half of such receipts for any one month can be applied to that purpose. The statute governing such associations permits the issuance of full-paid, prepaid, deposit, or installment shares, as well as permanent or guaranty stock, and that a nonborrowing stockholder, on withdrawal, shall receive not less than 90 per cent. of the money he has paid in, "less his proportionate share of the net losses of the association during the time he was stockholder." Gen. Stat. 1909, § 1860. The statute also provides that the retired shareholders shall be paid the full value of their shares, less all fines, and their proportion of any loss. Gen. Stat. 1909, § 1869.

Thus it appears that this stock really represents the holder's interest in the corporation, differing from other classes of stock in respect to the holder's share of the annual earnings, and to the right of withdrawal upon the conditions named, and the right of the corporation to retire the stock. The holder is, however, a member of the corporation, with a voice in its management and a share in its liabilities. In this situation, the following excerpts are pertinent: "The law is now clearly settled that a preferred stockholder is not a corporate creditor." Cook on Corp. (5th Ed.) § 271. "Shares of stock are not regarded as credits. They are not evidences of debt, for the reason that there is no debtor, as in the case of open accounts. The shares simply represent the interest of the shareholder in the corporation; and the certificates are the mere indicia of the interest of the stockholder." 4 Thomp. on Corp. (2d Ed.) § 3468. "Redeemable stock.—This can scarcely be said to be a separate class of stock. Like the interest-bearing stock, it is more properly a peculiar kind of preferred stock. The statutes of Pennsylvania authorize the issuance of preferred stock in classes, with preference in the rates, and in the order of payment of dividends, or in the redemption of principals, with the right to redeem on terms prescribed in the issue of such stock." Id. § 3432. Concerning the right of a corporation to retire its preferred stock, it is said: "Where a corporation is authorized to issue preferred stock, it may attach such conditions thereto as it deems best. One of the conditions may be that the corporation may retire the stock at par within a certain time." 1 Cook on Corporations (5th Ed.) § 270. These general principles are sustained by adjudicated cases, among which are: *Taft, Trustee, v. Hartford, Providence & Fishkill Railroad Co.*, 8 R.

I. 310, 5 Am. Rep. 575; *Allen v. Herrick and Others*, 15 Gray, 274. The same principle applies to building and loan associations. *Mutual Union L. & B. Ass'n v. Stolz*, 93 Ill. App. 164; *Towle v. American Building & Loan Ass'n (C. C.)* 75 Fed. 938.

It has also been held that shares of such stock are not credits from which debts may be deducted in the assessments for taxes. *Albany Building Association v. City of Laramie*, 10 Wyo. 54, 85 Pac. 1011; *Bridgman v. City of Keokuk et al.*, 72 Iowa, 42, 83 N. W. 355; *Morrill v. Bentley (Iowa)* 130 N. W. 734. See, also, *People ex rel. Cohn & Co. v. Miller*, 94 App. Div. 564, 88 N. Y. Supp. 197.

Without citing other cases, it is deemed sufficient to refer to the decision of this court in *Loan Association v. Merriman*, 87 Kan. 779, 74 Pac. 256, which seems to fairly cover the ground. In that case it appeared that Merriman held a document issued by the association, one part of which was in the form of an ordinary certificate of stock, and the other part in the form of certificate of deposit for \$100 (which was the par value of the share of stock), payable as provided by the by-laws, to draw interest at 6 per cent., or such rate as the board of directors might determine. The question in that case was whether the holder of that certificate could be compelled to withdraw the money in the circumstances disclosed in the record. The association contended that the holder of the certificate was a depositor, and therefore a creditor; while the holder claimed that he was a stockholder, and this claim prevailed. It was said in the syllabus: "One who invests money in a building and loan association, receiving as evidence of his investment a document in two parts, one in the form of a certificate of deposit for the amount paid, drawing annual interest based on the earnings of the business, the other in the form of a certificate that he is a member of the association and the owner of a share of its stock, is a stockholder and not merely a creditor, unless the by-laws forbid such conclusion; and held that the by-laws of the association here involved do not forbid it." Syllabus 1.

Nothing in the by-laws of this association precluded the application of the principle of that decision. Here the appellant was not even called a depositor. The certificate issued to him under the by-laws, and the practice of the association, recognizing him as a member and electing him as an officer, are all in conflict with the claim that he is merely a creditor; and therefore his stock is not a "credit," within the meaning of the tax laws. The appellant cites *Arapahoe County v. Fidelity Sav. Ass'n*, 81 Colo. 47, 71 Pac. 376, and *Deniston, Auditor, v. Terry*, 141 Ind. 677, 41 N. E. 143, as opposing these views, but, under our statutes, and following the *Dutton* and *Merriman* Cases, we

must hold that the appellant was not entitled to the deduction claimed. The district court having so decided, the judgment is affirmed. All the Justices concurring.

# MARTIN v. CITY OF CHANUTE.

(Supreme Court of Kansas. Dec. 9, 1911.)

## 1. MUNICIPAL CORPORATIONS (§ 244\*)—BIDS—CONTRACTS—VARIANCE.

A joint and several bid of a city for a lease of the gas rights in the lands of an individual and of a corporation described the land of the corporation by government surveys, and as containing 1,120 acres, more or less. The city had inspected the premises, and knew, or had the opportunity of knowing, the location of schoolhouse grounds of two acres on the tract of the corporation. Held, that the contract, describing the land of the corporation as containing 1,118 acres, was not invalid for the variance between its terms and the bid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 244.\*]

## 2. TRIAL (§ 350\*)—ISSUES—SPECIAL QUESTIONS.

Where, under the instructions, all the issues presented were determined by a general verdict, the refusal to submit special questions was not erroneous, especially where they related to questions of fact on which there was no conflict, or presented a question of law.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 828-833; Dec. Dig. § 350.\*]

Appeal from District Court, Neosho County.

Action by Charles E. Martin against the City of Chanute. From a judgment for plaintiff, defendant appeals. Affirmed.

Lapham & Lapham, for appellant. Farrelly & Evans, for appellee.

PER CURIAM. This case was tried before a judge pro tem. and a jury, in the district court of Neosho county.

To his petition, the plaintiff attached as exhibits the bid of the city for a lease of the gas rights in 80 acres of land, owned by the plaintiff, and of another tract of 1,120 acres, owned by the Hudson Oil & Gas Company. The bid was joint and several, as the court instructed the jury, being in the sum of \$7,500 for the two tracts and specifying the sum of \$5,000 for the gas rights belonging to the Hudson Company, and \$2,500 for the gas rights in the tract belonging to the plaintiff. The assignment of leases by the plaintiff was nominally for \$1 and other considerations, and the assignments of the Hudson Company were for \$5,364. The evidence fully explained the situation, and that the assignment by the plaintiff was really for \$2,164, which amount, with interest, is all that he recovered. The condition of the bid was that both should be accepted, but there was also a joint bid of \$7,500 for the rights of the plaintiff and the company. The plaintiff received just the amount he was en-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

titled to under the subsequent arrangement, and the city was not prejudiced thereby.

[1] In the bids the acreage of the tracts of land in which the Hudson Company owned the gas rights is described as 1,120 acres, "more or less." The assignment was of 1,118 acres. The remaining 2 acres was a schoolhouse site, and it appears that the city had had the premises inspected, for the purpose of determining the value of the gas rights, and knew, or had an opportunity to know, the fact of the location of the schoolhouse grounds. As the consummation of the contract depends upon the making and acceptance of the bid, without modification thereof, it is contended that the small difference would defeat the claim of the plaintiff that the contract was consummated. We think it was a substantial acceptance of the conditions of the bid. The description of the land as 1,120 acres, "more or less," after describing the land by government divisions, indicates that the exclusion of this two-acre tract might have been in view, and it does not appear that the city ever suggested this as a ground for repudiating the contract until it did so in this action.

[2] We think the evidence fully justified the verdict of the jury; that there was no prejudicial error in admitting or excluding evidence; that the jury was fully instructed as to the law of the case; and that there was no error in refusing the additional instructions asked, or in refusing to submit the special questions to be answered by the jury. Three special questions were asked, to be submitted to the jury for answer; two of these relate to questions of fact upon which there is no conflict in the evidence, and the third presents a question of law.

Under the instructions of the court, all the issues presented were fully determined by the general verdict of the jury.

The judgment is affirmed.

#### GIBSON v. JACKSON et al.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

#### TAXATION (§ 762\*)—TAX DEED—VALIDITY.

A tax deed, of record more than five years, correctly stated the separate payments made at the tax sale for each of the lots included; also the correct aggregate thereof. The subsequent payments on account of each lot were also correctly stated, the total of which, correctly added, would be \$227.35. The granting clause recited that, for and in consideration of \$213.95, "due as aforesaid," to the treasurer paid as aforesaid, the conveyance was made. *Held*, that the understatement of the aggregate should be regarded as a clerical error, and was controlled by the previous statements and recitals, and did not avoid the deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1514-1516; Dec. Dig. § 762.\*]

Appeal from District Court, Shawnee County.

Action by Charles E. Gibson against Ella M. Jackson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Lee Monroe, for appellant. Wheeler & Switzer, for appellees.

WEST, J. This case involves the validity of a tax deed on record 11 years. It includes four separate descriptions, and the separate and aggregate amounts for which they were sold at the tax sale are correctly stated. The separate amounts of subsequent taxes paid on each description are also correctly stated, but in the granting clause the total of all payments is given as \$213.95, instead of \$227.35. The recital is, "for and in consideration of the sum of two hundred thirteen dollars and ninety-five cents, taxes, costs and interest in the aggregate, due as aforesaid, on said land for the years A. D. 1893, 1894, 1895 and 1896, to the treasurer paid as aforesaid"; the former recitals showing the correct total and separate payments at a sale in 1894 for the tax of 1893.

It is argued that "paid as aforesaid" here means only the recited aggregate sum; but we think the only fair and reasonable interpretation is that the words mean the separate payments before set forth in the deed.

It is also urged that, as the consideration included the payments made subsequently to the tax sale, a failure to state correctly the aggregate amount avoids the deed, by reason of section 9480, Gen. Stat. 1909. That section provides that: "In any case where any purchaser at any tax sale shall purchase more than one parcel or tract of land or lots, he may require the county clerk to include all such lands or lots on one deed, stating the amount of tax, interest and penalty for which each separate tract is sold and conveyed, the sum of which separate amounts shall be the gross or aggregate consideration of the deed."  
\* \* \*

It is argued that, as the requirement to state in the deed the amount for which each separate tract is sold and conveyed was held mandatory in *Gibson v. Kueffer*, 69 Kan. 534, 77 Pac. 282, it should likewise be held that the other requirement is equally binding, that the sum of the separate amounts shall be the gross or aggregate consideration. This we think, is true, but we do not consider the latter provision as a mandatory requirement that the true gross or aggregate consideration must be correctly recited in the granting clause. If it reasonably appear from the face of the deed, upon a reasonable construction of all its statements and recitals, that the gross or aggregate amount was in fact the consideration for which the deed was executed, a mere understatement in a recital in the granting clause will not so control the other

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

statements and recitals as to render the deed void. The previous statements that the correct separate payments and the correct aggregate were made at the tax sale, and that the correct separate payments for the different lots for subsequent taxes were made, giving the amount of each, would of themselves conclusively show that the real consideration for the deed was \$227.35. The expression, "two hundred thirteen dollars and ninety-five cents \* \* \* due as aforesaid, \* \* \* to the treasurer paid as aforesaid," bears upon its face the evidence of a mistake in addition, because the amounts "due as aforesaid" and "paid as aforesaid" amount to more than \$213.95. To hold that the mere recital of the latter sum in the granting clause controls would be to eliminate the correct recital of the separate payments at the sale, the correct recital of the subsequent payments, and the expressions, "due as aforesaid" and "to the treasurer paid as aforesaid," which would be much less justifiable and reasonable than to regard the recital of the total as manifestly a clerical error. "A tax deed, like any other instrument, is to be construed as a whole; and if any uncertainty in one part is made certain by another the deed as a whole is sufficient." *Downer v. Schmidt*, 85 Kan. 513, page 514, 117 Pac. 1013.

While a deed which shows on its face that the purchaser paid into the county treasury less than the law requires is void (*Douglass v. Lowell*, 60 Kan. 239, 56 Pac. 13; *Manker v. Peck*, 71 Kan. 865, 81 Pac. 171; *Wilks v. De Hart*, 78 Kan. 217, 95 Pac. 836), still a deed which shows that it was actually executed for the proper and lawful consideration is not avoided by the mere understatement thereof in a recital found in the granting clause. *Bowman v. Cockrill*, 6 Kan. 311; *Mack v. Price*, 35 Kan. 134, 10 Pac. 521; *Clarke v. Tilden*, 72 Kan. 574, 84 Pac. 139; *Kessler v. Polkosky*, 81 Kan. 69, 105 Pac. 7.

A fair and reasonable construction of all the language used in the deed leads to the conclusion that the consideration was correctly shown, and that only a mistake in adding the amounts appears in the recital placed in the granting clause, and, in accordance with the doctrine of *Downer v. Schmidt*, supra, the deed, having been of record more than five years, should be upheld. See, also, *Hoffman v. Woodward*, 119 Pac. 712.

The judgment is affirmed. All the Justices concurring.

STATE ex rel KNITTLE, Co. Atty., v. WILL†  
(Supreme Court of Kansas. Dec. 9, 1911.)

JUDGMENT (§ 17\*)—VALIDITY—WANT OF JURISDICTION.

An injunction against a person out of the state, not served with summons and not appearing, and not ratifying an unauthorized appearance by an attorney filing a demurrer and

subsequently asking to withdraw it, and not waiving want of jurisdiction, is void for want of jurisdiction.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 25-33; Dec. Dig. § 17.\*]

Appeal from District Court, Saline County.

Action by the State of Kansas, on relation of Frank T. Knittle, County Attorney, against Nina Will and others. From a judgment for plaintiff, defendant Will appeals. Reversed.

Burch & Litowich, for appellant. John S. Dawson, Atty. Gen., Frank T. Knittle and H. O. Tobey, for appellee.

PER CURIAM. The judgment of injunction was void as against appellant. It appears without contradiction that she was out of the state, and was not served with summons, and also that she did not enter her appearance in the action. An attorney for another defendant filed a demurrer, which purported to be for her; but soon afterwards, learning of the mistake, he asked leave to withdraw this appearance for appellant. It is shown, beyond dispute, that the appearance was unauthorized, and there has been no ratification of the action of the attorney, nor waiver of the lack of jurisdiction. The injunction judgment against her was therefore void, and furnished no basis for the proceedings against her in this case. *Reynolds v. Fleming*, 30 Kan. 106, 1 Pac. 61, 46 Am. Rep. 86, and cited cases; *Green v. Green*, 42 Kan. 654, 22 Pac. 730, 16 Am. St. Rep. 510.

The judgment of the district court is reversed.

ANDERSON et al. v. METROPOLITAN ST RY. CO.

(Supreme Court of Kansas. Dec. 9, 1911.)

ATTORNEY AND CLIENT (§ 189\*)—ATTORNEY'S LIEN.

Laws 1905, c. 68, § 1 (Gen. St. 1909, § 435), gives an attorney a lien upon money due his client in the hands of an adversary from notice of such lien. Separate suits were brought in Missouri and in Kansas on the same cause of action by different attorneys. Defendant's general solicitor settled the Missouri suit, without knowing of the other suit, or that plaintiff's attorneys therein had given notice of lien to defendant's attorney in Kansas. Held, that plaintiff's attorneys in the Kansas suit could enforce a lien against defendant.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 189.\*]

Appeal from District Court, Wyandotte County.

In the matter of certain actions against the Metropolitan Street Railway Company. From a judgment adjudging an attorney's lien in favor of T. P. Anderson and another, defendant appeals. Affirmed.

O. L. Miller, C. A. Miller, and Samuel Maher, for appellant. T. P. Anderson and E. K. Robinnett, for appellees.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied February 10, 1912.

**PER CURIAM.** The agreed statement of facts upon which the case was tried compels an affirmance of the judgment. It appears that the action in the district court was commenced on the 21st day of March, 1910, upon the same cause of action stated in the petition filed by the same plaintiff in the circuit court of Jackson county, Mo.; that the appellees, who were the attorneys for the plaintiff in the Kansas action, procured service of summons in that case upon the appellant on March 22, 1910; and that written notice of their lien for service in said action as attorneys was duly served upon the appellant on March 21st, by delivery of a copy thereof to the regularly employed, salaried attorney for the appellant in Wyandotte county. On March 23, 1910, the appellant, through its general solicitor in Missouri, who had no notice or knowledge of the commencement of the second suit, made a full settlement of the claim of the plaintiff at the office of her attorneys in Missouri, who had brought the first action.

Our statute gives the attorney a lien for his services upon money due his client in the hands of the adverse party, in any matter, action, or proceeding in which the attorney was employed, from the time of giving notice of the lien to the adverse party. Laws 1905, c. 68, § 1; Gen. Stat. 1909, § 435. Under this statute, the notice which the appellees served upon the appellant gave them a lien upon any money in the hands of the appellant due to their client upon any settlement or adjustment of the cause of action which was the basis of the Kansas suit.

The judgment must be affirmed.

#### NEW v. SMITH.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

#### 1. EJECTMENT (§ 4\*)—FORM OF ACTION—LAW OR EQUITY.

An action to recover the possession of a tract of land, the real gravamen of which is to set aside a recorded deed, which purports to have been executed by the plaintiff, for the reason that such deed was fraudulently obtained by the grantee, is in form an action in ejectment, but, in substance, is an action for relief on the ground of fraud.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 4; Dec. Dig. § 4.\*]

#### 2. EJECTMENT (§ 93\*)—EVIDENCE—SUFFICIENCY.

The evidence requisite to sustain such action is the same as would be required if the facts of the transaction were pleaded, instead of the conclusion authorized by the statute in actions of ejectment.

[Ed. Note.—For other cases, see Ejectment, Dec. Dig. § 93.\*]

#### 3. LIMITATION OF ACTIONS (§ 37\*)—LIMITATIONS APPLICABLE—ACTIONS AFFECTING REAL PROPERTY.

The limitation of time within which such action may be brought is 2 years after the dis-

covery of the fraud, as provided by section 17 of the Code of Civil Procedure (Gen. St. 1909, § 5610), subject to being tolled as in other cases, and not the 15 years as provided in section 15 of the Code (Gen. St. 1909, § 5608).

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 182-186; Dec. Dig. § 37.\*]

#### 4. APPEAL AND ERROR (§ 917\*)—REVIEW—PRESUMPTIONS—RULING ON DEMURRER.

Where, in an action brought by several plaintiffs, whose petition alleged several grounds of relief, the defendant demurs to the petition on the ground of misjoinder of causes of action and other grounds, the district court sustains the demurrer without specifying the ground upon which it is sustained, and, where an appeal is taken to the Supreme Court from such order and the ruling thereon is sustained on the ground of misjoinder of causes of action, it will be presumed that the district court decided the demurrer on the same ground.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3706-3709; Dec. Dig. § 917.\*]

#### 5. JUDGMENT (§ 18\*)—VALIDITY—PLEADING TO SUSTAIN JUDGMENT.

If in such case, after sustaining the demurrer and without other pleading, the court enters a judgment in favor of the defendant that he is the owner and entitled to the possession of the property in question, the judgment is based on no allegation of fact in any pleading in the case, and is void. It is coram non judge.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 34-37; Dec. Dig. § 18.\*]

#### 6. LIMITATION OF ACTIONS (§ 130\*)—COMMENCEMENT OF ACTION—NEW ACTION AFTER FAILURE OF FORMER ACTION.

The plaintiff, having commenced such action in due time, failed therein "otherwise than on the merits," and was entitled to one year after such failure within which to bring a new action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 553-566; Dec. Dig. § 130.\*]

#### 7. JUDGMENT (§ 719\*)—CONCLUSIVENESS—MATTERS CONCLUDED—MATTERS IN ISSUE.

The rule which determines the conclusiveness of a judgment is that it is conclusive only so far as it determines matters put in issue or admitted in the pleadings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1249, 1250; Dec. Dig. § 719.\*]

(Additional Syllabus by Editorial Staff.)

#### 8. LIMITATION OF ACTIONS (§ 130\*)—COMMENCEMENT OF ACTION—NEW ACTION AFTER FAILURE OF FORMER ACTION—EFFECT OF APPEAL.

Under Code Civ. Proc. § 22 (Gen. St. 1909, § 5615), authorizing a new action within one year after a former action has failed otherwise than on the merits, and section 565 (Gen. St. 1909, § 6160), granting an appeal from an interlocutory order sustaining a demurrer, a party has one year after determination of his appeal within which to bring a new action after failure of the former action otherwise than on the merits.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 553-566; Dec. Dig. § 130.\*]

#### 9. CONVICTS (§ 6\*)—ACTIONS—PARDON—REVIVOR OF ACTION.

Where an action is commenced by the trustee of the estate of a person confined in a penitentiary, revivor of the action in her name on

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.



her restoration to civil rights by a pardon is not authorized by law.

[Ed. Note.—For other cases, see *Convicts*, Cent. Dig. §§ 5, 10; Dec. Dig. § 6.\*]

Appeal from District Court, Greenwood County.

Action by Amelia New against J. A. Smith. From a judgment for defendant, plaintiff appeals. Reversed and remanded, with instructions to grant a new trial.

John Stowell, Crane & Woodburn Bros., Lew E. Clogston, and Robt. H. Clogston, for appellant. T. A. Kramer and James Shultz, for appellee.

SMITH, J. It is conceded in this action that upon the death of her husband, Joseph New, in 1897, Amelia New became the owner of all the land in controversy; she having owned one tract prior thereto. On the 24th day of January, 1898, having been found guilty of murder in the second degree on the charge of killing her husband, she was sentenced to the penitentiary for the term of her natural life. Soon after her incarceration on the sentence, her brother, claiming to be her heir, brought an action to recover the same land. It was held that the sentence did not devolve the title upon her heir or heirs. 62 Kan. 541, 64 Pac. 70, 53 L. R. A. 141. On the determination of that case, Robert Clogston was appointed and qualified as trustee of the estate of Mrs. New, and on the same day commenced an action, jointly with Mrs. New and the firm of Stowell & Nold, to set aside the transfer, and for the rents of the land. The defendant demurred to the petition on the ground of misjoinder of causes of action and other grounds. The demurrer was sustained, and an appeal was taken to this court. The decision of the lower court was affirmed December 12, 1903. 68 Kan. 807, 74 Pac. 610. This action was commenced by the trustee February 6, 1904, and, after an amended petition had been filed therein, the court below sustained a demurrer thereto. An appeal was again taken to this court. In the decision it was held that the trustee was the proper party to maintain the action, that Mrs. New was without capacity to sue, but that her appearance as a party should be treated as surplusage and redundant. The judgment was reversed. 73 Kan. 174, 84 Pac. 1030. On November 26, 1907, Gov. Hoch granted a full pardon to Mrs. New, restoring her to her full civil rights, and on the 21st day of January, 1908, the district court made an order reviving the action in her name. While in the title of the action, in the amended petition, the name of Clogston as trustee was continued, the petition was signed only by attorneys for Mrs. New as plaintiff.

The defenses raised by the answer to the amended petition were (1) that the attempted

revivor is null and void; (2) general denial; (3) that the petition is barred by the two-year statute of limitations; (4) that on April 2, 1901, the district court, after sustaining a demurrer to plaintiff's petition in the same action which was decided on appeal to this court, in 68 Kan. 807, 74 Pac. 610, rendered judgment that the defendant, J. A. Smith, was the owner and entitled to the possession of the land. The amended reply upon which the case was tried, consisted of a general denial of the third and fourth defenses. The jury was impaneled, and both parties submitted evidence. At the conclusion of the plaintiff's evidence in rebuttal, the defendant demurred to all the evidence given by the plaintiff for the reasons (1) that such evidence does not show the plaintiff is entitled to a verdict or judgment against the defendant, Smith; (2) that the evidence shows that the defendant is entitled to a verdict and judgment against the plaintiff for costs; (3) that the evidence of plaintiff shows that any interest she ever had in the land had been conveyed to the defendant, and, in substance, that there is no evidence to show that such conveyance is not valid and binding on the plaintiff, but, on the other hand, shows defendant is the owner and in possession and entitled to said real estate. The demurrer was sustained and judgment rendered for defendant. Plaintiff appeals.

It is evident that the bringing of an action by the plaintiff's brother is to be entirely disregarded in the decision of this case. Neither she nor the trustee of her estate was a party thereto. It is conceded that the plaintiff was disqualified to bring an action while she was in the penitentiary under sentence for a felony, and that no action for the recovery of the land could legally be brought until a trustee of her estate was appointed and qualified. Until such time the running of the statute of limitations was tolled notwithstanding any knowledge the plaintiff or Clogston, who became the trustee, may have had of any fraud in the procuring of the deed to the land from her.

[4] On the very day of his appointment the trustee commenced an action to recover the land, and the plaintiff and others joined with him as plaintiffs in the petition filed and other relief than the recovery of the land was prayed for therein. A demurrer to the petition, on the ground that there was a misjoinder of causes of action and other grounds, was filed and sustained by the court below, and the plaintiffs brought the action to this court for review. This court sustained the ruling upon the ground of misjoinder. The record does not disclose upon what ground the district court based its ruling. It is therefore to be presumed that it was on the same ground upon which the decision was affirmed. *Holderman v. Hood*, 78 Kan. 46, 96 Pac. 71; *Routh v. Brd. of Co.*

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Com'rs of County of Finney, 84 Kan. 25, 113 Pac. 397.

[6] As we shall later see, the judgment, purporting to be for the defendant awarding him the title and right of possession of the land, was void. The plaintiff failed, then, to maintain the action in the district court on an order sustaining a demurrer on the ground that the causes of action set forth in the petition were improperly joined. Such failure is within the meaning of "otherwise than upon the merits" as used in Code Civ. Proc. § 22 (Gen. St. 1909, § 5615). The trustee commenced that action within due time, and failed therein "otherwise than upon the merits." By the provisions of section 22 of the Code, he had one year after such failure to commence a new action.

[8] It is contended that since plaintiffs stood upon their petition for the purpose of appealing the judgment of the court thereupon rendered, although void so far as it purports to finally determine the merits of the case, must at least be regarded as a valid dismissal of the action, and the action of the trustee then, at least, "failed otherwise than upon the merits," that he had only one year thereafter to commence a new action, and not one year after the Supreme Court affirmed the ruling. It is true that, when a final judgment is appealed from, the judgment is only suspended during the appeal, and, when affirmed, becomes effective from the time it would have been effective, had the appeal not been taken, for the purpose of maintaining liens, and perhaps generally. The sustaining of the demurrer and the dismissal of the action are not judgments, but are interlocutory orders (Code Civ. Proc. §§ 562, 565 (Gen. St. 1909, §§ 6158, 6160)), from which an appeal is expressly granted. The appellee's contention would compel a party who deems himself prejudiced by such an order to forego his right of appeal, as frequently, perhaps generally, he cannot get a hearing thereon in the Supreme Court and commence a new action within one year. To commence a new action in the same court without an appeal is virtually to submit to what he regards as an illegal order. This is not the intent of the Code. Construing sections 22 and 565 of the Code together, we hold that the trustee had one year from the filing of the decision in the Supreme Court within which to commence a new action.

[1,3] He commenced this action within two months after the final decision in that case, and it is still properly pending. Much space in the briefs is devoted to the discussion of the question whether the 15-year statute of limitations prescribed in actions of ejectment or the 2-year statute for relief on the ground of fraud is applicable to this case. In the view we take of the case it is not material, as we think even the 2-year limitation had not expired. The action in form is ejectment, but, as was shown by

the undisputed evidence, to obtain the relief sought for, the plaintiff must show that a deed of record from herself to one Schultz was fraudulently obtained from her. Looking beyond the mere form of the action to the real issue therein, we hold that the action is an action for relief on the ground of fraud, and that the 2-year limitation applies.

[9] Another contention of the defendant is that the revivor, which was had in this action by which Mrs. New was made a party to the action in lieu of her trustee, was not authorized by law. In this we think the defendant is correct. The action of the trustee did not abate by the restoration of the plaintiff to full rights of citizenship effected by her pardon. Hence there could be no revivor thereof.

The action was commenced by the trustee for her benefit, and with the consent of the trustee, upon her pardon, she could have been substituted in his stead as plaintiff, and we know of no reason why he, with her consent, could not have proceeded therein as plaintiff to final judgment. No one else, certainly not the defendant, had any interest in the matter. She was, in fact, substituted as plaintiff in lieu of the trustee, and this was proper. The form is immaterial. For decisions dealing with different facts, but involving the same principles of law, see *Shattuck v. Wolf*, 72 Kan. 366, 83 Pac. 1093; *Mo. Pac. Ry. Co. v. Moffatt*, 60 Kan. 113, 55 Pac. 837, 72 Am. St. Rep. 343.

[5] Again, it is contended by the defendant that, upon the sustaining of the demurrer to the petition in the first action commenced by the trustee and others, a judgment was rendered that the defendant was the owner and entitled to the possession of the land in question, and that the Supreme Court affirmed that judgment which became and is res adjudicata as to the issues herein involved. If the district court rendered such judgment, which seems improbable, it was based upon no issue of fact or of law which was submitted for determination. The trustee in his petition had asserted his ownership and right to the possession of the land for the plaintiff, and the defendant had neither asserted any right thereto in himself nor denied the allegation of the trustee. If the judgment was rendered, it was not res adjudicata, but was void. It was coram non iudice.

But, it is urged, the judgment was affirmed in the Supreme Court. This court, as the opinion shows, considered only the questions raised by the demurrer. If it can be said from the language used in the decision that the Supreme Court affirmed the judgment as a whole, including the adjudication of the ownership and right of possession of the land, this would give no validity to the void judgment. The so-called judgment was a nullity. The Supreme Court cannot make something out of nothing. In

Gille v. Emmons, 58 Kan. 118, 48 Pac. 569, 62 Am. St. Rep. 609, it is said: "A judgment entirely outside the issues in the case and upon a matter not submitted to the court for its determination is a nullity; and may be vacated and set aside at any time upon motion of the defendant. A proceeding in error in which there was an affirmation does not validate the void judgment, nor prevent the trial court from subsequently vacating the same." See, also, Munday v. Vail, 34 N. J. Law, 418; St. Lawrence Boom & Mfg. Co. v. Holt, 51 W. Va. 352, 41 S. E. 351; Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464.

The only proper proceeding upon the sustaining of the demurrer was to allow, on request, the filing of an amended petition; or, if the plaintiff elected to stand upon his pleading, to dismiss the action. It is evident from a reading of the decision, rendered on the review of the case in this court (68 Kan. 807, 74 Pac. 610), that the attention of the Supreme Court was not called to the existence of a judgment in favor of the defendant on the merits. It is apparent that the plaintiff in the action, both in the district court and in this court, failed "otherwise than upon the merits," and he had one year from the affirmation to commence a new action. The defendant, as shown by the evidence, claims title to the land through a deed thereto from the plaintiff to one E. C. Schultz and a quitclaim deed from E. C. Schultz and her husband to the defendant. Hence there need be no further consideration of the chain of title.

On the trial the plaintiff offered evidence of title in herself down to the time when the defendant showed record evidence of a quitclaim deed from the plaintiff to E. C. Schultz. The authorities are numerous, and, it is believed, unconflicting that, if Schultz acquired no valid title to the land from the plaintiff, the defendant could under the circumstances here presented acquire no valid title through a quitclaim deed from Schultz. In other words, a quitclaim deed conveys only such title as the grantor has and the grantee takes subject to all outstanding equities, liens, and titles if such there be provided their existence could have been discovered by diligent inquiry. The burden rested upon the plaintiff to show the invalidity of her deed to Schultz, or rather, so far as the ruling on the demurrer is concerned, to produce some evidence tending to show that the deed was invalid. If she had produced such evidence, the demurrer should have been overruled. On the demurrer to the plaintiff's evidence in rebuttal, it was within the province of the court to determine neither the credibility of the witnesses nor the weight of the evidence, if there was any evidence tending to impeach the validity of the deed. The credibility of the wit-

nesses and the weight to be given to their evidence are questions for the jury to determine, and, until their verdict is rendered, are not for the consideration of the court.

The evidence showed that James Schultz was at the time the deed was executed by her the attorney for Mrs. New, and obtained the deed from her to his wife as grantee. By the well-recognized rule of law he was bound to exercise the highest degree of fidelity in dealing with her. There is, however, abundant evidence, if true, to indicate that the deed was without consideration, and was fraudulently obtained. The demurrer should therefore have been overruled.

The judgment is reversed, and the case is remanded, with instructions to grant a new trial. All the Justices concurring.

#### STATE ex rel. COPLIN et ux. v. SUPERIOR COURT, SPOKANE COUNTY, et al.

(Supreme Court of Washington. Dec. 15, 1911.)

#### CERTIORARI (§ 5\*)—GROUNDS—REMEDY BY APPEAL.

Certiorari does not lie to review orders reviewable on appeal.

[Ed. Note.—For other cases, see Certiorari, Cent. Dig. §§ 5, 6; Dec. Dig. § 5.\*]

Department 2. Certiorari by the State of Washington, on the relation of W. A. Coplen and wife, against the Superior Court for Spokane County and J. Stanley Webster, judge thereof, to review orders of the Superior Court in a pending case. Denied.

Cannon, Ferris & Swan, and John B. White, for plaintiff. Fred H. Witt, for respondents.

PER CURIAM. The relators have applied for a writ of certiorari to the superior court of Spokane county, asking us to review certain orders made by the superior court in a case then pending before it, wherein H. R. Von Dreathen is plaintiff and W. A. Coplen and wife are defendants. From an inspection of the application and the record before us, we are of the opinion that all the questions sought to be determined upon this hearing may properly be raised upon appeal.

Therefore, following the established practice of this court in such cases, the writ is denied.

#### SCAMMON v. SCAMMON.

(Supreme Court of Washington. Dec. 9, 1911.)

#### 1. APPEAL AND ERROR (§ 900\*)—REVIEW—PRESUMPTIONS.

On appeal parties are presumed to have made all the showing at their command in the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 900.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**2. DIVORCE (§ 246\*)—DECREE—REFUSAL TO VACATE—EFFECT.**

An order denying a motion to vacate a divorce decree so far as it applies to property rights is equivalent to a decree on the merits.

[Ed. Note.—For other cases, see Divorce, Dec. Dig. § 246.\*]

Department 2. Appeal from Superior Court, Kittitas County; Ralph Kauffman, Judge.

Action by Martha Alice Scammon against Richard Scammon. From an order refusing to vacate a decree so far as it applies to property rights, plaintiff appeals. Affirmed.

Austin Mires, John Van Zante, and A. H. Tanner, for appellant. E. K. Brown, for respondent.

CHADWICK, J. [1, 2] This is an appeal from an order denying a motion to vacate a judgment and decree of divorce in so far as it applies to property rights. It appears that plaintiff instituted a suit, and the testimony to sustain her alleged grounds of divorce was heard by the court, and that thereafter defendant was brought in to make disclosure of the common property. Plaintiff says that she had expected to be present at this hearing, and had furnished her attorney a list of witnesses who, had they been subpoenaed, would have given evidence to sustain her allegations that the community was possessed of a money-making business and of property aggregating in value \$18,000 or more. The defendant appeared and was examined by counsel for the respective parties, but neither plaintiff nor her witnesses were present. Her attorney had informed her by wire that her presence would not be necessary. The court decreed a divorce, gave the community property subject to debts to defendant, and charged him with the payment of suit money, and an allowance of alimony of \$25 per month. After several months plaintiff filed her motion, supported by sworn petition, in which she sets up several statutory grounds for the vacation of decrees and judgments; the gist of her petition being that she had, by reason of the oversight, neglect, or design of her then attorneys, been deprived of making a showing that would have sustained the allegations of her complaint with reference to the character and extent of the property. This petition came on for hearing, both parties appearing and being represented by present counsel. The plaintiff and several witnesses, some of whom she says she had expected to testify in her behalf on the former hearing, were called and gave evidence. Defendant was a witness in his own behalf. The issue as to the property was fairly tried out, and in the judgment of the trial judge, in which judgment we concur, plaintiff failed utterly to substantiate her

assertions that the community had been possessed of property of any considerable value over existing indebtedness. Whatever irregularities may have occurred in the former proceeding which might have tended to the prevention of a fair trial, it is clear to us that they were all cured by the subsequent proceedings and the hearing upon the petition to vacate. Nor do we find merit in the contention that the evidence is insufficient to warrant the present order of the court. The court was open and both parties might have made, and we must presume they did make, all the showing at their command. An order denying the motion to vacate as made in this case is equivalent to a decree on the merits, and, being sustained by the weight of evidence, must be affirmed. Judgment affirmed.

DUNBAR, C. J., and MORRIS, CROW, and ELLIS, JJ., concur.

**STATE v. JONES.**

(Supreme Court of Washington. Dec. 15, 1911.)

**1. INTOXICATING LIQUORS (§ 156\*)—LOCAL OPTION LAW—GIFTS IN PROHIBITION TERRITORY.**

Local Option Law (Laws 1909, c. 81) §§ 9, 12, making it unlawful to sell, give away, or in any manner dispose of intoxicating liquor in prohibition territory, except gifts to guests within private dwellings or apartments, prohibit any gift of liquor within dry territory without reference to the purpose of evading the law, except gifts to guests within private dwellings or apartments.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 155; Dec. Dig. § 156.\*]

**2. STATUTES (§§ 107, 114\*)—TITLE—SUFFICIENCY.**

The local option law (Laws 1909, c. 81), entitled, "An act to provide for the submission to the qualified electors of the question whether the sale of intoxicating liquors shall be licensed or prohibited, providing for the enforcement of the result of the elections \* \* \* defining offenses \* \* \* and providing penalties therefor," contains but one subject within Const. art. 2, § 18, and the provisions of the act penalizing gifts of intoxicating liquors within dry territory, except within private dwellings or apartments, are germane and within the title.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. §§ 107, 114.\*]

Department 2. Appeal from Superior Court, Whatcom County; John A. Kellogg, Judge.

W. C. Jones was charged with violating the local option law; and, from a judgment sustaining a demurrer to the information, the State appeals. Reversed.

Frank W. Bixby and Howard C. Thompson, for the State. Waters & Downer and Chas. A. Sather, for respondent.

MORRIS, J. Appeal by the state from an order sustaining a demurrer to an informa-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

tion charging a violation of what is commonly known as the local option law of 1909 (Laws 1909, c. 81). The charging part of the information material to the point submitted is: "The said W. C. Jones at Ferndale, Whatcom county, Washington, on or about January 28, 1911, did willfully and unlawfully give away to an adult person intoxicating liquor on the public streets of Ferndale, Washington, the said giving away being within a unit in which the giving away of intoxicating liquor was prohibited and unlawful." To this information a demurrer was sustained, which is supported by respondent upon two grounds: (1) The Legislature did not intend to prohibit any gifts in a dry unit other than such gifts as are made for the obvious purpose of evading the provision against sales. (2) If the Legislature did attempt to prohibit all gifts except within the giver's private house or apartments, that portion of the act is unconstitutional, as contrary to article 2, § 19, of the Constitution: "No bill shall embrace more than one subject and that shall be expressed in the title."

[1] Upon the first contention the language of the act is so plain as to hardly call for any construction. Section 9 of the act provides in part: " \* \* \* It shall not be lawful to sell, give away, or in any manner dispose of intoxicating liquor in any quantity whatsoever, within the limits of the unit in which the election was held (and the electors voted against license): Provided, that the words 'give away' shall not be construed to prohibit the giving of intoxicating liquor to guests by a person in his private dwelling or private apartments, unless such dwelling or private apartments shall become a place of public resort. \* \* \*" Section 12 reads as follows: "The giving away, delivering or handling of any intoxicating liquor by any storekeeper at any place of business, or the taking or soliciting of orders, or the making of agreements for the sale or delivery, or for the giving away, of any intoxicating liquor within the limits of a unit which shall have voted against licensing the sale of intoxicating liquors therein, or any other device to evade the provisions hereof, shall be deemed an unlawful sale of intoxicating liquor, and any person guilty thereof shall be punished as provided in the preceding chapter." If section 12 stood alone, it might be subject to the construction contended for by respondent—that the gift sought to be prohibited was one made for the obvious purpose of evading the provision against sales, and was manifestly intended to cover any device resorted to for the purpose of evading the provision prohibiting sales within dry units. Section 9, however, answers such contention. While section 12 covers a gift made for the purpose of evading the restriction against sales, section 9 can have no meaning, unless, as

plainly expressed within its terms, it was there intended to write a prohibition against all gifts irrespective of their purpose, or by whom made, excepting, within the language of the proviso, gifts made to guests within private dwellings or apartments. The whole scheme of disposing of intoxicating liquor contrary to the evident intention of the law is covered in these two sections, and the only lawful disposition of liquor within a dry unit is the gift to a guest within one's private home. As was said in *People v. Myers*, 161 Mich. 40, 125 N. W. 701: "The local option law was intended, not only to wipe the business out of existence in the county, but to prevent the inhabitants of the county from obtaining liquor within the county. For the latter purpose the act prohibits any person from giving away intoxicating liquor, and thereby heads off the numerous subterfuges which would interfere with the enforcement of the law." If respondent's contention be given effect, any person within a dry unit could load a dray with liquor, and stand on the street corner and give to all who would receive, intending thereby an act of hospitality or good fellowship, as he contends the act charged was, or as an expression of sympathy with the dry throats of those who were wont to indulge in the use of liquor whenever opportunity afforded. All he need do to obtain the law's protection would be to refuse recompense either directly or indirectly, except the gratitude of those to whose appetite he had administered. Such a construction would make the law a farce, and dry units an abomination. It hardly needs argument to convince that such was not the intention of the Legislature in passing an act giving to the people of each unit the right to restrict, not only the sale, but the use of, intoxicating liquor, except within the privacy of the home. We therefore hold that any gift of intoxicating liquor within any dry unit is a violation of law, except it come within the only exception made in the act—a gift to guests within a private dwelling or apartment. A similar holding under like statutes may be found in *State v. Danforth*, 62 Vt. 188, 19 Atl. 229; *People v. Myers*, supra; *People v. McCall*, 161 Mich. 674, 126 N. W. 1052; *People v. Bedell*, 162 Mich. 230, 127 N. W. 33.

[2] Neither can we subscribe to respondent's second contention that if it was the intent of the Legislature to prohibit gifts of liquor in dry units, except within private dwellings or apartments, the expression of such intent is unconstitutional, as not within the title of the act. The title to the act is: "An act to provide for the submission to the qualified electors of the question whether the sale of intoxicating liquors shall be licensed or prohibited, providing for the enforcement of the result of the elections hereunder, defining offenses hereunder and pro-

viding penalties therefor." In determining the subject of a criminal statute within the meaning of the constitutional provision, it can generally best be perceived by ascertaining the evil the law seeks to remedy and the act it seeks to penalize. It is apparent from the wording of the title that the Legislature is making provision for determining the manner in which the will of the people as to the sale of liquors shall be ascertained and determined, and, when so determined, how that will shall be enforced, and the results of the election preserved. The act contains but one subject—the regulation of the liquor question by the qualified electors. In effecting its purpose the act contains many provisions, but, so long as these provisions or any of them are germane to the general subject of the act and are consistent with the regulation which is made the subject of the act, they are within its title, although no specific reference be there made to them. It is just as much within the power and intent of the Legislature in specifically "providing for the enforcement of the result of the elections hereunder as it has in this title" to say that gifts as well as sales shall be penalized. The word "sale" in the title is not determinative of the only act penalized. Its limitation is found in the submission to the people "of the question whether the sale of intoxicating liquors shall be licensed or prohibited." If the verdict shall be for prohibition, then the title contains provisions for the enforcement of the result, and gives notice that the act defines offenses and violations. There is no necessity under any constitutional provision of burdening the title with all the provisions contained in the act for its enforcement, nor defining its offenses, since it satisfies the constitutional provision by giving notice that it does contain provisions for the enforcement of the law, and does define offenses thereunder. The nature of such provisions or the character of such offense can be safely left to the sections of the act. Otherwise no act could be more descriptive nor comprehensive than its title. It is therefore clearly within the subject and title of the act to provide for its enforcement by penalizing gifts of intoxicating liquors within dry units, except within private dwellings or apartments. The constitutional requirement that an act shall embrace but one subject is intended to prevent hiding away in the body of the act matters not related to the subject the act is intended to deal with, and of which the title when read gives no indication. The further provision that the subject shall be expressed in the title does not require that the title shall be an index to the act, nor make special reference to all its provisions. *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *Seattle v. Barto*, 31 Wash. 141, 71 Pac. 735; *State*

*v. Sharpless*, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; *State ex rel. Zenner v. Graham*, 34 Wash. 81, 74 Pac. 1058; *Johnston v. Wood*, 19 Wash. 443, 53 Pac. 707; *Percival v. Cowychee Irr. Dist.*, 15 Wash. 480, 46 Pac. 1035; *Callvert v. Winsor*, 26 Wash. 368, 67 Pac. 91; *In re Donnellan*, 49 Wash. 460, 95 Pac. 1085. In the following cases it has been held that a gift of intoxicating liquor may be penalized under a statute whose title only provided for the regulation or prohibition of its sale: *State v. Adamson*, 14 Ind. 296; *Stickrod v. Commonwealth*, 86 Ky. 285, 5 S. W. 580; *State v. Deusting*, 33 Minn. 102, 22 N. W. 442, 53 Am. Rep. 12; *Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522; *Thomasson v. State*, 15 Ind. 449. In the *Adamson Case* the court well says: "When we consider the object for which such a law was passed, viz., to prevent abuses that might flow from the unrestrained disposal of liquors in these respects, it would seem that the giving away under circumstances which might produce the same evil results as the selling would be a matter properly regulated in connection with the selling. Indeed, it may be regarded as a necessary incident to a statute regulating the sale to secure its efficient operation. It is a necessary precautionary provision to prevent evasion of the prohibition to sell. All experience under license laws proves this." Similar rules are announced in *State v. Owens*, 9 Kan. App. 595, 58 Pac. 240; *Luck v. Sears*, 29 Or. 421, 44 Pac. 693. See, also, note to *Crookston v. County Commissioners*, 79 Am. St. Rep. 453. It is conceded that cases may be found holding that a gift is not included within a title regulating sales of intoxicating liquor. Those cases, however, follow an extreme, technical construction of constitutional provisions as applied to the title of acts, which this court has never adopted. We are not therefore now disposed to follow them, based as they are upon views contrary to those so oft expressed by this court in construing this constitutional requirement.

It follows that the judgment is reversed.

DUNBAR, C. J., and ELLIS, CROW, and CHADWICK, JJ., concur.

#### GARLAND v. GARLAND.

(Supreme Court of Washington. Dec. 15, 1911.)

#### DIVORCE (§ 31\*)—GROUNDS—NONSUPPORT.

Neglect to support his family for such time as reasonably shows a settled intention to refuse permanently to support them is ground for divorce, under Rem. & Bal. Code, § 962, and neglect or refusal for practically three months is sufficient.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 95, 96; Dec. Dig. § 31.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Department 1. Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Action by Bessie Mae Garland against Grover Garland. Judgment dismissing the action, and plaintiff appeals. Reversed and remanded.

Reeves & Reeves, for appellant.

DUNBAR, C. J. This is an action for divorce, brought by the wife, the appellant in the case. The cause of action alleged is nonsupport. The court, after making the jurisdictional findings of fact, found in addition:

"(3) That on the 20th day of February, 1911, the defendant without any cause whatever, other than that the plaintiff and defendant had some slight words over the refusal of defendant to take plaintiff to a show, told her that from henceforth they should be nothing to each other, and on the following day wrote her a letter stating that he would no longer live with her, and that he hoped it would never be necessary for them to see each other's faces again.

"(4) That thereafter, and on February 23, 1911, the plaintiff endeavored to induce the defendant to live with her as her husband, and was advised by the defendant that he had no longer any affection for her, and at which time the plaintiff honestly told the defendant that her love for the defendant was such, and her desire to continue the married relations were such, that she would accompany him to their home and live with him, even though he did not have any affection for her at that time, and would endeavor to gain his affection, which offer the defendant refused; and thereafter, on the same or following day, the defendant sent the few personal effects of plaintiff to Wenatchee.

"(5) That the plaintiff and defendant are far different in temperament, and are incompatible, in that the plaintiff is of a lively, vivacious, and talkative disposition, while the defendant is taciturn, a man of few words, and his wife's talking to him annoys him.

"(6) That the defendant is a large, strong, able-bodied man, 26 years old, and is capable of earning a good salary by manual labor, and is now and has been at all times herein mentioned enjoying good health.

"(7) That on the day prior to the commencement of this action, at the request of plaintiff, one of her attorneys had a conference with the defendant in an honest endeavor to effect a reconciliation between the plaintiff and defendant, and to induce the defendant to take the plaintiff into his home again as his wife, and make a further effort to continue living together as husband and wife, but all without avail, and at said conference the defendant refused to undertake a resumption of the marriage relation.

"(8) That while plaintiff and defendant were living together as wife and husband, the plaintiff desired that her husband go upon a farm that was then in the possession of the defendant, and reside there, and make a home there for himself and his wife, which defendant refused to do, but for the greater portion of their married life lived with his parents, Mr. and Mrs. J. Garland, domiciling his wife in their said home. To this she objected, and insisted on living unto themselves on the said farm, and this caused a considerable disagreement between them.

"(9) That ever since the 20th day of February, 1911, the defendant has wholly failed to make suitable provision, or any provision whatever, for the support of the plaintiff, and has contributed nothing whatever to her maintenance or support since said date, during which time the plaintiff has resided with her parents in Wenatchee, and has worked during a portion of said time, and is now so working, as waitress in the Wenatchee Hotel, and she has no means of support whatever, and has not had since the 20th day of February, 1911, save and except her own labor and the kindness of her parents."

The court also found that, at the time of the commencement of the action, the plaintiff was anxious and willing to live with the defendant as his wife; but he was unwilling to live with her, or receive her as such, or to maintain her, and did refuse to do either, and continued his refusal down to the day of the trial. Upon the foregoing facts, the judge concluded as a matter of law that the action should be dismissed. From a judgment flowing from this conclusion, this appeal is taken.

Defendant did not testify at the trial, and there is no question raised upon the testimony; the only question being, Do the findings support the judgment of dismissal? We are of the opinion that the court placed too limited a construction upon the statute. Section 982, Rem. & Bal. Code, among other causes which will warrant a divorce, provided: "(4) Abandonment for one year; (5) cruel treatment of either party by the other, or personal indignities rendering life burdensome; (6) habitual drunkenness of either party, or the neglect or refusal of the husband to make suitable provisions for his family." Whatever may be said of other provisions of the statute, it seems to us that this woman has brought herself squarely within the latter part of paragraph 6, viz., the neglect or refusal of the husband to make suitable provisions for his family. The court doubtless took the view that a sufficient time had not elapsed from the time of the refusal of the husband to provide to the time of the action. It will be noticed that, while the statute provides that abandonment must continue for one year, there is no such provision with reference to the husband making suitable provision for his family. The two provisions are in

no way connected. A husband may abandon his wife, so far as consortium is concerned, and at the same time make suitable provision for her support, or he may be willing to live with her and refuse to support her. In the absence of a specified time in the provisions of the statute in relation to support, we can but hold that a reasonable time is within the contemplation of the act, and if a wife is entitled to support for one year, she is entitled to support for one month, or any time, and at all times; the only duty of the court being to determine that the time was of such duration as to reasonably show a settled intention to refuse permanently to support. The time shown by the testimony in this case, as determined from the findings of fact, was from the 20th of February until the 13th day of May, or practically three months. We think this was a sufficient time to indicate such want of support as was contemplated by the statute.

The judgment will be reversed, and the lower court will grant the decree as prayed for.

PARKER, MOUNT, and FULLERTON, JJ., concur.

#### ROBINSON v. AMERICAN FISH & OYSTER CO. (Civ. 856.)

(District Court of Appeal, Third District, California. Oct. 5, 1911. Rehearing Denied by Supreme Court Dec. 4, 1911.)

##### 1. APPEAL AND ERROR (§ 1002\*)—VERDICT—CONCLUSIVENESS.

In an action to charge a principal with the acts of his agent, the evidence of the agent's authority being conflicting, the question was for the jury, by whose finding the appellate court is bound.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

##### 2. PRINCIPAL AND AGENT (§ 123\*)—POWERS OF AGENT—EVIDENCE.

In an action to charge a principal with the contract of his agent, evidence held to warrant a finding, under Civ. Code, § 2300, providing that an agency is ostensible when the principal intentionally or by want of ordinary care causes a third person to believe another his agent, that the agent was possessed of the ostensible power to make the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420-429; Dec. Dig. § 123.\*]

##### 3. PRINCIPAL AND AGENT (§ 116\*)—POWER OF AGENT—APPARENT POWERS.

Secret instructions will not lessen the apparent powers of an agent which have been exercised by him without objection by the principal.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 377, 377½; Dec. Dig. § 116.\*]

##### 4. PRINCIPAL AND AGENT (§ 147\*)—POWERS OF AGENT—SPECIAL AGENCY.

Where an agency is known to be special, or the circumstances connected with it are such

as should put a party dealing with the agent on inquiry, one dealing with the agent is bound to inquire into the nature and extent of the authority conferred, and to deal with the agent accordingly.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 528-533; Dec. Dig. § 147.\*]

##### 5. SALES (§ 187\*)—ACTION FOR PRICE.

In an action to recover for fish sold and delivered, where the quantity of fish sold and received and the price were definitely fixed, interest was properly allowed to the plaintiff, either as compensation for the use of his money, as provided for by Civ. Code, § 1917, or as damages for the wrongful withholding of it, as provided for by section 3287.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 187.\*]

##### 6. SALES (§ 355\*)—ACTION FOR PRICE—PLEADING—ISSUES.

In an action for the purchase price of fish sold, where the defendant did not plead the defense that the fish were in a nonmerchandise condition when received, proof of that defense could not be made.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 355.\*]

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

Action by Ellis Robinson against the American Fish & Oyster Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Webster & Webster (T. H. Selvaage and J. J. Cairns, of counsel), for appellant. Otto C. Gregor and Kenneth Newett, Jr., for respondent.

HART, J. Plaintiff instituted this action for the purpose of recovering the sum of \$815.60, with interest from October 23, 1900, said sum representing, it is alleged, the purchase price of fish sold and delivered by plaintiff and his assignors to the appellant. J. P. Meng, who was made a party defendant, was not served with summons, and the appellant was, therefore, alone proceeded against. Section 414, Code Civ. Proc. The cause was tried by jury, and a verdict returned awarding plaintiff the total sum declared upon, with interest at the rate of 7 per cent. per annum from the 23d day of October, 1900, the date of the delivery of the fish to appellant, and judgment was entered in favor of plaintiff in accordance with the terms of said verdict. The appeal here is by the defendant, American Fish & Oyster Company, from the judgment so entered, the record being brought here by the method authorized by sections 953a, 953b, and 953c of the Code of Civil Procedure. The complaint contains 17 counts, of which 16 represent an equal number of distinct claims of persons and firms for fish sold and delivered to appellant and which claims were, it is alleged, assigned to plaintiff. The seventeenth count is for fish sold and delivered to appellant by plaintiff himself. The complaint is verified. The answer specifically denies,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Cases & Rep'r Indexes



seriatim, the allegations of the several counts of the complaint.

It is charged that the court erred in its rulings as to certain evidence and misdirected the jury in matters of law; that the evidence is insufficient to justify and sustain a verdict awarding to plaintiff any sum whatsoever as against appellant; that it was error to allow interest on the amount returned by the jury in favor of plaintiff and against the appellant.

Of the foregoing assignments the first in importance is that involved in the claim that the evidence does not support the verdict, and to this we will first give attention. The particular contention in this regard is that the evidence shows that the fish delivered by plaintiff to appellant were the "first run of fish" (that is, fish caught on the first night of the season of 1909), and that the agreement was that fish so taken should be delivered to appellant on consignment (that is, upon the understanding that they were so delivered to appellant to be sold by it in San Francisco), and, after deducting a commission for selling said fish, the appellant was to return the balance to plaintiff, and that therefore "the plaintiff could only expect to receive what such fish brought in the market in San Francisco, to which point such fish had been shipped." While there is a conflict in the evidence as to the circumstances by which plaintiff and his assignors were employed to furnish fish to the appellant, there is, nevertheless, in our opinion, sufficient evidence to support the verdict.

1. The facts, as established to the evident satisfaction of the jury, are: The appellant is, as the complaint alleges, a corporation engaged in the business of packing and selling fish, with headquarters in the city of San Francisco. One J. A. Junta had for several years acted as its agent for the purpose of catching, buying, and shipping to it in San Francisco fish taken from Eel river, in Humboldt county. One J. P. Meng had also been for several years engaged in like business on Eel river, representing other San Francisco wholesale fish dealers. Either late in the year 1908 or at the beginning of the year 1909, Junta had a conversation with Meng in which he proposed to employ the latter to buy fish during the season of 1909 for him (Junta) or, more properly, for the appellant. Meng finally agreed to work for Junta upon the understanding that he would be paid for his services at the rate of half a cent per pound of fish so handled by him. The services of Meng were to and did consist in buying fish from a number of fishermen plying their occupations as such on Eel river, packing such fish in boxes and shipping them to appellant in San Francisco in the name of Junta. Meng was authorized by Junta to agree to pay the fishermen from whom he procured fish the price which would be paid during that season "down the river"—that is, whatever price those engaged in the

fishery business at the mouth of the river fixed as the ruling price for fish taken from Eel river that year. Junta stated to Meng that he thought the price so paid would not be less than two cents per pound, and Meng so stated to the fishermen whose fish he engaged to purchase. (It was shown that the price per pound paid to fishermen for fish by those engaged in the business of buying fish "at the mouth of the river" during the season of 1909 was two cents.)

In brief, the testimony of Meng discloses that Junta, acting for and in behalf of appellant, employed him to buy all the fish that he could during the season of 1909 on the terms above set forth, and that, in pursuance of that arrangement, he (Meng) purchased, under special agreement with plaintiff and his assignors, the fish referred to in the complaint. Meng further testified, in direct contradiction to Junta, that the latter never at any time suggested or even intimated that the fish taken from the first night's run and purchased by him (Meng) should be shipped on consignment, and that the proposition as to shipping on consignment he never heard of until after this action was instituted. Indeed, Meng testified that, after a controversy arose between him and the appellant over the payment for the fish he had bought under his arrangement with Junta, he and the fishermen (plaintiff's assignors) held a meeting, at which Junta was present, for the purpose of discussing the situation, and that Junta then declared that the fishermen were entitled to be paid by the appellant; that Junta on that occasion said absolutely nothing about any agreement that the first run of fish should be shipped on consignment or be sold by the appellant on commission.

It was shown that a "camp" (from which term we understand is meant a structure of some sort), bearing the name of the appellant, was established and maintained by Junta on Eel river, and there he carried on the business of catching and buying fish for the appellant during the years 1907, 1908, and 1909. Junta himself testified that, during the years 1907 and 1908, he had employed men at the "camp" catching fish and that he also bought fish for the appellant from other fishermen than those who were employed by him; that he paid for the fish so purchased with money he received from the appellant.

[1] But the appellant erects its entire argument against the sufficiency of the evidence to support the verdict upon the testimony of Junta. It is claimed that his testimony clearly and unmistakably shows that he had no authority to purchase outright fish taken on the first night of the season, and was so expressly instructed by appellant; that Junta communicated to Meng, when making the agreement with the latter, the fact of having received such instructions from his principal and expressly declared

to Meng that he was not authorized to purchase, nor would he receive, the first night's run of fish, except upon the understanding that such fish should be shipped and delivered to appellant on consignment or subject to be sold by appellant upon commission; that the fish described in the complaint were from or consisted of the first night's catch. But upon the question whether he made such statement to Meng there is, as seen, a sharp conflict in the evidence, Meng having, as we have before shown, testified that Junta never at any time stated to him that the fish purchased by him from the first night's run should be shipped on consignment or that appellant had instructed him (Junta) not to purchase fish caught the first night, or that the latter was without authority to contract for the purchase of fish taken from the river on the first night. Of course, it was for the jury to determine the truth of that as well as all other matters of fact as to which a conflict arose in the testimony, and its verdict constituted an implied finding, by which this court is bound, that the agreement as described by Meng was the agreement that was made between the parties.

[2] And we think, as the plaintiff contends, that the jury were clearly warranted in finding, from all the facts and circumstances revealed to their minds by the evidence, that Junta did negotiate the agreement with Meng to the making of which the latter testified, and that Junta was at the least possessed of ostensible power to make such agreement. Section 2300, Civ. Code. That section provides that "an agency is ostensible when the principal intentionally, or by want of ordinary care, causes a third person to believe another his agent who is really not employed by him."

There is, as is clear from what has thus far appeared, no dispute about the employment of Junta as an agent of appellant with authority to procure fish for the corporation from Eel river, but the contention is, as seen, that if Junta made the agreement to which Meng testified, then the former exceeded his authority as such agent in that transaction. But even if it be true in point of fact that Junta thus transcended his authority, the conduct of the appellant, as disclosed by the evidence and as found by the jury, very clearly tended to lead Meng, the plaintiff and the latter's assignors into the belief that Junta was acting within the legitimate sphere of his employment when he entered into the agreement with Meng. The last named and the fishermen with whom he had business in pursuance with the agreement with Junta had been engaged for years in fishing for a livelihood in Eel river and selling their fish, either directly or indirectly, to wholesalers, some of whom had their principal places of business in San Francisco, and they knew that Junta was, during the years 1907 and 1908, the repre-

sentative of appellant, especially appointed and authorized to procure fish for it either by catching or purchasing the same. There had been nothing in his conduct as agent of appellant or in the conduct of the latter with regard to his agency indicating that he was without authority to buy fish from the first night's run. In short, from the whole record, the jury were justified in inferring that appellant had either clothed Junta with unrestricted authority as its agent to make contracts with the fishermen engaged in taking fish from Eel river for the purchase of their fish whenever the same might be taken or caught or that its conduct or silence as to his authority was such as to clearly imply that he was possessed of plenary power to do so.

That appellant knew that Junta purchased fish from the fishermen is not disputed, and if it were, the fact nevertheless would irresistibly follow from the admitted fact that the latter paid for such purchases with money furnished him by appellant. It is equally clear, from all the circumstances, that appellant knew that Junta held himself out, while at the "camp" on Eel river, as the purchaser of fish for appellant, having no "strings" attached or annexed to his authority as such purchasing agent, and yet, if his authority as such agent was in fact limited in any measure, the appellant, then, either willfully or negligently, or, as our Code puts it, "by want of ordinary care," permitted Junta to proceed, ad libitum with the purchasing of fish or the making of agreements to purchase them from the fishermen, regardless of the time at which such fish were taken from the river.

[3] The law will not, of course, permit a principal to escape the liability which it attaches to him by reason of such circumstances as are present here upon the plea that the agent has violated or transcended some limitation that he has secretly or without the knowledge of those with whom his agent as such is to deal placed upon the latter's authority as such agent, and in this case it will imply from the conduct of appellant authority in Junta to make the agreement into which the jury found that he entered with Meng. As is said by all the law writers and all the cases, the rule is that "quiescence is tantamount to acquiescence," and forbids the principal denying an authority which his own conduct has invited those with whom he was dealing to assume. See Clark on Contracts, p. 717, and cases cited in the footnote. So, it may be true—indeed, assumed—that appellant did limit the authority of Junta in the respects specified by the latter, and yet the former, under the circumstances as disclosed here, and according to the implied findings of the jury, is still bound by his acts and estopped by its own conduct from denying his authority to go as far as he did. "Where the special character of the agency is not known, and the principal has clothed the

agent with apparent powers, strangers, in dealing with the agent, may assume that such apparent powers are possessed. The principal cannot, by private communications with his agent, limit the authority which he allows the agent to assume." Clark on Contracts, p. 734, and cases cited.

[4] It is true that the general rule is that "if an agency is known and is special, or if the circumstances connected with it are such as should put a party dealing with the agent on inquiry, it becomes the duty of the person so dealing with the agent to inquire into the nature and extent of the authority conferred by the principal, and to deal with the agent accordingly." Towle v. Leavitt, 23 N. H. 360, 55 Am. Dec. 195; Clark on Contracts, p. 734. But, in the case at bar, as we have seen, there was apparently no occasion for inquiry as to the extent or scope of the authority of Junta, for there was nothing in his acts or his conduct or in those of appellant that warranted inquiry by those with whom he was dealing into the extent of his authority. There appeared, in other words, no extraneous circumstances in connection with Junta's agency that would suggest any question as to any restriction on the extent or scope thereof. To the contrary, there were, as we have shown, circumstances of a very significant character tending to disclose that he was not limited in any degree in his authority to purchase fish caught at any time in Eel river from whomsoever he pleased.

[5] 2. There is no merit in the contention that the plaintiff was not entitled to interest on the several pleaded claims from the 23d day of October, 1910—the day on which the fish mentioned in the complaint were sold and delivered to appellant. The quantity of fish sold to and received by appellant and the price to be paid therefor were definitely fixed and known to appellant. It was not necessary, in other words, to resort to evidence in court or to an accounting or by an accord between the parties to establish the amount due. To the contrary, the amount was susceptible of ascertainment by simple computation. Cox v. McLaughlin, 76 Cal. 60, 18 Pac. 100, 9 Am. St. Rep. 164, and cases therein cited; Easterbrook v. Farquharson, 110 Cal. 311, 317, 42 Pac. 811; Courtney v. Standard Box Co., 117 Pac. 778. Indeed, there seems to have been no dispute as to the quantity of fish delivered to appellant by Meng, and while there was some controversy involving the price per pound which Junta agreed to pay therefor—that is, whether the price agreed upon was a cent and a half or two cents per pound—still the total amount due at either price was capable of ready ascertainment by mere computation and, therefore, required no accounting to reach the precise sum due. As is said in Courtney v.

Standard Box Co., supra, so it is true here: "Whether interest has been allowed upon the theory that compensation is thus awarded plaintiff for the use of his money, past due (section 1917, Civ. Code), or as damages for defendant's (appellant's) wrongful withholding of said money from plaintiff (section 3287, Civ. Code), in either case the allowance was perfectly proper."

The case of Heald v. Hendy, 89 Cal. 632, 27 Pac. 67, cited by appellant as an authority against the allowance of interest in the present case, is not in point. There the action was for a recovery upon certain running accounts, the precise amounts of which could not be ascertained except by an examination of said accounts and evidence as to their correctness.

[6] 3. The offer of appellant to show the condition of the fish referred to in the complaint when they reached San Francisco was properly rejected. The appellant tendered no issue upon that proposition. As seen, it merely denied the indebtedness upon the several claims pleaded by plaintiff. To have permitted proof that the fish were in a bad or nonmerchantable condition when they were received in San Francisco would have been to allow proof of a special defense not pleaded or set up. It is only elementary to say that a special defense, to be available, must be pleaded, and that evidence in support of such a defense where the same is not specially pleaded would be clearly inadmissible, and where admitted under such circumstances against the objection of plaintiff would be erroneous, and, if such defense were sustained, prejudicial.

4. After a careful reading of the court's charge, we have discovered nothing therein to warrant appellant's criticism thereof. The court, in its instructions, seems to have correctly covered all the important and vital points at issue.

The judgment should be affirmed, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

CARPENTER v. SIBLEY et al. (Civ. 799.)  
(District Court of Appeal, Third District, California. March 15, 1911. Rehearing Denied by Supreme Court May 13, 1911.)

#### 1. APPEAL AND ERROR (§ 675\*)—REVIEW—DENIAL OF CHANGE OF VENUE.

The denial of a motion for a change of venue, based on the ground that plaintiff cannot have a fair and impartial trial before said or any jury, cannot be reviewed, the material averments of plaintiff's affidavit, containing all the evidence in support of the motion, being denied by the counter affidavits, and the voir dire

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

examination of the jurors not being in the transcript.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2875; Dec. Dig. § 675.\*]

**2. MALICIOUS PROSECUTION (§ 20\*)—PROBABLE CAUSE—BELIEF IN GUILT OF ACCUSED—GROUNDS.**

To constitute probable cause for a prosecution, which will bar an action for malicious prosecution, one must have had, in addition to a belief that the facts amounted to the offense charged, only such knowledge or information, including information obtained through the ordinary and generally recognized channels of communication, as would superinduce in the mind of an ingenuous and unprejudiced person of ordinary capacity a reasonable belief of guilt of the charge.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 28, 27; Dec. Dig. § 20.\*]

**3. MALICIOUS PROSECUTION (§ 64\*)—PROBABLE CAUSE—EVIDENCE.**

Evidence on an action for malicious prosecution, the prosecution having been for subornation of perjury, held to warrant a finding of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 151-153; Dec. Dig. § 64.\*]

**4. APPEAL AND ERROR (§ 909\*)—RECORD—PRESUMPTION.**

The record on appeal by plaintiff in an action for malicious prosecution not showing all the evidence that was presented to the grand jury and used on the trial of the indictment, it would be presumed that there was a sufficient showing to constitute probable cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3675; Dec. Dig. § 909.\*]

**5. MALICIOUS PROSECUTION (§ 56\*)—PROBABLE CAUSE—BURDEN OF PROOF.**

Plaintiff in an action for malicious prosecution has the burden of proof as to probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 112-116; Dec. Dig. § 56.\*]

**6. GRAND JURY (§ 41\*)—FINDING BY GRAND JURY—COLLATERAL ATTACK.**

The action of a grand juror cannot, in a collateral proceeding, as an action for malicious prosecution, be impeached by his testimony that he did not intend to find any such indictment.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 86, 87; Dec. Dig. § 41.\*]

**7. MALICIOUS PROSECUTION (§ 59\*)—PROBABLE CAUSE—EVIDENCE.**

Evidence that a grand juror did not intend to find the indictment has no relation to the question of probable cause for the prosecution by others.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 125-137; Dec. Dig. § 59.\*]

**8. EVIDENCE (§ 314\*)—HEARSAY.**

The question to a witness, "After refreshing your memory from that exhibit, who offered S. these inducements so to testify?" is objectionable as calling for hearsay; witness not claiming to know who offered the inducements.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 314.\*]

**9. MALICIOUS PROSECUTION (§ 59\*)—PROBABLE CAUSE—EVIDENCE.**

A., the county attorney, sued for malicious prosecution, because of prosecuting plaintiff for

inducing S. to commit perjury on the trial of E., having been put on the stand by plaintiff and interrogated as to his reasons for the course he pursued, a statement purporting to have been made in jail by S., which was evidence that he at the trial of E. did commit perjury, and which was part of the information which came to A., as county attorney, and on which he acted, was admissible on the question of probable cause, though he did not ask the questions, or hear the answers contained in the statement, or see it signed, but on his cross-examination only stated that he knew the signature to be that of S., and that the statement was the one he referred to in his direct examination.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 125-137; Dec. Dig. § 59.\*]

**10. MALICIOUS PROSECUTION (§ 59\*)—"PROBABLE CAUSE"—EVIDENCE.**

Probable cause, depending not on the actual state of the case, but on honest and reasonable belief, being necessarily the product, in part, of hearsay declarations, the prosecuting attorney, being called on in an action for malicious prosecution to justify his course, may give the sources of his information, and relate in detail not only the facts of his personal knowledge, but those communicated by others (citing 6 Words and Phrases, 5618-5620; vol. 8, p. 7785).

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 125-137; Dec. Dig. § 59.\*]

**11. WITNESSES (§ 275\*)—CROSS-EXAMINATION.**

A., the district attorney, sued by C. for malicious prosecution for having prosecuted C. for inducing S. to commit perjury at the trial of E., having been put on the stand by plaintiff, and asked if he had not been sued by plaintiff for slander based on his statement at the trial of E., the purpose thereof being to show malice on his part, could on cross-examination, to rebut such inference and show his good faith, state just what he then said.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.\*]

**12. WITNESSES (§ 275\*)—CROSS-EXAMINATION OF PARTY.**

A district attorney sued for malicious prosecution of C. for subornation of perjury, may on cross-examination testify to all the information imparted to him as district attorney on which he acted, he having been called as a witness for plaintiff, and on his examination in chief a part only of the information having been called for, and one informant, an alleged thief and perjurer, having been singled out, and the matter left so that it might appear that this was the only warrant for defendant's action.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.\*]

**13. WITNESSES (§ 275\*)—CROSS-EXAMINATION.**

A., sued for malicious prosecution of C. for inducing S. to commit perjury, having, as a witness for plaintiff, been asked whether he agreed not to prosecute S., if S. would give his evidence in certain cases, could, on cross-examination to show his good faith in the transaction, explain fully what occurred between him and S. as to the promise of immunity.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

**14. MALICIOUS PROSECUTION (§ 50\*)—PROBABLE CAUSE—EVIDENCE.**

That one at the time of trial of the action against him for malicious prosecution knows that one of the statements on which he acted in bringing the prosecution was false in many particulars does not affect the question of probable cause.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 125-137; Dec. Dig. § 59.\*]

**15. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR.**

One is not harmed by the sustaining of objection to his question; the witness having subsequently testified fully as to the matter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195-4206; Dec. Dig. § 1058.\*]

**16. EVIDENCE (§ 471\*)—CONCLUSION.**

The question asking witness to state whether or not he saw plaintiff suborn a witness at a trial is objectionable as calling for a conclusion.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2149-2185; Dec. Dig. § 471.\*]

**17. TRIAL (§ 97\*)—STRIKING TESTIMONY—INVITED ERROR.**

Plaintiff in an action against a district attorney for malicious prosecution, having asked defendant if he had courted an investigation in court of the charge that he had attempted to secure money from plaintiff, on condition and promise that the indictment against plaintiff be dismissed, cannot complain of the answer as scandalous and libelous, which, while somewhat discursive and argumentative, amounted to no more than a negative, with his reasons for not courting the investigation, failure of plaintiff to make his charges sufficiently definite.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 97.\*]

**18. APPEAL AND ERROR (§ 928\*)—RECORD—PRESUMPTION.**

The record not purporting to contain all the instructions given, refusal of requested instructions may be presumed to have been justified by instructions given.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.\*]

**19. APPEAL AND ERROR (§ 1029\*)—HARMLESS ERROR—PARTY NOT ENTITLED TO SUCCEED.**

Plaintiff in an action for malicious prosecution is not harmed by any error in rulings on evidence, and in giving and refusing instructions the uncontradicted facts warranting a direction for defendants, on the ground that there was probable cause for prosecution.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4035, 4036; Dec. Dig. § 1029.\*]

**20. MALICIOUS PROSECUTION (§ 24\*)—PROBABLE CAUSE—EVIDENCE—CONVICTION.**

One's conviction on a prosecution, though reversed on appeal, is conclusive of probable cause, in the absence of evidence of conviction having been obtained by fraud.

[Ed. Note.—For other cases, see Malicious Prosecution, Cent. Dig. §§ 49-55; Dec. Dig. § 24.\*]

Appeal from Superior Court, San Joaquin County; F. H. Smith, Judge.

Action by A. H. Carpenter against W. F. Sibley and others. Judgment for defendants. Plaintiff appeals. Affirmed.

See, also, 153 Cal. 215, 94 Pac. 879, 15 L. R. A. (N. S.) 1143, 126 Am. St. Rep. 77.

A. H. Carpenter, for appellant. Nicol & Orr, G. F. McNoble, Louttit & Louttit, and A. H. Ashley, for respondents.

**BURNETT, J.** The defendant W. F. Sibley was the sheriff, the defendant A. H. Ashley the district attorney, and the defendant George F. McNoble the assistant district attorney, of San Joaquin county during all the times mentioned in the complaint. The Fidelity & Deposit Company of Maryland was the surety on the official bond of said Sibley, and John N. Stennett, the other defendant, was, it is alleged in the complaint, "a thief and perjurer who bartered his testimony to other defendants herein for immunity from crime."

Among the allegations against these defendants is that "they corruptly, maliciously, and without probable or any cause prosecuted plaintiff before the grand jury and before a trial jury in the superior court and on appeal before the Supreme Court for the crime of subornation of perjury, and whereby they obtained a judgment of conviction against plaintiff by means of fraud, coercion, and by false and perjured testimony." Plaintiff was convicted and sentenced to the penitentiary for five years, but the judgment was reversed by the Supreme Court. 136 Cal. 391, 68 Pac. 1027. The said criminal action was thereupon dismissed by the district attorney, but after the defendant therein had suffered confinement in the county jail for a period of 261 days. The trial herein was before a jury and a general verdict was rendered in favor of defendants. The appeal is from the judgment and the order denying a motion for a change of venue.

[1] It is apparent that we cannot disturb this latter order. The only evidence in support of the motion is found in the affidavit of plaintiff wherein he sets out that "he has reason to believe and does believe that he cannot have a fair and impartial trial of said action in said county before said or any jury" for certain reasons, which he enumerates. The material facts therein averred are all denied in the counter affidavits of the sheriff, the district attorney, and assistant district attorney, and these defendants are positive in the opinion that there was nothing to prevent the plaintiff from having a fair trial. The voir dire examination of the jurors is not included in the transcript, and hence we cannot hold, in view of the action of the court below upon conflicting affidavits, that a single citizen liable for jury

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

duty in the county was disqualified to give plaintiff a fair and impartial trial.

Many points are made by appellant for a reversal of the judgment. Those that we consider of sufficient importance to merit consideration we proceed to notice.

[2] In the first place, it is insisted that no evidence was produced that plaintiff committed the crime charged against him, and therefore it must be held that he was prosecuted without probable cause. The gravamen of the perjury charge in the indictment is that at the trial in the justice court of Stockton township of the charge of petit larceny against one Arthur Ennis J. H. Stennett falsely testified "in substance and to the effect that he, the said J. H. Stennett, did not at any time on the night of January 8, A. D. 1901, or on the morning of January 9, 1901, or at all, see one Arthur Ennis on the premises of the said J. H. Stennett, near Lodi, in San Joaquin county, and the particular charge in said indictment against plaintiff herein was that the "said A. H. Carpenter, at and in said San Joaquin county, California, on or about the 23d day of January, A. D. 1901, did feloniously, willfully and corruptly, knowing the testimony so given by the said J. H. Stennett as aforesaid, would be, and was knowingly, willfully and corruptly false as aforesaid, and well knowing that the said J. H. Stennett well knew that the said statement that he, the said J. H. Stennett, was about to make and did make under oath, in the manner and form aforesaid, was knowingly, willfully and corruptly false, suborn, incite, and procure the said J. H. Stennett, being so sworn as aforesaid, to feloniously, knowingly, willfully, and corruptly and falsely testify as aforesaid."

Plaintiff's contention is that the only evidence that he committed the offense is found in the answers to three leading and suggestive questions asked of the said John H. Stennett, as follows: "Q. I will ask you whether he asked you then and there that afternoon whether or not you ever saw the defendant Ennis at any time out to your premises on the 8th day of January or the morning of the 9th of January, or at all? A. Yes, sir. Q. What did you answer to that? A. No, sir. Q. I will ask you whether or not at any time previous to the time that you—that question was asked you and that answer given by you—whether Carpenter had even talked over with you that that was to be your answer to that question? A. Yes, sir." It is further contended that, since the relation of attorney and client existed at the time mentioned between the said Carpenter and Stennett, "the act of 'talking over' the said testimony was in no sense a crime, but a professional duty on the part of plaintiff as such attorney." There is no question as to the rule. It is well stated in *Harkrader v. Moore*, 44 Cal. 151, as follows: "The gravamen of the action is that the de-

fendant instituted the proceedings without probable cause—that is, without having at the time such knowledge or information as would superinduce in the mind of an ingenuous and unprejudiced person of ordinary capacity a reasonable belief that the plaintiff was guilty of the charge. The defense must be that he did believe and had reasonable grounds to believe that the accusation he made was well founded. 'Probable cause does not depend on the actual state of the case, in point of fact, but upon the honest and reasonable belief of the party prosecuting. It must appear that the defendant knew of the existence of these facts which tended to show reasonable and probable cause, because without knowing them he could not act upon them; and also that he believed the facts amounted to the offense which he charged, because otherwise he will have made them the pretext for prosecution without even entertaining the opinion that he had a right to prosecute.' 2 Greenleaf, Ev. 455."

[3] Of course, it is apparent that the term "knowledge," as used in the foregoing quotation, is not confined to personal observation, but it includes that and also information obtained through the ordinary and generally recognized channels of communication. With this view of the requirement of the rule "of probable cause," if the evidence quoted by appellant were all that was submitted to the grand jury, we could hardly escape the conclusion that the district attorney had failed to justify his prosecution, but an examination of the whole record places the matter in an entirely different light. Mr. Ashley was put upon the stand by appellant and interrogated as to his reasons for the course he (Ashley) pursued. From his lengthy statement we select the following significant facts: On January 21st the case of *People v. Davis* came on for trial. Carpenter telephoned Ashley that, if the Stennetts were absent, he (Carpenter), who represented Davis as well as Ennis and the Stennetts, would consent to a continuance. Carpenter was placed upon the stand and stated that, after Stennett was acquitted a day or two before, he, Carpenter, went from the justice court to his office, but, as a matter of fact, the district attorney learned that Carpenter had gone to the Roosevelt lodging house on Main street, and while he was there a note was taken out to the Stennetts over the back fence down to the Standard lodging house, advising them to get out of town, to go down the Santa Fé Railroad track and take the train and get out that way. The statements of the Stennetts were taken very carefully, and corroborating evidence was obtained that they had visited Mr. Carpenter at his office and had seen him on the street at such times as they mentioned. Before the trial of the Ennis Case the district attorney had received from the sheriff a written statement made by Stennett in the county jail, on January

11, 1901, in which he declared that Ennis and Davis were at his house at the time in dispute, that they came there to borrow his "rig," and said they were going to Sargent's to get some pork, and they came back between half past 2 and 3 in the morning with a hog in the wagon. In said statement was given a minute account of what occurred. At the trial of Ennis Mr. Ashley heard the witness Stennett testify that he did not see Ennis at his home on the night in question. After court was adjourned, the district attorney asked the sheriff to arrest Stennett for perjury, and, in reply to Mr. Carpenter's statement that it was a bulldozing scheme, Mr. Ashley said it was a serious matter, so serious that Mr. Carpenter's connection with it would have to be investigated and laid before the grand jury, and that Carpenter would have an opportunity himself to be heard. Immediately after the trial of Stennett, Mr. Wall, a deputy sheriff, told Mr. Ashley to hurry and get a subpoena, as he had seen Carpenter beckon Stennett to go. The constable, James Grant, reported that he had gone to Carpenter's office and could get no information as to Stennett's whereabouts. Subsequently Mrs. Stennett stated to Mr. Ashley that Mr. Carpenter was in the room in the Roosevelt lodging house, and, at his suggestion, a note was written to Mr. Stennett to get out of town. Mr. Stennett and Mrs. Stennett stated that they had gone to Mr. Carpenter's place and had seen him. He said that he would have to see the statement that Stennett had made to the sheriff, that he was sorry that Stennett had made the statement, and finally made an appointment for the next day in his office. Then in the office Mr. Carpenter endeavored to ascertain whether the statement was sworn to, said it could not be sworn to because the sheriff could not administer an oath, and he did not need to identify Ennis as being at his place at Lodi, did not need to identify Ennis, who was then to be tried. Mr. Stennett said that he asked Mr. Carpenter if there was any danger of perjury, and Carpenter had told him no, and that he must not be surprised if Carpenter went after him rough on cross-examination, and that he must watch Carpenter, keep his eye on him in reference to his testimony, watch his objections, and he would maybe get a line as to how he would answer. He said further that in talking to Mr. Carpenter he would go on to say that Ennis was present when Carpenter asked him who was there, repeating that Ennis was there because of the fact, and that Mr. Carpenter would say, "You must not say that; that it would convict Ennis." The district attorney also described the peculiar conduct of Stennett while testifying at the trial of Ennis, stating that, when the witness was asked an important question, he "would wait for you (Carpenter) to object, and he seemed to gather from your objection something

in line with his answer. I could not at all times be between you and the witness, and, when I got between you, the witness was confused and seemed to be at sea, and I would get more answers from him in accordance with the statement he made to the sheriff," etc. No appellate court could say that the district attorney had no legal right to believe from the foregoing and other circumstances detailed that plaintiff was guilty of the crime of subornation of perjury, and that it was his duty to prosecute him for said offense. The district attorney is necessarily vested with considerable discretion, in such matters. If there is substantial ground for his belief, and it is so held by the trial court, the finding manifestly cannot be successfully assailed on appeal. Mr. Ashley declared as a witness that "from what had come to his knowledge as district attorney, from the statements of all these parties and from his observation of the talk and actions of Mr. Carpenter, that he did not have the shadow of a doubt that plaintiff had committed the crime of subornation of perjury."

[4] The record does not show clearly all the evidence that was presented to the grand jury or that was used on the trial, but it does appear that there was a sufficient showing to constitute the basis for "probable cause." Even if this were not so, in the condition of the record, we should have to presume that the indictment and the trial were warranted, assuming that for insufficiency of the evidence therefor the district attorney could be held liable for damages in an action for malicious prosecution. We have devoted attention to the case only as it affects the defendant, Ashley, for the reason that it is very clear from the record that there was no conspiracy shown, and the acts of the other defendants were really dependent upon and subordinate to the conduct of the district attorney and in line with their plain duty as public officials without any malice whatever against the plaintiff. It is hardly necessary to add that the plaintiff may have been entirely innocent of the charge against him—and we desire to intimate nothing to the contrary—but it is nevertheless true, as a matter of law, that there was probable cause for his prosecution. In *Booraem v. Potter Hotel Co.*, 154 Cal. 102, 97 Pac. 66, it is said the conduct of plaintiff throughout the transaction, which was the basis for his arrest, "was that of an honorable and upright man, and there was nothing in his conduct to have excited suspicion," yet, by reason of a mistake made by a Los Angeles bank in dishonoring a check, it was held that probable cause was shown for the prosecution, notwithstanding that prosecution was afterwards proved to be absolutely unwarranted.

Appellant claims that "the same testimony and facts that were before the trial jury were before the grand jury, and the only evidence before the trial jury was to the ef-

fect that plaintiff talked over the evidence with his client, and the only witness that testified to the charge was the thief and perjurer Stennett." But he is not borne out by his references to the transcript. No witness attempted to produce all the testimony that was heard by either body. The fault of appellant is in pointing out a portion of that testimony which is reproduced and assuming, contrary to the record, that nothing else was presented. One of the grand jurors called by plaintiff illustrates the fallacy of this position in the declaration that: "I can't call to memory the different witnesses and the different parts they took in that testimony. The testimony was proven to the satisfaction of the grand jury that you did suborn Stennett." He also testified that he "remembered from the evidence that the persons who testified that Mr. Carpenter committed subornation of perjury were present and heard or saw the suborning." J. A. Plummer, also, who was plaintiff's attorney on the criminal charge, testified that there was a large number of witnesses at the trial who testified to many circumstances bearing upon the charge and that he did not pretend to give all the testimony, even of Mr. or Mrs. Stennett.

[5] Appellant is equally inaccurate in his assertion that the record shows that no effort was made to prove that Stennett swore falsely when he testified that he did not see Ennis at his place. Appellant ignores the rule imposing upon him the burden of proving the want of probable cause. Respondents could rest upon the presumption that they acted in good faith and for sufficient reason, but in addition, as we have already seen, Mr. Ashley had information which justified him in the belief that said testimony was false, and it appears, at least inferentially, that there was such evidence put before the grand and also the trial jury.

[6, 7] The ruling of the court was manifestly correct in sustaining an objection to the following question asked of one of the grand jurors: "You did not intend to find any such indictment against A. H. Carpenter then?" No citation of authorities is needed for the proposition that a grand juror cannot, in a collateral proceeding, impeach in this manner his official action in finding an indictment. Besides, it is clear that it could have no relation to the question of probable cause for the prosecution or conspiracy on the part of defendants.

[8] Referring to the transcript of the testimony taken at his trial, plaintiff asked the said witness, J. A. Plummer, this question: "After refreshing your memory from that exhibit, can you tell now who offered Mrs. Stennett these inducements to so testify?" The objection was made that the writing itself was the best evidence of what the testimony was. The court so ruled. It is clear that the witness did not claim to know who offered said inducements, and hence the form

of the question was objectionable as calling for hearsay testimony. But, if it was sought to show what the testimony concerning said inducements was at the trial, it is difficult to understand why plaintiff should have objected to the writing when the witness had just stated that the writing was substantially correct.

[9] Appellant claims that "it was error for the court to receive in evidence the alleged statement of John H. Stennett, which purported to have been made at the county jail on January 11, 1901. The witness did not see the hog thief sign the statement, and did not ask the questions, nor hear the answers thereto. He had no personal knowledge of the correctness of that statement." But Mr. Ashley had stated that he knew the signature to be that of Stennett, and that it was the statement to which he referred in his direct examination. It was evidence that Stennett at the trial of Ennis had committed perjury, and was a part of the information which came to Ashley as district attorney, and upon which he acted, and was clearly admissible upon the question of probable cause.

[10] "Probable cause," depending, as it does, not upon the actual state of the case, but upon the honest and reasonable belief of the party prosecuting, must necessarily be the product, in part at least, of hearsay declarations, and much of the information as to the crime and party committing it would naturally be imparted to the district attorney alone prior to the actual prosecution. Called upon to justify his course in instituting the investigation before the grand jury and in bringing plaintiff to trial on the indictment, it was entirely proper for Mr. Ashley to give the sources of his information and to relate in detail the facts of his own personal knowledge and those communicated by others in order that the court might determine whether his activity against the plaintiff rested upon an honest and reasonable belief as to guilt and was inspired by a sense of duty and right or was the product of a wanton and malicious purpose to injure plaintiff or to accomplish some object which he knew to be wrong and against sound public policy. *Fox v. Smith*, 25 R. I. 255, 55 Atl. 698; 6 Words and Phrases, 5620-5627, vol. 8, p. 7765. Indeed, the recital of his reasons for the prosecution was invited by the plaintiff, who asked Mr. Ashley for the sources of his information, and "where and when he learned that the offense of subornation of perjury had been committed."

[11] It was entirely proper for the court to allow the witness Ashley to answer the question: "Did you at that time say anything to Mr. Carpenter with reference to investigating his case, and if the facts coming to your knowledge justified it in your judgment as district attorney of laying it before the grand jury?" The question re-



lated to the trial of Ennis, and was proper cross-examination. The witness had been asked by plaintiff if the former had not been sued by the latter for slander based upon the statements made by Ashley at the time. The purpose of the direct examination in that respect was obviously to show malice on the part of the witness. To rebut the inference and to show his good faith he clearly had the right on cross-examination to state just what was said.

[12] The court committed no error in overruling plaintiff's objection to the question asked of Mr. Ashley on cross-examination: "Will you please state fully all the information imparted to you as district attorney upon which you acted and upon which you brought to the attention of the grand jury, the charge against A. H. Carpenter of subornation of perjury?" On examination in chief a part of the information had been called for, and one informant, an alleged thief and perjurer, had been singled out and the matter left so that it might appear that this was the only warrant for the district attorney's action. The door was thereby opened for a complete revelation of the sources and extent of his information.

[13] It was entirely proper for Mr. Ashley, on cross-examination, to explain fully what occurred between him and the witness Stennett as to the promise of immunity from prosecution made by the former to the latter in order to show the good faith of the district attorney in the transaction. Besides, he substantially covered the ground in the direct examination when, in reply to the question: "Did you agree not to prosecute him for any charges of perjury and for his hog stealing if he would give his evidence in certain cases?" he answered: "I agreed if—on the—after the 24th of March, after consultation with Judge Budd—that I would not prosecute him for these charges of perjury, provided he would tell the truth and furnish me with all the circumstances and details and corroborating matters which would show at every time the matters and things involved in their truthful light; and to the best of my knowledge he did so."

[14, 15] Appellant complains that the court sustained an objection to the following question asked by him of Mr. Ashley on redirect examination: "This statement that has been offered in evidence and that has been read in evidence, of Jack Stennett, was false in many particulars?" The question was objectionable on the ground that the statement had been received in evidence simply for the purpose of showing the information which came to the district attorney. It would not affect the question of probable cause if the district attorney knew at the time of the present trial that said statement was false in many particulars. As a matter of fact, however, the witness testified afterwards without objection that at the

time the statement was made he "was satisfied that portions of it were false and portions were true." Appellant, therefore, had the full advantage of any material inquiry as to the verity of the statement.

[16] Plaintiff asked witness Parker, the justice of the peace who presided at the trial of Ennis, the following question: "Now will you state to the jury whether or not you saw me suborn the witness Stennett while the trial was going on there in your presence, and in the presence of the jury and spectators?" The court properly sustained an objection that it called for a conclusion, and not facts and occurrences. The witness was permitted to answer every proper question that was submitted to him.

[17] Mr. Ashley was asked by plaintiff this question: "You have not courted an investigation in this court upon that subject, have you?" referring to a charge that the said Ashley had attempted to secure \$1,000 from Carpenter upon condition and promise that the indictment against the latter be dismissed. The witness answered: "Because you never have put a paper in this court in my judgment stating facts upon which any proceeding could be had against you for your statements. You state your facts in such a way it does not give the court jurisdiction, and it does not give the party any recourse against you. You put into your papers a number of allegations of such a character that they cannot be answered for their indefiniteness and there is no way to meet them." The answer is somewhat discursive and argumentative. It amounts no more, however, than to a negative with his reasons for not courting the investigation. Appellant claims that this and some subsequent answers were "scandalous and libelous," but it may be said that, considering the character of the questions propounded, it hardly behooves appellant to complain.

[18] Some 30 instructions, covering 25 pages of the transcript, were requested by plaintiff and refused. In reply to appellant's complaint, for the court's action, it would be sufficient to say that the record does not purport to contain all the instructions given. We should have to indulge, therefore, the presumption, if necessary, that the jury were fully instructed by the court. But, assuming that the full charge is contained in the transcript, it is apparent that the jury were instructed upon all questions that were necessary for their enlightenment.

[19] Finally, it may be said in answer to all the criticism of the rulings of the court during the trial and of its action in giving and refusing instructions, that, if any error was committed, the error was without prejudice for the reason that the only conclusion warranted by the evidence is that there was probable cause for the prosecution of appellant, and, furthermore, upon certain uncontradicted facts to which Mr. Ashley and oth-

ers testified, the court would have been authorized to instruct the jury to render a verdict for defendants for the reason that there was sufficient ground for said prosecution. There was some contradiction of the truth of some of the statements made to Ashley, but no contradiction of the fact that he was so informed, and there is nothing in the record to justify the conclusion that he did not act in good faith.

[20] There is no evidence in the record of any fraud on the part of the defendants or any of them. Hence, under the rule, the conviction of appellant was sufficient evidence of probable cause for his prosecution. It is stated in *Holliday v. Holliday*, 123 Cal. 32, 55 Pac. 704, that, "without reviewing the cases cited, we deem it enough to say that, while there is some apparent conflict in the decisions, the prevailing rule is that when a person is charged before a competent court having jurisdiction of the matter, and is tried and found guilty, the judgment rendered, unless it is shown to have been obtained by means of fraud, is conclusive evidence of probable cause for making the charge, even though it is afterward held to be unauthorized and reversed on appeal. *Crescent Live Stock Co. v. Butchers' Union*, 120 U. S. 141 [7 Sup. Ct. 472, 30 L. Ed. 614]." In the latter case it is said: "The rule is founded on deeper grounds of public policy in vindication of the dignity and authority of judicial tribunals constituted for the purpose of administering justice according to law and in order that their judgments and decrees may be invested with that force and sanctity which shall be a shield and protection to all parties and persons in privity with them."

Again, the gravamen of the charge against defendants is that they "did for the purpose of injuring the plaintiff in his social and business relations and of exposing him to public hatred, ridicule, and contempt, wrongfully, unlawfully, maliciously, and feloniously conspire, combine, confederate, and agree together to falsely charge and accuse plaintiff of the crime of subornation of perjury and also to convict and punish him for the aforesaid felony and in pursuance thereof, at divers times during the aforesaid period, the above-named conspirators unlawfully procured false evidence to be given before the grand jury," etc. There was no evidence worthy of the name that the defendants did conspire together for such purpose or for any purpose, nor is there any evidence that in "pursuance" of any conspiracy or at all they "procured false evidence to be given before the grand jury." There was, therefore, an entire failure to prove the material allegations of the complaint, and the jury might properly have been so instructed.

We have examined the record with care, but we are satisfied with the conclusion of

the lower court. The judgment and order are therefore affirmed.

We concur: CHIPMAN, P. J.; HART, J.

### EXCHANGE NAT. BANK v. ROSS. (Civ. 951.)

(District Court of Appeal, Second District, California. Oct. 13, 1911.)

#### 1. ESTOPPEL (§ 118\*)—EVIDENCE—FINDINGS.

Evidence held insufficient to sustain a finding that plaintiff bank had acquiesced in the sale of certain real estate and the completion of the transaction, so as to be estopped to assert a liability against defendant on notes previously pledged to it for a part of the purchase price of the property by defendant's vendor.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 306, 308; Dec. Dig. § 118.\*]

#### 2. BILLS AND NOTES (§ 427\*)—PLEDGED NOTES—RIGHTS OF PLEDGEE.

Defendant purchased certain real estate from S., paying part of the price and agreeing to pay the balance, evidenced by notes for \$300, payable at intervals of 6 months, S. agreeing to convey a clear title to the property, which at the time of the contract was incumbered by mortgage for \$2,000. S. assigned defendant's notes to plaintiff bank as security for an indebtedness, but, before defendant had notice thereof, he contracted to convey the property to K., pursuant to which agreement certain money was deposited in escrow in a savings bank. Before the transaction was consummated, defendant was notified of the pledge. Notwithstanding such notice, the property was sold to K. and the money received used to satisfy the outstanding mortgage, plaintiff receiving nothing. Held, that plaintiff bank never having consented to such settlement, it constituted no satisfaction of defendant's notes pledged to it.

[Ed. Note.—For other cases, see *Bills and Notes*, Cent. Dig. §§ 1233-1244; Dec. Dig. § 427.\*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Exchange National Bank against J. A. Ross. Judgment for defendant, and plaintiff appeals. Reversed.

Roland G. Swaffield, for appellant. Simpson, Moody & Simpson and J. H. Merriam, for respondent.

JAMES, J. Action brought upon five promissory notes, each being for the sum of \$300, executed by defendant and made payable to S. A. Sanderson or order. These notes were negotiable in form, but were given to represent a certain indebtedness arising upon a contract for the purchase of real property. On June 28, 1906, defendant and S. A. Sanderson entered into a written contract whereby Sanderson agreed to sell and defendant to buy portions of two lots of land in the city of Long Beach. The contract provided that the defendant should pay a total sum of \$2,250 for the property, and that he was to receive a clear title thereto. The promissory notes were given as evidence of the partial payments to become due under the con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

tract, it being provided in the latter instrument that the sum of \$300 should be paid by defendant Ross upon the execution of the contract, and the further sums of \$300 every six months thereafter, except that the final payment of \$150 was to be made three months after the last installment of \$300 became due. On April 26, 1907, Sanderson assigned the contract, together with the promissory notes incident thereto, to the plaintiff bank as collateral security for the payment of a large indebtedness then owing by him to said plaintiff. At the time the contract referred to was made, the real property which was the subject thereof was incumbered by a mortgage given prior thereto by Sanderson to secure an indebtedness of \$2,000 owing to one Mary M. Shaw. At the time the assignment of the contract was made by Sanderson to plaintiff, defendant Ross had paid all of the money then required to be paid by him, to wit, the initial payment of \$300 and the payment of the further sum of \$300 which had fallen due on December 28, 1906. Before defendant had notice that Sanderson had assigned the contract and notes to the plaintiff, he had entered into some agreement whereby it was contemplated that one Kirsher should be given title to the real property agreed to be conveyed by Sanderson to defendant. Certain money which was to be used in the consummation of the latter deal was deposited with the escrow clerk of the Citizens' Savings Bank of Long Beach, but before this transaction was finally consummated defendant Ross received notice that the plaintiff bank held the contract and notes which he had theretofore executed in favor of Sanderson. Notwithstanding this notice, a sale of the property was made to Kirsher, the money received being used to satisfy the mortgage indebtedness then outstanding to Mrs. Shaw, and the plaintiff bank received nothing. The latter commenced this action on July 2, 1909, at which time the several notes for \$300 each, falling due, respectively, on June 28, 1907, December 28, 1907, June 28, 1908, December 28, 1908, and June 28, 1909, had all matured. The trial court found in favor of the defendant and entered a judgment accordingly, from which judgment, and from an order denying its motion for a new trial, the plaintiff has appealed.

[1] The appeal may be determined by an examination of the questions presented by appellant touching the sufficiency of the evidence to sustain the findings of the trial court. Among other facts determined, the trial court made the following finding: "That after the placing of said money in escrow with said Citizens' Savings Bank by said defendant and said Kirsher as aforesaid, the plaintiff having knowledge of the deposit of said money in escrow as aforesaid, consented to and urged the carrying out of said escrow." This finding was made evidently with the view entertained by the trial judge

that, while defendant, after receiving notice that his contract and notes had been assigned by Sanderson to the bank, was answerable to the bank on account of payments becoming due under said contract, the plaintiff had by acquiescence in the sale of the property to Kirsher and the carrying out of the terms of that transaction, whatever they may have been, estopped itself from thereafter making any claim against the defendant on account of the contract indebtedness. If the fact had appeared in evidence according to the terms of the finding of the court, no doubt the legal result just indicated would follow, but the evidence is wholly insufficient to sustain the finding. Nowhere in the bill of exceptions is it shown just what the contract proposed to be made with Kirsher, and which was presumably evidenced by some writing placed with the escrow holder, was. Defendant Ross admitted that before the deal with Kirsher had been carried out he received notice from the plaintiff bank that it held his contract and notes, and he himself testified upon that subject as follows: "The money was put up in the bank about July 19, 1907, and I learned that the Exchange National Bank held the notes a short time after that. At the time the money was paid over and the deed from Sanderson to Kirsher delivered, I knew that the Exchange National Bank held these notes. Prior to that time I had gone to Mr. Julian (the escrow clerk) and told him not to turn that money over to Sanderson until he had possession of the notes. I had several conversations with Mr. Wallace of the Exchange National Bank with reference to these notes prior to the closing of the deal on September 6, 1907." The following testimony given by the cashier of plaintiff bank was uncontradicted by any testimony which appears in the record: "While the money was still in escrow in the Citizens' Savings Bank, and in the early part of August, 1907, Mr. Ross told me that he had instructed Mr. Julian not to deliver the money to Sanderson until he had possession of the notes. During the early part of August, 1907, after I had written Mr. Ross relative to these notes, notifying him that we were the owners of the same, and after I had received a reply, I had several conversations with Mr. Ross relative to the payment of these notes. He came to the bank two or three times trying to get the notes and stated that he had sold the property and asked me if I wouldn't turn over those notes so that he could complete the escrow as he had sold the property. I suggested he could, upon satisfying what Mr. Sanderson owed us, I would turn over the notes. Then he said he would notify Mr. Julian or notify the bank, not to turn over that money until we got the money concerning that point. This occurred after I had written him as I before stated and after he had replied and during the early part of August, 1907." There was also introduced in evidence the following letter,

which was identified by defendant as having been received by him: "August 6, 1907. Mr. J. A. Ross, Pasadena Calif.—Dear Sir: We are in receipt of your letter of the 2nd inst., explaining that the \$1,650 had been in the First National Bank of this city since June 28th to pay off notes bearing your name. We thank you for this information and will have to admit that we were not aware of the transaction. We are notifying the First National Bank to-day and urging them to hasten the cleaning up of this matter. Very truly yours, Wm. H. Wallace, Cashier."

[2] This is in substance all of the testimony introduced touching the matter of any alleged consent given by plaintiff bank to the carrying out of the Kirsher deal, and it is far from establishing the important fact found by the court, that the bank consented to the carrying out of the escrow agreement in the way in which it was carried out, with the result that plaintiff should receive nothing on account of the contract and notes held by it. As before noted, the testimony as shown in the record is meager indeed, upon the subject of just what the escrow directions, as given to the Citizens' Savings Bank, were. Conceding that the promissory notes and agreement of purchase taken together evidenced a contract nonnegotiable in form, and that therefore until defendant Ross had notice of the assignment thereof to plaintiff, he would have been justified in making payment of his obligation to his original creditor, Sanderson, the case as it is presented to us stands without any evidence tending to show that Ross had by any binding contract satisfied his indebtedness to Sanderson before notice that the bank held his contract and notes was received by him. The defendant did in fact recognize the claim of the bank and represented to the latter that he had given instructions that the Kirsher deal was not to be carried out until the notes held by the bank had been surrendered. Quoting his own words, he said: "Prior to that time I had gone to Mr. Julian and told him not to turn that money over to Sanderson until he had possession of the notes." We do not regard the evidence referring to the satisfaction of the mortgage held by Mrs. Shaw, and the finding based thereon, as material to a determination of the controversy. It may be added that the evidence does not show that the total consideration received on the Kirsher deal was only sufficient to satisfy the mortgage held by Mrs. Shaw. Witness Julian, the escrow clerk, testified as follows: "The total amount put up was something like \$2,100. The selling price of the property as we had it was part money and part trade." The fact was that defendant Ross, having made payment of \$600 on account of a total sum of \$2,250 to be paid under his contract for the purchase of real estate, entered into a negotiation with Sanderson and Kirsher

by which he proposed to transfer his interest in the property and so satisfy his debt to Sanderson. At that time he owed no debt to Sanderson, plaintiff bank having acquired the right to receive all moneys due under the contract, and any settlement or compromise made with Sanderson was without effect as against the right of the bank to make collection of the full amount of the indebtedness. As we have pointed out, there is no evidence sufficient to justify the finding of the court that the plaintiff bank gave consent to any attempted settlement made by the defendant with the original payee of the contract and notes.

It follows that the judgment and order must be reversed, and it is so ordered.

We concur: ALLEN, P. J.; SHAW, J.

#### PEHL v. FANTON. (Civ. 875.)

(District Court of Appeal, Second District, California, Oct. 16, 1911. Rehearing Denied Nov. 15, 1911. Denied by Supreme Court Dec. 15, 1911.)

#### 1. APPEAL AND ERROR (§ 171\*)—TRIAL—THEORY OF CAUSE—QUESTIONS NOT RAISED AT TRIAL.

Where in an action for broker's commissions, the court inadvertently struck from defendant's answer matter denying that plaintiff had procured a purchaser, but, notwithstanding this, plaintiff introduced evidence to prove the fact, and both parties tried the case on the theory that a material issue had been raised thereon, plaintiff could not claim for the first time on appeal that there was no denial of such fact.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1053-1069, 1161-1165; Dec. Dig. § 171.\*]

#### 2. BROKERS (§ 60\*)—PERFORMANCE OF CONTRACT.

Where a broker is employed to negotiate a sale of property, and has found a purchaser ready, able, and willing to purchase on the vendor's terms, the broker's right to commissions does not depend on final consummation of the sale by the vendor; the broker's contract being complete when he delivers or tenders to the owner a valid written contract containing the terms of sale agreed on, signed by a party able to comply therewith, or to answer in damages if he fails to perform.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 91-97; Dec. Dig. § 60.\*]

#### 3. BROKERS (§ 49\*)—CONTRACT—SERVICES—PROCUREMENT OF PURCHASER—ESCROW AGREEMENT.

Where a broker, employed to sell property on specified terms, procured a person who executed an escrow agreement to purchase the property, or forfeit \$1,000, such agreement was a mere option to purchase, and not a sale, and did not entitle the broker to commissions.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

#### 4. BROKERS (§ 49\*)—EMPLOYMENT TO SELL REALTY—TERMS OF CONTRACT—"SALE FOR CASH."

Where a broker was employed to sell real estate for a specified price, payable half cash and the balance in a year's time, such terms required payment of the cash portion immediately on a delivery of the property sold; and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

hence an agreement with a proposed purchaser, authorizing him to pay the cash part of the price within 15 days, was not a compliance with the terms.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 70-72; Dec. Dig. § 49.\*]

Appeal from Superior Court, Riverside County; F. E. Densmore, Judge.

Action by N. G. Pehl against C. D. Fanton. From a judgment for defendant, and from an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

Chas. P. Huey and Walter C. Davison, for appellant. G. R. Freeman, for respondent.

SHAW, J. Plaintiff, a real estate broker, brought this action to recover from defendant \$300 for commissions alleged to be due him for obtaining a purchaser for certain real estate owned by defendant. Judgment was rendered for defendant, from which, and on order denying his motion for a new trial, plaintiff prosecutes this appeal.

As shown by the record, defendant, on February 5, 1907, by a memorandum in writing, authorized plaintiff to sell the property therein described as lot No. 406 of Ontario colony lands for the price of \$11,000 payable one-half in cash and the balance in one year, with interest thereon at the rate of 7 per cent. per annum, payment thereof to be secured by a mortgage on the property sold, which agreement contained the following provision: "If sale is made, I hereby agree to execute and deliver a good and acceptable conveyance of said property, and to pay a commission of 5 per cent. on the first \$1,000 or less, and 2½ per cent. on all over that amount, out of the first payment." No time was specified when plaintiff's authority to sell should terminate, and the authority given was at no time revoked by defendant. In his complaint plaintiff alleged that on March 6, 1908, he procured a buyer who was then and there ready, willing, and able to purchase and pay for the property in conformity with the terms and conditions set forth in said contract, and notified defendant to that effect, but defendant refused to consummate the sale. This allegation (other than that defendant refused to make the sale) was denied by the answer, which also, in addition to its denials, set up certain affirmative matter, beginning on line 11, p. 3, of the answer, and ending on line 18, p. 4, thereof. Plaintiff moved that all of said matter (specifying it by line and page) be stricken from the answer as irrelevant and redundant. This motion was by the court granted, but, instead of limiting the order as made to that part of the answer to which the motion was directed, the court, as shown by the minute entry, ordered stricken out certain designated pages of the answer, which included the allegations of denial, leaving as the only issue to be tried under

the pleadings certain affirmative defenses, as to which the court found adversely to defendant. Notwithstanding the fact that it clearly appears the order of court was due to inadvertence, and not responsive to the motion, counsel for appellant strenuously insists that this court should eliminate from consideration all issues, other than those raised by the answer, after the making of the said order as shown by the record; and thus considered it is claimed that certain material findings in favor of defendant are not within the issues.

[1] It is apparent, however, that upon the trial of the cause both the court and the parties regarded the question whether or not plaintiff had, as alleged, procured a purchaser for the property, in accordance with the terms of the contract authorizing the sale, as the chief issue involved. Without objection, both plaintiff and defendant introduced evidence touching the question, and the court made its findings thereon. If the plaintiff had desired to take advantage of such condition of the pleadings, he should not only have refrained from introducing evidence in support of the allegation of his complaint which he now claims was not denied, but should also have entered an objection to the defendant introducing testimony thereon. Having failed to do so and the parties and the court having tried the case upon the theory that such material issue was involved in the pleadings, appellant cannot in this court for the first time raise the question that there was no such issue to be tried. *Flinn v. Ferry*, 127 Cal. 648, 60 Pac. 434; *Barbour v. Flick*, 126 Cal. 628, 59 Pac. 122; *Murdock v. Clarke*, 90 Cal. 427, 27 Pac. 275; *Klopper v. Levy*, 98 Cal. 525, 33 Pac. 444.

In support of plaintiff's allegation that he had procured one ready, able, and willing to purchase the property in accordance with the terms and conditions of the memorandum authorizing the making of the sale, he introduced evidence establishing the following facts: On March 6, 1908, 13 months after the date when plaintiff was so authorized to sell the property, he procured one Henry S. Gruenwald to execute certain escrow instructions, directed to the First National Bank of Upland, California, wherein it was stated: "I herewith hand you check for \$1,000, and agree to deposit with you \$4,500 in cash on or before fifteen days from this date, and agree within said fifteen days to execute and deliver to you one promissory note and mortgage securing same on the property described below, dated March 6, 1908, due one year after date, with interest at 10 per cent. per annum, with 3 per cent. rebate clause"—which note and mortgage was to be in favor of defendant for the sum of \$5,500, and the bank was instructed to deliver the \$1,000, together with the mortgage agreed to be executed and the \$4,500 agreed to be depos-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ited, to defendant upon receipt of a deed for the property, accompanied by a certificate of title from the Pioneer Abstract & Title Guaranty Company, or the Consolidated Abstract & Title Company, showing title to be vested in defendant, free of incumbrances, except taxes, etc. It was further provided in said escrow that, "in event you are unable to comply with these instructions within fifteen days from the date hereof, on account of my failure to comply with the terms herein stated, you are authorized to pay to the seller \$1,000 as forfeit, and hold balance subject to my order," to all of which plaintiff assented in writing, signing the same "N. G. Pehl, Agent." That at said time defendant was living near Corona, Cal., and plaintiff wired him from Upland, Cal., that he had sold the property in accordance with the terms of the contract, which telegram was followed by a letter to the same effect. The court made its findings in accordance with the facts thus established, except that the court erroneously found that, as a condition of sale, defendant was required to furnish certificates from two abstract companies, certifying to the satisfactory condition of title; whereas, the escrow contract required a certificate from either one of two such companies therein designated.

[2] The law is well settled that where a broker is employed to negotiate a sale of property, and has found a purchaser ready, able, and willing to purchase upon the vendor's expressed terms, the broker's right to recover the agreed commission does not depend upon the final consummation of the sale by the vendor. "The contract on the part of the broker is complete when he delivers or tenders to the owner a valid written contract, containing the terms of sale agreed on, signed by a party able to comply therewith, or to answer in damages if he should fail to perform. \* \* \* The necessity of a written contract of sale may be rendered unnecessary if the agent bring the vendor and vendee together, and the latter is able and willing and offers to complete the contract, provided the vendor will make the conveyance. In such a case the agent has done all that he can do, and if the vendor, under such circumstances, refused to complete the sale, he, nevertheless, will be compelled to pay the agent his commissions, \* \* \* whether the trade is finally consummated or not, because if the vendee refuses to take the property the vendor holds the contract, which renders the former liable for all damages." *Hayden v. Grillo*, 35 Mo. App. 647, cited with approval in *Gunn v. Bank of California*, 99 Cal. 353, 33 Pac. 1105.

[3] Plaintiff's right to recover is dependent upon whether or not the execution and delivery of the escrow contract, the substance of which is hereinabove stated, accompanied by his check for \$1,000, to be applied as therein specified, constituted either a sale of the property, or the procuring of a purchaser

therefor, within the terms of the authorization given. Tested by the authorities, we are firmly convinced that it did not. At most, the escrow constituted a proposed purchase of an option on the part of Grunenwald to buy the property within 15 days from the date of the escrow, according to the terms of the memorandum given plaintiff, authorizing him to make a sale, and in the event of Grunenwald's failure to exercise such option and complete the purchase on his part the \$1,000 was to be paid to defendant as forfeit money; otherwise to be applied on the first payment of \$5,500. Indeed, counsel for plaintiff admits as much, for he says, referring to Grunenwald's contract: "This agreement was placed in escrow, together with a \$1,000 check, in the First National Bank of Upland; said \$1,000 being forfeit money, in case said Grunenwald refused to buy the property." And, again, that "defendant would receive \$1,000 as forfeit money, then on deposit in the First National Bank of Upland, California," in case Grunenwald made default in paying the balance of \$4,500 and causing the delivery of the note and mortgage for \$5,500. It is not claimed that plaintiff at any time brought the parties together, or that defendant ever assented to the sale to Grunenwald. Conceding the latter was ready, willing, and able to purchase upon the terms authorized by defendant, nevertheless he signed no agreement or contract binding himself so to do. Had defendant accepted the offer of Grunenwald, obtained through plaintiff as broker, the latter would have been entitled to recover his commissions (*Sibbald v. Iron Co.*, 83 N. Y. 378, 38 Am. Rep. 441; *Gunn v. Bank of California*, supra); but, for a failure on the part of Grunenwald to execute the note and mortgage and make the further payment provided within the time specified, defendant's only remedy would have been the enforcement of the provision for the forfeiture of the deposit of \$1,000. "This," says counsel for plaintiff, "was ample deposit to protect the owner, had the purchaser refused to perform further." The record being silent upon the subject of the sufficiency of the deposit for such purpose, this court cannot, as a matter of law, so hold; suffice it to say, the plaintiff had no authority to make such contract for the defendant. Moreover, one-half of the sale price was payable in cash, while Grunenwald's proposition contemplated an extension of time of 15 days within which to make payment of the \$4,500.

[4] A sale for cash is one wherein the money is to be paid immediately upon the delivery of the property sold. *Bliss v. Arnold*, 8 Vt. 252, 30 Am. Dec. 467; *Chapman v. Devereux*, 32 Vt. 616; Civ. Code, § 1784. Under the terms of the memorandum authorizing the sale to be made by plaintiff, defendant had the right to insist upon payment of the entire \$5,500 and delivery of an executed note and mortgage immediately upon tender of a sufficient conveyance, transferring good title to

the buyer. To postpone such payment for a period of 15 days was not "cash," within the terms of the authority given plaintiff.

In view of the fact that plaintiff did not, as alleged in his complaint, procure a purchaser for the property within the terms upon which he was authorized to make the sale, it is unnecessary to discuss other alleged errors to which our attention is directed. In no event, under the circumstances of this case, could the substantial rights of appellant be prejudiced by reason thereof.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

### JOHNSTON v. JOHNSTON. (Civ. 869.)

(District Court of Appeal, Second District, California. Oct. 14, 1911.)

#### 1. DIVORCE (§ 127\*)—DESERTION—EVIDENCE—CORROBORATION.

Where, in an action for divorce for desertion, the only evidence in corroboration was the affidavit of a witness, averments of which in the main were mere conclusions, and did not contain any statement with reference to the husband's alleged misconduct or threats to injure the wife, there was no sufficient corroboration, required by Civ. Code, § 130, providing that no divorce can be granted on a default of the defendant, or on the uncorroborated admission or testimony of the parties.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 403-407; Dec. Dig. § 127.\*]

#### 2. DIVORCE (§ 127\*)—EVIDENCE—CORROBORATION.

Corroboration required by Civ. Code, § 130, in an action for divorce, is sufficient if it is pertinent to some fact or facts which is or are sufficient to support the action, and to justify the entry of a decree.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 403-407; Dec. Dig. § 127.\*]

#### 3. DIVORCE (§ 31\*)—GROUNDS—NONSUPPORT.

Where, at the time plaintiff left her husband for alleged cruelty, he furnished her with means of transportation, and gave her a check for \$50, and it did not appear that she ever requested or desired any further contribution from him while she remained away from his place of abode, but the evidence indicated that she did not expect defendant to contribute to her support after she left, she was not entitled to a divorce for nonsupport.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 96, 98; Dec. Dig. § 31.\*]

#### 4. DIVORCE (§ 249\*)—DIVISION OF PROPERTY—HOMESTEAD.

Civ. Code, § 146, provides that, in case of the dissolution of a marriage, the community property and the homestead shall be assigned to the former owner, if it has been selected from the separate property of either, subject to the power of the court to assign it for a limited period to the innocent party. Held that, where plaintiff, in an action for divorce, claimed that certain real property was her separate estate, and prayed a decree to that effect, but on the trial it was proved that she and her husband had joined in a declaration of homestead affecting the property, the court was limited to a disposition thereof in accordance with section 146, which right was dependent on the granting of a

divorce; and this being denied the homestead rights of the parties continued.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 701-713; Dec. Dig. § 249.\*]

Appeal from Superior Court, Los Angeles County; George R. Davis, Judge.

Action for divorce by Jessie E. Johnston against James C. Johnston. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Jones & Weller, for appellant. G. A. Gibbs, for respondent.

JAMES, J. Action for divorce. Appeal by defendant from the decree entered against him. In the complaint of plaintiff were set out two causes of action; one for the desertion of her by defendant, and the other for defendant's failure to provide her with the necessities of life. Defendant in his answer, denied generally the allegations of plaintiff's complaint, and on this appeal contends that the evidence heard at the trial is insufficient to support the judgment of the court.

[1, 2] The parties were married in the year 1876, in the county of Los Angeles, and lived together until about the year 1887, when plaintiff left defendant and remained away from him for a great many years, returning again to reside with her husband in 1905. During the interval of her absence, she lived with another man as his wife. In September, 1905, defendant was living at a mining settlement called Cactus Flats, in California. After it had been arranged that his wife was to return and live with him, the couple went before a magistrate at San Bernardino; and a second marriage ceremony was performed, after which they immediately left for Cactus Flats, and there took up their abode. In July of the following year, the plaintiff again left the defendant and came to Los Angeles, where she continued to reside up to the time of the commencement and trial of this action. She testified that her husband had paid her traveling expenses when she left him, and the husband testified that he gave his wife a check for \$50 at the time of her departure. Plaintiff further testified that defendant was willing that she should go, and knew that she never intended to return. As to the cause assigned by her for leaving, we quote her own words as they appear in the transcript of the testimony: "It was his continual accusation of wrong, and another was a continual threat of my life. \* \* \* There was no one there to do wrong with. It was a continual accusation of wrong, and what he was going to do, and if he caught any one around there, and all this. He carried a shotgun or rifle continuously. I told him if he killed some innocent person it would be a terrible thing; and he said he had a right to kill anybody that came on his place.

And on the 13th day of May, 1906, he was very angry. I don't know why he should be; but it was always just after the stage left. \* \* \* I told him that he would have to tell me what in the world had made him act so, why he should do so; and I told him I would not stand any such treatment as that. I could not live with anybody and live under those conditions; and that was the first cause of our trouble, years and years ago, when I left him, a continual accusation of something wrong. So he got very angry. He took up the shotgun, dragged me into the front room, and pulled the shotgun on me, and I took the shotgun away from him, and he knows it. He says he never threatened to kill me; he knows he said that." The foregoing statement is the substance of all of the material testimony given by the plaintiff touching the matter of the cause which defendant furnished for her act of leaving him. It will be noted that plaintiff was not specific as to the particular charge which her husband made against her. She did, however, testify to acts of violence committed by him against her person; and if enough corroboration of her testimony is to be found in other evidence furnished at the trial a sufficient case would be made out to sustain the decree of the court, given upon the first cause of action set out in the complaint, to wit, that for desertion. Section 98, Civ. Code. Corroboration of the testimony given by the plaintiff in support of her first cause of action was sought to be shown by an affidavit made by one Anna D. Crain, which was admitted in evidence by stipulation of counsel. The material parts of that affidavit read as follows: "I know there was a great deal of trouble between the plaintiff and the defendant while I was there, caused by the jealousy of the defendant for the plaintiff, which was without any reason; that upon Memorial Day the plaintiff visited my school, and her appearance indicated that she was in great distress of mind, and that she had been crying. The same night I went back to the plaintiff's house and stayed all night. Things were in great disorder at her house, and I said, 'It looks as though you were going to move,' and Mrs. Johnston said: 'Yes; I am going to move, because Mr. Johnston is accusing me of things that I am not guilty of,' and this was said in the presence of Mr. Johnston, and he did not deny it; he turned and walked away. The next day a party went over to Rose Mine, and Mr. Johnston went along and would not converse with any one, unless spoken to, and then only in monosyllables, so that it was noticed very much and remarked among the people that something was the matter with him." In the main, the statements made in this affidavit were expressions of mere conclusions upon the part of the deponent. It was not shown that the plaintiff, in the presence of her husband

and Anna D. Crain, stated what her husband had accused her of, and nothing at all was said by the plaintiff to Anna D. Crain, so far as the affidavit expresses the things which she did state, about any violence committed by the husband against the wife, or of any threats made by him to injure plaintiff in any way. In our opinion, the testimony given in support of the cause of action for desertion is entirely without corroboration. Section 130 of the Civil Code provides that: "No divorce can be granted upon the default of the defendant, or upon the uncorroborated statement, admission, or testimony of the parties. \* \* \*" Attention has been called by counsel for respondent to the case of *Venzke v. Venzke*, 94 Cal. 225, 29 Pac. 490, in which it is claimed a condition of evidence parallel to that shown in this case is disclosed. An examination of the decision referred to, however, does not bear out that contention. In the *Venzke* Case, the ground of extreme cruelty was assigned by the plaintiff, consisting of various alleged harsh conduct indulged in by the defendant there, and upon each of the several items of said charge there was some specific and direct testimony furnished by witnesses, other than the plaintiff herself. It has been said that corroboration in divorce actions is sufficient, if such corroboration is pertinent to "some fact or facts which is or are sufficient to support the action, and justify the entry of the decree in plaintiff's favor." *Cooper v. Cooper*, 88 Cal. 45, 25 Pac. 1062; *Matthal v. Matthal*, 49 Cal. 90. In our view of this case, this measure of corroboration has not been here satisfied.

[3] There was no sufficient evidence to sustain the finding that defendant had willfully failed to provide plaintiff with the common necessities of life for more than one year preceding the commencement of her action. Without dispute, it appears in testimony that at the time plaintiff left Cactus Flats in July, 1906, defendant furnished her with the means of transportation, giving her a check for \$50; and it nowhere appears by any of the testimony that the plaintiff ever requested or desired any further contribution from him while she remained away from his place of abode. In fact, every natural inference to be drawn from all the facts and circumstances shown in evidence supports the conclusion that the plaintiff did not require or expect the defendant to contribute to her support after she left him the last time.

[4] In the course of the allegations of plaintiff's complaint, it was set up that plaintiff was the owner of certain real property situated at Wilmington, in the county of Los Angeles, which was her own separate estate. She asked for a decree so declaring it to be, and the judgment of the court followed in accordance with the prayer of the complaint. The defendant in



his answer denied that the property mentioned was the separate property of the wife, and alleged that the property had been acquired by purchase by him subsequent to his marriage with the plaintiff. Evidence was introduced on the part of plaintiff touching the purchase of this property, which was sufficient to establish the fact, as found by the court, that the land in question was of the separate estate of the wife. However, in the course of the trial, the plaintiff voluntarily showed that in the year 1884 a joint declaration of homestead affecting this property had been duly executed by herself and husband, and no showing was made that this homestead so selected had ever been abandoned or relinquished. If it had not been shown that the character of a homestead had become attached to the property, the decree of the court, having been made without any objection raised to its jurisdiction to make such a decree in this kind of an action, might be sustained and remain undisturbed, notwithstanding the reversal of the judgment for divorce. This court has held that where, by cross-complaint in a divorce action, conflicting claims to real property are sought to be settled, and no objection is urged by the parties, and trial is had, such parties would be precluded thereafter from questioning the jurisdiction of the court to make and enter a judgment affecting issues thus presented. *Huneke v. Huneke*, 12 Cal. App. 199, 107 Pac. 131. But here the plaintiff in making her proof showed to the court that the property which she claimed as her separate estate was subject to homestead rights created by the joint act of herself and husband, and this fact appearing, the court in the disposition thereof would be controlled by the provisions of section 146, Civil Code. The provisions of that section, in so far as they are material in their application to this case, are as follows: "In case of the dissolution of the marriage by the decree of a court of competent jurisdiction, the community property, and the homestead, shall be assigned as follows: \* \* \*

4. If a homestead has been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party." By this section, the right of the trial court to make any order or decree which would be determinative of the interests of the respective parties in the homestead is dependent upon a decree first being made, dissolving the marriage. If the marriage is not dissolved, then the homestead rights of the parties continue undisturbed. The decree in this case determines that the plaintiff's title to the real property is quieted against all claims of the defendant, and that the defendant is estop-

ped from setting up any claims thereto. The decree in its entirety must therefore be set aside.

The judgment is reversed, and the cause remanded for a new trial.

We concur: ALLEN, P. J.; SHAW, J.

**SAN FRANCISCO & SUBURBAN HOME BLDG. SOCIETY v. LEONARD et al.**

(Civ. 828.)

(District Court of Appeal, Third District, California. Oct. 17, 1911.)

**1. FORCIBLE ENTRY AND DETAINER (§ 4\*)—POSSESSION OF MANAGER OF CORPORATION—LIMITATION OF EMPLOYMENT.**

Code Civ. Proc. § 1159, provides that every person is guilty of forcible entry, who, either by breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror, enters on any real property, or who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct the party in possession. *Held*, that where a corporation's manager, after the termination of his employment, refused to surrender possession of premises previously occupied by him by virtue of his appointment or employment, his possession having been acquired peaceably, he was not guilty of forcible entry by his refusal to surrender.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 5-22; Dec. Dig. § 4.\*]

**2. FORCIBLE ENTRY AND DETAINER (§ 27\*)—COMPLAINT—AMENDMENT.**

Where a complaint in forcible entry and detainer as originally filed alleged generally that plaintiff by defendant's acts in detaining possession of the premises had suffered damages in the sum of \$15,000, the court had power, in the exercise of discretion conferred by Code Civ. Proc. § 473, authorizing amendments, to permit an amendment served two days prior to the commencement of the action, averring specified sums as special damages and claiming punitive damages for vindictiveness, and the refusal to allow such amendment was an abuse of discretion.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. § 126; Dec. Dig. § 27.\*]

**3. FORCIBLE ENTRY AND DETAINER (§ 27\*)—PLEADING—AMENDMENT.**

Code Civ. Proc. § 1173, providing that where it appears that defendant has been guilty of either forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that the complaint be forthwith amended to conform to the proofs, etc., confers no authority to allow amendments for any other purpose than that prescribed.

[Ed. Note.—For other cases, see *Forcible Entry and Detainer*, Cent. Dig. §§ 126, 127; Dec. Dig. § 27.\*]

**4. PLEADING (§ 236\*)—AMENDMENT—POWER OF COURT.**

Code Civ. Proc. § 473, authorizing amendments, confers general power to allow amendments at any time before, during, or after trial, and before judgment, where it clearly appears that it would be in the furtherance of justice, and a refusal to do so constitutes an abuse of discretion.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. § 601; Dec. Dig. § 236.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

**5. FORCIBLE ENTRY AND DETAINER (§ 30\*)—DAMAGES—LOSS OF RENTS—PROTECTING PROPERTY—CESSATION OF BUSINESS.**

In an action for forcible entry or unlawful detainer, Code Civ. Proc. § 1174, authorizes a recovery under appropriate averments in the complaint of any damage which is the natural and proximate consequence of the alleged forcible entry and unlawful detainer, such as loss of rents, expense of protecting the property, loss by cessation of plaintiff's business, etc.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 141-152; Dec. Dig. § 30.\*]

**6. PLEADING (§ 236\*)—AMENDMENT.**

Great liberality should be shown by a trial court in permitting the amendment of pleadings, where it can be done without working great delay, and will facilitate the production of all the facts bearing on the questions involved in the action.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 236.\*]

**7. FORCIBLE ENTRY AND DETAINER (§ 30\*)—DAMAGES—ELEMENTS.**

Where plaintiff's manager, on the termination of his employment, refused to surrender plaintiff's premises so as to permit plaintiff to proceed with its business of constructing houses, etc., though he did permit some of plaintiff's officers to enter the building and office, but refused, however, to allow them to take charge of plaintiff's affairs or to do any act in the furtherance of its business, and refused to permit the men employed by plaintiff to proceed with the completion of the houses in the process of construction, or to take lumber or other materials essential for the completion of the unfinished buildings, plaintiff was entitled to recover damages for injuries to its business.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. §§ 141-152; Dec. Dig. § 30.\*]

**8. FORCIBLE ENTRY AND DETAINER (§ 30\*)—PUNITIVE DAMAGES—PLEADING.**

Since a charge of forcible detainer of real property carries an implication that it was from a bad motive, an allegation of forcible detainer is sufficient without more to sustain an award of exemplary damages.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 146; Dec. Dig. § 30.\*]

**9. FORCIBLE ENTRY AND DETAINER (§ 34\*)—EXEMPLARY DAMAGES—ALLOWANCE—QUESTION FOR COURT OR JURY.**

Code Civ. Proc. § 735, provides that, if a person recovers damages for forcible entry or unlawful detainer, judgment may be entered for three times the amount of the actual damages. Section 1174 declares that the damages occasioned to the plaintiff by any forcible entry or detainer shall be assessed, and that judgment may be entered "in the discretion of the court either for the amount of the damages and rent found due or for three times the amount so found." *Held*, that whether the damages should be trebled and exemplary damages thereby awarded in an action of unlawful detainer is a question for the court, and not for the jury.

[Ed. Note.—For other cases, see Forcible Entry and Detainer, Cent. Dig. § 157; Dec. Dig. § 34.\*]

Appeal from Superior Court, City and County of San Francisco; G. A. Sturtevant, Judge.

Forcible entry and unlawful detainer by the San Francisco & Suburban Home Building Society against Joseph A. Leonard and

others. Judgment for plaintiff for less than the relief demanded, and it appeals. Reversed and remanded.

Chas. F. Hanlon, Pringle & Pringle, and E. K. Taylor, for appellant. James G. Maguire and E. T. Barrett, for respondents.

**HART, J.** The plaintiff is a corporation organized under the laws of the state of California. The business of said corporation is that of selling improved real estate, and for that purpose it became the owner of a large number of lots situated in what is designated as "Jordan Tract," in the city of San Francisco. The scheme of the corporation was the erection of dwelling houses on the lots in said tract and the selling or the leasing thereof. On the 26th day of January, 1905, the plaintiff and the defendant Joseph A. Leonard entered into a written agreement, by the terms of which said Leonard became, for the term of four years from the 1st day of January, 1906, the manager of plaintiff's business, for the performance of the duties of which he was to receive certain stipulated compensation. Among other covenants, said contract contained the following: "In the event that the land owned or hereafter acquired by the society in the 'Jordan Tract' is finally built up by the erection of houses as now contemplated, or building operations thereon are suspended for ninety (90) days on account of inability to sell houses and lots at a profitable price, or if, for any reason, the net profits for any period of ninety (90) days shall be less than the expenses properly charged against that period of time, then this agreement may be terminated by either party upon giving sixty (60) days notice, and thereupon accounts between the parties thereto shall be closed, and, as soon as ascertainable, profits adjusted in accordance therewith." It was further provided by said contract that "at the time of the settlement between the parties hereto, if any question arises as to the value of any of the securities, mortgages or any property," etc., such question "shall in the event the parties hereto cannot agree as to the value, be appraised by two appraisers, one to be selected by the first party and one to be selected by the second party."

On the 9th day of January, 1908, the board of directors of the corporation, then composed of James C. Jordan (president), E. K. Taylor, William B. Pringle, H. G. Pendleton, and Joseph A. Leonard (defendant), who also held the office of vice president, held a meeting at which a resolution was adopted by which, after setting forth that the net profits of plaintiff "for a period of thirty days have been less than the expenses properly charged against that period of time," the contract made with Leonard was, in accordance with the terms of paragraph 5

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

thereof, above quoted, terminated, it being therein further provided that 60 days' notice be given Leonard of the election of the corporation to terminate said contract. Leonard was present at said meeting, and voted against the adoption of said resolution. On the same occasion, the president of the corporation wrote and delivered to Leonard a letter, formally notifying him of the foregoing action of the board of directors. On March 4, 1908, a committee selected from the board of directors, having previously been appointed for that purpose, reported to the board at a regular session thereof that "the value of the goods, securities, mortgages and properties, and the amount to be written off for depreciation, are materially different from those given in the statement referred to the committee and reports of Mr. Leonard now on file." Said report was received and filed, and thereupon the board of directors adopted a resolution declaring that a dispute had arisen between plaintiff and Leonard "as to the value of the securities, mortgages and property of this company, and as to the amount to be taken off for depreciation," and appointing, under the authority so to do provided for by the contract between plaintiff and Leonard, one Stanley Pedder to be its arbitrator and appraiser, "to join with an arbitrator and appraiser to be appointed by J. A. Leonard under said contract, and to act under said contract in said matters, and that Mr. J. A. Leonard be and is now requested to appoint an arbitrator and appraiser in accordance with said contract." On the same day—March 4th—a resolution was adopted instructing Leonard to deliver up on March 9th possession of the keys to the offices and buildings and of "everything pertaining to the company to Mr. Pendleton, the secretary of the corporation," etc.

The offices of the manager and the board of directors were located in a building situated within the exterior boundaries of "Jordan Tract." On March 11, 1908—a trifle over 60 days after notice had been served upon Leonard of the action of the directors terminating the contract by which he was employed as manager of the corporation—directors Pringle, Pendleton, and Taylor, accompanied by several other parties, including Pedder, who, as seen, was appointed by the board as arbitrator and appraiser to examine into the affairs of the company, called at the office of the manager, and demanded a surrender of the possession of his office and the properties of the corporation. Pringle read to Leonard, in the presence of some other men, some of whom were special policemen who were there to aid Leonard in keeping possession, the several resolutions theretofore adopted by the board of directors—the one terminating Leonard's employment and the others appointing Pedder as an appraiser, etc., and authorizing Pendleton, as secretary of the corporation, to take charge of the keys and the properties, etc. But

Leonard, assisted by the special policemen, refused to permit the directors to take charge of the affairs of the corporation. Pedder, having entered the office, was ejected by force. While Pendleton was permitted to go into the office and the other buildings, he was not allowed to handle any of the properties of the corporation.

On several occasions thereafter, the directors, either through agents specially commissioned for that purpose or by their own personal efforts, attempted to secure possession of the manager's office and the properties of the company, but were each time repelled by Leonard, the latter at different times forcibly ejecting Pedder, a Mr. Derby, appointed by the board to take charge of the affairs of the company, and the Kinney Bros., who were on the 20th day of March, 1908, appointed and authorized by the directors to take and maintain possession, on behalf of the corporation, "of all the real property of this corporation in Jordan Park, including the mill thereon and its contents." One Sullivan, a carpenter, had been sent by the board to the premises to take charge of the mill, and proceed with the completion of certain dwelling houses then in process of construction, and upon which no work was then being done on account of the differences between the company and Leonard. The latter refused to permit Sullivan to take charge of the mill and execute the duties thus committed to him. In addition to the commission of the foregoing acts of resistance to the efforts of the corporation to secure possession and control of its properties and affairs, Leonard changed the locks on the doors to his office and other buildings on the premises, and also changed the combination to the safe. He, however, turned the keys to the new locks and the combination over to the secretary, Pendleton, on March 12th. Leonard, with his family, resided in the upper story of the building in which his office was located.

From the statement of the facts as thus given, it will be observed that the conduct of Leonard throughout the whole controversy consisted entirely in a persistent refusal on his part to allow any person authorized so to do by the directors to have any voice in the management of the company's business, and to that end ejected by force, where necessary, any person commissioned and sent by the corporation to supplant him as manager. And thus the situation remained until the 9th day of April, 1908, when he surrendered his position as manager and the possession of the properties of the company to the board of directors. The action here is for forcible entry and forcible and unlawful detainer of the premises referred to, for restitution of said premises, and for damages for the entry and detention thereof so alleged. The complaint was filed March 28, 1908. The action was tried by jury and a verdict was returned in favor of plaintiff for forcible

detainer, and therefore for the restitution of the premises, but awarding no damages.

The court thereupon caused judgment to be entered that defendants "have been and are guilty of a forcible detainer of the said lands and premises and improvements, but have not been and are not guilty of any forcible entry, \* \* \* and it is further decreed that the plaintiffs do not recover or have judgment for any damage or damages herein," etc. This appeal is prosecuted by the plaintiff from that part of the judgment decreeing that defendants were not guilty of a forcible entry, and that "plaintiff do not recover or have judgment for any damage or damages herein," etc., and from the order denying plaintiff a new trial.

It may be well here to explain that the defendant Holzhausen was an employé of the corporation under Leonard, and that at the times the directors attempted to obtain possession of the properties of the corporation from Leonard he (Holzhausen) assisted Leonard in resisting the directors, and, in fact, had been commissioned a special policeman, no doubt for that specific purpose.

In its charge the court instructed the jury that there was no evidence of a forcible entry by the defendants, and thus eliminated that issue from the case, and therefore excluded it from consideration by the jury.

The main contention of the appellant is that the court erred to its prejudice in thus taking the question of forcible entry from the jury, and, further, that the court abused its discretion by disallowing a proffered amendment to the complaint under the averments of which certain special damages might be shown; evidence offered in proof of such damages having been rejected on the ground that they were not pleaded.

It is further claimed that the court erred by refusing to read to the jury an instruction submitted by the plaintiff covering the question of exemplary damages.

We think the case must be sent back for retrial for the ruling disallowing the proposed amendment to the complaint. But we have conceived it to be proper to decide the first point above stated, and thus dispose of it as an issue on the retrial, if the evidence adduced therein be no different from that presented in this record. We shall also pass upon the third point above stated.

[1] In the outset it is just as well to say that we are unable to perceive any element of forcible entry of the premises described in the complaint or of any part thereof on the part of either of the defendants or both. Section 1159 of the Code of Civil Procedure thus defines forcible entry: "Every person is guilty of forcible entry who either: (1) By breaking open doors, windows, or other parts of a house, or by any kind of violence or circumstance of terror enters upon or into any real property; or, (2) who, after entering peaceably upon real property, turns out by force, threats, or menacing conduct, the

party in possession." Of course, it is not claimed, nor could it be under the evidence, that the conduct of the defendants comes within the purview of the first subdivision of the foregoing section. But the contention is that the acts of the defendants as disclosed by the evidence may be so construed as to bring them within the terms of the second subdivision of said section. In support of this view, counsel for appellant cite section 1172 of the Code of Civil Procedure and a number of California cases which, it is claimed, sustain appellant's construction of the meaning and scope of that section. Said section provides, *inter alia*, that on the trial of any proceeding for any forcible entry the plaintiff shall only be required to show, in addition to the forcible entry complained of, that he was peaceably in the actual possession at the time of the forcible entry.

To sustain the contention of appellant, it would be necessary to hold that with the expiration of the 60-days notice which the contract between the parties stipulated should terminate Leonard's employment as manager, the plaintiff would, *ipso facto*, or by operation alone of the terms themselves of the contract, and without any further act or steps on its part or that of Leonard, be placed in actual possession of the premises. This could, of course, no more be true than that the violation by a lessee of a vital covenant of a lease would itself have the effect of immediately putting the lessor into the actual possession of the demised premises. It is very manifest that a lease or a contract by which the possession of land is held cannot work automatically in that respect. Leonard's possession arose by virtue of his appointment or employment as manager of plaintiff's business, and, if he never himself abandoned or surrendered the possession of the premises so acquired, then, it seems obvious to us, he could not be guilty of forcible entry merely for the reason that the plaintiff had declared his contract at an end and therefore his right to the actual possession of the property forfeited. Indeed, to the contrary; if, under such circumstances, the plaintiff had forcibly driven Leonard from the premises and thus taken possession thereof, it would itself have been guilty of forcible entry, although it might transpire, as it has transpired, that, as a matter of legal right, it was entitled to the possession. This proposition necessarily follows from the very theory upon which or the purpose for which the forcible entry and forcible and unlawful detainer statute is enacted, *viz.*, to secure a judicial adjustment of differences of that character, and thus prevent the parties themselves from redressing or attempting to redress their own wrongs which is likely to lead to serious wrongs against the public or society. While the question of the right of possession must necessarily arise in such cases, since the power to award restitution

of the premises involved rests with the jury or the court, and since, moreover, it may enter into the determination of the question whether punitive damages should be allowed, still it is only an incidental issue; the gist of such actions being in the wrong which inheres in the very act itself of forcibly entering upon and invading the possession of another or forcibly or unlawfully detaining a possession to which the detainer is not lawfully or rightfully entitled.

The undisputed evidence, as seen, shows that Leonard had been put in possession of the premises as manager of the corporation's business by plaintiff itself, and it further shows that he had never abandoned or surrendered such possession and still maintained the possession thus obtained until the surrender of the same by him on the 9th day of April, 1908. It is true that the meetings of the board of directors were regularly held in one of the rooms of the building on said premises in which Leonard's office was located; but Leonard never had nor claimed to have ever been given possession of that room. The possession of said room by the directors or the corporation was not inconsistent with, nor did it in any measure whatsoever impair, Leonard's right to the possession of his office and of the balance of the premises and property, into the possession of which he entered under his contract with plaintiff. There is no evidence showing that the directors or the corporation were ever at any time prevented by Leonard or any other person employed by him from occupying for any purpose the room in which they had customarily held their meetings and transacted their official business. It is no doubt true, as the jury found, that it was the duty of Leonard to have surrendered possession of the premises upon the expiration of the 60-days notice to him that his contract with the company had been terminated and a demand by the officers of the corporation for the return of the possession, but this omission or refusal does not constitute proof that he was not in actual possession, peaceably obtained, or that his conduct in forcibly ejecting the agents and representatives of plaintiff from his office or those parts of the premises of which he had possession, however indefensible in law his conduct might be, constituted anything more than a wrongful and forcible detention of a possession which he had lawfully and peaceably acquired. These views are not at all out of harmony with the rule as it is enunciated and applied in the cases cited by appellant. Indeed, the most recent of these (*Kerr v. O'Keefe et al.*, 138 Cal. 415, 71 Pac. 447), if anything at all, is an authority against the contention of appellant. In that case the plaintiff (lessee) was in default in the payment of rent. The lease provided that on such default by the lessee the lessor might re-enter the premises, take possession thereof, and remove all persons therefrom. The de-

fendant (lessor), upon the lessee being so in default, made a peaceable entry upon the premises, in the absence of plaintiff, and took possession. Thereafter the plaintiff returned to the premises, ordered the defendant to leave the same, and thereupon the latter, reinforced by his brother and a loaded shotgun, proceeded to "remove" and in fact ejected the plaintiff from the premises and took possession thereof himself. Action for forcible entry was instituted by plaintiff and sustained by the courts. The defendant (the lessor) set up the plea that, the lease having provided that he might re-enter and retake possession of the premises upon default in the payment of the stipulated rent, he therefore entered upon the possession under color of right and in good faith. All that was decided in that case of importance was that the plea so made was without merit; the Supreme Court saying: "We cannot see that good faith constitutes an element in a defense to a forcible entry or forcible detainer, \* \* \* nor that an entry peaceably made and in good faith cuts any figure in a defense to a forcible detainer." But, while the defendants in the present case could not, in an action for forcible detainer, defend their unlawful and forcible detention of the property on the ground that they believed in good faith that they were entitled to its possession, yet, having been given and taken peaceable possession thereof, and being so in possession, their resistance to dispossession by the plaintiff, who was entitled to actual possession, cannot, as we have before declared, be construed into a forcible entry thereof merely because the defendants had no right to the possession or no defense which they could successfully interpose to such unlawful and forcible detainer.

Our conclusion upon this point is that the court was right in taking from the jury the question whether there was a forcible entry by the defendants—an issue tendered by the complaint which, as we have seen, derives absolutely no support from the evidence.

[2] But, as announced in the outset of the discussion, we think there was a clear and palpable abuse of discretion in the denial to plaintiff of its application to amend its complaint. The complaint as filed alleged generally that the plaintiff had by the acts of the defendants in detaining from it the possession of the premises for a period of nearly one month suffered damage in the sum of \$15,000. The action was commenced on the 28th day of March, 1908. The trial was begun on the 16th day of April, 1908. On the 14th day of April, 1908—two days prior to the commencement of the trial—the plaintiff served on the attorney for the defendants a copy of a proposed amendment to the complaint. Said proposed amendment contained averments of special damages, as follows: (1) Rental value, one month, of the real estate, \$625; (2) delay in receiving purchase price, four houses, \$65.45; (3)

cost, maintaining plant during forcible holding, \$5,000; (4) cost of watchmen to guard during suspension of work by the unlawful and forcible detainer, including wages of Sullivan and his crew, who were forced to cease work, \$1,069.50; (5) punitive damages for vindictiveness. On the first day of the trial counsel for the plaintiff made an application to the court for leave to amend its complaint in the particulars mentioned. Objection to the allowance of the amendment was made by counsel for defendants and sustained by the court. What the specific ground of the objection was does not appear in the record, but it is stated by counsel for appellant, and not denied, that no objection was taken to the proposed amendment on the ground of surprise or on the ground that the granting of the motion would necessitate a postponement of the trial. Thereafter counsel for appellant undertook and offered to prove the special damages as specially pleaded in the proposed amendment, promising that, if the court would permit such proof, they would amend the complaint so that its allegations would conform thereto. The court allowed proof of rental value under the general allegation of damages (*Tewksbury v. O'Connell*, 25 Cal. 263), but as to all other damages the offer was rejected on objections interposed thereto by counsel for defendants on the ground that the same were not pleaded.

[3] We do not think, as counsel for appellant contend, that the amendment proposed comes within the provisions of section 1173 of the Code of Civil Procedure. That section does not vest in the court the power of allowing all sorts of amendments in cases of this class, as will readily be observed upon reading it. It provides that where "it appears from the evidence that the defendant has been guilty of either a forcible entry or a forcible or unlawful detainer, and other than the offense charged in the complaint, the judge must order that such complaint be forthwith amended to conform to such proofs," etc. We apprehend that nothing further by way of amendment can be authorized by the court under that section than what is therein expressly prescribed. In other words, there is no authority given the court by said section to allow amendments for any other purpose than that expressly stated.

[4] But trial courts are, by virtue of section 473 of the Code of Civil Procedure, possessed of general and ample power to allow amendments at any time before, during, and even after trial and before judgment to any pleading, and where it clearly appears, as we think it does here, that it would be in furtherance of justice to allow an amendment proposed at an opportune time within the meaning of that section, a refusal to do so constitutes an abuse of the discretion which said section has committed to trial courts. The undisputed evidence shows, as

we have seen, that the plaintiff served its proposed amendment on the attorneys for the defendants two days before the commencement of the trial, and that application for leave to amend was urged on the day on which the trial began and before evidence was taken. There was no claim, as there could scarcely be consistently with reason, that counsel for appellant were taken by surprise, nor was there any showing made that a continuance would have been necessary by reason of the amendment, if allowed, and, if there had been, the court could have granted the motion upon any reasonable terms to which it might, in its discretion, have felt constrained to subject the moving party.

[5] It will not, of course, be denied that the plaintiff was entitled to show, if it could, under a complaint sufficient for that purpose, any damages occasioned to it by the forcible or unlawful detainer complained of (section 1174, Code Civ. Proc.); that is to say, it was entitled to recover, if it could prove it, under appropriate averments of its complaint, any damage that was the natural and proximate consequence of the alleged forcible or unlawful detainer. 2 *Green*, on Ev. § 256; *Anderson v. Taylor*, 56 Cal. 131, 38 Am. Rep. 52. If, therefore, plaintiff could show that it had suffered the loss of rents through the acts complained of against defendants or had necessarily been put to expense in protecting its property while the defendants wrongfully and forcibly detained the same and by reason thereof or that it had sustained loss by the cessation of the prosecution of its business during the period of the wrongful detention and by reason thereof, then all such facts would disclose proper items of damages, and, if pleaded, the rejection of proof thereof would manifestly be erroneous and prejudicial. And, as seen (with the exception of the items for rent and punitive damages), such were the special damages to which the proposed amendment, if allowed, would have given plaintiff an opportunity to address whatever proof that was available to it in those respects.

[6] The Supreme Court of this state has repeatedly declared that great liberality should be shown by a trial court in permitting, where it can be done without working great delay, such amendments to pleadings as will facilitate the production of all the facts bearing upon the questions involved in the action. *Spelling on New Trial and Appellate Practice*, § 107, and cases therein cited. "The object of judicial proceedings is to discover all the facts of a case and apply the law; and the theory of the Code is that the parties should each have reasonable opportunity to present his side of the case." *L. K. R. W. D. Co. v. K. R. & F. C. Co.*, 67 Cal. 577, 8 Pac. 91.

We have been unable to discover, from the circumstances under which the application was urged for permission to amend the com-

plaint in this case, any reason why the amendment should not have been allowed. The action here is a summary proceeding, and was designed to afford the speediest legal remedy by which one may secure redress for the wrongful or forcible invasion of his possession of real property, or, where the possession of the same, though rightfully obtained, is forcibly or unlawfully detained, for the restitution of the premises, and damages, if any are sustained, for the wrongful act. In such cases it is likely to often happen, as it no doubt has frequently occurred, that complaints are hastily, and, as a consequence, carelessly drawn, with the result that many facts which might properly be proved are either not properly pleaded or not pleaded at all. In such cases, therefore, trial courts should be particularly liberal in allowing amendments, especially so where, as here, it appears reasonably clear that full justice may not be done without such amendments.

In the present case, it does not appear, as before stated, that either the court or the defendants would have been subjected to great, if any, inconvenience or the defendants placed at any undue disadvantage by the granting of plaintiff's application to amend, and, while it may be true, as counsel for the defendants suggest, that, the possession of the premises having been turned over to plaintiff before the commencement of the trial, the present action could have been dismissed and the plaintiff have instituted another action to recover all the damages it claims to have sustained, yet the law requires no such course to be followed, and the suggestion is no argument in support of the court's action in denying plaintiff's application.

It is, however, intimated by counsel for the respondents that the amendment could have served no useful purpose, since the evidence discloses "that the respondents never interfered with appellant's possession of any part of the tract mentioned in the complaint, except a portion of one block and four lots upon which houses were being built"; that "there was no evidence that the plaintiff or any of its officers or employees ever sought admission to the paint shop or the plumbing shop or the warehouse or the drafting room, which was a part of the office, or to the lumber yard, except that a demand made for keys to those shops and rooms was not complied with until five or six days afterwards."

[7] But the gist of Leonard's sinning did not consist so much in refusing to allow the officers of the company to enter the premises or the buildings thereon, as it did in refusing to allow them to take possession of the premises and so proceed with the business of the corporation. The evidence, it is very true, shows that he permitted the physical entrance of some of the directors into the building and into his office, but he positively refused to allow them to take charge of the

affairs of the corporation or to do any act in furtherance of the business of the concern. He would not permit the men employed by the corporation to proceed with the completion of the houses then in course of construction. He would not allow it or its employees to take lumber and other material essential to the completion of the unfinished buildings. These constituted hindrances or delays which might result in great damage to the corporation. A. might employ B. as his manager to take sole possession of and conduct his mercantile business. If A. should finally demand from B. the return of the possession of the building and the business and the latter should refuse the demand, and not allow A. to do any act in connection with the business, or should close down the business, and refuse to allow A. to reopen it or to take any other steps looking to a resumption of the business, the mere fact that B. might have allowed A. physical entrance into the building in which the business was carried on would most certainly not absolve B. from the charge of unlawful or perhaps forcible detainer, nor from liability for any damages A. might suffer by reason of B.'s conduct.

The business of the plaintiff here is, as stated, the building, selling, and renting of houses upon a large tract of land, and the acts of Leonard necessarily had the effect of stopping the business, practically closing it down for a period, and certainly it cannot be maintained that, because Leonard generously permitted its officers to go upon the premises, with permission, however, to exercise no more authority over the affairs of the corporation than if they were perfect strangers, the defendants may escape the responsibility of responding in whatever damages plaintiff may be able to show were proximately occasioned to it by their unauthorized acts.

[8] It was not necessary in our opinion for the plaintiff to plead more than the alleged forcible detainer to entitle it to prove facts which would have justified the court in awarding exemplary or punitive damages. The charge of forcible detainer of real property necessarily carries with it the implication that such detainer is from a bad motive, and what the precise nature of that motive is—whether it be founded in malice or fraud or oppression of any sort—may properly be shown under the general averment that the detainer is forcible. It may be that the defendant in such a case can show that the force used was only in furtherance of the maintenance of his rights; yet, the statute having said that such detainer is in violation of law, the mere charging of the act presupposes the existence therein of all the elements essential to the consummation of the charge as it is defined by the statute, and whether, as a matter of fact, elements justifying the imposition of punitive damages are present in the act must, of course, depend upon what the proof discloses.

[8] But the court did not in our judgment err by its refusal to allow the instruction, proposed by the plaintiff, which would have authorized the jury to allow exemplary damages or damages which may be allowed under the provisions of section 3294 of the Civil Code. Indeed, we think that an examination of our statute relative to actions for forcible entry and forcible or unlawful detainer will show very clearly that the Legislature intended to commit to the court, rather than to the jury, the determination of the question whether in such cases damages by way of punishment shall be allowed, and manifestly, under this view of the proposition, an instruction to the jury upon the question of exemplary damages would be entirely out of place. Section 1174 of the Code of Civil Procedure, among other things, provides that "the jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. Judgment against the defendant guilty of the forcible entry, or forcible or unlawful detainer may be entered *in the discretion of the court either for the amount of the damages and rent found due, or for three times the amount so found.*" Section 735 of the same Code provides: "If a person recover damages for a forcible or unlawful entry in or upon, or detention of any building or any cultivated real property, judgment may be entered for three times the amount at which the actual damages are assessed." Thus it will be perceived the Legislature has clearly limited the power of the jury in such cases, so far as damages are concerned, to the assessment of such damages only as have actually been suffered by the complaining party and has conferred upon the court the sole power of determining, in the exercise of its discretion, whether, in a given case, the circumstances are such as to justify the entry of judgment in favor of plaintiff, as a penalty for the acts of the defendant, for three times the amount found by the jury either as damages or for rent. That the power thus specially given the court was intended to be exercised in those cases only where the evidence discloses that the defendant has committed the tortious act charged against him wantonly or by oppression or with malice, express or implied (section 3294, Civ. Code, supra), is a proposition which, in our opinion, is rendered free from any kind of doubt, if not alone by the language of section 1174 of the Code of Civil Procedure, then most surely by that of section 735 of the same Code. In other words, the power to treble the damages or rent is a power to be exercised by way of punishment only, and the Legislature has (wisely, we think, as the writer further thinks would

be true if it were so in all cases as to the awarding of punitive damages) committed the exercise of that power to the courts in preference to the jury, the theory of the law-makers no doubt being that the court, having equal opportunity with the jury of hearing and passing upon the testimony, is better able to decide whether the evidence warrants the imposition of any penalty at all or an allowance in excess of the amount found by the jury to be the damages actually sustained.

But, if any doubt could arise, from the mere reading of sections 1174 and 735 of the Code, as to the construction thus given those sections—that is, that the Legislature thereby intended to restrict the power of the jury, in cases of forcible entry and of forcible or unlawful detainer, to the passing upon and deciding of the question of the actual damages, if any, sustained by the plaintiff and to vest in the court the exclusive power and discretion of annexing a punishment by trebling the amount of the damages or rent—then such doubt will readily disappear upon reference being made to some very early California cases which have never been reversed, and which, we think, can never be reversed by any logical process so long as the statutes concerning forcible entry and forcible or unlawful detainer remain as they now exist and read. In the case of *Hicks v. Herring*, 17 Cal. 568, Chief Justice Field, speaking of a provision of the law precisely similar to the one we are considering, said: "This section is added, not merely to indemnify the complainant for the injuries suffered from loss of rents and profits, and for waste committed, but to punish the offending party." "In other words," said Judge Currey, referring to the same section, in *Tewksbury v. O'Connell*, 25 Cal. 284, "by the amendment the landlord was held only to claim and prove damages; and then, when assessed, it became the magistrate's (the court's) duty, not by reason of the claim therefor, but in the enjoined exercise of penal authority, to treble them." Certainly, it will not be contended that, the statute, having said that the court may, in the exercise of its discretion, add, by way of example or punishment, the amount specified therein to that found by the jury as representing the amount of the rent or the damage actually suffered by the plaintiff, the jury may, nevertheless, also add exemplary damages. The manifest result of such a construction would be that the defendant could not only be required to pay three times the actual damages found, but could also be compelled to pay three times the amount of the exemplary damages awarded. And, if the jury may, in addition to actual damages, allow damages by way of a penalty, the court may obviously likewise do so, where the cause is tried by the court without a jury. Surely it cannot be said that the court could find actual damag-



es, to which, as a finding from the evidence, it could add punitive damages, then, additionally, in the exercise of the discretion with which it is invested by section 1174 of the Code of Civil Procedure, treble the total amount so found. Nor is it a reply to the construction to which we here subject the sections in question to say that, in case the jury, in addition to finding actual damages, awards exemplary damages, the court will not enter judgment for treble the damages so found, and that, if it did do so under such circumstances, it would be an abuse of the discretion committed to it by the statute; for in no case could the court know or segregate the actual from the exemplary damages, and we know of no case where the jury have done so in their verdict.

It follows, of course, from the foregoing views that evidence bearing upon the question of punitive or exemplary damages is, in cases of forcible entry or forcible or unlawful detainer, always to be addressed to the court and not to the jury, and that, as before announced, instructions to the jury upon that question could obviously subserve no useful purpose.

There are no other questions presented which in our judgment require special notice.

For the reasons herein stated, the judgment and order are reversed and the cause remanded for retrial.

We concur: CHIPMAN, P. J.; BURNETT, J.

MIDLAND VALLEY R. CO. v. STATE et al.  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

1. RAILROADS (§ 58\*)—ESTABLISHMENT OF DEPOT—ORDER OF RAILROAD COMMISSION.

Evidence examined, and held sufficient to establish the reasonableness and justness of the order appealed from.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 130-136; Dec. Dig. § 58.\*]

2. RAILROADS (§ 58\*)—"STATION"—"DEPOT."

The word "station," as used in section 26, art. 9, Const., means a place where railroad trains regularly come to a stand for the convenience of passengers, and taking in freight; and the word "depot" in the same section means a building for the accommodation and protection of railway passengers or freight.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 58.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2004, 2005; vol. 7, pp. 6644, 6645.]

3. RAILROADS (§§ 225, 226\*)—DUTIES—MAINTENANCE OF DEPOTS.

Under section 26, art. 9, Const., it is the duty of each and every railway company within the state to provide and maintain adequate, comfortable, and clean depots at its several stations for the comfort and accommodation of the traveling public and suitable freight depots or buildings for the receiving, handling, storing

and delivering of all freight handled by such roads.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. §§ 225, 226.\*]

Appeal from State Corporation Commission.

Appeal by the Midland Valley Railroad Company from an order of the State, and G. W. Gullledge and others, Corporation Commission, in relation to the establishment of a depot. Order affirmed.

Edgar A. de Meules, for appellant. Chas. West, Atty. Gen., Chas. L. Moore, Asst. Atty. Gen., and Z. T. Walrond, for appellees.

KANE, J. This is an appeal from an order of the Corporation Commission requiring the appellant to establish one of its small type of depots at Briartown, to be maintained and operated as any other depot on its road. The appellant contends that the order of the commission should be set aside, first, because it is contrary to law; second, because it is contrary to the evidence; and, third, because the findings and order of the commission are not supported by the evidence.

[1] In relation to the necessity for a depot at Briartown from the standpoint of the traveling public, the commission found as follows: "Briartown is a prepay station on the defendant's line of railroad in the southeast part of Muskogee county, about 2½ miles north of Canadian river, and, according to the railroad map issued by the commission, it is 6.1 miles south of Porum by rail, and 8 miles north of Stigler by rail. It is about 5½ miles from Porum by wagon road, and about 11 miles from Stigler by wagon road. It is adjoining the Canadian bottom where allotments average about 80 acres and parties live on all allotments. The town of Briartown has about 70 population, 2 stores, a gristmill, and a blacksmith shop. Hoyt is a country town about 5 miles southwest of Briartown, and south of the Canadian river. Hoyt has about 300 population, 3 or 4 stores, and a cotton gin. Some of the stores at Hoyt do considerable business. Whitefield is also a country town about 3 miles southeast of Briartown. It has a population of about 375. This town would do practically all of its shipping business from Briartown if freight facilities were established. Also a considerable portion of the business from Hoyt would be transacted at Briartown. The country from which Hoyt and Whitefield draw trade, together with the territory of Briartown proper, and, when the fertility of the Canadian bottom land is considered, Briartown it appears from the evidence has sufficient area of agricultural territory and the requisite number of people to furnish a reasonable amount of business for the maintenance of a railway station." These findings are amply supported by the evidence, and fairly outline

the conditions existing in and around Briartown in so far as they are material to the question involved. The commission also made exhaustive findings as to freight and passenger earnings at that point, from which it concluded that a station at Briartown was not only a reasonable and necessary facility for the convenience of the patrons of the road, but also would be advantageous to the railway company from a financial standpoint. The evidence on this latter phase of the case does not so clearly support the findings of the commission, but in view of the presumption that its orders are prima facie just, reasonable, and correct, and another feature of the case which will be noticed hereafter, its findings and conclusions on that point will not be disturbed.

[2,3] The commission further found that "there is now maintained at Briartown switching facilities, cotton platform, and tickets are sold by the postmaster about 100 feet from the railroad, and passenger trains are stopped on flag. However, the general manager stated at the hearing that this would be made a regular stop." This, we think, with the other facts developed by the evidence, and found by the commission, constitutes Briartown a station within the meaning of that term as used in section 26, art. 9, Const., which provides: "It shall be the duty of each and every railway company, subject to the provisions herein, to provide and maintain adequate, comfortable, and clean depots, and depot buildings, at its several stations, for the accommodation of passengers, and said depot buildings shall be kept well lighted and warmed for the comfort and accommodation of the traveling public; and all such roads shall keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing and delivering of all freight handled by such roads." One of the definitions of the word "station" found in Webster's International Dictionary is as follows: "A place where railroad trains regularly come to a stand for the convenience of passengers, taking in freight," etc. And "depot" is defined as follows: "A building for the accommodation and protection of railway passengers or freight." Those words, no doubt, are used in section 26, supra, in the sense of the above definitions. If, as we have concluded, Briartown is one of its stations, it is mandatory upon the appellant to provide and maintain an adequate, comfortable, and clean depot thereat for the accommodation and protection of passengers and freight. There is no way to avoid this duty, except by the overthrow of section 26, supra, and that section is in no way assailed in this proceeding.

It follows that the order of the Corporation Commission must be affirmed. All the Justices concur.

# ARKANSAS VALLEY & W. RY. CO. v. BULLEN.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

## 1 MUNICIPAL CORPORATIONS (§ 663\*)—EMINENT DOMAIN (§ 136\*)—VACATION OF STREET—RIGHTS OF ABUTTING OWNERS—RIGHT TO COMPENSATION—VACATED STREET.

Whenever a street is vacated by a city council, the land embraced in said street at once attaches itself in the nature of an accretion to the adjacent and abutting lots in proportion to the frontage and becomes the private property of the adjacent and abutting lot owners; and, where a railway company after such vacation of the street constructs upon a portion thereof an embankment and railway tracks, it is liable to the abutting lot owner to whose lot the land taken became attached in the nature of an accretion for the value of the land taken and for the depreciation in the value of the remaining portion of his real estate not taken, resulting from the taking of a part, and for such damages as the lot owner actually sustains to his personal property by such appropriation of his land.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1438-1440; Dec. Dig. § 663; \* *Eminent Domain*, Dec. Dig. § 136.\*]

## 2. EMINENT DOMAIN (§ 106\*)—REMEDIES OF OWNERS—ACTION FOR VALUE OF PROPERTY—INSTRUCTIONS.

It is error to instruct the jury in such case that they may allow as an element of damages for the obstruction of such lot owner's right of ingress and egress to and from his lots over said street.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 282-289; Dec. Dig. § 106.\*]

Error from District Court, Noble County; W. M. Bowles, Judge.

Action by H. B. Bullen against the Arkansas Valley & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

W. F. Evans and R. A. Kleinschmidt, for plaintiff in error. P. W. Cress, for defendant in error.

HAYES, J. This action was originally brought in the court below by defendant in error, hereinafter referred to as "plaintiff," against plaintiff in error, hereinafter referred to as the "railway company," to recover damages for the depreciation of the value of his property occasioned by the railway company's constructing its railway beds and tracks in front of his lot and interfering with the use of them. The cause has been before this court once before. *Bullen v. Ark. Val. & W. Ry. Co.*, 20 Okl. 819, 95 Pac. 476. The railway beds and tracks of the railway company from which plaintiff claims to have suffered his damages lie in and upon a strip of land formerly constituting a street in front of plaintiff's property. One of the points in controversy at the former hearing before this court was whether said street had been vacated. At that hearing, plaintiff contended that the street had been vacated

by ordinance of the city council, and the land embraced therein had, prior to the construction of the railway, attached itself in the nature of an accretion to the adjacent real estate in proportion to the frontage. The railway company, on the other hand, contended that the street had never been vacated, but that it had been granted a franchise to construct its railway thereon by an ordinance of the city. The opinion and judgment of this court at that hearing sustained the contention of plaintiff. After the case was remanded to the district court for a new trial, plaintiff filed a substituted petition, in which he alleges that he is the owner of certain lots in the city of Perry, each of which abuts upon the south side of A street, a public street in that city; and that he has for several years conducted upon his said lots a large and extensive lumber business for which purpose the lots are well adapted; and that said lots were on or about the 1st day of October, 1903, reasonably worth the sum of \$8,000. He alleges that, prior to said last-mentioned date, the city council of the city of Perry by an ordinance vacated said A street in front of his property; and that by reason thereof the street to the center became his property as an accretion to his lots abutting thereon. He alleges that on or about the 1st day of October, 1903, the railway company, without his consent, erected a large fill directly in front of his lots and in and upon the same and built in the street in front of his property and in and upon his property a steam railway, consisting of three tracks, the nearest of which is at a distance of about 10 feet from the former curb line of his property; that by reason of said obstructions he has been deprived of all means of ingress and egress to and from his property, rendering it wholly unfit for the purposes for which he had been using it.

The railway company by its answer denies all the allegations of plaintiff's petition, except such as are expressly admitted. It thereupon admits that the city of Perry by ordinance vacated that portion of the street in front of plaintiff's property; and that, before it constructed its road thereon, the land lying in said street to the center thereof in front of plaintiff's property attached to plaintiff's property in the nature of an accretion thereto. It admits the construction of its railway tracks upon a portion of said street that has become attached to plaintiff's lots, that the construction was wrongful, and that it is liable to plaintiff for his just damages.

[1] There was a trial to a jury to ascertain the amount of damages. The jury found plaintiff's damages at \$1,800. The only question presented for our determination in this proceeding arises upon an instruction given by the court to the jury, and upon instructions requested by the railway company but refused by the court, all of which bear upon the question of what the jury may take

into consideration in ascertaining the amount of plaintiff's damages. The instruction given by the court and complained of is not free from ambiguity; but there is no controversy between counsel that it has the effect to authorize the jury in arriving at the amount of plaintiff's damages to take into consideration as an element thereof the destruction by the railway company's lines of railway of plaintiff's right of ingress and egress to and from his property over said A street in front thereof. By instructions requested by the railway company and refused by the court, the court was asked to instruct the jury that upon vacation of said street in front of plaintiff's lots said street became the private property of the owners of the adjoining lots; and that thereupon plaintiff had no right whatever to use same as a street for the purpose of ingress and egress to and from his lots; and that they should not allow plaintiff any damages, because of the obstruction of the street and interference with plaintiff's egress and ingress thereover to and from his property. We think the court committed error in giving the instruction objected to and in refusing the instruction requested involving this question. Whether, in the absence of special legislative provision, the vacation of a street is such injury to abutting lot owners for which they can recover compensation against the municipality, is a question upon which the authorities are divided. 37 Cyc. p. 192; 15 Am. & Eng. Encyc. of Law (2d Ed.) p. 402.

The question has never been directly determined in this jurisdiction; but the right to recover against the city is assumed in the reasoning of the court in *Blackwell, Enid & S. W. Ry. Co. v. Gist*, 18 Okl. 516, 90 Pac. 889. Assuming without deciding in this case that plaintiff had such a property right in the street as could not be destroyed by the vacation thereof by the city, without rendering the city liable to him for its damages, still we know of no theory upon which the railway company could be liable therefor. It received no right whatever in the street or in the land lying therein by reason of the vacation of the street. When the street was vacated, the land therein became the private property of the adjacent lot owners on each side in proportion to the frontage of their real estate. Section 688, Comp. Laws 1909; *Bullen v. Ark. Val. Ry. Co.*, supra. The vacation of the street did not grant to the railway company any right to construct its lines of railway upon the lands lying in the vacated street any more than it authorized the railway company to appropriate any of the other private property of the adjacent lot owners. In order to construct its lines of railway upon said land, it was necessary for it to purchase the same from the lot owners or to condemn it and pay as compensation therefor the damages assessed. The railway company took no property of plain-

diff lying in the street, nor has it destroyed any right of his in a street; for, before it constructed its tracks and the embankments complained of, the street had ceased to exist. Not all of the railway tracks lie upon that portion of the vacated street that has become attached to the lots of plaintiff and become his property, but some of them lie upon the opposite side of the street on land that has become the private property of other adjacent lot owners. These lot owners are entitled to compensation from the railway company for the value of the land that has become their property by reason of the vacation of the street, unincumbered by any easement of plaintiff therein.

[2] It would be manifestly unjust to require the railway company to pay such owners the value of said land taken by it as unincumbered by any easement of plaintiff therein, and at the same time allow plaintiff to recover for a right of ingress and egress over same to and from his property. The damages which a real estate owner is entitled to recover for land taken by a railway company in the construction of its railway was held in *Blincoe v. C. O. & W. Ry. Co.*, 16 Okl. 286, 83 Pac. 903, and *A. V. & W. Ry. Co. v. Witt*, 19 Okl. 262, 91 Pac. 897, 13 L. R. A. (N. S.) 237, to be the value of the land taken; the depreciation in the value of the real estate not taken resulting from the taking of a part thereof and the damages the owner sustains to his personal property by reason of such appropriation of his land. See, also, *Blackwell, Enid & S. W. Ry. Co. v. Gist*, supra.

It follows that the judgment of the trial court should be reversed, and the cause remanded.

TURNER, C. J., and KANE and DUNN, JJ., concur. WILLIAMS, J., not participating.

#### ARKANSAS VALLEY & W. RY. CO. v. JOHNSON.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

#### RAILROAD IN STREET.

Syllabus same as in *Ark. Val. & W. Ry. Co. v. Bullen*, 119 Pac. 414, decided at this term, but not yet officially reported.

Error from District Court, Noble County; W. M. Bowles, Judge.

Action by A. Dinah Clark Johnson against the Arkansas Valley & Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

W. F. Evans and R. A. Kleinschmidt, for plaintiff in error. P. W. Cress, for defendant in error.

HAYES, J. Defendant in error brought this action in the court below to recover damages for the construction by plaintiff in error of a railway upon a portion of a street in the city of Perry in front of lots owned by defendant in error and abutting on said street, which street had been vacated by ordinance of the city council prior to the construction of the railway thereon. From a judgment in her favor for the sum of \$500, plaintiff in error prosecutes this appeal.

Identically the same question is presented in this case as was presented and determined by this court in *Ark. Val. & W. Ry. Co. v. Bullen*, 119 Pac. 414, decided at this term, but not yet officially reported; and, upon the authority of that case, the judgment of the court below in this cause should be reversed, and the cause remanded, and it is so ordered.

TURNER, C. J., and KANE and DUNN, JJ., concur; WILLIAMS, J., not participating.

#### HUSTON et al. v. COBLEIGH.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

#### GUARDIAN AND WARD (§ 44\*)—LEASE OF LAND—VALIDITY.

Mansfield's Digest, § 3502 (section 2398, Ind. T. St. 1899), as in force in the Indian Territory, empowered the United States courts in the Indian Territory, sitting as probate courts, to authorize the guardian to lease the lands of a minor according to the best interests of the ward, subject to the approval of the court; and sections 3509, 3510, and 3511 of said Digest (sections 2405, 2406, and 2407, Ind. T. St. 1899) authorize the probate court to sell and lease for purposes of reinvestment, or putting proceeds on interest. Held that, while at common law all leases by a guardian to extend beyond the term of the guardianship were voidable, a lease of a minor's land, pursuant to an order of the probate court, was valid, though it extended beyond minority, following *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 192-201; Dec. Dig. § 44.\*]

Turner, C. J., dissenting.

Error from District Court, Washington County; T. L. Brown, Judge.

Action between E. B. Huston and others and John C. Cobleigh. From the judgment, Huston and others bring error. Affirmed.

J. A. Tillotson and Stanford & Stanford, for plaintiffs in error. J. T. Shipman, J. P. O'Meara, and H. H. Montgomery, for defendant in error.

WILLIAMS, J. Counsel for plaintiffs in error in their brief say: "The facts, as disclosed by the pleadings, raise several propositions, but we believe they are ultimately

resolved into one; that is, Did the United States Court for the Northern District of the Indian Territory, sitting at Pryor Creek, have the power to decree the execution of a valid oil and gas lease upon the allotment of Agnes B. Henry, she being a minor Cherokee citizen, for a period, extending beyond the minority of the allottee?"

It is contended by counsel for plaintiffs in error that said court was sitting in the exercise of probate jurisdiction only. If so, certain acts, as contained in Mansfield's Digest of the Statutes of Arkansas 1884, apply. Such statutes, then in force in the Indian Territory, are as follows: Mansfield's Digest, § 3502 (section 2398, Ind. Ter. Stat. 1899), empowered the United States courts in the Indian Territory, sitting as probate courts, to authorize the guardian to lease the lands of a minor according to the best interests of the ward, subject to the approval of the court; and sections 3509, 3510, and 3511, Mansfield's Digest (sections 2403, 2406, and 2407, Ind. Ter. Stat. 1899), authorize the probate court to sell and lease for purposes of reinvestment, or putting proceeds on interest.

In *Beauchamp v. Bertig*, 90 Ark. 351, 119 S. W. 75, 23 L. R. A. (N. S.) 659, it is said: "Our statute empowers the probate court, upon being satisfied that it would be for the best interest of the estate of a minor, to make an order, authorizing the guardian to rent the lands of such minor, publicly or privately, as in his judgment shall be best for the interest of his ward, subject to the approval of the probate court, or the judge thereof in vacation. Sections 3789, 3790, Kirby's Digest. It also gives the probate court power to lease or sell for purposes of reinvestment, or putting proceeds on interest. Section 3801, Kirby's Digest. At the common law, the guardian in socage could make a lease in his own name of the lands belonging to his infant ward, to continue only until the infant was 14 years of age, unless the latter chose to continue it longer. 'But the common law,' says Drake, J., 'in its ever-watchful care of the interest of minors, has suffered their guardians to make advantageous leases for them continuing, at the option of the minor, beyond the age of 21.' Snook v. Sutton, 10 N. J. Law, 133, and authorities cited. Under the common law, or statutes simply declaratory thereof, leases made by the guardians to extend beyond the term of the guardianship are voidable. Rogers on Domestic Relations, 861, note 5; 15 A. & E. Ency. Law (2d Ed.) 68 and 69, note 1; Emerson v. Spicer, 46 N. Y. 594; Ross v. Gill, 1 Wash. (Va.) 87; Ross v. Gill, 4 Call (Va.) 250; Talbot v. Provine, 7 Baxt. (Tenn.) 502, at page 510; 1 Bac. Abr. Leases; 2 Kent Com. 228; 1 Wash. Real Prop. 307; Schouler, Dom. Rel. § 350, note 1; Putnam v. Ritchie, 6 Paige (N. Y.) 390; Field v. Schieffelin, 7 Johns. Ch. (N. Y.) 150, 11 Am.

Dec. 441; People ex rel. Hannagan v. Ingersoll, 20 Hun (N. Y.) 316. In England, from the time of Lord Hardwicke, the High Court of Chancery had no power to lease or sell an infant's real estate without the aid of act of Parliament. The course was to give reference to a master to inquire whether it would be for the benefit of the minors that application be made for an act of Parliament. Russell v. Russell, 1 & 2 Malloy, 258. But the supreme lawmaking power in our state has by the above statute invested the probate court with power to sell and lease the lands of infants. The matter is left in the judgment of the probate court, and there are no limitations prescribed for the term of lease, and we are of the opinion, from the above and cognate provisions of chapter 76, Kirby's Dig., that none were intended. The best interest of the estate of the minor is the prime and only consideration, and that seems to be the only limit to his discretion, within the statutory provisions. Complying with these, the intention of the lawmakers was to give the probate courts plenary power in the premises. Hence the lease, made by order of the court, was valid, although it was to continue beyond the minority of the infants."

Section 3801, Kirby's Digest, is identical with section 3509, Mansfield's Digest (section 2406, Ind. Ter. Stat. 1899), and section 3803 of Kirby's Digest is identical with section 3511, supra.

Sections 3789 and 3790 of Kirby's Digest provide for the annual leasing of the lands of minors when it shall be for the best interest of the ward, such renting to be subject to the approval of the court or judge, and the taking of security for the payment of rent.

Section 3502, supra, provides that: "The probate court shall order the proper education of minors according to their means, and for that purpose may, from time to time, make the necessary appropriations of the money or personal estate of any minor, and when the personal estate shall be insufficient or not applicable to the object, upon application the court may order the lease or sale of real estate, or so much thereof as may be requisite," etc.

The statutes in force in the Indian Territory were fully as comprehensive in empowering the guardians, with the permission of the court, to execute a lease to extend beyond the minority of the minor as those of Arkansas at the time of the delivery of the opinion in *Beauchamp v. Bertig*, supra, which was on April 26, 1909. See, also, Act Cong. April 28, 1904, c. 1824, § 2, 33 U. S. Stat. p. 573; Morrison et al. v. Burnette, 83 C. C. A. 391, 154 Fed. 617.

At the time this lease was executed by the guardian, the land of the ward was also in the hands of a receiver appointed by the United States Court for the Northern Dis-

trict of the Indian Territory. The receiver was authorized to make a lease covering such period, and the same was approved by the court; the lease being made jointly by Amella D. Henry, the receiver of the estate of the minor, and also as guardian of the minor. The lease was therefore approved by the Secretary of the Interior, and also by the United States court, exercising chancery jurisdiction, and also by the same court, exercising probate jurisdiction. It seems to be settled that such court, exercising the powers of chancery, had authority to approve a lease extending beyond the minority of the ward. *Ricardi et al. v. Gaboury et al.*, 115 Tenn. 484, 89 S. W. 98; *Marsh v. Reed*, 184 Ill. 263, 56 N. E. 306; *Branton v. Branton*, 23 Ark. 569; *Haag v. Sparks*, 27 Ark. 594; *Hankins v. Layne*, 48 Ark. 545, 3 S. W. 821; *Turner v. Rogers*, 49 Ark. 51, 4 S. W. 193.

It follows that the judgment of the lower court must be affirmed. All the Justices concur, except TURNER, C. J., who dissents.

**BARNETT et al. v. WAY et al.**  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

**1. INDIANS (§ 18\*)—LANDS—DESCENT AND DISTRIBUTION.**

The descent and distribution of the allotted lands of an enrolled Creek Indian, who died before the ratification of the Original Creek Treaty (Act March 1, 1901, c. 676, 31 Stat. 861), and who had during her lifetime allotted to her under section 11 of the Curtis Act (Act June 28, 1898, c. 517, 30 Stat. 495) the use and occupancy of the surface of the allotment, which was thereafter by section 6 of the Original Creek Treaty ratified and deed issued to her heirs therefor, is, by reason of section 28 of the Original Creek Treaty, regulated and controlled by the law of descent and distribution of the Creek Nation.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18.\*]

**2. INDIANS (§ 18\*)—LANDS—DESCENT AND DISTRIBUTION.**

In determining who are the heirs of a deceased enrolled Creek Indian, who during her lifetime received the allotment of the use and occupancy of an allotment, which, after her death, was ratified to her heirs by virtue of section 6 of the Original Creek Treaty (Act March 1, 1901, c. 676, 31 Stat. 861), the laws of descent and distribution of the Creek Nation are to be applied as if the deceased Indian had received title to her allotment during her lifetime and died seised thereof.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18.\*]

**3. INDIANS (§ 18\*)—LANDS—DESCENT AND DISTRIBUTION.**

An enrolled Creek Indian died February 8, 1900, and left surviving her as her relations her father, some brothers and sisters, some of whom were the children of the father and mother of the deceased and others were the children of the father by a former wife, not the mother of the deceased, and left also a half-brother and the children of a half-sister, who were children of the deceased's mother by other hus-

bands than the father of the deceased. The deceased's father died on March 17, 1900. *Held*, under section 28 of the Original Creek Treaty (Act March 1, 1901, c. 676, 31 Stat. 861), the children of the father inherited the allotment of the deceased to the exclusion of the half-brothers and the children of the half-sisters, who were the children of the deceased's mother.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 49; Dec. Dig. § 18.\*]

Error from District Court, Muskogee County; John H. King, Judge.

Action by Thomas J. Way and others against Pompey Barnett and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

Z. T. Walrond, for plaintiffs in error.  
Maxey & Runyan and Mars & Mars, for defendants in error.

**HAYES, J.** This action was originally brought by defendants in error in the United States Court for the Western District of the Indian Territory for partition and to set aside and have canceled certain invalid deeds as a cloud upon title to the land in question. Upon the admission of the state, the cause was transferred to the district court of Muskogee county. The decree of that court disposes of the void instruments satisfactorily to all parties, but that part of the decree which determines who the heirs of Cita Barnett, a deceased Creek Indian, are, and distributes among them her allotment of land, is complained of in this proceeding. There is no controversy about the facts. Cita Barnett, a Creek Indian, died on the 8th day of February, 1900. During her lifetime she had allotted to her as a member of the Creek Tribe of Indians the use and occupancy of the N. W.  $\frac{1}{4}$  of section 35, township 16 N., range 15 E. She left surviving her as her next of kin her father, George Barnett, her full brothers and sisters, Johnson Barnett, Jenetta Johnson, née Barnett, a half-brother, Pompey Barnett, a niece, Della Squires, née Barnett, and a nephew, Thomas Davis. Her mother was the second wife of her father, and her father was the third husband of her mother. Louisa Barnett is the half-sister of Cita Barnett by reason of her being an illegitimate child of her father by a woman other than Cita's mother, but recognized by her father as his daughter. Della Squires is Cita Barnett's niece by reason of her being a child of a daughter of George Barnett by his first wife. Pompey Barnett was a half-brother, because of his being a son of Cita's mother by her second husband, and Thomas Davis is a nephew, because of his being the son of a daughter of Cita's mother by her first husband. This contest is between, on the one side, the children of George Barnett, their heirs and grantees, and, on the other side, Pompey Barnett and Thomas Davis of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

kin to Cita Barnett on her mother's side, but of no blood relation to George Barnett. George Barnett, the father of the deceased allottee, died on the 17th day of March, 1900. His wife, the mother of Cita, had died prior to Cita's decease. It is the contention of defendants in error that George Barnett, upon the death of Cita, inherited her allotment, and upon his death it descended to his children, and the judgment of the trial court in giving the entire allotment to the heirs of the father, George Barnett, sustained this contention.

[1] In considering this question, it is to be noted that the initial allotment of land to Cita Barnett was made and her death and the death of her father, George Barnett, occurred prior to the enactment of the act of Congress, entitled "An act to ratify and confirm an agreement with the Muskogee and Creek Tribes of Indians and for other purposes" (Act March 1, 1901, c. 676, 31 Stat. 861), and generally known as the Original Creek Treaty. Section 28 of that act provides: "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled, 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

The act of 1898, referred to in the foregoing statute, is commonly called the Curtis Act. By section 11 of the Curtis Act (Act June 28, 1898, c. 517, Stat. 495) it is provided that when the roll of citizenship of any of the Five Civilized Tribes or Nations is fully completed as provided by law, the Dawes Commission shall proceed to allot the exclusive use and occupancy of the surplus of all lands of any such nation or tribe among the citizens thereof as shown by the roll of the tribe, giving each as far as possible his fair and equal share. Cita Barnett was allotted during her lifetime the use and occupancy of the land in controversy under the provisions of this statute; but the allotment of lands to an Indian under this statute does not vest the allottee with any title to the fee in the land, nor does it provide for the allottee's acquiring the fee thereto. It was only the use and possession of the land that was allotted to them under it, so that, when Cita Barnett died, she did not have any title to or estate in the fee in the land constituting her allotment, and the fee there-

fore could not and did not descend at that time to her heirs.

The Creek Tribe of Indians, prior to the ratification of the original Creek agreement in 1901 and the allotment of lands thereunder, held the title to its tribal lands in the Creek Nation as a political society under a patent issued to the tribe by the United States government under the provisions of the treaty of the United States with said tribe in 1833 (Act Feb. 14, 1833, 7 Stat. 417). By that patent the fee-simple title to said lands, subject to a contingent reversionary interest in the United States, was conveyed to the tribe, and the tribe was guaranteed the lands conveyed so long as it existed as a nation and continued to occupy them. Under this patent, however, the individual Creek Indian received no title to any part of the lands. The title was in the nation, and the individual members could and did enjoy only possessory rights to occupy and use part of it. Congress, by the Curtis Act, subject to the approval of this tribe provided not only for breaking up the tribal lands into allotments for use and occupancy of the surface by the individual members, but to convey the title thereto to the allottees. That act as enacted by Congress included within its provisions in an amended form a treaty or agreement made by the commission to the Five Civilized Tribes with the Creek Indians on the 27th day of September, 1897. Sections 1 to 12, inclusive, of that treaty provide for allotment of the lands to the individual members of the tribe, and for conveyance of the title thereto to the allottees; but the act provides that the provisions of that amended treaty shall not become effective unless ratified by the tribe at an election for that purpose on a date expressed in the act. The tribe rejected the amended treaty, and the Curtis Act, as it finally became effective, contained no provision under which the Creek Indian could acquire the legal title to any of the tribal lands. Notwithstanding the failure of the Creek tribe to ratify the proposed treaty, the commission to the Five Civilized Tribes proceeded to allot, and prior to the ratification of the original treaty on May 25, 1901, did allot, under section 11 of the Curtis Act, to many members of the tribe the use and occupation of the surface of that portion of the tribal lands to which each member of the tribe was entitled, and Cita Barnett was one of such allottees.

[2] Section 6 of the Original Creek Treaty provides that allotments, made to Creek citizens prior to the ratification of that agreement to which there was no contest and which did not include public property, were thereby ratified; and that the same should in all things be governed by the provisions of that treaty. Cita Barnett's allotment did not fail because made before the ratification of the treaty; for by said section 6 it was

ratified, and by section 28 was made to carry and vest in her heirs as an allottee all the right and title she would have received by such allotment, if it had been made to her after the ratification of the treaty.

It is unimportant for the purpose of this case whether the right and estate thus conferred upon the heirs is one of inheritance or one of purchase. It is plain that the allotment of the deceased, Cita Barnett, with all the rights added thereto by the treaty became, under section 28, the rights of her heirs. While the treaty does not name the heirs who shall take, it does provide that the allotment of a deceased member not received by him during his lifetime to which he would be entitled if living "shall descend to his heirs according to the laws of descent and distribution of the Creek Nation and be allotted and distributed to them accordingly." It is to be noted that this act, which first provides for the extinguishment of the tribal title and conveyance thereof, together with the reversionary right of the federal government to individual members of the tribe, provides that if any member be deceased, and therefore unable to receive the grant provided for by the treaty, then the right of allotment shall descend to, and the lands shall be allotted and distributed to, the heirs of deceased in accordance with the rule of descent and distribution therein named. What the rule of descent and distribution was at the time of the death of Cita Barnett and her father, George Barnett, is unimportant; for, at the time of her death, she had no title, equitable or legal, in the fee in her allotment to descend. The rule of descent and distribution adopted by the treaty and to be applied in such case is the rule of descent and distribution in force in the Creek Nation, governing the devolution of property owned by any of its deceased members at the time of such member's death.

[3] The law of descent of the Creek Nation at the time of the death of Cita and her father and at the time of the ratification of the original Creek agreement, in so far as it is material in this case, was as follows: "Be it further enacted that if any person dies without a will, having property and children, the property shall be equally divided among the children by disinterested persons, and in all cases, where there are no children, the nearest relation shall inherit the property." Chapter 6, Laws of Creek Nation, 1880 Compilation.

The Creek Tribe of Indians has, for a number of years, been a civilized tribe and recognized as such; but, until legislation of Congress, looking to the allotment of their lands in severalty, this tribe had maintained a tribal government. Its domestic affairs, the political and the property rights of its members were, in a large measure, governed by tribal laws; and the members of the tribe had little knowledge, and many of them were

totally ignorant, of the laws governing the similar rights of their white neighbors. The change in the system of ownership of tribal lands by the allotment thereof to the individual members was an important one to the Indians. It was the most important step in the legislation, looking to the dissolution of the tribal government; and to the preparation of the Indian for the advent of statehood and the subjecting of him and his property to the laws of the state of which he was to become a citizen. It cannot be doubted, as the history of the negotiations between the nation and the government discloses, that these Indians did not readily agree to this radical change in the system of the ownership of their lands. So long as the title remained in the tribe, they knew that they, their heirs and descendants, would have the use of their lands as they had theretofore; but if the title was transferred to the individual members, and upon their death descended to somebody under a law with which they were not familiar, they were apprehensive that the tribal lands would in time become lost to their heirs and descendants. It can be readily understood why they chose to retain, as a rule of descent and distribution, the Creek laws. Crude, imperfect, and difficult of application to estates in lands as the law is, the Indians were familiar with their own law. They knew that under it, at the death of any Indian, such Indian's property went to certain kinsmen of the deceased, that the order of descent was not determined by the happening of some event in the future or fixed by the deceased's status at some time prior to his death, and we think it was the intent to provide that the land to which a deceased Indian would have been entitled to an allotment, if he had not died before allotment, should be allotted to and received by those persons as heirs of such Indians that would have received it under the Creek laws, if the allotment had been made to the deceased at the time of his death and had descended under said law.

This conclusion does not conflict with the judgment or opinion of this court in Hooks et al. v. Kennard et al., 28 Okl. 457, 114 Pac. 744. In that case the allotments of three deceased Creek Indians were involved. One of the deceased Indians died in 1900, before the ratification of the original Creek agreement in May, 1901. The other two died in the year of 1901, after the ratification of the original Creek agreement; but, before the ratification and proclamation of the supplemental Creek agreement in 1902, the allotments to all three were made in the order named after the ratification of the original Creek agreement, and before the ratification of the supplemental agreement with the Creek tribe, ratified on June 30, 1902 (Act June 30, 1902, c. 1323, 32 Stat. 500), and proclaimed by the President as a law August 8, 1902 (32 Stat. 2021). Patents to all



the allotments were issued to the heirs of the deceased Indians in 1904, after the supplemental treaty had become a law. The contest in that case was whether descent was cast when the allotments were made to the heirs, whoever they were, and when they became vested with the equitable title, at which time the Creek laws of descent and distribution were in force, or at the issuance of patent and conveyance of legal title, at which time the laws of descent and distribution provided by chapter 49, Mansfield's Dig. of the Statutes of Arkansas (Ind. T. Ann. St. 1899, c. 21), were in force. It was held that the law in force at the date when the allotments were segregated and made governed, and not the law in force when patent issued. It was not involved in that case whether, in applying the law of descent and distribution to determine who are the heirs that take the allotment of a deceased Creek Indian, dying before allotment to him, the law shall be applied as if the deceased had received his allotment at the time of the death or as if he had lived until the time the allotment is selected, which is one of the questions involved and decided in this case.

Our conclusion that section 28 of the Original Treaty prescribes the law of descent that governs the distribution of the tribal lands to which Cita Barnett was entitled is not sound, if the allotment to a member of the tribe under section 11 of the Curtis Act means the same thing as an allotment to a member within the meaning of said terms as used in section 28 of the original agreement and in the other sections of that treaty; for in that event Cita Barnett had received her allotment before the enactment of the treaty, and she was vested with an equitable title to the fee therein at the time of her death, and such estate descended at that time to her heirs by virtue of the law of descent and distribution then in force, and not by virtue of some law subsequently enacted, for this court has several times held that the segregation of an allotment to a Creek Indian under the provisions of the original treaty and the issuance of certificate of allotment vests in the allottee or his heirs, in the event of his death before allotment, an equitable title to the fee of the lands allotted. *Hooks et al. v. Kennard et al.*, *supra*, and cases therein cited.

Section 11 of the Curtis Act is not clear in its meaning. Language may be found therein upon which it may be contended with some reason that it was the legislative intent that an allotment made by the Dawes Commission under the authority of that section to a member of any of the tribes or nations should vest in such allottee the title or the right to the title in the lands allotted. The same sentence of the section that provides for the allotment of the use and occupancy of the surface provides that the oil, coal, asphalt, and mineral deposits in the lands

of the tribes shall be reserved to the tribe, and no allotment of such land shall carry title to such oil, coal, asphalt, or mineral deposits. Applying the familiar rule of construction, "*expressio unius est exclusio alterius*," it would seem from this language that it was intended that an allotment made under this statute should carry to the allottee the right or the title of the tribe in the lands allotted, except as to any oil, coal, asphalt, or mineral deposits that might be found therein. But, as has often been said by the courts, rules of construction are not to be applied arbitrarily. Their application is to be made when such application will aid in ascertaining the legislative intent. If the application of a rule leads to a construction contrary to the legislative intent, it is not to be applied. The meaning of section 11 and the authority granted by it to the Dawes Commission to make allotments cannot be determined by looking at that section alone. The entire act must be construed together, and all its parts be made to harmonize, if possible. The history of the negotiations between Congress and these tribes, looking to the dissolution of the tribal government and the abolition of tribal ownership of the lands and to subsequent legislation of Congress upon the same subject embraced within said section, may be looked to to ascertain the general purpose of the Curtis Act and the construction that Congress itself has placed upon it. This act contains an agreement made by the Dawes Commission with commissioners representing the Choctaw and Chickasaw Tribes on the 23d day of April, 1897, as amended by the act. The first provision of this treaty is that "all the lands" within the Indian Territory belonging to the Choctaw and Chickasaw Tribes shall be allotted to the members of said tribes, and a subsequent clause provides that, as soon as practicable after completion of the allotments, patents shall be executed by the principal chief of the nation and the Governor of the Chickasaw Tribes to such allottees, conveying to each allottee all the right, interest, and title of the tribes in the lands allotted. As hereinbefore stated, this act also contained a proposed treaty with the Creek Tribes, section 1 of which provides that there shall be allotted out of the lands owned by the Creek Nation to each citizen of the Creek Nation 160 acres; and section 12 provides that, after the completion of such allotments, there shall be executed and delivered to each allottee a patent, conveying to him all right, interest, and title to the lands so allotted. It is clear that it was intended by these provisions of the proposed treaties to allot not only the use and occupancy of the lands to the individual members of the tribe, but the land itself, and to extinguish the tribal title by conveying it to the allottees. But the act provides that the provisions of these treaties shall not become effective unless the treaties

be ratified by the tribes before dates fixed in the act. To hold that it was intended by section 11 to authorize the commission to allot the lands, and by the allotment thereof to vest the title or the right to the title in the allottees, would render the provisions of this act inconsistent and convict Congress of gross duplicity in its dealings with the Indians under this act; for under such construction, by the treaty provisions of the act, Congress said to the Creek, Choctaw, and Chickasaw Tribes, "If the tribes consent, the tribal lands will be allotted and title divested out of the tribes and vested in the allottees"; and, by section 11, said that such will be done, whether the tribes consent or not. It is a general rule of construction, without exception, that an act shall be construed so as to give effect to all its provisions, if such construction is not inconsistent with the general purposes of the act and its provisions are not necessarily conflicting. *Bernier v. Bernier*, 147 U. S. 242, 13 Sup. Ct. 244, 37 L. Ed. 152.

The subsequent legislation of Congress relative to the allotment of these lands shows that Congress placed no such construction on this act. The treaty proposed in the Curtis Act to the Chickasaw and Choctaw Tribes was adopted by those tribes; but the treaty proposed to the Creek Tribe was, as before stated, rejected by that tribe. Shortly thereafter, through the Dawes Commission, Congress began the negotiation of another treaty with the Creek Tribe, which, in an amended form, was ratified and confirmed by Congress in an act approved March 1, 1901, being the original Creek agreement already referred to herein. But the provisions of that act are that its provisions shall not become effective unless the same are ratified by the Creek National Council within 90 days from the approval of the act by the President. Section 3 of this treaty provides that "all lands of said tribe, except as herein provided shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value as nearly as may be," and then provides the manner of allotment. Section 23 provides for the execution and issuance by the principal chief of the tribe, to be approved by the Secretary of the Interior, a patent to each allottee, whereby the tribal title and all the right, title, and interest of the United States shall be conveyed and relinquished to the allottees. Later, the supplemental Creek treaty was negotiated and adopted by Congress and the tribe, dealing with the allotment of the tribal lands and the conveyance of the title to the allottees. On March 1, 1901, there was approved an act of Congress, entitled "An act to ratify and confirm the agreement with the Cherokee Tribe of Indians and for other purposes." Act March 1, 1901, c. 675, 31 Stat. 848. The passage of this act occurred after

the enactment of the Curtis Act. The treaty therein contained provides for the allotment of the lands of the Cherokee Nation to the members of that tribe and the conveyance of the title to the allottees, but that act is to become effective only, if ratified by the majority vote of the members of the tribe at an election to be held for that purpose.

On the 16th day of December, 1897, the Dawes Commission entered into a treaty with the representatives of the Seminole Tribe, which was ratified by act of Congress approved July 1, 1898 (Act July 1, 1898, c. 542, 30 Stat. 567), just three days after the approval of the Curtis Act. This treaty provides that the lands of the Seminole Tribe shall be divided equally among the members of the tribe; that each allottee shall have the sole right of occupancy of the lands so allotted to him during the existence of the tribal government, and until the members of the tribe shall become citizens of the United States; and that, when tribal government shall cease, a deed shall be executed to each allottee, conveying to him the title to the lands so allotted to him. Thus, it appears that by all the treaties negotiated by the Dawes Commission with these tribes just before and after the passage of the Curtis Act, which in amended forms were ratified by Congress, Congress was endeavoring to obtain the consent of the tribes to the allotment of their tribal lands and to the divesting of tribal title. It is part of the history of the condition of tribal affairs at the time of this legislation that in some of these nations the lands were held, occupied, and used under the tribal laws in large tracts or bodies by the more thrifty members of the tribe to the exclusion of by far the larger number of the tribes who received but little, if any, benefits from their lands. Those holding large bodies of the tribal lands naturally would be averse to surrendering the advantage they enjoyed under the tribal ownership and control; and, among many of those who did not hold any of the lands, there was reluctance to give up a system with which they were familiar and adopt one with which they were not familiar. It was in a large measure, we think, to remedy this condition that Congress provided by section 11 of the Curtis Act that whether the tribes ratified the treaty proposed, and thereby consented to the allotment of their lands and the divesting of their tribal titles, the use and occupancy thereof should be distributed equally among the members of the tribe, thereby accustoming and educating the entire membership of the tribe to an individual control and use of a part of the tribal lands and progress at the same time be made toward the allotment of lands and conveyance of the title thereto when consent should ultimately be obtained from the tribes. Under this view of the meaning

of said section 11, Cita Barnett had no estate in the fee in her allotted lands at the time of her death, and descent of her allotment was not cast at that time.

The remaining question is: Who would have inherited her allotment, applying the Creek law of descent and distribution, put in force by the Original Treaty, if Cita Barnett had received her allotment in her lifetime and been seised thereof at the time of her death? As she had no children, it would have descended to her nearest relations. Her nearest relations, if living, were her parents. The parents are nearer of kin than brothers and sisters. 4 Kent Comm. (13th Ed.) p. 395. Of them, the mother is nearer kin than the father within the meaning of the Creek law. *De Graffenreid et al. v. Iowa Land & Trust Co.*, 20 Okl. 687, 95 Pac. 624. But of her parents, Cita Barnett's father alone survived her. He therefore would have inherited her allotted lands, had she received them before her death, and upon her death they would have descended to his children, to the exclusion of the children of Cita Barnett's mother by her husband other than George Barnett.

There is no controversy between the heirs of the father about the distribution of the allotment between them, and the judgment of the trial court is affirmed.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

ST. LOUIS & S. F. R. CO. v. SUTTON et al.  
(Supreme Court of Oklahoma. Feb. 28, 1911.  
On Petition for Rehearing, May 9, 1911.  
On Rehearing, Nov. 14, 1911.)

*(Syllabus by the Court.)*

1. RAILROADS (§§ 225, 226\*)—REGULATIONS IN GENERAL—DUTY TO PROVIDE FACILITIES.

Under the common law, a carrier was under no obligation to provide buildings for the receiving, handling, and storing of freight, or for the accommodation of passengers awaiting passage.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 739, 740; Dec. Dig. §§ 225, 226.\*]

2. RAILROADS (§§ 225, 226\*)—OPERATION—DUTY TO PROVIDE FACILITIES—DEPOTS.

By section 26, art. 9, of the Constitution of this state, the duty is expressly imposed upon every railroad company to provide and maintain adequate, comfortable, and clean depots and depot buildings at its several stations for the accommodation of passengers; said depot buildings to be kept well lighted and warm for the comfort and accommodation of the traveling public.

Said railway companies, by said section, are further required to keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing, and delivering of all freight handled by such roads.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 739, 740; Dec. Dig. §§ 225, 226.\*]

3. RAILROADS (§ 58\*)—OPERATION—DUTY TO PROVIDE FACILITIES—DEPOTS.

By section 18, art. 9, of the Constitution of this state, the Corporation Commission is not only empowered, but it is also made its duty, to require every railroad company to perform the duty imposed upon it by section 26 of said article; the only limitation upon the action of said Commission in such respect being that it shall be reasonable and just.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 58.\*]

4. RAILROADS (§ 58\*)—OPERATION—DUTY TO PROVIDE FACILITIES—DEPOTS.

Said Commission being so authorized to require railway companies to establish, construct, and maintain depots, it may, by order, designate the place, and, after the plans and specifications are submitted by the railway company, it may approve or reject the same in toto, or reject in part and amend in part, specifying the kind of material to be used; the limitation being that the order in that respect must be reasonable and just.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 58.\*]

5. RAILROADS (§ 58\*)—REGULATION—SUPERVISION BY CORPORATION COMMISSION.

The plans and specifications and the size of the depot being agreed upon both by the Commission and the railway company, the only controverted proposition being as to whether it should be built a frame, as proposed by the railway company, or a cement or brick, depot, as directed by the Corporation Commission; there being nothing to show that the income from the road will not justify such expenditure out of the current expense fund. *Held*, that the order of the Corporation Commission, directing it to be constructed out of brick or cement, will not be disturbed.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 58.\*]

*On Rehearing.*

6. RAILROADS (§ 58\*)—REGULATION—SUPERVISION BY CORPORATION COMMISSION.

It is within the sound discretion of the Corporation Commission to prescribe in advance of the undertaking the material to be used in a depot building ordered constructed on the line of road of the appellant, pursuant to section 26, art. 9, of the Constitution.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 58.\*]

*(Additional Syllabus by Editorial Staff.)*

7. RAILROADS (§ 58\*)—REGULATION—SUPERVISION BY PUBLIC AUTHORITY.

It is a valid exercise of the police power for a state to require a railroad company to establish stations where the public necessity and conditions require it.

[Ed. Note.—For other cases, see Railroads, Dec. Dig. § 58.\*]

Appeal from the State Corporation Commission.

Appeal by the St. Louis & San Francisco Railroad Company from an order of the Corporation Commission, granted on application of J. W. Sutton and others. Affirmed.

W. F. Evans, Fred H. Wood, R. A. Kleinschmidt, for appellant. Chas. West, Atty. Gen., and Chas. L. Moore, for appellees.

**WILLIAMS, J.** This is an appeal from an order of the Commission, requiring the appellant to erect a depot at Tablequah, to be constructed of brick, cement, or other material of that character; the cost of which would be approximately \$10,000.

Appellant's depot at the city of Tablequah, having been burned about May 22, 1910, has not been rebuilt; box cars, during the interval, being used for depot accommodations. The average receipts at said station per month since that time is about \$7,800 for freight and \$4,500 for passengers. At said city a water and light system is in operation, and a sewer system is under construction. These conveniences may reasonably be placed in the depot. The site proposed, and to which there is no objection by the appellant, is about one-half mile from the business section of the city; the resident population of which is about 3,000 people.

There is no error assigned by the appellant as to the size or specifications required, other than as to the material to be used. The appellant contends that it ought to be permitted to construct a frame building at a cost of about \$5,000, instead of a brick or concrete one of the same size, etc., which would cost approximately \$10,000. Appellant, in its brief says: "Therefore the single issue presented in this case is whether, instead of the depot proposed by the defendant, it should be, and can be required to construct one of the same size, arrangement, and conveniences, but of material such as brick, stone, or cement, instead of frame." Appellant further insists that " \* \* \* it is specifically found that the plans, as submitted by the company, are reasonably adequate, so far as size and arrangements are concerned."

[7] It is a valid exercise of the police power for a state to require railway companies to establish stations where the public necessity and convenience require it. *Minneapolis & St. L. R. Co. v. Minnesota*, 193 U. S. 53, 24 Sup. Ct. Rep. 396, 48 L. Ed. 614; *Louisiana & A. R. Co. v. State*, 85 Ark. 12, 106 S. W. 960; *Commission v. Eastern R. Co.*, 103 Mass. 254, 4 Am. Rep. 555; *Railroad Com'rs v. P. & O. Central R. Co.*, 63 Me. 269, 18 Am. Rep. 208.

In *Atchison, Topeka & Santa Fe Ry. Co. v. State et al.*, 23 Okl. 510, 101 Pac. 262, it was held by this court that, by virtue of the provisions of the Constitution of this state, the Corporation Commission was empowered to require a transportation company, in the performance of its duties as a public service corporation, to establish and maintain a flag station at a certain point designated by the Commission. The order of the Commission, in *Kansas City, M. & O. Ry. Co. v. State et al.*, 25 Okl. 713, 107 Pac. 912, in requiring said railway company to establish a station at a designated point, was

sustained, on the theory that a depot was a facility. See, also, *M., K. & T. Ry. Co. v. State*, 24 Okl. 339, 103 Pac. 613; *M., O. & G. Ry. Co. v. State et al.*, 113 Pac. 930, decided on February 9, 1911, but not yet officially reported.

[2] Section 26, art. 9, of the Constitution, provides as follows: "It shall be the duty of each and every railway company, subject to the provisions herein, to provide and maintain adequate, comfortable and clean depots, and depot buildings, at its several stations, for the accommodation of passengers, and said depot buildings shall be kept well lighted and warmed for the comfort and accommodation of the traveling public; and all such roads shall keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing and delivering of all freight handled by such roads."

[1] Under the common law, a carrier was under no obligation to provide buildings for the receiving, handling, and storing of freight, or for the accommodation of passengers awaiting transportation. *Nashville, C. & St. L. Ry. Co. v. State*, 137 Ala. 439, 34 South. 401; *People v. New York, Lake Erie & Western R. Co.*, 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484. The syllabus of the latter case is as follows: "A railroad company is under no obligation to provide stations for passengers or warehouses for freight, unless expressly required by statute."

[3] The reason for expressly imposing this duty upon every railroad company by the fundamental laws of this state is obvious. Section 18 of the Constitution empowers and authorizes and charges the Commission with the duty of supervising, regulating, and controlling all railroad companies doing business in this state in all matters relating to the performance of their public duties, and in requiring them to establish and maintain facilities and conveniences. A depot being a facility, and the duty of every railroad company to establish and maintain such facility being imposed by the fundamental law of this state, the jurisdiction of the Commission to require such railroad company to comply with such duty is therefore by express language contained in said section 18. The duty of the railroad company to establish and maintain a depot at this station is undoubted. The order complained of involves the exercise of both legislative and administrative power. This the commissioners should be peculiarly fitted to do. We should ascribe to their findings such presumption. *K., C. M. & O. Ry. Co. v. State et al.*, 25 Okl. 715, 107 Pac. 912.

[8] There is nothing in the record showing that the business of this road at said station, or the income from said line, would not justify a sufficient expenditure from the current expense account to build such station

of brick or cement. As to whether it is reasonably necessary to build the same of brick or cement, in order for it to be adequate and meet the needs of the public, as required by said section 26, that is a question of fact. Courts or legislative bodies, as a rule, take notice of matters of general knowledge and experience. Rice on Civil Evidence (1892) vol. 1, § 24 (d), p. 27; Walker v. Village of Ontario, 118 Wis. 571, 95 N. W. 1086; Payne v. McCormick Harvesting Machine Co., 11 Okl. 318, 66 Pac. 287. When such knowledge in regard to building materials, to wit, wood, brick, cement, and stone, in connection with the prima facie presumption in favor of said order, are considered, we are not prepared to say that it can be found by this body to be unreasonable. K. C., M. & O. Ry. Co. v. State et al., 25 Okl. 723, 107 Pac. 912; M., K. & T. Ry. Co. v. State, 24 Okl. 337, 103 Pac. 613.

[4] The city of Tahlequah, in which this railroad depot is to be constructed, has been for over 70 years the capital of the Cherokee Nation. It was there, in convention on the 6th day of September, 1839, that the Cherokee Constitution was framed, probably the second written Constitution framed and promulgated by this tribe or nation of Indians. Removal of the Cherokee Indians from Georgia by Lumkin, Dodd, Mead & Co. (N. Y.) p. 42, vol. 1. In addition, said city is also the county seat, or, as our Anglo-Saxon ancestors in the mother country would say, "the shiretown" of Cherokee county. Also the second Legislature of this state, recognizing this historic spot and the environments thereof, located there the Northeastern State Normal School. By reference to the map and the special federal census of 1907, we ascertain that this city is the center of a considerable area and population within this state formerly comprising the Cherokee Nation. It is also disclosed from the record that appellant's line of railway is the only railroad touching this city.

In La. & Ark. Ry. Co. v. State, 85 Ark. 22, 106 S. W. 963, it is said: "So if, after considering all the facts and circumstances, giving due consideration to the determination of the Legislature, and resolving every doubt in its favor, the court should be convinced that there was no public necessity for a station there, and that the result of enforcing the act would be to put the defendant to large expense without corresponding benefit, *either to it or the public*, then the Legislature has no right to make such requirement. \* \* \* The facts, if proved, that the cost of erecting and maintaining the station would be greatly in excess of and out of proportion to the revenues to be possibly derived from the business at that place, does not of itself render the requirement unenforceable. That fact, however, would be important for the court to consider in determining whether or not the requirement was arbitrary and unreasonable, and whether or

not there is any corresponding necessity for a station."

In Morgan's La. & T. R. & S. S. Co. v. Railroad Commission, 109 La. at page 262, 33 South. at page 219, it is said: "The conflicting interests between the corporations and the state are safeguarded by the officers of the former, on the one hand, and by the Railroad Commission, on the other. The power, authority, and duty of the latter are not limited merely to matters affecting the public safety or the public health. They extend also to matters concerning public comfort and public convenience; and in the consideration of matters of comfort and convenience the number of persons who may be concerned or interested in some particular matter at some particular point enter as important factors in determining what is proper to be done. The Commission cannot ignore the comfort and convenience of numbers of citizens on a line of travel or conveyance to base their action exclusively upon a consideration of the amount of dollars and cents which may be involved. As a matter of course, the Commission could not, even under expressly delegated powers, act arbitrarily, in manner such as to trench upon the rights or corporations secured to them by law; but, within certain limits, though their action and orders are all subject to review, they are not all subject to reversal. In the present instance, it cannot be claimed that the Southern Pacific Road, either in the operation of its line as a whole, or that part of it which falls within the limits of Louisiana, has not been and is not remunerative; nor can it be said that the Morgan Railroad Company is not a paying corporation. It is not claimed that the order complained of in this case, carried into execution, would have the effect of changing the situation in this respect. The utmost claimed is that a small sum, not exceeding five or six hundred dollars in amount, which the Commission's order would cause to be expended at Berwick City, and the small amount which will be required to keep an agent at that place, will reduce their profits for a trifling amount. The objection seems to be aimed rather at the place where this money is ordered to be expended, and the inconveniences to which they will be subjected, than to any effect, or any general effect, which the expenditure will have upon the profits of the roads. It is not claimed, nor is there any evidence in the record which would tend to show, that the Commission has, by its orders of rulings as to other places along the roads, in respect either to depots or other matters, brought itself within the limitation placed upon it of not trenching upon the plaintiff's legal rights. So far as we know, the order complained of may be the only one as to betterments which the Commission has given. We do not think the point is made that, after the business of a railroad corporation has made it fairly remunerative, the Commission is without gen-

eral authority to direct that a portion of the 'surplus' profits (if that expression can be used) should be applied to the promotion of the comfort and convenience of the people along the line of road. When such a point in the business of the road is reached, the rights of the 'general public' come clearly into view, and it is not for the railroad, but for the Commission, to determine how, in what way, and in what place this money is to be expended so as to best subserve their interest." See, also, *People v. President, etc., Delaware & H. Canal Co.*, 32 App. Div. 120, 52 N. Y. Supp. 850; *Id.*, 165 N. Y. 362, 59 N. E. 138.

The question of removing or destroying a facility that can by additional expense be made adequate, and replacing it with one of a different material at an additional expenditure, is not involved in this case. The expense of heating and insurance, as well as the benefit to the public, may be considered in determining as to the unreasonableness of the order. Such matters are peculiarly for the consideration of parties especially skilled and adapted for passing on such administrative or legislative matters. Though this may be constricted as an item of expense, it is also a betterment, increasing the value of the road as a property, and making it less expensive and easier to maintain and keep such station in repair.

If, when you consider the income from the passenger and freight business derived from this station, together with its present necessity, it should appear to be unreasonable to make such an outlay of expense in such improvement, then this order should not stand. For the appellant to assert that it has an arbitrary right to name the kind of material that it will build this station of, when it appears that it would be of more benefit to the public to build it of other material, and at the same time the appellant's interest would be conserved by having a permanent improvement maintained with less expense, we are not prepared to say that the order of the Commission is unreasonable. Appellant is a public service corporation, existing and doing business in this state by virtue of its law as to eminent domain, etc., and cannot, as a rule, be required to transport passengers or freight without a just return therefor. It is a reasonable exercise of the police power to require reasonable facilities, the amount of business and income, and size and location of the place considered. The Commission had the authority to make the order. The only question is whether, under the record, its order was unreasonable. The burden to so show is upon the appellant. It has not sufficiently discharged the same.

In the findings of fact, as made by the Commission, is the following: "The railroad company provides in its waybills that if goods are left in the depot beyond a certain number of hours that the owners of the goods become liable in case they are destroy-

ed by fire, and this is one of the reasons urged why the building should be of noncombustible materials." This finding is challenged by the appellant in its brief. There is not one scintilla of evidence in the record as to any proof being offered as to such provision in any bill of lading. If the Commission thought this was a proper matter for consideration in determining what its order should be, it should have had the matter introduced in evidence when the appellant was present and had an opportunity to answer as to such evidence. Under the express mandate of the Constitution, the appellant was entitled to notice. *Hine v. Wadlington*, 27 Okl. 285, 111 Pac. 543. This notice is provided by the Constitution that it might be present and meet the issue.

In the findings of fact, we also find the following: "It further appears that it is the policy of the railroad company in other towns to build depots much more expensive than the one proposed at Tablequah; that at Hugo a depot was built, costing approximately \$25,000, or possibly more." This is also challenged in appellant's brief. There is not one scintilla of evidence in the record as to the cost or the size or character of the depot at Hugo. Neither the Commission nor the court, as a matter of law, take notice of such matters. If more care was given to putting the facts in the record as a predicate for the Commission's findings of fact, rather than embellishing the findings of fact by statements that are not borne out by the record, it would be easier to sustain the order. In cases where it becomes necessary to reverse the orders of the Commission on account of want of care in developing facts, the fault is not with this court.

The public service corporations of this state are entitled to a just compensation for the service performed. Likewise the state, as the sovereignty, has a right to require certain duties of such corporation on behalf of the people. It is the duty of this court, sitting in a reviewing capacity, whenever the facts in the case justify it, to see that such duty is performed.

The order appealed from is affirmed.

TURNER, C. J., and DUNN and HAYES, JJ., concur. KANE, J., concurs in the conclusion.

#### On Petition for Rehearing.

WILLIAMS, J. On March 21, 1911, the appellant filed its petition for rehearing. No response to said petition has been made by the Attorney General for the state, or any one for the other appellees.

Without passing upon its merits, as a serious question is raised as to the sufficiency of the evidence to sustain the Commission's finding, it is ordered that this cause be remanded to the Commission, with instructions to take additional evidence as to the con-

struction of the depot in question out of brick or cement, rather than wood.

In its findings of fact, the Commission recites: "The railroad company provides in its waybills that if goods are left in the depot beyond a certain number of hours that the owners of the goods become liable in case they are destroyed by fire, and this is one of the reasons urged why the building should be of noncombustible materials." No evidence is contained in the record on this point, and it is directed that the Commission receive evidence thereon, and certify it up. The Commission in its findings further recites: "It further appears that it is the policy of the railroad company in other towns to build depots much more expensive than the one proposed at Tahlequah; that at Hugo a depot was built, costing approximately \$25,000, or possibly more." No evidence appears in the record to support such finding. It is directed that the Commission receive evidence as to the character of the depot built at Hugo, and the amount of freight and passenger receipts received at said station, the size of the town, the population thereof, and of the adjacent country, etc.

It is further directed that the Commission receive evidence as to other lines in the state having constructed brick or cement depots in towns or cities of the size of Tahlequah, or less, the receipts of such station, reasonable expectancy of such town or city, etc.

In the record there is no showing made as to the population of the nearby towns, and as to the population of the surrounding country, and as to its prospective development. These are matters that the Commission is directed to receive evidence on and to certify up, all of which is directed to be done within 30 days. All the Justices concur.

#### On Rehearing.

TURNER, C. J. [6] In its brief submitting this cause to this court, appellant stated the issue thus: "Therefore the single issue presented in this case is whether, instead of the depot proposed, it should be, and can be, required to construct one of the same size, arrangement, and convenience, but of material such as brick, stone, or cement, instead of frame." This issue was brought about by appellant tendering, on the hearing before the Commission, plans and specifications of a proposed frame depot at Tahlequah, alike in every respect to the depot subsequently ordered built by the Commission of "brick, stone, or cement." In support of the issue as thus defined, appellant assailed the order of the Commission as being unreasonable in requiring it to build of the material stated; but this court in the opinion sustained the order, and in effect held that appellant had not fairly overcome the presumption that the same was *prima facie* just,

reasonable, and correct. In other words, the Commission, by rejecting the frame structure so tendered, and ordering the same to be constructed of brick, etc., in effect held, *inter alia*, that a frame depot was not as adequate, in point of affording comfort and accommodation to the traveling public, as one constructed of brick, stone, or cement. In this the court in its opinion sustained the action of the Commission, and we adhere to that opinion.

On this rehearing, however, for the first time, it is contended that in ordering the structure built of said material the Commission exceeds its jurisdiction. This sends us to its grant of power. Section 28 of article 9 of the Constitution provides: "It shall be the duty of each and every railway company, subject to the provisions herein, to provide and maintain adequate, comfortable, and clean depots, and depot buildings, at its several stations, for the accommodation of passengers, and said depot buildings shall be kept well lighted and warmed for the comfort and accommodation of the traveling public; and all such roads shall keep and maintain adequate and suitable freight depots and buildings for the receiving, handling, storing, and delivering of all freight handled by such roads." The contention, in short, on the part of the Commission, is that a depot at that point would be adequate in point of comfort and accommodation built of a certain material only, and on the part of appellant that one built of another kind would be adequate; and it is for us to determine which one of these contending forces has, under said grant of power, the first right to exercise its discretion and determine this question of adequacy. It is of the utmost importance to know whether the Commission has the right only to order in a depot at a certain point, and then leave it to the discretion or option of the appellant to build it of adobe, log, frame, brick, or whatever material it may choose; or whether the Commission, in the first instance, as here, has the option to exercise its discretion and prescribe the material which will meet the idea of adequacy and comfort under all the facts disclosed in the record.

That said section of the Constitution vests this power in the Commission we think is clear. In *Railroad Commissioners v. P. & O. C. R. R. Co.*, 63 Me. 269, 18 Am. Rep. 208, one Parsons and other citizens of Hartford applied to the railroad commissioners of that state, in a manner pursuant to law, representing that the public convenience and necessity required the establishment of a depot at Hartford Center, upon the line of the defendant's road. After hearing, the commissioners determined that the prayer of their petition should be granted, and ordered the construction of a building, particularly described by them, in a place designated by them, to be erected within a cer-

tain time. The company refusing compliance with the order, said commissioners, in their official capacity, in behalf of the state, presented their petition to the Supreme Court, setting forth the facts, and praying appropriate action. Later defendants appeared and pleaded the unconstitutionality of the act under which the proceedings were had, and an infringement of its charter. Also that the opinion of said commissioners was against the weight of the evidence; and that public convenience and necessity did not require the erection of the depot at the designated spot.

The charter of the defendant company, among other things, provided: "Said corporation \* \* \* shall be bound at all times to have said railroad in good repair, and a sufficient number of suitable engines, carriages and vehicles for the transportation of persons and articles, and be obliged to receive, at all proper times and places, and convey the same when the appropriate tolls therefor shall be paid and tendered. \* \* \* That the Legislature shall, at all times, have the right to inquire into the doings of the corporation and into the manner in which the privileges and franchises herein and hereby granted may have been used and employed by said corporations, and to correct and prevent all abuses of the same \* \* \* but not to impose any other or further duties, liabilities or obligations; and this charter shall not be revoked, annulled, altered, limited or restrained, without the consent of the corporation, except by due process of law."

By section 6, the president and directors, under direction of the stockholders, were authorized to exercise all the powers granted to the corporation for locating, building, completing, and running the road, and all such power as may be necessary and proper to carry into effect the objects of the grant.

The duty of defendant in respect to the subject-matter under consideration was prescribed by that part of the charter which required it "to receive, at all proper times and places, and convey persons and articles." The precise contention of the corporation was that the power to determine what are "proper" times and places for the purposes stated was discretionary with it; and that its decision was conclusive and final. On the part of the state, it was claimed that the duty thus enjoined was imperative and absolute; and that the state had the power, through its proper tribunals, to say whether it had been performed, and to enforce a performance if there had been none, or only a partial one. In determining the question thus presented, the court said:

"By the same section that contains the provision in question, the corporation is required 'to have its railroad in good repair and a sufficient number of suitable engines, carriages and vehicles for the transportation of persons and articles.' The language of

the charter is, not that it shall be optional with the corporation what number and kind of engines, carriages, and vehicles to furnish, at what times and places to receive and convey persons and freight, and what state of repair to keep the road in, or that it shall put in such rolling stock as it may deem 'suitable and sufficient,' build such depots as it may pronounce 'good,' but the meaning of the language is that the several things required to be done shall, respectively, be 'suitable and sufficient,' 'proper,' and 'good'; in other words, that they shall in fact reasonably be of the description specified. The qualifying words do not change the rights of the parties under the charter. The duty of the corporation and the rights of the public in these respects would have been the same as they now are, if the charter had simply required the corporation to keep its road in good repair, furnish it with rolling stock, and receive and convey passengers and freight along the line of its road. Under such provisions of the charter, it would be the duty of the corporation to keep the road reasonably safe, provide such rolling stock, establish such depots, and operate the road in such a manner as would afford the public reasonable safety and dispatch in the transaction of business upon the road. The duties enjoined upon the corporation are ministerial duties, to do and perform what the public convenience and necessity reasonably required, in respect to the particulars specified. Nor is it within the discretion of the directors to determine ultimately what these ministerial duties are, or the manner in which they are to be performed; to hold so would be to concede to the directors the power to promote the private interests of the corporation by subverting the public objects to be subserved by the charter. The power, both of determination and enforcement, are necessarily vested in state authority. It has been repeatedly held that the general duty of municipal corporations 'to keep their highways in repair' is ministerial; and that a writ of mandamus lies to compel its performance, because it is a ministerial, in contradistinction from a discretionary, duty. A fortiori, the duties enjoined under the eighth section of the charter of the defendant corporation are ministerial, since to their public character is superadded the obligation of performance, resting in contract. Indeed, our whole system of legislative supervision, through the railroad commissioners, acting as a state police power over railroads, is founded upon the theory that the public duties devolved upon railroad corporations by their charter are ministerial, and therefore liable to be thus enforced. Dillon on Mun. Corp. 293; Uniontown v. Commonwealth, 34 Pa. 293; Hammar v. Covington, 3 Metc. (Ky.) 494."

And overruled the exceptions to the order, and in the syllabus said: "It is not within the discretion of the directors of a railroad



company ultimately and conclusively to determine the manner in which the corporation shall discharge the public duties enjoined upon it by its charter; that power and duty are devolved upon the state tribunals."

If the Commission in that case, pursuant to the comparatively slender grant of power authorizing it to enforce the provisions of the charter requiring the defendant "to receive, at all proper times and places, and convey persons and articles," had the right to lay down plans and specifications for a depot (which, of course, prescribe the structural material), and order it built according thereto, and on a precise spot designated by the Commission in its order, which it did, and in so doing was sustained by the Supreme Court of that state, we see no reason why the Commission in this instance under the liberal grant of power, supra, cannot do the same thing, and also prescribe the structural material, to the end that, being charged with the duty of seeing that appellant shall provide and maintain a depot adequate for the comfort and accommodation of passengers, it may determine the question of adequacy in point of comfort and accommodation of the traveling public in advance of the undertaking. This is not in conflict with what we held in *St. Louis, I. M. & S. Ry. v. State*, 111 Pac. 396. Here is a question of jurisdiction. There none was raised. Here we have held it to be within the jurisdiction of the Commission to determine in advance what would be the proper material with which to erect a depot adequate in point of comfort and accommodation to meet the reasonable requirements of the traveling public; and that it is not within the option of the appellant so to determine. There the reasonableness of the order only was involved; and it was held under all the facts and circumstances that the company had offered to comply with all that could be reasonably exacted of it, and that the order of the Commission, requiring it to remove an old structure and submit plans and specifications for a new, and rejecting the tender of a proposed depot, ample in every respect, was unreasonable.

As to the reasonableness of the order under consideration, we might say, in addition to what has been so ably said by Mr. Justice WILLIAMS, that a sense of comfort is received much through the sense of sight; that a community feels a sense of comfort and pride in a slightly depot closely akin to that felt by one in a slightly home. For that reason, the community, when interested, has the right, when, as here, the erection of a depot is contemplated, to have that sense of comfort in a measure gratified, bearing in mind that what in this respect would be adequate for one man or one community would not be so for another man or another community with higher tastes and aspirations. That the grant of power to the Commission was lim-

ited to the bare necessity of the case, and did not contemplate that this comfort, as well as mere physical comfort, should be taken into consideration by the Commission in discharging its duty of seeing that the company provide and maintain adequate and comfortable depots, which seems to contemplate one in keeping with and fairly demanded for the accommodation of the traveling public, under all the facts and circumstances in the record, or, as stated in the *Nowata Case*, supra, which defines a facility to be such "as might be fairly demanded, regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodation asked for, and to all other facts which would have a bearing upon the question of convenience and cost," we are not willing to concede. Rather are we of a contrary opinion, and that, the business of appellant having become fairly remunerative, quoting from *La. & Ark. Ry. Co. v. State*, cited in the main opinion, we repeat: "When such a point in the business of the road is reached, the right of the general public comes clearly into view, and it is not for the railroad, but for the Commission, to determine how, in what way, and in what place this money is to be expended so as to best subserve their interest" under the grant of power vested in the Commission by such section, supra, of the Constitution.

Since the evidence alleged in the opinion to have been omitted from the record has since been supplied by a further reference to the Commission, and it has thus been further shown that 8 or 10 towns, scattered over an area of about 80 miles, get freight at Tahlequah; that 3 or 4 summer resorts and clubhouses are near there on the Illinois river, with an average membership of 100 each, who live at Muskogee and towns in adjoining country, which brings large crowds during the summer months; that the receipts of the station, as shown by the annual reports, are:

Freight forwarded per month.....	\$1,733 54
Freight received " " .....	6,125 25
Passenger tickets " " .....	3,181 11
Express receipts " " .....	869 17
Express forwarded " " .....	191 12

—making \$1,060.29 express business per month, and that the railroad received 55 per cent. of the above amount, or a little over \$500 per month from this source, and that the bill of lading, spoken of in the main opinion, provides that "the carrier or party in possession of the property specified in the bill of lading shall not be responsible for damages or delay caused by the act of God, public enemy, the authority of the law, \* \* \* nor for loss, damage or delay caused by fire occurring after forty-eight hours, exclusive of legal holidays, after notice of the arrival of the property at destination \* \* \* the carrier's liability shall be that of a warehouseman only," we are of opin-

ion that the Commission had not only the jurisdiction to make the order complained of but that the same is still *prima facie* just, reasonable, and correct.

HAYES, WILLIAMS, and KANE, JJ., concur. DUNN, J., concurs but not without grave doubt, which is resolved in favor of the power sought to be exercised.

### HOLMES v. STATE.

(Criminal Court of Appeals of Oklahoma. Dec. 11, 1911.)

#### (Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 776\*)—TRIAL—INSTRUCTIONS—CHARACTER OF ACCUSED.

(a) A general instruction upon the subject of character is all that the court should give in the trial of a criminal case, and, even although a defendant may introduce evidence of a previous good character, yet, if the facts and circumstances in the case are such that such evidence could not be of benefit to the defendant, it is not error for the trial court to refuse to instruct upon this subject.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1838-1845; Dec. Dig. § 776.\*]

#### 2. CRIMINAL LAW (§§ 517, 1169\*)—EVIDENCE—APPEAL—CONFESSIONS—HARMLESS ERROR.

(a) Where it is proven that confessions of the defendant were freely and voluntarily made, they are competent evidence against him.

(b) Even although the court may have erred in admitting evidence of a confession made by a defendant, yet if the defendant takes the witness stand in his own behalf, and testifies to the truthfulness of every material statement contained in said confession so erroneously introduced in evidence, such error in the admission of the confession becomes harmless, and is not ground for reversal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1146-1156; Dec. Dig. §§ 517, 1169.\*]

#### 3. CRIMINAL LAW (§ 800\*)—TRIAL—INSTRUCTIONS—MEANING OF TERMS.

(a) Where the court instructs the jury that, if they convict a defendant of murder, they should assess his punishment at death or imprisonment in the penitentiary at hard labor for life, as in their discretion they may see fit, the court should not attempt to define the legal meaning of the word "discretion."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1810, 1812; Dec. Dig. § 800.\*]

#### 4. HOMICIDE (§ 293\*)—CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—SELF-DEFENSE—APPLICABILITY TO EVIDENCE.

(a) It is only in cases of homicide where the issue of self-defense is presented that it is necessary for the court to instruct the jury that they must view the facts and circumstances in evidence from the standpoint of the defendant as they reasonably appeared to him at the time of the homicide.

(b) It is only when the testimony given by the defendant presents issues upon which he might be acquitted, or upon which the offense might be reduced to a lower degree, that he is entitled to have the jury instructed upon the hypothesis that such testimony is true.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 293; Criminal Law, Cent. Dig. § 1979; Dec. Dig. § 814.\*]

#### 5. CONSPIRACY (§ 41\*)—CRIMINAL LAW (§§ 59, 814\*)—HOMICIDE (§ 29\*)—PARTIES TO OFFENSES—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

(a) For facts which did not authorize the court to instruct the jury as to the law of voluntary withdrawal from a conspiracy, see opinion.

(b) For facts which did not raise the issue that the fatal shot had been fired after the termination of a conspiracy, see opinion.

(c) When a conspiracy is entered into to do any unlawful act, all persons who engage therein are responsible for all that is done in pursuance of such conspiracy by any of their co-conspirators until the purpose for which such conspiracy was entered into has been fully accomplished.

(d) The responsibility of co-conspirators is not confined to the accomplishment of the common purpose for which the conspiracy was entered into, but extends to and includes all collateral acts incident to and growing out of the common design.

(e) Where parties enter into a conspiracy for the purpose of committing a robbery and dividing the proceeds of such robbery among themselves, such conspiracy continues and such parties are responsible for the acts of their co-conspirators incident to or growing out of such conspiracy and done in pursuance thereof, until they have divided the proceeds of such robbery.

(f) If several persons set out in concert, whether together or apart, upon a common design which is unlawful, each taking the part assigned to him, some to commit the act, some to watch, and some to prevent surprise or to aid the escape of the immediate actors, if the crime is committed, in the eyes of the law all are guilty as principals.

(g) Where several persons confederate together to commit the crime of robbery, and one of them is armed with a deadly weapon to be used by them in such robbery, and such robbery is in fact attempted or committed, and the party robbed or attempted to be robbed resists and calls for help, and the conspirator so armed with a pistol shoots and kills such person to silence his voice and prevent him from summoning assistance, or for any other purpose incident to such conspiracy, all of such persons so conspiring and confederating together for the purpose of robbery are alike guilty of murder.

(h) Where parties voluntarily act together in the commission of any act which may result in death to another and such death ensues therefrom, all such parties so acting together are as guilty of murder as if they had intended the death of such party.

(i) When the evidence in a case is such that there is no reason to believe that an intelligent and honest jury, having a due regard for their oaths, the law, and the evidence, would arrive at a given conclusion, it is not error for the trial court to decline to give the jury instructions upon the law applicable to such issue.

(j) Before it is necessary for a trial court to instruct the jury upon an issue favorable to a defendant in any case, such issue must involve a conclusion which can be legitimately arrived at from the evidence in the case by an honest and intelligent jury.

[Ed. Note.—For other cases, see Conspiracy, Dec. Dig. § 41; Criminal Law, Cent. Dig. §§ 71-74; Dec. Dig. §§ 59, 814; Homicide, Cent. Dig. § 47; Dec. Dig. § 29.\*]

#### 6. HOMICIDE (§ 142\*)—INDICTMENT—ISSUES AND PROOF.

(a) Where an indictment or information charges a defendant with murder under the first subdivision of the statute (Snyder's Comp.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Laws 1909, § 2268), a conviction can be had, if warranted by the evidence, under and by virtue of the other subdivisions of the statute.

(b) Our statute defining murder was intended to simplify the law upon this subject, and make it plain and bring it within the common understanding of the citizens of the state, and it does not prescribe a rule of pleading, but it establishes a guide to the conduct of the trial prescribing the proof requisite to a conviction.

[Ed. Note.—For other cases, see Homicide, Dec. Dig. § 142.\*]

**7. HOMICIDE (§ 332\*)—PUNISHMENT—DEATH PENALTY.**

(a) Where the testimony clearly shows an aggravated case of murder, this court has no right to interfere with the verdict of the jury upon the ground that the death penalty should not have been inflicted.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 699-704; Dec. Dig. § 332.\*]

Armstrong, J., dissenting.

Appeal from District Court, Oklahoma County; W. R. Taylor, Judge.

James Holmes was convicted of murder, and appeals. Affirmed.

On the 3d day of April, 1911, in the district court of Oklahoma county, the following verdict was returned against appellant: "We, the jury drawn, impaneled, and sworn in the above-entitled cause, do upon our oaths find the defendant, James Holmes, guilty of murder in the manner and form as charged in the information, and fix his punishment at death. T. D. Turner, Foreman." On the 24th day of April, 1911, sentence of death was pronounced against the defendant by the court in accordance with said verdict. Appellant appealed. Affirmed.

The first witness for the state was Miss Kate O'Mara. She testified: That on the 8th day of March, 1911, she lived at 214 East Third street in the city of Oklahoma. At about 1:30 o'clock that night she heard some one coming up Third street whistling. This person then began to sing. She wondered who was singing so loudly at that hour of the night, and got up to see. By the time she had got to the window, the singer had passed. Only one person was whistling and singing. Soon after this she heard some shuffling of feet on the sidewalk. That this noise was made by more than one person, and was pretty loud. She next heard a muffled scream. Soon after this she heard one shot. She looked out of the window again, and about one minute after the shot was fired she saw four persons in the street. Two were going west on Third street. One was in the center of the street, and the fourth person ran through her yard between the hydrant and the porch and ran to the alley. That she did not see these persons until about a minute after the shot was fired. That the parties had their heads down and were running, and witness was unable to recognize them. The next morning between

4 and 5 o'clock she saw a man lying out on the sidewalk. There was a large crowd there. There was a great pool of blood where the man was lying that had run down several feet on the pavement. The shot which she heard the night before was in the direction of the place where the man was lying.

H. E. Harris testified: That he lived at 220 East Third street. That on the 9th of March, 1911, about 1 o'clock at night, he heard some one singing, but did not pay any attention to it. That soon after this a noise was started up. That he first thought there were cats around the back yard, but he pretty soon discovered a man's voice or probably two men's voices. He then heard a gun shot. The windows were all down, and he could not distinguish exactly where the noise was. He got up, put on his clothes, and walked out in the back yard, and looked in his barn to see if his horse was all right, and walked around in the alley. He did not see or hear anything or anybody and the lights were out and he went back to bed. He got up about 4:30 o'clock the next morning, saw a man lying dead on the sidewalk, his pants pockets wrong side out. Blood appeared to run from the dead man's head down the street about 30 feet.

E. T. Bryan testified: That he resided at 214 East Third street in the city of Oklahoma. That about 1:30 o'clock on the night of the 8th of March he heard a shot, and soon after the shot was fired he heard running. He did not hear the running until two or three minutes after the shot was fired. It was dark, and witness could not see any one. He got up the next morning, and found a man lying dead on the sidewalk. The man was lying between 214 and 216 East Third street. The man was shot in the left side of the head, right through the ear.

Charles Bersha testified: That about 4 o'clock on the morning of the 9th of March, 1911, he had occasion to be on East Third street in the 200 block. He saw a man lying dead on the sidewalk. The man had a wound in the left side of his head. Blood ran down from the wound something like 35 or 40 feet. That witness then phoned to the police department.

D. M. Ely testified that on the morning of the 9th of March, 1911, he saw a man lying in block 200 on East Third street in the city of Oklahoma. He identified the dead body as that of W. H. Archie. His pants pockets were turned wrong side out. The man was shot in the left side of the head. Blood ran down on the pavement about 30 feet.

B. Z. Hutchinson testified that he was acquainted with W. H. Archie during his lifetime, said Archie being in the employ of the witness, and having been in such employment for 2½ years. Witness identified

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the body of the dead man as that of W. H. Archie.

Charley Goodall testified: That he was acquainted with W. H. Archie in his lifetime, and occupied the same room with him. That the deceased was in the habit of carrying some money on him all of the time. That on the evening of the 8th of March, 1911, he saw him take a roll of money out of his clothes, and saw him place a roll of money in his pockets. He thought the deceased had at least \$50 or \$60 which was in currency. Deceased also had a watch. It was an open-faced gold case watch. Witness then identified a watch handed him as the watch that belonged to Archie in his lifetime.

Adolph Frankel testified: That he was engaged in the merchandise and loan business in the city of Oklahoma at 3½ West California street. That between 10 and 1 o'clock that day Bud Johnson, one of the parties accused of the murder of W. H. Archie, came into his place of business, and pawned a watch to him for \$6.25. Witness here identified the watch pawned to him by the said Johnson.

G. W. Morgan testified: That he was present in Justice Hawkins' courtroom when the defendant was arraigned. That the witness heard a conversation between the county attorney and the defendant James Holmes and the other persons charged with the murder of W. H. Archie. That they told the county attorney that they were at the Alabama Hotel, and they went north from the Alabama Hotel up to Second street, and they saw a white man going east. They ran up to this white man, and one of them ran around and stuck a gun in his face, and told him to throw up, and he had his hands in his pockets, and he backed up against a post, and at that moment they grabbed him and threw him down, and, as he fell—it seems he had his money in a little tobacco sack and it fell out on the ground—they picked it up, and there was a shot fired, and they all ran. That the defendants were all talking. That first one would start to tell how it was done and another would correct him. That the defendant Elijah Turner said he was not present when the shot was fired, but had run a little piece away, and the defendant James Holmes turned to Turner, and said: "Why, you were there with the rest of us."

L. K. Reynolds testified: That he was present in Justice Hawkins' court when the preliminary information was read to the defendant James Holmes when he was charged with the murder of W. H. Archie. That the defendant, Holmes, pleaded guilty to said charge at said preliminary trial. That all of the other defendants were present when the defendant Holmes pleaded guilty to said charge. That the witness heard all of the

defendants talking about this trouble. That all of the defendants took part in the conversation. That defendant Holmes stated they got between \$80 and \$85 off of deceased Archie, which was divided up between Posey and Prather. That the other defendants got \$5 apiece, and that Bud Johnson got the watch.

Dr. John W. Riley testified as to the nature of the wounds on the person of the deceased, and that they were the cause of his death.

W. P. Hawkins testified: That he was a justice of the peace in the city of Oklahoma. That he heard the preliminary examination of the defendant charged with the murder of Archie on the 15th day of March, 1911. That, when the information charging the defendant with the murder of W. H. Archie was read to the defendant Holmes, he entered a plea of guilty to said charge. That, after the defendants had all pleaded guilty, the witness heard a statement made by the defendants with reference to the murder of Archie. They all stated they were there, and gave a description of what occurred. They said that, when "they got to the corner of Second and Walnut, they seen this man walking ahead of them on the east side of Walnut street between Second and Third street. As they got down about the middle of the block somewhere, they caught up with him, and Prather steps in front of him and threw the gun in his face, and told him to hold up his hands. The rest of them grabbed him. He resisted and hollered, and they got him down and taken his money away from him and his watch, and, after they had done that, while they were still holding him, Prather shot him. Q. Do you remember anything particular that Elijah Turner said in the presence of James Holmes with reference to this charge? A. Why, Elijah Turner made a statement of his own that, when the man hollered, he ran, and he got up at the corner or just around the corner when he heard a shot fired. Q. State whether or not there was any response to that statement by either one of the defendants, and, if so, by whom? A. Well, the one with a wart or mole on his lip told him—he says, 'You was right there and holding him or helping to hold him.' That was at the time the shot was fired. Q. I wish you would look at this young man, and state to the jury whether or not that is the man that made that statement? A. That is the man that made the statement. Yes, sir." Witness identified defendant Holmes as the person who made this statement.

Peter Blewer testified: That he was connected with the police force in the city of Oklahoma, and was assistant in the bureau of identification. He testified that the appellant voluntarily made the following statement to him: "He told me that he had started

from the Alabama Hotel with Charlie Posey, John Henry Prather, alias Blue, and Cy Booker. This was about 8 p. m. on the night of March 8, 1911. They went north of Stiles to Eighth street, and turned east to Geary. At Eighth and Geary they run on a young white man. Blue stuck the gun under him, and he and Cy Booker went through his pockets, got about \$2.15. They then came back to the Alabama Hotel, and got Bud Johnson. This was about midnight. They went up Walnut street to Second. Then in the middle of the block between Second and Third on Walnut they saw a white man going north, and Blue said, 'Let's get him,' and the white man turned on the south side of East Third street, and about the center of the block, and Prather went up in front of him, and stuck the gun on him, and told him to hold up his hands, and the man didn't do it, and kinder backed away. Q. He, who do you mean? A. James Holmes and Cy Booker and Bud Johnson and Posey grabbed him, and threw him down, and Posey searched him, and that Blue stood off and held the gun on him; that Posey searched him and taken his money. He said after he taken that money, he said, Blue put up the gun to the man's head and fired. He said, 'We'll all run.' He said, 'I ran with the rest of the boys.' They went back to the Hole on Second street. The Hole was closed, and they all went to the Alabama Hotel where they divided the money. He said he had gotten \$5. Then Holmes went upstairs and went to bed. He said he saw Posey the next day, that Posey had said he had the gun; that Blue had given him back his gun, and that Bud Johnson got the watch." The witness further testified that later in the day the defendant repeated this statement to him as above set forth; that the witness kept a memorandum of the statement made by the defendant.

Harry Stege testified that he belonged to the police department of the city of Oklahoma; that he was working in the secret service department. He stated that he heard the defendant Holmes make the following statement: "He said they went up to Eighth and Geary, and held up a white man, Posey and Blue, Cy Booker, and himself. They got \$2.15. He said that was a young white man, light complected, well dressed. The man made no resistance. They went down to the Alabama Hotel and they got Bud. They went up Walnut street, I think Third or Second street. They seen a white man turn going on the south side of Thrd street, and Blue said I am going to throw the gun on him. Blue went up in front of him, put the gun on him, and told him to hold up. The man refused to do so. He resisted, and they all grabbed hold of him and threw him down, and Posey searched him. and. when Posey said he had got the money, they all let loose of him, and started to run, but in the meantime Blue was standing off a little ways

with the gun, and, after Posey got the money, some of the boys started to run. He said he, Holmes, was standing right alongside of the man, when Blue went up to the man, pushed the gun into the man's head, and fired. He run away with Blue then, and he asked Blue why he wanted to kill the man after they had got his money, and the man was making no resistance. Blue said he just wanted to kill a white man anyhow. He said they went down Walnut street to the Alabama Hotel, to the Hole, that is where they went first, but it was closed, and they went back over to the Alabama Hotel. Blue had some money given to him by Charlie Posey, and then he gave him \$5, and they disbanded."

Shirley Dyer testified that he was chief of the secret service department of the police force of Oklahoma City. He stated that he had a conversation with the defendant Holmes with reference to the killing of the deceased, Archie, and that in that conversation Holmes stated to the witness that about 8 o'clock on the evening of March 8th himself, Cy Booker, Prather, or Blue, and Charlie Posey went north to Eighth street. There they turned and went east to somewhere near Eighth and Geary. "If I remember right, met a white man, a young fellow dressed in a light suit of clothes." That Blue shoved the gun in his face, and told him to throw up his hands. That he did, did not resist, and that he searched him ("meaning the defendant if I am not mistaken") and got \$2.15. "They then went back to the Alabama Hotel, divided the proceeds I believe, and later they got hold of Bud Johnson, who was there at that time and went out again, went over to the Hole in the Wall. From there they went west on Second street, and they saw a white man turn east on Third on the south side, and Blue pulls out his gun (meaning John Henry Prather), and said, 'Boys lets get him.' Blue went around in front of him, shoved the gun in his face, and the man refused to give up, and we all grabbed him and threw him down. That Posey went through the white man and got his money. That, when Posey said 'I have got it,' that we all run. He said he was standing near the white man who had raised on his elbow getting up when John Henry Prather, alias Blue, shot him. Hollering for help, the white man was, and he saw him fall back and kick a little. That he asked Blue what he shot him for after he had stopped struggling, and he said he wanted to kill a man anyhow. They went back to the Hole in the Wall, and it was closed, and from there they went to the Alabama Hotel, and that Blue, I believe it was, gave him \$5 which he said he had gotten from Posey, and that he then went to bed. Said he thought Blue gave Posey back his gun. The next day he met Posey, and Posey told him that he was going to Memphis, and that Blue had given him his gun. As near

as I can remember, that is about his confession."

The state then introduced the written confession of the defendant Holmes, which is as follows: "I started from the Alabama Hotel in company with Charles Posey, Cy Booker, and John Henry Prather, alias Blue, at about 8 p. m. on the evening of March 8, 1911. We walked north, and, when we got to East Eighth street, we went east. About the corner of Eighth and Geary we met a white man. Blue had borrowed Charles Posey's pistol, a shiny barreled 44-caliber gun, and he pushed it in the man's face, and ordered him to throw up his hands. The man made no resistance, and I and Cy Booker went through his pockets and got \$2.15. He was a young man well dressed, light complected. We went down Geary to the Alabama Hotel, and got hold of Bud Johnson, and told him to come with us and get a little easy money. We then went up to Walnut street and saw a man, a white man, going north between Second and Third streets. He turned down Third street on the south side of the street. Blue pulled out his pistol, and said to us boys, 'Let's go and get him.' Blue went up to him, and shoved the gun to his head, and told him to throw up his hands. The man refused to do so, and all of us boys grabbed him, and threw him down while Blue stepped a little ways off with the pistol. Charles Posey went through his pockets and got considerable money. I don't quite know how much. When Posey said he had the money, we all started to run. I was standing right close to the white man, who was on his elbows on the ground just getting up. He was shouting for help, and Blue, who had the pistol, pointed it at his head, and fired. I saw the man fall back and kick about a little. Then I ran with the rest of the boys. I asked Blue why he had shot the man after he had stopped struggling, and he said, 'I just wanted to kill a man, anyhow.' We went back to the Hole on East Second street, but it was closed, and so we went to the Alabama Hotel. Blue had the money which Charles Posey had turned over to him, and he gave me \$5. I then went upstairs and went to bed. I think that Blue gave Charles Posey back his gun at the Alabama Hotel that night. Blue had carried it all day. I saw Charles Posey on March 11th. He said that he was going to Memphis. He showed me his gun, and said that Blue had returned it to him. Blue shot the white man about 1 a. m. in the morning of March 9th. State of Oklahoma. Oklahoma County. I, James Holmes, being first duly sworn according to law, depose, and state that I have read the above and foregoing statement and that the matters and things therein set forth are true. [Signed] James Holmes. Subscribed and sworn to before me this 12th day of March, A. D. 1911. W. R. Gorby, Notary Public. [Seal.] My commission expires Jan. 6, 1913."

The state then rested.

The defendant placed several witnesses upon the stand who testified that they had known him for a number of years, and that he had the general reputation of being a quiet, peaceable, and law-abiding man. The defendant testified in his own behalf as follows: "Well, on March 8th, me and some more boys started north from the Alabama Hotel early about 8 o'clock in the evening. We went north on Stiles. We got up about Seventh or Eighth street. We turned east or west towards Geary. After we went middle ways of the block, we met a white man, and, when we met him, Prather, as we started passed by him, pulled out a revolver, stuck it in his face, and told him to throw up his hands. He made no resistance, and me and another boy went through his pockets and got \$2.15. Then we went back down Geary to the Alabama Hotel. We got there, and Bud Johnson was with us. Then we set around there a while, played some music around there, bought some whisky. Then we went back over to the place they call the Hole, a pool hall over on Second street, went back over there and it was closed. We stayed there a while. Then we went up Second street to Walnut. We got near to Walnut, and we seen a man going north on Walnut. Then Prather said, 'Come on, let's get him.' We started north behind the man and overtaken him just around the corner on Third from Walnut and Third and between Stiles and Central—no; Central and Walnut. Prather walks around in front of the man, and throws the gun on him, told him to throw up his hands. He kinder backed off from him, and Posey and some more of the boys grabbed hold of him and threw him down. Prather stood off a little ways with the pistol in his hand, and the man began to yell. Posey said, 'Come on, let's let him alone.' Then we all broke and run. Prather, when I left him, Prather was still standing there over the man with the revolver, and then, as I started, I told Prather to come on away, let the man alone. He might let the gun go off accidentally. Prather was still standing there as I started on away. As I turned my back to him, I heard the gun fire, and I looked around, and I seen the man kinder fall back and kick back a little. I broke in a run and caught up with the other boys. Posey and Turner was just a little ahead of me, and we all run down Walnut. Prather caught up with us. After we turned east on Second, I asked him did he shoot the man. He said, 'Yes.' I asked him why did he want to shoot the man. 'Well,' he says, 'just because I wanted to kill a man anyhow.' We never said any more then. We went on down. After we crossed Central, Prather and Turner and Posey were in front, and Bud Johnson and I were behind, walking along talking. They went on down to the Alabama Hotel, and me and Johnson went on down there, and they met us at the

edge of the porch, and handed Bud Johnson a \$10 bill to split with me, and says, 'Here is \$5 apiece.' Blue had already given Turner \$5 and gave Bud \$10 to split with me."

Edward A. Wagener, for appellant. Smith C. Matson, Asst. Atty. Gen., and E. G. McAdams, for the State.

FURMAN, P. J. (after stating the facts as above). [1] First. Counsel requested the court to instruct the jury as to the objects and purposes for which they might consider the question of character evidence introduced by appellant, which was refused by the court. The refusal of the court to give this instruction was not error. A general instruction upon the subject of character was given by the court. This was all that should have been given on that question. While it is true that several witnesses testified that previous to the commission of this offense the appellant had the reputation of being a quiet, peaceful, and law-abiding citizen, yet, according to his own testimony, he was a highwayman and a thief. This entirely destroyed the effect of the testimony which he had introduced upon the subject of character, and, in view of his own admissions, the jury could not possibly have reached any conclusion favorable to him on this issue. If appellant had denied participation in the commission of this offense, his previous good character might have been of some value to him. But his own testimony took the question of character out of the case, and it would not have been error if the court had refused to give any instruction at all upon this subject. See *Morris v. Territory*, 1 Okl. Cr. 619, 99 Pac. 760, 101 Pac. 111.

[2] Second. Appellant complains of the introduction in evidence of his written confession upon the ground that it was obtained from him by duress and fear. There was no testimony showing duress except that of appellant himself. His statements upon this subject were contradicted by a number of reputable witnesses. It was proven that this confession was made freely and voluntarily, and that appellant had made similar statements freely and voluntarily to a great number of persons, which statements were far more damaging to appellant than his written confession. The trial court did not err in admitting the written confession. But, even if there was error in this respect, it could not have prejudiced appellant, because, when he went upon the stand as a witness in his own behalf, he confirmed every material statement contained in the written confession.

[3] Third. The trial court instructed the jury that, if they found the defendant guilty of murder beyond a reasonable doubt, they should assess his punishment either at death or at imprisonment in the penitentiary at hard labor for life, as in their discretion they might see fit. Counsel for appellant insists that the court should have given the

jury a definition of the meaning of the word "discretion." With this contention we cannot agree. "Discretion" is a common English word in use in everyday life, and its meaning is well understood by all persons of ordinary intelligence. It has no special legal significance. We must presume that the jury were at least men of ordinary intelligence and were capable of understanding the English language. We feel quite sure that the jury understood the meaning of the word "discretion" fully as well as the court, or the attorneys in the case could possibly have explained it to them.

[4] Fourth. Counsel contend that the jury should have been instructed to view the facts and circumstances of this case from the standpoint of appellant as they reasonably appeared to him at the time of the homicide, and cite in support of this position the case of *Price v. Territory*, 1 Okl. Cr. 508, 99 Pac. 157, and further contend that it was the right of appellant to have an instruction given the jury based upon the hypothesis that his testimony was true, and cite in support of this position the case of *State v. Partlow*, 90 Mo. 608, 4 S. W. 14, 59 Am. Rep. 31. It cannot be questioned but that the two cases above cited state correct principles of law, which under proper conditions should be given in homicide cases in which the right of self-defense is presented, and where the testimony of the defendant presents a legal defense to such homicide. But these principles have no application at all to the case at bar. According to appellant's own testimony, he was the voluntary aggressor in a case of highway robbery, in the perpetration of which the homicide occurred, and no word of testimony offered in his defense presents the least excuse or justification for the crime in which he confessedly participated. Therefore, while the principles of law which are cited by counsel are correct, they are not applicable to the facts contained in this record.

Fifth. Appellant contends that the court should have instructed the jury that if the conspiracy in which appellant had engaged had terminated before the homicide was committed, or if appellant had voluntarily withdrawn from the conspiracy before the fatal shot was fired, in either event appellant would be entitled to an acquittal. Both of these contentions state correct abstract propositions of law. The question is, Are they applicable to the evidence introduced upon the trial of this case? We do not think that the testimony in the record would have authorized the court to submit either of these issues to the jury. When a conspiracy is entered into to do an unlawful act, all persons who engage therein are responsible for all that is done in pursuance thereof by any of their co-conspirators until the object for which the conspiracy was entered into is fully accomplished. This responsibility is not confined to the accomplishment of the

common design for which the conspiracy was entered into, but it extends to and includes collateral acts incident to and growing out of the common design. According to appellant's own testimony, the purpose of this conspiracy was not accomplished until after the return of the parties to the Alabama Hotel where the money obtained by the robbery and murder was divided among them. Neither does the record raise the issue that appellant withdrew from the conspiracy before the fatal shot was fired, because, according to his own statement, he accompanied his co-conspirators to the Alabama Hotel, and there, in pursuance of such conspiracy, participated with them in the division of the money stolen. With full knowledge on his part that Prather had shot the deceased and having seen the deceased fall back and kick his feet, and knowing that after the deceased was shot he had ceased to call for help and was therefore probably dead, appellant continued to act with his co-conspirators and shared with them in the division of the fruits of their joint crime. He therefore cannot be heard to say that he had withdrawn from the conspiracy before the fatal shot was fired. It is true that appellant did testify at the trial that he had started to leave the place of the homicide before the fatal shot was fired, and that, before doing so, he had told Prather to come away and let the man alone; that the gun might go off accidentally. This might indicate a withdrawal upon the part of appellant from a conspiracy to kill Archie, but it does not indicate a withdrawal on his part from the conspiracy to rob, which alone could absolve him from responsibility for the act of Prather in killing the deceased in executing the conspiracy to rob. This testimony on the part of appellant was clearly an afterthought, and, even if standing by itself it did tend to constitute a defense, its falsity was so conclusively and overwhelmingly proven by the other testimony in the case that it would not have been necessary for the court to instruct upon this issue.

Miss Kate O'Mara was the first witness for the state. She testified that she heard a man passing her house whistling and singing; that she went to the window, but he had passed out of her sight; that she soon heard shuffling of feet, and heard a muffled scream, and afterwards heard a shot; that she looked out of the window again, and in about a minute after the shot was fired she saw four persons in the street, and they were running from the place the sound of the shot came from, and where the deceased was found dead. It was proven that the deceased was found immediately east of the house of this witness. Therefore, if appellant had started to leave the place where the shot was fired as he testified, before the shot was fired, the witness would have seen him as soon as she looked out of the window, and could not have seen him

one minute after the shot was fired. This witness was clear that she did not see the parties running from the place until one minute after the shot was fired.

E. T. Bryan testified: That he resided at 214 East Third street. That he heard the shot fired at 1:30 o'clock. That he heard some parties running two or three minutes after the shot was fired. That the deceased was lying when found next morning between 214 and 216 East Third street. It simply cannot be true that appellant and those acting with him, except Prather, ran away from where the deceased was before the shot was fired. These disinterested witnesses testified that the running away did not take place until from one to three minutes after the shot was fired.

G. W. Morgan testified that in Justice Hawkins' courtroom he heard a conversation between the county attorney and all of the defendants as to how the homicide occurred, and he heard Elijah Turner, one of the defendants, say that he was not present when the shot was fired, but ran a little piece away, and that appellant James Holmes turned to Turner, and said, "You were there with the rest of us."

W. P. Hawkins testified: That he was justice of the peace in the city of Oklahoma. That he heard a conversation between the county attorney and all of the defendants in his courtroom. That the defendants were telling how Archie was killed, and that in said conversation Elijah Turner, one of the defendants, stated that he had just run around the corner when he heard the shot fired. That in response to this statement on the part of Turner appellant Holmes said, "You were right there holding him, or helping to hold him, when the shot was fired." So, even if appellant's testimony that he started to leave the place of the homicide before the fatal shot was fired, standing by itself, might tend to raise an issue favorable to him, yet the other evidence in the record conclusively shows that this is not the truth, and that appellant did not leave or attempt to leave the scene of the homicide until after the shot was fired. If human testimony is worth anything, and can be relied upon to establish any fact, no sane man can doubt but that appellant was a continuous participant in the crime committed to its final consummation. If Archie had submitted to being robbed without resistance and even after he lost his money, if he had not continued to call for help, it is probable that he would not have been murdered. The first man robbed that night made no resistance, and did not attempt to call for help, and he was permitted to go his way after the robbery was over. It is therefore safe to say that Archie would not have been killed if he had not persistently attempted to give the alarm. The only reasonable inference from all of the evidence is that the defendants did not dare to leave Archie alone, because, even if they



should be able to get away with his money, his calling for help might bring assistance, and, as long as he was alive, he might be able to show the direction in which the defendants had gone and secure their arrest, and thereby defeat the object of their robbery. It is therefore shown beyond all reasonable doubt that they found it necessary to murder Archie before they attempted to leave him, and that Prather did this in the presence of the other defendants. So from every standpoint the court did not err in refusing to instruct the jury upon the law of withdrawing from the conspiracy, or as to a homicide committed after the conspiracy was complete. Before it is error for the court to refuse to instruct upon any issue, there must be sufficient evidence in the record to make such issue not only possible, but also a legitimate deduction from such testimony, and one at which an intelligent and honest jury could reasonably arrive. When there is no reason to believe that an intelligent and honest jury, having a due regard for their oaths, the evidence, and the law, would legitimately reach a conclusion favorable to a defendant upon an issue, it is a waste of time for the court to instruct upon such supposed issue. The only effect of such an instruction would be to needlessly incur the record, and confuse and mislead the jury, and possibly result in a miscarriage of justice.

In the case of *Starr v. State*, 5 Okl. Cr. 459, 115 Pac. 356, when discussing the law of conspiracy, Judge Doyle, speaking for this court, said: "It is not necessary that the prosecution establish beyond peradventure that the acts, declarations, or conduct of the alleged conspirators were based upon the conspiracy or in reference to the crime charged. It is sufficient if they harmonize with and tend to confirm the charge of conspiracy, or show the motive for the crime. If such acts, declarations, or conduct of the alleged conspirators could not be shown, unless the motive therefor, or the connection between the same and the crime, were made undisputably clear, the range of inquiry would be very limited. It is sufficient that such acts, declarations, and conduct have an apparent or probable connection with the crime. The general rule is that where there is evidence of a conspiracy to commit a crime, and of its subsequent commission, the prosecution may in support and corroboration thereof show acts, declarations, or conduct of the alleged conspirators intermediate to the conspiracy and the crime which apparently recognizes the existence of the conspiracy, or reasonably indicates preparation or motive to commit the crime." In the case of *Wishard v. State*, 5 Okl. Cr. 641, 115 Pac. 793, Judge Doyle again said: "As a general rule, in cases of conspiracy, each conspirator is criminally responsible for the acts of his confederates committed in furtherance or in prosecution of the common design, or for any

act which follows incidentally in the execution of the common design as one of its probable and natural consequences, even though it was not intended as a part of the original purpose or design. Whether the evidence tending to prove the unlawful purpose of conspiracy is sufficient and \* \* \* was in furtherance of the common purpose and design were questions for the jury to determine. On the other hand, every person entering into a conspiracy or common design already formed is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design." In section 40, 3 Greenleaf on Evidence, the law is stated as follows: "If several persons set out in concert, whether together or apart, upon a common design which is unlawful, each taking the part assigned to him, some to commit the act, and others to watch at proper distances to prevent a surprise, or to favor the escape of the immediate actors, here, if the act be committed, are all in the eye of the law present and principals."

Where a conspiracy embraces not merely a series of unlawful acts, but also extends to a division of the fruits and proceeds of such acts among the co-conspirators, anything said or done by them, although after the commission of the unlawful acts, but before a disposition or division of the proceeds of such acts, is admissible evidence against all the other conspirators. See *State v. Pratt*, 121 Mo. 566, 26 S. W. 556; *Scott v. State*, 30 Ala. 508; *People v. Pitcher*, 15 Mich. 397; *State v. Grady*, 34 Conn. 118. The theory upon which such evidence is admissible is that the conspiracy does not terminate until there has been a division of its fruits or spoils. See *People v. Opie*, 123 Cal. 294, 55 Pac. 989. Conspirators are also responsible for the acts of their co-conspirators done for the purpose of escaping detection and arrest. See *State v. Thaden*, 43 Minn. 253, 45 N. W. 447. In the case of *Reeves v. Territory of Oklahoma*, decided by the Supreme Court of the Territory of Oklahoma, and reported in 10 Oklahoma Reports at page 195, 61 Pac. at page 828, Judge Hainer correctly said: "Where several persons confederated together to commit a crime of a nature or under such circumstances as will, when tested by human experience, probably result in the taking of human life if such necessity should arise to thwart them in the execution of their unlawful plans, it must be presumed that they all understood the consequences which might be reasonably expected to flow from carrying into effect their unlawful combination, and to have assented to the taking of human life if necessary to accomplish such unlawful act. And, if death happens in the prosecution of such a common design or object, all are alike guilty of a homicide." See, also, *People v. Brown*, 59 Cal. 352.

The Supreme Court of the State of Illinois,

in the case of *Lamb v. People*, reported in 96 Illinois Reports at page 73, said: "Where the accused was present and committed the crime with his own hands, or aided and abetted another in its commission, he will be considered as having expressly assented thereto. So, where he has entered into a conspiracy with others to commit a felony, or other offense, under such circumstances as will, when tested by experience, probably result in the unlawful taking of human life, he will be presumed to have understood the consequences which might reasonably have been expected to follow from carrying into effect the purpose of the unlawful combination, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. But further than this the law does not go." The court further said: "If the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design, whether he is present or not." The Supreme Court of Illinois, in the case of *Brennan v. People*, reported in 15 Illinois Reports at page 512, said: "Where several persons conspire to commit a felony, and death happens in the prosecution of the common object, all are alike guilty of the homicide; that the act of one is the act of all, although some are not present when the crime is committed. The prisoners may be guilty of murder, although they neither took part in the killing nor assented to any arrangement having for its object the death of Story. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story, and that he was killed in the attempt to execute the common purpose. If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide. The act of one of them done in furtherance of the original design is in consideration of law the act of all." The Supreme Court of Illinois, again, in the case of *Hannah v. People*, reported in 86 Illinois Reports at page 243, said: "If a party, with others indicted with him, had a common design to do an unlawful act, whatever act any one of them did in furtherance of the original design is the act of all, and all are equally guilty of whatever crime is committed."

The Supreme Court of Iowa, in the case of *State of Iowa v. Shelleady*, reported in 8 Iowa Reports at page 477, said: "It is not error to instruct a jury in a criminal case that 'if two or more persons conspire together to do an unlawful act, and in the prosecution of

the design an individual is killed, or death ensue, it is murder in all who enter into, or take part in, the execution of the design. If the unlawful act be a felony, or be more than a mere trespass, it will be murder in all, although the death happen collaterally, or beside the original design. If the unlawful act be a trespass only, to make all guilty of murder, the death must ensue in the prosecution of the design." In the case of *Martin v. State*, 136 Ala. 33, 34 South. 205, the Supreme Court of Alabama said: "If two or more persons conspire to do an unlawful act, and in the prosecution of a common object another person is killed, they are all alike guilty of the homicide, since each is responsible for everything done which follows incidentally in the execution of the common unlawful purpose as one of its probable and natural consequences, even though such act was not intended or within the reasonable contemplation of the parties as a part of the original design." In the case of *Kirby v. State*, reported in 23 Texas Court of Appeals Reports at page 14, 5 S. W. 166, the court said: "Appellant and two other prisoners conspired to escape from jail, and arranged that C., who was one of them, should secure and detain the jailer in the corridor while the escape should be effected. No understanding to kill or injure the jailer, otherwise than by his detention, was expressly proved, but the conspirators had obtained and prepared a piece of iron with which the jailer was killed by C., and it had been concealed by the appellant the morning previous to the homicide. C. killed the jailer in the corridor of the jail, and whilst the appellant and the other prisoner were locked up in their cell, and thus disabled from assisting C. in the homicide. There was no proof that appellant by word or gesture encouraged C. to kill the jailer. Held, that on this state of case the question arises whether the appellant was a principal in the homicide, and the test of that question is whether he and C. acted together, and whether the act was done in pursuance of a common design and purpose wherein their minds had agreed. It is contended for appellant that the conspiracy extended no further than the escape, and did not contemplate the killing of the jailer, or the infliction of bodily injury upon him beyond his mere detention, and that the killing was the individual and independent act of C. alone, perpetrated without appellant's knowledge or complicity, and without ability on his part to prevent it. But held, in view of the nature of the conspiracy, and of the preparation and use of a deadly weapon as a means to execute the common design, that the homicide was not the independent act of C. alone, but was the act of each and all the conspirators, because it was directly incident to and grew out of the common design of all. See the opinion in extenso on the amena-

bility of co-conspirators for the acts of each other done in the execution of an unlawful thing."

In the body of the opinion, beginning on page 23, 23 Tex. App., on page 171, 5 S. W., the court, speaking through Presiding Judge White, said: "According to this statement or evidence, it is clear that the parties had entered into an agreement and plan by which to effect their escape from jail, a part of which was to the method by which Cannon was to secure and detain Glazner in the corridor. It is true that appellant says nothing about an understanding that Glazner was to be killed, or even that any bodily injury was to be inflicted upon him further than his confinement or imprisonment after he had entered the jail; but as part of the plan, and doubtless, as considered by them, a most important part, they had procured and prepared for use the piece of iron with which the murder was committed, and appellant tells us that he himself, after it was prepared, hid the same under the water-closet on the morning before it was used with such deadly effect by Cannon. If not to be used in any contingency, why prepare and hide such a weapon? Here we have established by the statement the conspiracy to effect the escape, and the preparation of a deadly instrument to be used, it may be, only if occasion required. True that at the very time it was used appellant and Brown were so situated that it was impossible they could afford Cannon any direct assistance, or, in fact, do more, perhaps, than encourage him by words and gestures, even if they do so encourage him, of which fact there is no positive proof. Under such circumstances, and without direct proof of encouragement, the question is, could appellant be held and considered in law a principal in the crime committed by Cannon? It is declared that 'all are principals who are guilty of acting together in the commission of an offense' (Penal Code, art. 74), and 'all persons who shall engage in procuring aid, arms or means of any kind to assist in the commission of an offense whilst others are executing an unlawful act' are principals (Penal Code, art. 76). And, again, any person who advises or agrees to the commission of an offense, and who is present when the same is committed, is a principal thereto, whether he aids or not in the illegal act. Penal Code, art. 78. Thus it will be seen that, to render a party equally guilty and responsible with the real perpetrator, all that is required is that he be present, consenting, and that the act was the result of a common design. It is true his bare presence is not sufficient, nor is his failure to give alarm. Neither is his inactive and supposed concealment of the offense. *Burrell v. State*, 18 Tex. 713; *Truitt v. State*, 8 Tex. App. 148; *Tullis v. State*, 41 Tex. 598; *Ring v. State*, 42 Tex. 282. But such significant facts as his presence in connection with his companionship, his con-

duct at, before, and after the commission of the act, are potent circumstances from which participancy may be inferred. *Id.* The true test is, Did the parties act together, and was the act done in pursuance of a common design and purpose in which their minds had agreed? *Welsh v. State*, 3 Tex. App. 413; *Wells v. State*, 4 Tex. App. 20; *Scales v. State*, 7 Tex. App. 361; *Corn v. State*, 41 Tex. 301; *Smith v. State*, 21 Tex. App. 107 [17 S. W. 552]. There can be no question as to the common design and conspiracy to effect an escape from jail, and the fact is also incontestible that the murder was committed by Cannon in pursuance of this common purpose. But, while this is so, it is insisted that the conspiracy only extended to a purpose to confine Glazner in order that the escape might be accomplished, that the evidence fails to show that appellant and Brown ever contemplated, much less agreed to, his murder or the infliction of any bodily harm upon him, and that the fatal blows dealt him by Cannon causing death were the result of an independent act upon the part of Cannon without their knowledge or concurrence, and without the ability on their part even to prevent it. The joint responsibility of parties for each other's misconduct rests on the principle that, when an act is committed by a body of men engaged in a common purpose, such act is treated as if specifically committed by each individual. It should be observed, however, that, while parties are responsible for collateral acts growing out of the general design, they are not responsible for independent acts growing out of the particular malice of individuals. Thus, if one party of his own head turn aside and commit a felony foreign to the original design, his companions do not participate in his guilt.' *Whart. on Hom.* §§ 201, 202; *Mercersmith v. State*, 8 Tex. App. 211; *Stevenson v. State*, 17 Tex. App. 619. But it is equally as well settled that 'all combining to commit an offense to which homicide is incident are principals in homicide. As where persons combine to stand by one another in a breach of the peace, with a general resolution to resist all opposers, and in the execution of their design a murder is committed, all of the company are equally principals in the murder, though at the time of the act some of them were at such a distance as to be out of view, if the murder be in the furtherance of the common design. \* \* \* Malice in such a killing may be inferred as a presumption of fact from the nature of the design and the character of the preparation. Whether the deceased fell by the hands of the accused or otherwise is immaterial. \* \* \* It is only where the causes leading to the homicide have no connection with the common object that the responsibility of such homicide attaches alone to its actual perpetrator.' *Whart. on Hom.* § 338. As stated, we have in the evidence before us a common design to escape from jail, prep-

arations to effect that purpose, a deadly weapon prepared as a means to be used if necessary in the accomplishment of the common purpose, the use of the deadly weapon by one of the parties in endeavoring to carry out the common design. Such a homicide, committed under such circumstances, is not a collateral, independent act of the actual perpetrator, but is the act of all, because it was an act directly incident to and growing out of the common design of all." It will be noted that in this decision Judge White says: "The acts of the companionship of co-conspirators, their conduct at, before, and after the commission of the act, are potent circumstances from which the participation may be inferred."

The principle involved is that where parties voluntarily act together in the commission of an offense which may result in death to another, and such death does ensue therefrom, all such parties so acting together are just as guilty of murder as though they had intended the death of such party. The human eye cannot read the secrets of the minds and hearts of men. Therefore of necessity we must judge their intentions by the reasonable and probable results of their voluntary conduct. In other words, the law presumes that men do intend to accomplish those things which naturally and reasonably result from their actions. This is not only the law upon reason and human authority, but it is in strict harmony with the divine law. The sixteenth, seventeenth, eighteenth, nineteenth, twentieth, and twenty-first verses of chapter 35 of the Book of Numbers are as follows:

"16. And if he smite him with an instrument of iron, so that he die, he is a murderer: the murderer shall surely be put to death.

"17. And if he smite him with throwing a stone, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death.

"18. Or if he smite him with an handweapon of wood, wherewith he may die, and he die, he is a murderer: the murderer shall surely be put to death.

"19. The revenger of blood himself shall slay the murderer: when he meeteth him, he shall slay him.

"20. But if he thrust him of hatred, or hurl at him by laying of wait, that he die;

"21. Or in enmity smite him with his hand, that he die: he that smote him shall surely be put to death: for he is a murderer."

So it is seen that, according to the divine law, the man or men who do things from which another may die are just as guilty of murder, and should be as severely punished, as if they had done these things intending that death should result therefrom.

[6] Sixth. Counsel for appellant contends that there is a variance between the allegations in the information and the testimony

introduced in the trial of this cause because the information charges that the homicide was committed with a premeditated design to effect the death of W. H. Archie, while the proof fails to show ill will or hostility on the part of the defendants toward the said W. H. Archie, and that, at most, the evidence shows a conspiracy among the defendants to rob the said Archie. In support of this position, counsel for appellant relies upon section 2268 of Snyder's Compiled Laws of Oklahoma of 1909, which is as follows: "Sec. 2268. Murder defined.—Homicide is murder in the following cases: (1) When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being. (2) When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. (3) When perpetrated without any design to effect death by a person engaged in the commission of a felony."

This presents the question as to whether or not, where an information charges that the deceased was killed with a premeditated design to effect his death, a conviction can be secured where the proof shows that the killing occurred during an attempt to rob the deceased or to commit any other felony. This question has never before been presented to this court. The objection is purely technical, and should not be sustained unless it involves some substantial right of appellant. Our statute does not recognize different degrees or grades or kinds of murder. It only enumerates the class of evidence by which a murder may be proven. Where a murder has been committed, its essential character is not affected by the means by which it is accomplished. The statute upon which counsel relies was intended to simplify, and not to complicate our criminal laws, and it is our duty to place such a construction upon it as will effect its objects and promote justice. This we are required to do by section 2027 of Snyder's Compiled Laws of Oklahoma of 1909, which is as follows: "The rule of common law that penal statutes are to be strictly construed has no application to this Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." In construing penal laws, we should constantly keep in mind the fact that the supreme purpose for which they were enacted is the protection of society, and they should be given that construction which will best accomplish this result whenever it can be done without depriving a defendant of his substantial rights or working any injustice to him; and, in determining the issues presented in any case, we should always be controlled by substance rather than by form, and seek to enforce justice rather than to maintain artificial

technical regularity. It is always bad pleading to state the evidence upon which the pleader relies to establish his case. It is never necessary and proper for an information or indictment to state more than the ultimate facts necessary to be proven to establish the offense. This rule is so manifestly just and so universally accepted and acted upon that it is not necessary to cite authority in its support. What are the ultimate facts in every trial for murder? First, the identity of the accused; second, the time and place where the homicide occurred; third, the means by which death was effected; fourth, the identity of the deceased; fifth, the intention with which the act resulting in death was committed. When these ultimate facts are clearly stated, they constitute every essential element of murder, and they inform the defendant of the accusation against him, and that is all that he has a right to demand in reason or under the Constitution and laws of the state. Whenever a defendant is so charged with murder in the courts of Oklahoma and the evidence brings the case within any one of the three subdivisions of section 2268, above quoted, the law has been fully complied with, and the defendant cannot be heard to complain. It will be noticed that the first subdivision of the statute includes every case of homicide, it matters not by what means or under what circumstances committed, where there was a premeditated design to effect the death of the person killed or of any other human being. It may have been accomplished by a person engaged in the commission of a felony or doing some act imminently dangerous to others and evincing a depraved mind regardless of human life, still such homicide would come under the first subdivisions of the statute if it was the result of an act committed with a premeditated design to effect the death of some human being. The difference is that the first subdivision provides for all cases where the homicide was committed with a premeditated design to effect the death of the person killed or of some other human being, and the second and third subdivisions include cases where a premeditated design to effect the death of the person killed or of some other human being is not proven. This statute does not attempt to regulate the questions of pleading, but only undertakes to say what class of evidence is necessary to establish murder. There is no denying the proposition that the whole necessarily includes all of its several parts. Therefore, when an indictment or information charges a defendant with murder under the first subdivision of the statute, even though the state may not be able to prove that the killing was done with a premeditated design to effect the death of the person killed or of some other human being, yet, if the other allegations of the indictment are proven, a conviction may be had under and by virtue

of either of the other provisions of the statute. Placing any other construction upon this statute would only be to complicate and make more difficult and intricate the enforcement of the penal laws of this state, and thereby assist in delaying or defeating the enforcement of justice. We cannot understand how by this construction a defendant can be deprived of any substantial right. There are already too many loopholes for the escape of the guilty in our system of jurisprudence. In our judgment this is the prime cause for the want of respect for law and the lack of confidence in the courts which pervade our people, and also for the low esteem in which human life is held in America. We have before us the judicial statistics of England for the years 1903, 1904, 1905, and 1906, presented to both houses of Parliament by command of the king. They are, therefore, authentic public records. These statistics show for the year 1903 only 11 persons were tried for murder in the city of London. In the year 1904 only 11 persons were tried in the city of London for murder. In the year 1905 only 10 persons were tried for murder in London, and that in the year 1906 only 8 persons were tried for murder in the city of London. They also show that during these years 80 per cent. of persons tried for crime in England were convicted. We have no official statistics for the United States, but according to the Chicago Daily Tribune of Saturday, December 31, 1910, on page 18, column 6, excluding suicides and lynchings during the year 1910, as reported and recorded in the papers of the various states and territories of the Union, 8,975 persons died by personal violence. We have before us the official report of the general superintendent of police of the city of Chicago, dated December 31, 1910, which shows there were 202 homicides in that city alone during the year 1910, and only one of this number was sentenced to be hanged. When we remember that London has over 7,000,000 population, and that for these years it averaged less than 1 murder a month, and then compare this with the record made by Chicago, it is enough to cause the people and the courts of America to consider this matter, and discover if they can the cause which lies at the root of the evil. It is appalling, but nevertheless true, that, while the population of London is more than four times as great as the population of the entire state of Oklahoma, yet during the year 1911 in Oklahoma county alone twice as many persons have been tried for murder as were tried in the city of London in the year 1906. These facts should cause every intelligent and patriotic American to stop and inquire as to the cause of this disregard of law and fearful annual loss of human life. It should cause the courts to seriously consider as to whether or not the judicial system of America does not need reorganization. When a man kills another in England, the chance

es of his escape from punishment are exceedingly small, and the probability of his speedy prosecution and execution stares him directly in the face. It cannot be denied that this exercises a wholesome and restraining influence upon the passions of men, and results in respect for and confidence in the law, and consequent protection to society. It is the nearness and the certainty of punishment that strikes terror into the hearts of evildoers. The longer punishment is delayed, and the greater the opportunity for its evasion and defeat, the less efficacious it becomes as a means of deterring persons from violating the law. We inherited our criminal jurisprudence from England. The trouble is we have endeavored to maintain it just as we received it, and we are still striving as hard as England did before the Revolutionary War to maintain technical regularity and form at the sacrifice of everything else, while, on the other hand, in England, the trial of criminal cases has been simplified, and many of the arbitrary technical rules of the common law, the effect of which was to hinder, delay, and defeat justice, have been abolished, while America keeps on using the old antiquated, worn-out, secondhand, cast-off legal garments with reference to the enforcement of criminal law which England has long since discarded and thrown away. America leads the world in all departments of life, thought and action except in the administration of justice. While all other departments are full of progress and development, in the enforcement of justice we are largely stationary. It is time that the courts of America should act for the present and the future, and consider the past only for the purpose of avoiding the mistakes therein made. If the courts desire to enjoy public confidence and respect, they must earn it by basing their decisions alone upon substance and by paying more attention to justice than to shadows, form, and technical regularity.

For these reasons we cannot accept the argument made and the authorities cited by counsel for appellant in support of the proposition that there is a variance between the allegations in the information and the evidence in this case. We are glad to know that we are not without support in the conclusions at which we have arrived touching this matter. The case of *Territory v. Bannigan*, 1 Dak. 451, 46 N. W. 597, is directly in point. The statute in that then territory upon the subject of murder was identically the same as ours. The indictment in that case did not use the language of the statute, but alleged that the homicide had been committed "willfully, feloniously, and with malice aforethought." The defendant was convicted, sentenced to death, and appealed. The court held that the Legislature had endeavored to make plain to the common understanding of the citizens of the territory, the meaning of the legal phraseology used

in framing the Penal Code, and had, therefore, used the words "with a premeditated design to effect the death," etc., as equivalent to the common-law term "malice aforethought." It also held that the statute did not prescribe a rule of pleading, but establishes a guide to the conduct of the trial prescribing the proofs requisite to a conviction. The court then proceeds as follows: "In California, murder is divided into two degrees, and defined as follows: 'All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, or burglary, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree.' Under this statute the Supreme Court of that state has uniformly held an indictment in the common-law form sufficient, charging the offense to have been committed with 'malice aforethought.' *People v. Lloyd*, 9 Cal. 55; *People v. Dolan*, 9 Cal. 576; *People v. Cronia*, 34 Cal. 191; *People v. Martin*, 47 Cal. 101. The force of these authorities is not weakened by the consideration that the specific definition of the degrees is preceded by the general common-law definition of the crime in the California statute. Our statute says 'homicide is murder in the following cases.' The question recurs, What is murder as here used? Being a word defined by law, it must be construed according to its legal meaning. Section 220, Crim. Proc. Therefore supplying the definition, or all that is implied in the single word, and we have in general arrangement the California statute, without the division into degrees. In the state of Pennsylvania, where murder in the first degree is defined to be 'by means of poison or lying in wait, or in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, or by any other kind of willful, deliberate and premeditated killing,' the indictment in common-law form, charging the offense to have been committed with 'malice aforethought,' has always, 'without variable-ness or shadow of turning,' been held sufficient. The contrary doctrine has been held by the Supreme Courts of Ohio (*Fouts v. State*, 8 Ohio St. 98) and Iowa (*State v. McCormick*, 27 Iowa, 402), and insisted upon in a few dissenting opinions (*Bacon, J., in Fitzgerald v. People*, 37 N. Y. 685; and *Dixon, C. J., in Hogan v. State*, 30 Wis. 442 [40 Am. Rep. 575]). Wharton, in his work on Criminal Law (vol. 2, p. 1115), says: 'According to the great weight of authority, a common-law indictment for murder is sufficient to support, under the statutes, murder either in the first or second degree'—citing in support of the proposition a long array of authorities, not necessary here to refer to. But it seems unnecessary to pursue the inquiry further. We have not been referred to one single au-

thority holding a common-law indictment insufficient under a statute that leaves murder as at the common law undivided into degrees. Bishop, who maintains the doctrine laid down in the cases of *Fouts v. State*, and *State v. McCormick*, *supra*, in his work on Criminal Procedure (vol. 2, p. 586), uses the following language: "The result is that, according alike to the principles of the common law, to those principles of natural reason and justice which are inherent in the case, and to the provisions of state and national Constitutions, the indictment for murder, where the statute divides it into two degrees, should, if murder of the first degree is meant to be proved against the prisoner, contain those allegations which show the offense to be in this degree. \* \* \* If murder in the second degree only is to be proved, then in all cases an indictment for murder, drawn in any of the common-law forms, will be adequate. Thus it is with the two degrees of felonious homicide which we now call murder and manslaughter—the only degrees known to our statute. From these considerations we are clearly of the opinion, and so hold, that the indictment in this case is sufficient."

In the case of *People v. Enoch*, 13 Wend. (N. Y.) 164, 27 Am. Dec. 197, the Supreme Court of New York passed upon this question. The statute then in force in New York defining murder was substantially the same as ours. The indictment in that case did not follow the language of the statute, but charged that the defendant committed the murder "feloniously, willfully, and of his malice aforethought." The defendant was convicted and sentenced to be hung. He appealed, and the Supreme Court held that the conviction should be sustained. The case was then taken by writ of error to the Court for the Correction of Errors. The court for the Correction of Errors sustained the conviction on this indictment, and among other things said: "One object of our Revised Statutes was to get rid of those technical difficulties that had so justly been complained of as a disease of the law, which, without being necessary for the protection of any substantial right of the accused, had so frequently entangled justice in the net of form; and this object of the Legislature will certainly be best promoted by adhering to the common-law form of indictment in cases of murder, the nature of which offense has not been materially changed in the revision of the laws."

In the case of *People v. Giblin*, 115 N. Y. 197, 21 N. E. 1062, 4 L. R. A. 757, the Supreme Court of New York said: "The defendant was convicted at a court of oyer and terminer, held in and for the city and county of New York, of the crime of murder in the first degree for the killing of Madeline Goelz. From the sentence of death pronounced upon him he has appealed to this court, alleging various grounds in support of his ap-

peal. The indictment was drawn in common-law form, and in one count charged the killing to have been done willfully, feloniously and with malice aforethought. The defendant objected that such an indictment was not sufficient to sustain the conviction of the defendant for the offense of murder in the first degree while engaged in the commission of the felonious assault upon Valentine Goelz. He argues that the offense is defined by the statute in the alternative, as consisting of separate acts, and the indictment should have stated the circumstances constituting the offense, according to the third alternative provision of section 183 of the Penal Code, which makes the killing of a human being murder in the first degree when committed, without a design to effect death, by a person engaged in the commission of, or in an attempt to commit, a felony. The objection to the indictment is untenable. A conviction of murder in the first degree under such an indictment is sustained by proof of a killing in the perpetration of a felony. *People v. Conroy*, 97 N. Y. 62; *People v. Willett*, 102 N. Y. 254, 6 N. E. 301. If the indictment contains a plain and concise statement of the acts constituting the crime, and the proof, as to the manner in which it was perpetrated, brings it within one of the statutory definitions of murder in the first degree, the requirements of the law are sufficiently met. The various statutory changes in the definition of what may constitute the crime of murder have not affected, and have not been held to affect, the ordinary common-law counts in indictments for murder." In the case of *People v. Osmond*, 188 N. Y. 84, 33 N. E. 740, appellant was convicted of murder in the first degree. In passing upon the case the court said: "The indictment in this case is in the common-law form, and does not charge the killing to have been done in the statutory language, 'from a deliberate and premeditated design to effect the death' of Mary Osmond. It charges that the defendant killed her 'willfully, feloniously, and of his malice aforethought,' and it contains no charge that while intending to kill another the defendant killed his wife. Ever since the adoption of the Revised Statutes, it has been held without interruption that an indictment for murder in the common-law form was proper, and that under it the people might prove any case which amounted to murder under the statute, and, if the proof did not bring the case within some one of the statutory definitions of murder, it was the duty of the court to give proper instructions to that effect to the jury, and, unless it appeared that the court had failed so to do upon request, the appellate court would presume that the proper instructions were given. *Fitzgerrold v. People*, 37 N. Y. 413, citing *People v. Enoch*, 13 Wend. (N. Y.) 159 [27 Am. Dec. 197], and *People v. White*, 24 Wend. (N. Y.) 520; *People v. Conroy*, 97 N. Y. 62; *People v. Giblin*, 115

N. Y. 196 [21 N. E. 1062, 4 L. R. A. 757]. Under this indictment, it was, therefore, proper to prove any facts which would show the defendant guilty of murder, as defined in any portion of the statute." In the case of *People v. Sullivan*, 173 N. Y. 122, 65 N. E. 989, 63 L. R. A. 353, 93 Am. St. Rep. 582, appellant was convicted of murder. The indictment against him was in the common-law form. The appellant contended that, under such an indictment, the trial court could not submit to the jury the issue as to whether or not the homicide had been committed while the accused was engaged in the commission or attempting to commit a felony, but the court held that under such an indictment the prosecution might prove any facts which would bring the case within any of the provisions of the statute defining the offense.

In the case of *State v. Foster*, 136 Mo. 655, 38 S. W. 722, the Supreme Court of that state said: "The indictment charges that the murder was committed in the attempt to rob Atwater, but such statement was wholly unnecessary, as the indictment may be drawn in common form, and then when proof is made that the homicide was done in the perpetration of a robbery, this proof being made is tantamount to that premeditation, deliberation, etc., which otherwise are necessary to be proven, in order to constitute murder in the first degree. *State v. Hopkirk*, 84 Mo. 278; *State v. Meyers*, 90 Mo. 107 [12 S. W. 516]; *State v. Donnelly*, 130 Mo. 642 [32 S. W. 1124]. But the unnecessary statement aforesaid did not vitiate the indictment. Enough was stated outside of the matter in reference to the robbery, which made the indictment good, but we do not approve of the unnecessary averment." In the case of *People v. Giblin*, 115 N. Y. 196, 21 N. E. 1062, 4 L. R. A. 757, the Court of Appeals of New York held: "An indictment for murder in the first degree, which charges that the killing was done 'willfully, feloniously, and with malice aforethought,' is sufficient, under Pen. Code N. Y. § 183, which makes the killing of a human being murder in the first degree, when committed, without a design to effect death, by one engaged in the commission of a felony, and a conviction thereunder is sustained by proof of a killing while in the perpetration of a felony."

[7] Seventh. Counsel complain that the death penalty should not have been assessed in this case. As the evidence amply supports the verdict, we have no right to interfere. The law provides that the jury may in their discretion affix the penalty of death. This is not only the human law, but is also the divine law. The thirty-first, thirty-second, thirty-third, and thirty-fourth verses of the thirty-fifth chapter of the Book of Numbers are as follows:

"31. Moreover ye shall take no satisfaction for the life of a murderer, which is guilty of death: but he shall be surely put to death.

"32. And ye shall take no satisfaction for him that is fled to the city of his refuge, that he should come again to dwell in the land, until the death of the priest.

"33. So ye shall not pollute the land where-in ye are: for blood it defileth the land: and the land cannot be cleansed of the blood that is shed therein, but by the blood of him that shed it.

"34. Defile not therefore the land which ye shall inhabit, wherein I dwell: for I the Lord dwell among the children of Israel."

The tenth, eleventh, twelfth, and thirteenth verses of the nineteenth chapter of Deuteronomy are as follows:

"10. That innocent blood be not shed in thy land, which the Lord thy God giveth thee for an inheritance, and so blood be upon thee.

"11. But if any man hate his neighbor, and lie in wait for him, and rise up against him, and smite him mortally that he die, and fleeth into one of these cities:

"12. Then the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die.

"13. Thine eye shall not pity him, but thou shalt put away the guilt of innocent blood from Israel, that it may go well with thee."

From these passages of Scripture it is seen that under the divine law no discretion was allowed and every murderer was condemned to suffer death, while under human law the jury at their discretion may inflict death or imprisonment for life.

Appellant is guilty of a double crime, viz., both highway robbery and murder. One of the citizens of Oklahoma, while quietly and peaceably pursuing his way on one of the public streets of Oklahoma City, was first assaulted and robbed, and, because he called for help, he was brutally murdered. These facts fully authorized and justified the jury in inflicting the death penalty. We are not unmindful of the awful circumstances which surround appellant, but we are also mindful of the fact that upon the proper enforcement of the law depends the safety of the lives of the people of Oklahoma, and, under the facts and circumstances in this case, we do not feel that we have a right to disturb the verdict.

We listened attentively to the oral argument made in behalf of appellant, and have carefully examined all of the propositions so ably and zealously presented in the brief of his counsel. We have also considered all of the authorities cited by counsel for appellant, and we have been unable to find any reasonable ground upon which the judgment of the lower court should be interfered with. The judgment of the lower court is, therefore, in all things affirmed.

The time originally appointed for the execution of appellant having passed, it is ordered that the judge of the district court of Oklahoma county execute a warrant in due



form of law, attested by the clerk of the court under the seal of said court, and to be delivered to the sheriff of said court, commanding said sheriff to execute appellant, James Holmes, between sunrise and sunset on Friday, January 19, 1912, in accordance with law and the judgment of said court heretofore rendered.

DOYLE, J., concurs. ARMSTRONG, J., dissents.

### HUNTER v. STATE.

(Criminal Court of Appeals of Oklahoma. Dec. 18, 1911.)

#### (Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 304\*)—EVIDENCE—JUDICIAL NOTICE.

The courts of this state take judicial notice of the fact that the Kiowa Indian agency is adjacent to the city of Anadarko, where it has been established for many years by the United States government. They also take judicial notice of the fact that Anadarko is the county seat of Caddo county, Okl.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 304.\*]

#### 2. RAPE (§ 57\*)—AGE OF PROSECUTING WITNESS—EVIDENCE.

In prosecutions for statutory rape, the age of the complaining witness is always a question of fact for the jury, to be determined by them from all the evidence in the case; and, when the prosecuting witness appears on the witness stand before them, they may consider her apparent age in determining this question.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. § 57.\*]

#### 3. CRIMINAL LAW (§ 1175\*)—APPEAL—REVIEW—HARMLESS ERROR—VERDICT.

If error has been committed by the conviction of a defendant for statutory rape in the second degree, when under the evidence he should have been convicted of statutory rape in the first degree, the defendant cannot be heard to complain because the error was clearly to his advantage. The law never considers a question of error except in behalf of those who are injured thereby.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1175.\*]

Appeal from District Court, Caddo County; Frank M. Bailey, Judge.

Joseph Hunter was convicted of crime, and appeals. Affirmed.

Appellant was prosecuted by information in the district court of Caddo county for the offense of statutory rape in the first degree, and was found guilty by the jury of rape in the second degree. His punishment was assessed at imprisonment in the penitentiary for five years.

W. R. Haynes, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. It is contended by counsel for appellant that venue was not proven in this case. It is true that no witness testified in direct language that the crime

charged was committed in Caddo county, Okl. Cahoto, the mother of the prosecuting witness, testified that her home was at Apache, Caddo county, and that she and her husband and the prosecuting witness had been on a visit to the Cheyenne Indians some time in the fall previous to the commission of this offense. Her testimony on this subject is as follows: "Q. Did you go on a visit up to the Cheyenne Indians some time last fall? A. Yes, sir; we came back by here. Q. Did you stop at Anadarko as you came back? A. Yes; at Joe Hunter's camp. Q. Who of your people were with you when you camped over there? A. My folks and Joe's folks. Q. Who of your people were with you? A. We stayed by ourselves. Q. Was Ellen with you at that time? A. Ellen Mul-ke-hay was with us, and I saw them take her down to the river. Q. Was your husband with you over there? A. Yes; he was there." Chall-e-sin testified that the prosecuting witness was his stepdaughter. He then proceeded to testify as follows: "Q. Did you and your wife and Ellen go up to visit the Cheyennes any time last fall? A. Yes. Q. As you came back home, did you camp over here at old town in Anadarko? A. Yes; where Joe Hunter was camped. Q. Did you see Joe and Emma Hunter the day you camped there? A. Yes, sir. Q. Did they go out to gather any weeds while they were camped there? A. Emma told the girl to come and go with her when she went to get some weeds. Q. Where was Joe Hunter at that time, if you know? A. Joe was down at his camp. Q. How long was Emma gone at that time, Emma and Ellen? A. They got back about 7:30." The prosecuting witness testified that while she was on this trip the offense was committed upon her by appellant. It is useless to repeat the revolting details given in evidence. It was further proven that some ten days or two weeks after the alleged offense the prosecuting witness was taken to the Kiowa Indian agency to be examined by the physician in charge of the agency on account of the injuries alleged to have been received by her at the time of the commission of this offense.

[1] Courts of the state take judicial notice of the fact that the Kiowa Indian agency is adjacent to the city of Anadarko, in Caddo county, where it has been established many years by the United States government. They also take judicial notice of the fact that Anadarko is the county seat of Caddo county, Okl. Courts take judicial notice of the boundaries of the state and the counties in the state, and also of the geographical positions and location of cities and towns within their jurisdiction. See *Brunson v. State*, 4 Okl. Cr. 467, 111 Pac. 988; *Fuller v. Territory*, 2 Okl. Cr. 86, 99 Pac. 1098; *Reed v. Territory*, 1 Okl.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Cr. 492, 98 Pac. 583, 129 Am. St. Rep. 861.

The effect of Cahoto's testimony was that, when she returned from her visit to the Cheyenne Indians, she stopped at Anadarko at Joe Hunter's camp. Chall-e-sin testified that, when they came back from their visit to the Cheyenne Indians, they camped at old town in Anadarko where Joe Hunter was camped. The girl testified that this was the time and place when the offense was committed upon her. We think this sufficiently establishes the venue of the case.

[2, 3] The evidence shows that the prosecuting witness, Ellen Mul-ke-hay, was an Apache Indian girl. There was evidence to the effect that she was about 13 years old at the time of the commission of this offense. It is contended upon the part of counsel that, if she was under the age of 14 years, the offense committed was rape in the first degree, and that, as appellant was convicted by the jury for rape in the second degree, a valid judgment cannot be rendered against him thereon. The age of the prosecuting witness in cases of this sort is always a question of fact, to be determined by the jury from all the evidence in the case, and they may consider her apparent age when she appears upon the witness stand before them. We think that, if error was committed in this matter, appellant cannot be heard to complain, as it was clearly to his advantage. For a discussion of this question and citation of authorities, see *Coleman v. State*, 6 Okl. Cr. —, 118 Pac. 594.

We deem it due to counsel who represents appellant in this court to state that he did not represent appellant in the trial of this case in the district court. We have examined carefully the various questions which have been discussed in the brief of counsel for appellant and in his oral argument, but as no exceptions were taken to the rulings of the trial court, and as we cannot say from an inspection of the record that appellant suffered any material injury therefrom, it is not necessary for us to discuss any of these questions. If appellant was not properly represented in the trial court, that is his misfortune. If this was a ground for a new trial, defendants would employ none except the most incompetent counsel. We cannot grant a new trial upon this ground alone where appellant was represented by counsel of his own choice.

The prosecuting witness, her mother, and stepfather were all Apache Indians, and could not understand or speak the English language, and had to be examined and gave their testimony in court through an interpreter. It is true that their language was broken and their modes of expression were at times difficult to understand, but, taking their testimony as a whole, we think that it sufficiently established the offense. In addition to their testimony, W. C. Morrison, deputy sheriff, testified that he overheard

a conversation between appellant and his brother in which appellant said to his brother: "God damn it, I done it, and they cannot prove it." This was after the arrest of appellant and while he was in jail pending trial on this charge. As appellant was then in jail on this charge, the inference is natural that he referred to the crime for which he was being held. This inference is strengthened by the fact that although appellant took the stand as a witness in his own behalf, after having heard the damaging statement of the deputy sheriff, appellant did not attempt either to deny or explain it, and made no attempt to summon his brother, who heard the statement, to testify in his behalf concerning the matter. Taking the evidence altogether, we have no sort of doubt of appellant's guilt. It is true that the prosecuting witness is only a poor Apache Indian girl, yet she is as much entitled to the protection of the law as any girl in the state. The rich and influential can take care of themselves. It is the poor, the weak, the humble, and the ignorant who need the strong arm of the law for their protection. Her very weakness and helplessness should appeal strongly to the law for her defense. The testimony of this little daughter of the plains is enough to touch a heart of stone. When asked her name, she replied "Florence." She testified that Ellen Mul-ke-hay was dead.

The record then proceeds as follows: "Q. Do you go by the name of Ellen Mul-ke-hay or Florence? A. I got a new name. They call me Florence. Q. How long have you gone by the name of Florence? A. Since September when I started to school. The lady teacher gave me that name then. Q. Have you ever had a name before Florence? A. No. Q. How long have you had the name Florence? What was your name before the teacher called you Florence? A. Didn't they give me the name Florence? Q. What name did you go by before they called you Florence? What did they call you before they called you Florence? A. The teacher just called me the one name, Florence. Q. How long has it been since they have been calling you Florence? How long have you been going to school? A. I went to school four days. Q. How long did you go to school in all, when did you first start to school? A. I had not been to school any at that time. Q. Didn't you go to school before this happened? A. Yes; when this happened, I went to school." There is a pathetic side to this Indian question. This was their country. God gave it to them. It has been taken from them by the ruthless hand of power. They have been crushed as with an iron heel by the pitiless and inexorable march of civilization. The least we can do is to protect them and help them as far as possible to adapt themselves to conditions which have been forced upon them much against their will. If we

desire to convince them that our civilization is better than their previous mode of life, we must prove it by acts rather than by words. Here was a poor little Apache girl, on the soil of her fathers, surrounded by aliens, unable to understand or speak a single word of their language, and in her helplessness appealing to them and to their law for protection.

We think that the evidence fully sustains the verdict. The only thing strange about it is that the jury did not convict appellant of rape in the first degree and assess his punishment at the full limit of the law, which, if they had done, we would have cheerfully sustained.

We find no error in the record. The judgment of the lower court is therefore in all things affirmed.

ARMSTRONG and DOYLE, JJ., concur.

### BROWN v. STATE.

(Criminal Court of Appeals of Oklahoma. Dec. 14, 1911.)

*(Syllabus by the Court.)*

#### 1. COURTS (§ 207\*)—EXERCISE OF APPELLATE JURISDICTION.

A mandamus to an inferior court to direct its action in the course of justice is an exercise of appellate jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 207.\*]

#### 2. COURTS (§ 207\*)—JURISDICTION—CRIMINAL COURT OF APPEALS—MANDAMUS.

The Constitution and statutes confer exclusive appellate jurisdiction on the Criminal Court of Appeals in all criminal cases, to be exercised in the manner prescribed by law, and the statutes provide that, upon the refusal of a judge in a criminal case to certify to his disqualification, "application may be made to the proper tribunal for mandamus, requiring him so to do." Snyder's Sts. § 2016. *Held*, that the Criminal Court of Appeals has exclusive jurisdiction to issue the writ of mandamus to an inferior court in proceedings to disqualify the presiding judge in a criminal case, and that the district courts and the Supreme Court on appeal therefrom are without jurisdiction to allow a writ of mandamus for a change of judge in a criminal case.

[Ed. Note.—For other cases, see Courts, Dec. Dig. § 207.\*]

Appeal from Canadian County Court; H. L. Fogg, Judge.

G. C. Brown was convicted of a violation of the prohibition law, and appeals. Affirmed.

Forrest & Sansom, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. The plaintiff in error was convicted in the county court of Canadian county of a violation of the prohibition law, and on April 23, 1910, was sentenced to serve a term of six months in the county

jail, and to pay a fine of \$500. From this judgment he appeals.

The record shows that before trial the defendant filed his application for a change of judge, which, omitting the title and verification, is as follows: "Comes now the above-named defendant, Chas. Brown, and applies to the court for a change of judge in said action, and states as his ground therefor that the presiding judge of said county court is prejudiced and biased against said defendant, and that said defendant cannot have a fair and impartial trial before said presiding judge of said court on account of said prejudice and bias. He therefore prays for a change of judge for the trial of said cause." Which application was denied. When the case was called for trial, the defendant objected to a trial before H. L. Fogg as judge, and, in support of said objection, offered evidence showing that he had instituted mandamus proceedings in the district court, praying for a peremptory writ of mandamus ordering and directing H. L. Fogg, judge of the county court, to grant a change of judge on the aforesaid application, and that, in the event that the writ should be denied by the district court, he would appeal therefrom to the Supreme Court, which objection was overruled and exception allowed.

[2] The defendant's counsel here contend that the county court erred in overruling his application for a change of judge, and that the judge of the county court was without authority to proceed in the trial because the mandamus proceedings in the district court and the Supreme Court to compel said county judge to certify to his disqualification had not been finally determined. The fallacy of this contention is not very recondite. The application for a change of judge is wholly insufficient, and the pendency of the proceedings for mandamus in the district court of Canadian county or upon an appeal therefrom to the Supreme Court could, in no way affect the authority of the judge of the county court to proceed with the trial of the case, for the sufficient reason that the district courts of this state are without authority or jurisdiction to entertain an application for or to allow a writ of mandamus directing a change of judge in a criminal case. Under the constitutional provision and the act defining the jurisdiction of the Criminal Court of Appeals, this court is given exclusive appellate jurisdiction in all criminal causes. Among the provisions defining its jurisdiction is section 1916, Snyder's Sts.: "The Criminal Court of Appeals shall have exclusive appellate jurisdiction in all criminal cases appealed from county and district courts in this state, and such other courts as may be established by law." Section 1917. "The Criminal Court of Ap-

peals shall have exclusive appellate jurisdiction coextensive with the limits of the state in all criminal cases in the manner, and under such regulations, as may be prescribed by law." In the case of *ex rel. Eubanks v. Cole*, District Judge, 4 Okl. Cr. 25, 109 Pac. 736, it is said: "A mandamus to an inferior court is in the nature of appellate jurisdiction. The term 'appellate,' in the constitutional phrase, 'a Criminal Court of Appeals with exclusive appellate jurisdiction in all criminal cases,' is not used in a restricted sense, but in its broadest sense as embracing the power and jurisdiction to review and correct the proceedings of inferior courts in criminal cases brought before it for determination in the manner provided by law." Section 2016, Snyder's Sts., provides: "Any party to any cause pending in a court of record may in term time or in vacation file a written application with the clerk of the court, setting forth the grounds or facts upon which the claim is made that the judge is disqualified, and request him to so certify, after reasonable notice to the other side, same to be presented to such judge, and upon his failure so to do within three days before said cause is set for trial, application may be made to the proper tribunal for mandamus requiring him so to do."

[1] Where a mandamus issues to direct the action of a legal tribunal proceeding in the course of justice, it is an exercise of appellate jurisdiction. In other cases it is generally an exercise of original jurisdiction. The Criminal Court of Appeals having exclusive appellate jurisdiction in all criminal cases, an application for a writ of mandamus in a proceeding for a change of judge in a criminal case under section 2016, supra, must be made to this court. For this reason the pendency of the mandamus proceedings in the district or Supreme Court could in no way affect the authority of the presiding judge of the county court to proceed and try this case.

The record shows that, when the court instructed the jury, one of the jurors, Mr. Shupe, made the following inquiry: "By Mr. Shupe: I am not altogether satisfied as to the law. The idea is here— By the Court: Right there. These instructions given you are the law of the case, and by these you will be guided. Now, if there is anything you don't understand with reference to these matters after you retire to your jury room, ask the bailiff to bring you back down, and the court will try to explain it to you. It being nearly noon now, we will wait on you a few minutes, and see if you can agree upon a verdict. By Mr. Forrest: I want to take an exception to that statement of the court." It is contended that this action and language of the court was manifestly prejudicial to a fair consideration of the case by

the jury. We think the court sufficiently safeguarded the legal rights of the defendant in the instructions given, yet it would seem that the court in assessing the maximum penalty of the law for the first offense after the jury had failed to agree on the punishment to some extent justifies some of the criticisms, if not the contention of counsel that the presiding judge was unfair in his conduct of the trial.

While our examination of the record convinces us of the guilt of the defendant, it also convinces us that the sentence pronounced against the defendant is excessive. It is both the spirit and intention of the law that sentence shall be imposed in criminal cases for the protection of society, and the reformation of the offender. As we view this case, the action of the court complained of prevented the jury from fully considering the case by assessing the punishment in their verdict. For this reason, we have concluded to modify the sentence to the extent of reducing it one-half. The judgment and sentence is therefore modified to read three months confinement in the county jail of Canadian county and to pay a fine of \$250, and, in default of the payment of said fine, the same to be satisfied according to law.

The judgment of the county court of Canadian county as modified herein is hereby affirmed, and the cause remanded, with direction to enforce the judgment as modified.

FURMAN, P. J., and ARMSTRONG, J.,  
concur.

McGARY v. STEELE, District Judge.  
(Supreme Court of Idaho. Dec. 11, 1911.)

(Syllabus by the Court.)

1. TRIAL (§ 387\*)—DUTIES OF COURT—DECISION OF CASE.

Under the provisions of section 4406, Rev. Codes, upon a trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within 20 days after the cause is submitted for decision.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 908-907; Dec. Dig. § 387.\*]

2. TRIAL (§ 387\*)—DUTIES OF COURT—DECISION OF CASE.

Under the provisions of section 17, art. 5, of the Constitution, no Justice of the Supreme Court, or district judge, shall be paid his salary, or any part thereof, unless he shall have first taken and subscribed an oath that there is not in his hands any matter in controversy, not decided by him, which had been finally submitted to him for his consideration and determination 30 days prior to the taking and subscribing of such oath.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 908-907; Dec. Dig. § 387.\*]

3. TRIAL (§ 387\*)—DUTIES OF COURT—DECISION OF CASE.

The failure of counsel to furnish the trial court with a brief is not a sufficient reason to justify the court in delaying a decision longer

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

than the period prescribed by section 4406, Rev. Codes.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 903-907; Dec. Dig. § 387.\*]

4. MANDAMUS (§ 51\*)—SUBJECTS OF RELIEF—ACTS OF JUDGES.

Held, under the facts of this case, that a peremptory writ of mandate must issue as prayed for in the petition.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 98-100; Dec. Dig. § 51.\*]

Original proceedings by Ira McGary for writ of mandate to compel Edgar C. Steele, as Judge of the District Court of the Second Judicial District, to try a case tried and submitted to him for decision. Writ granted.

W. H. Casady, for petitioner.

SULLIVAN, J. This is an original application for a writ of mandate to the Honorable Edgar C. Steele, as judge of the Second judicial district of the state of Idaho, requiring him to show cause, if any he may have, why he has not decided the case of Ira McGary v. Steve Winchester, George D. Smith, and P. F. Courtney, which cause was tried or heard and submitted to said court on the 19th day of September, 1911, for final decision and judgment.

The application for the writ shows the following facts: That on the 11th day of April, 1908, an action of claim and delivery was commenced in said district court, wherein the said Steve Winchester was plaintiff and Ira McGary, the plaintiff herein, was defendant; that in said action said Winchester filed his undertaking for the delivery to him of the possession of the personal property therein claimed by him in the sum of \$3,000, with George D. Smith and P. F. Courtney as sureties thereon; that said action was heard without a jury before said district court, the Honorable Judge Steele presiding, on September 30, 1908, and after the evidence of both plaintiff and defendant had been submitted the cause was taken under advisement by the court, and W. N. Scales, Esq., attorney for said plaintiff, Winchester, was given until October 20th to file a brief, and W. H. Casady, Esq., attorney for the defendant, McGary, was to have until November 10th thereafter in which to file a reply brief, which briefs were filed accordingly. Thus it appears that said case was fully submitted to the court for decision on the 10th of November, 1908, and that said judge and court held said case under advisement until the 29th of July, 1909, thus holding said cause under advisement for nearly nine months before a decision was rendered. Thereafter a new trial was granted in said cause on February 4, 1910, and on September 6, 1910, the plaintiff, through his attorney, W. N. Scales, Esq., dismissed said claim and delivery action, and judgment was rendered in favor of the defendant for the return of said chattel prop-

erty, or the value thereof, found by the court to be the sum of \$1,500.

It also appears that said Winchester neglected and failed to return said chattel property to the defendant, McGary, or to pay him the value thereof, whereupon McGary took out execution therefor in said action, and placed the same in the hands of the sheriff of Idaho county, which execution was by said sheriff returned satisfied in part only, with a further return that the balance of the chattel property referred to could not be found; and that no property of said plaintiff, Winchester, could be found in said Idaho county from which to make the balance of said judgment and costs. Thereafter, on the 11th of January, 1911, the said Ira McGary brought an action on said replevin bond against said Winchester and his said bondsmen, Smith and Courtney, to recover the balance due on said judgment, which was the sum of \$1,029.10 and costs; that, prior to the bringing of said last-mentioned action, said Winchester left the state and went to Alaska, and the summons in that case was not served on him, and he made no appearance in said action. The summons was served on said Smith and Courtney, who appeared in said action by their attorney, W. N. Scales; that this action was continued upon the motion of the answering defendants over the January and June terms, 1911, of said court, and was brought to trial on the said 19th day of September, 1911; that, prior to the hearing of said action, the attorney for said defendants stated, in the presence of the Honorable Edgar C. Steele and the attorney for said McGary, that said defendants had no defense to said action, and requested counsel for McGary to consent to waive a jury, which request was granted, and the cause was tried by the court without a jury. The plaintiff introduced his evidence, and the defendants introduced no evidence whatever, and the cause was taken under advisement by the court on the 19th day of September, 1911. At the close of the trial, the said W. N. Scales requested of the court that a stay of execution be granted therein for a period of 60 days, which application was opposed by the attorney for the plaintiff, "whereupon the court stated that a stay of 60 days would be too long; that 30 days would be enough;" that said judge had held said cause under advisement since said 19th day of September, 1911, until the 10th day of November, 1911, when this application was made; that on the 15th of October, 1911, the plaintiff, through his attorney, made a request and demand in writing upon the said judge that he take action at an early date in said cause, and render some kind of a decision therein; that said judge failed to reply to said written request, and neglects and fails to decide said case; that affiant believes that said judge

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

has held and is now holding said case, and neglecting to render any judgment or decision therein, for the purpose of hindering and delaying the plaintiff from receiving the benefits of said judgment to which he is entitled; that the said delay in so rendering the judgment may take the place of the stay of execution as requested by the attorney for said defendants.

Upon that application an alternative writ of mandate was issued and served, with a copy of the petition or complaint, upon the Honorable Edgar C. Steele. The return to said writ is as follows: "Comes now the defendant, and states to the court that he is waiting for a brief in this case, which it was agreed by the parties at the time the evidence was heard should be furnished by W. N. Scales, an honorable practitioner and attorney for the defendants in this case, all of which facts are and were well known to the honorable counsel who filed a petition for a writ in this case at the time the affidavit was made therein. The court desires to have the said brief, and an opportunity to examine the case, and reach a satisfactory conclusion therein; and further affiant sayeth not."

[3] The return does not deny any of the allegations of the complaint or petition, and sets up as a defense that the honorable judge is waiting for a brief from W. N. Scales, attorney for the defendants in said action. The excuse that the judge was waiting for a brief from the attorney for defendants, and had failed to fix a time in which such brief must be filed, under the facts of this case, is not a sufficient excuse to deserve any consideration from this court. How long would the honorable judge continue to wait for said brief? Indefinitely, so far as his answer indicates, as 52 days had already expired since the case was submitted for decision. It is alleged in the petition that the judge is holding said case and neglecting to render any judgment or decision therein for the purpose of hindering and delaying said plaintiff from receiving the benefits of the judgment to which he is entitled. The judge has admitted that allegation by not denying it in his answer. The judge also granted a stay of execution for 30 days upon any judgment that might be entered in said case. Not only was the court waiting for a brief, thus delaying entering judgment, but had granted a stay of 30 days upon any judgment that might be entered in said case. These facts indicate, at least, that the judge was attempting to hinder and delay the plaintiff by granting an indefinite time for filing a brief, and by further granting a stay of execution for 30 days upon any judgment thereafter to be entered. It is such proceedings as these that cause laymen and litigants to complain so much of the delays of the courts, and induce attorneys sometimes to conclude that the court is "standing in" with opposing counsel in granting delays upon flimsy pretexts. Such delays ought not to be tolerated by any court.

In all of the writer's experience as a practitioner and on the bench, there has not come under his observation a case where the delays have been so great and the causes of delay so frivolous as in the case at bar. The original action out of which this action arises was an action in replevin; the defendant's personal property was taken from him and turned over to the plaintiff; the cause was tried by the court, and after being submitted for final determination the court held it from the 10th day of November, 1909, until the 29th of July, 1910, nearly nine months, without deciding it, and a new trial was thereafter granted therein, and then the plaintiff dismissed his replevin suit, still retaining possession of the property, and departed from the state. Judgment was finally entered in favor of the defendant in the replevin action for the return of the property, or, if return could not be had, for \$1,500, its value. Execution was issued on that judgment and returned satisfied in part only. Thereafter the defendant in the replevin suit brought his action on said replevin bond against said Winchester and his sureties to recover the balance due on said judgment, amounting to \$1,029.10 and costs. At the request of the attorney for the defendants, that case was continued over two terms of court, and was finally tried on the 11th day of September, 1911, at which time counsel for the defendants admitted that he had no defense to said action, and the case was submitted to the court for decision, and stay was granted for 30 days; on what the stay was granted we are not informed, but suppose on any prospective judgment that might be rendered in said case, thus giving defendant and his bondsmen further delay.

Judge Steele was fully cognizant of the numerous delays that had occurred in said two cases, as he had tried them both, and in his return to the alternative writ the only defense offered is that he is waiting for a brief from the defendants' counsel, when counsel for defendants had admitted in his presence, as shown by the record, that defendants had no defense whatever to the action. And still the judge was waiting, according to his return, for said brief "and an opportunity to examine the case, and reach a satisfactory conclusion therein." Why did he need a brief, if it was admitted by counsel for defendants that they had no defense whatever to said action? Need it take long for him to arrive at "a satisfactory conclusion" in such an action? We think not.

[1] Section 4406, Rev. Codes, provides as follows: "Upon a trial of a question of fact by the court, its decision must be given in writing and filed with the clerk within twenty days after the cause is submitted for decision." That section requires the district court, when a case is tried by it without a jury, to file its decision in writing 20 days after the cause is submitted for decision.

While a failure on the part of the district court to render his decision within 20 days after the cause is submitted for decision will not invalidate or avoid the judgment entered thereafter (Idaho Comstock, etc., Co. v. Lundstrum, 9 Idaho, 257, 74 Pac. 975), still it is mandatory upon the trial court to render its decision within 20 days after the submission of the case; and if the district court fails to file the decision within the 20 days he may be required to do so by writ of mandate, and this is the process by which this statute can be enforced. The only question raised under this statute in the Idaho Comstock Case was the validity of a judgment entered after the expiration of the 20 days from the final submission of the case; and the statement made in that case with reference to the statute being directory had reference only to the validity of a judgment entered after the expiration of the 20 days fixed by the statute. The suggestion and observations of the writer of that opinion in regard to the provisions of said section being directory are dictum, and were not necessary to a decision of the question presented in that case. District courts are not required to hear more cases than they can decide, and the reasons given in the dictum in that case for holding the provisions of said section merely directory are not applicable to the case at bar.

[2] Said section of the statute and section 17 of article 5 of the state Constitution, which latter provides, among other things, that no district judge or Supreme Justice shall be paid his salary, or any part thereof, unless he shall have first taken and subscribed an oath that there is not in his hands any matter in controversy, not decided by him, which had been finally submitted for his consideration and determination 30 days prior to taking and subscribing such oath, clearly indicate that the Legislature and the framers of the Constitution intend that after a case had been submitted for decision to a judge or court a prompt decision must be rendered.

This transaction shows that the plaintiff in this proceeding was deprived of his property on the 11th of April, 1908, and by the default of the plaintiff in the replevin action it appears that the plaintiff had no right or claim to said property whatever, and still the court would dally along and permit counsel for the defendants to delay the plaintiff in this proceeding from recovering for property he was illegally deprived of for about 3½ years; and we suppose the judge would have still been waiting for the brief of counsel, had it not been for the granting of the writ, and in a case where it was admitted there was no defense whatever. It seems to us from the facts as they appear in the record that this case is the limit, and we would suggest to the honor-

able defendant, when there is no defense to an action, when it is admitted by counsel for the defendants that they have no defense, that such a case ought to be decided promptly, and not delay a decision for a brief that is not needed. Counsel ought not to impose upon the generosity of the court by asking for unusual and unreasonable time in which to present briefs, nor should the court be overflowing with generosity on such occasions. It is the duty of the court to require briefs to be filed when necessary, so that the decision can be made within the statutory period.

[4] The peremptory writ must be issued as prayed for, and it is so ordered, with costs of this proceeding in favor of the plaintiff.

STEWART, C. J., and AILSHIE, J., concur.

#### BLISS et al. v. BLISS et ux.

(Supreme Court of Idaho. Nov. 2, 1911.)

##### (Syllabus by the Court.)

#### 1. GIFTS (§ 18\*)—VALIDITY—DELIVERY.

A declaration of intention to make a gift, unaccompanied by a transfer or delivery of the property, is no gift at all, and cannot be enforced by the courts.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 29-33; Dec. Dig. § 18.\*]

#### 2. TRUSTS (§ 21\*)—EXPRESS TRUSTS—CREATION.

No exact words or terms are necessary to establish a trust, but a voluntary trust cannot be complete, unless there is reasonable certainty as to the manner in which the trust fund is to be used or applied; and the purposes of the trust must be plainly indicated.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 29, 30; Dec. Dig. § 21.\*]

#### 3. TRUSTS (§ 29\*)—EXPRESS TRUSTS—CREATION.

Vague and indefinite expressions, or mere words of recommendation or sentiment, will not be held to create a trust or define its scope. The proof of intention to establish the trust must be unequivocal.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 29.\*]

#### 4. TRUSTS (§ 29\*)—EXPRESS TRUSTS—CREATION.

Where a son had before his marriage insured his life, naming his father and mother in the insurance policy as beneficiaries, and subsequent to marriage declined to change the beneficiaries in such policy, but expressed to the father the hope and expectation that the father and mother would "take care of his family in case of death, and never allow them to want for anything," such words are not sufficient to establish a trust, or fix its terms.

[Ed. Note.—For other cases, see Trusts, Dec. Dig. § 29.\*]

#### 5. TRUSTS (§ 359\*)—CREATION—IMPLIED TRUSTS.

Courts of equity may declare and enforce a trust, but they have no authority to create a trust, or to make a contract for the parties, where they did not see fit to make the contract

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

themselves, under circumstances where no trust could be implied or result by operation of law. [Ed. Note.—For other cases, see Trusts, Dec. Dig. § 359.\*]

Sullivan, J., dissenting.

Appeal from District Court, Canyon County; Ed. L. Bryan, Judge.

Action by Ida Bliss, in her own behalf and as guardian of Naomi Bliss, a minor, against Friend J. Bliss and wife. From a judgment for plaintiffs, defendants appeal. Reversed and remanded.

Henry Z. Johnson and John T. Morrison, for appellants. Hawley, Puckett & Hawley, for respondents.

**AILSHIE, J.** This action was instituted, praying a judgment and decree, declaring Friend J. Bliss and Adelaide Bliss trustees of the proceeds of a certain life insurance policy for the use and benefit of the plaintiffs Ida Bliss and Naomi Bliss, a minor. Ida Bliss is the surviving widow of one Ezra Ray Bliss, now deceased, and Naomi Bliss is the daughter and minor child of Ida Bliss and Ezra Ray Bliss. The appellants, Friend J. Bliss and Adelaide Bliss, are the father and mother of Ezra Ray Bliss, deceased. On the 23d day of June, 1904, Ezra Ray Bliss, being then unmarried, took out a life insurance policy in the Bankers' Reserve Life Company of Omaha, Neb., for \$5,000, and caused his father and mother, the appellants herein, to be named as the beneficiaries under that policy. Thereafter, and on the 1st day of January, 1907, Ezra Ray Bliss was married to the respondent, Ida Bliss. Thereafter, and on the 1st day of November, 1907, there was born to respondent Ida Bliss and Ezra Ray Bliss, a daughter, Naomi Bliss, who is the other respondent in this case. The policy of insurance was deposited by Ezra Ray Bliss with the First National Bank at Emmett for safe-keeping, and it remained in the custody of the bank from that time until after the death of the insured, which occurred on the 3d day of February, 1908. The policy was thereafter delivered to the appellants herein, and was by them collected from the insurance company. This suit was subsequently instituted by the wife of the deceased and the infant daughter to have the beneficiaries named in the policy declared to be trustees for the use and benefit of the wife and daughter of the deceased. The trial resulted in a judgment in favor of the plaintiffs, and the defendants prosecuted this appeal.

The question to be determined on this appeal is, Was there sufficient evidence to justify the trial court in decreeing and declaring a trust in this case, and does the evidence show that the beneficiaries named in the policy were ever constituted trustees, or did they take the absolute title to the benefits under the policy? The evidence in

the case is entirely oral. No evidence of any trust was ever reduced to writing. The oral testimony furnished is exceedingly meager and desultory. It all revolves about and refers back to a conversation which took place between Ray, the insured, and his father, one of the beneficiaries, shortly subsequent to the birth of respondent's child, Naomi. Ida Bliss testified that after the death of her husband her father-in-law told her that a short time after the birth of Naomi, when he and Ray were out duck hunting, that he approached his son on the subject of changing the beneficiaries in his insurance policy. She testifies that her father-in-law repeated the conversation to her as follows:

"While Ray and I were out duck hunting one time—I believe it was in October or November, I am not sure which, probably September, 1907—I insisted on Ray changing the policy, since he had a wife now—and I believe it was after the baby was born. He said: 'You have a wife and family now. You should change your policy. You can't tell what is going to happen to you.' And Ray said: 'No; Father. I am perfectly satisfied the way it is; I intend to leave it that way.' He insisted on him changing it, but Ray said he knew—in his exact words: 'I know you and mother will take care of my family in case of my death, and never allow them to want for anything, and you know that would be my wish.'"

The appellant Friend J. Bliss, relates the conversation and transaction as follows: "At the time of my son's death, I did not know who was named as beneficiary in the policy. The only time I ever saw the policy was when it was first made out. I knew it was made out, in the first place, to Mrs. Bliss and myself, but I had no further knowledge of the matter. About the 13th of November, 1907, I was going over some papers with my son, and I found a policy of his in the Commercial Travelers' of Chicago. It was the first I knew of this policy. I looked it over, and noticed that he had made his mother the beneficiary. I said: 'Ray, now you have a wife and child, don't you think you had better change this, and make it to your wife and child?' He said: 'No; Papa. I want it to stand just as it is.' He spoke so sharply and quickly that I had no further conversation with him at all. That is the only conversation I had with him at any time with reference to the beneficiary in any policy." It will be observed that the foregoing has reference to a different policy from that in controversy in this action. This constitutes the entire transaction out of which it is claimed a trust arises.

The respondent Ida Bliss testified to hearing a number of conversations which took place between her husband, who was an insurance agent, and other persons with ref-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



erence to his own insurance. This evidence was introduced for the purpose of showing that Ray Bliss thought his insurance was in such condition and status that in case of his death it would inure to the benefit of his wife and child. The following is a fair sample of this line of evidence: Ida Bliss testified to a conversation which took place between her husband and a Mr. Dewey, as follows: "Mr. Bliss told Mr. Dewey he should have an insurance, if he did not have already, to protect his wife in case he died, the same as he was protecting his own wife. I am not sure whether Mr. Dewey had a wife or not. He was living at Pocatello at that time. \* \* \* That is the only conversation I heard between my husband and Mr. Dewey. Mr. Dewey was working for my husband with headquarters at Pocatello, and was under the direction of my husband. My husband was manager of the company. This conversation was at our home in Pocatello. Mr. Dewey was frequently there. This was the only time I heard any conversation between my husband and Mr. Dewey, relative to insurance." Other conversations with different persons, concerning which she testified, were of the same general character, and equally as vague and indefinite. Prominent among the list is a man named Marquis, of Portland, Or., whose deposition appears in the record.

The only further evidence in the case on behalf of the plaintiffs was concerning the acts and declarations of the appellants subsequent to the death of their son. There is naturally a conflict between the parties as to just what was said at these various conversations. This perhaps grows out of the usual and well-known difference of construction placed by different parties upon the language used, and different degrees of accuracy and memory. There is no dispute but that many conversations took place between them. Ida Bliss testifies to several had with the appellant Friend J. Bliss, and perhaps an equal number with the appellant Adelaide Bliss, subsequent to the death of her husband, in which they assured her that they were going to take care of her, and that she need have no worry over financial matters. For instance, she says at one time that Mr. Bliss said to her: "Ida, you don't need to worry about your financial condition. You are well provided for. Ray has left you well provided for, and you will not want for anything as long as I live." After the policies were collected, she says she had a talk with her father-in-law, Mr. Bliss, and wanted an agreement or understanding with him and asked him to give her a written agreement, and he declined to do so. He then said: "I will tell you what I will do. I will pay you \$1,000 a year, \$500 every six months. And he asked me if I was satisfied with that, and I told him I was." It seems that in pursuance of this understanding he paid bills and accounts for her and furnished

her cash to the amount of about \$574. She also testifies that Mrs. Adelaide Bliss gave her like assurances as had been given her by the father-in-law, and she says that on several occasions Mrs. Bliss told her that she and her husband never expected to use a cent of Ray's insurance, but that they would use it for the benefit of their son's wife and daughter. She says that she did not know how the policies were made out until after her husband's death.

It is clear from the evidence of both the appellant and respondent that the main consideration which was moving and prompting the father-in-law and mother-in-law, the appellants herein, was to have the daughter-in-law take up her residence with them. It is conceded that they were deeply interested in the baby. They were at the time building a new home, which they named "Naomi," after the granddaughter. Ray Bliss was their only child, and they seemed to have been deeply affected over his loss. At every conversation which they had, concerning which any testimony has been given, it seems that the question arose about Ida coming and bringing the baby and living with Mr. and Mrs. Bliss. They prepared rooms in their new home for her. It also appears that Ida Bliss was an only child, the daughter of one John Cook. Cook was a man in very good circumstances, worth about \$75,000, as appears from the record. He was set down by all parties who ventured an opinion as a miser, and this was the estimate the son-in-law, Ray, placed upon him. Cook and Ray Bliss were not on good terms, and Ray appears to have cordially disliked the old man. The inference is pretty strong from this record that as soon as this insurance question came up after the death of Ray Bliss Cook began to take a hand in the matter, and urged his daughter to insist on getting hold of the insurance money. The differences and misunderstandings began to grow, and were magnified from that time on. Ida refused to go and take up her residence, even for a part of the time, with the appellants. They in turn insisted on her coming and keeping the baby with them at least a part of the time, and asked that they be permitted to provide for it and look after its education. During this time the old man Bliss was making inquiry and investigation as to where he could invest this insurance money in a permanent security, such as bonds or bank stock, that would pay a fair rate of interest or income. In the meanwhile, this action was commenced to have the beneficiaries named in the policies declared trustees, and to have them removed, and the money paid over to the cestuis que trust. It should be borne in mind that there is no evidence in the record, and no contention is made, that any conversation ever took place between Ray Bliss, the insured, and Adelaide Bliss, one of the beneficiaries named in the policy, with ref-

erence to the insurance or the disposition of any money that might ever be received under the policy, or anything of that kind. All the conversations which it is claimed ever took place prior to the death of the insured were between Ray Bliss, the insured, and Friend J. Bliss, his father, who is named as one of the beneficiaries.

Under the laws of this state (section 2676, Rev. Codes), if no trusteeship be established, one-half the receipts of this policy would become the separate property of the wife, Adelaide Bliss; and, under the provisions of section 2677, Rev. Codes, she would have the management and control of her share of the proceeds from this policy, and would have the absolute power and right of disposition of the same. One-half would, therefore, go to her absolutely; and in order to impress that half with a trust the same proof is necessary as to Adelaide Bliss as is necessary with reference to Friend J. Bliss.

[1] This action has been prosecuted on the theory that the trust was established and created by the declarations of the insured, made to the beneficiary, Friend J. Bliss, during the lifetime of the insured. It is only upon this theory that a recovery is sought or could be had. If, indeed, it were attempted to establish the trust, by reason of the acts and declarations of the beneficiary or beneficiaries after the collection of the fund, the case would shift entirely from one of trust to one of gift, and we would then be confronted with the controlling question in such cases that a declaration of intention to make a gift, unaccompanied with a transfer or delivery of the property, is no gift at all, and cannot be enforced by the courts. It is merely the declaration of an intention, unaccompanied by the acts necessary to execute such intention. If a trust is to be established in this fund, it is necessarily an express trust, declared by the insured or settlor, and accepted and concurred in by the trustee, who is the beneficiary named in the insurance policy. This action has been prosecuted on that theory, and, if maintainable at all, must be maintained upon that principle. Indeed, there is no element in this case of a trust arising by operation of law.

[2] Now, we may safely proceed to the further consideration of this question upon the theory, which we think is well established, that no exact words or terms are necessary to establish a trust. It is well settled, however, that no trust can arise or be implied "if there is uncertainty as to the property to be subjected to the trust, or to the persons to be benefited by the trust, or as to the manner in which the property is to be applied." 1 Perry on Trusts, § 116. In *Re Soulard's Estate*, 141 Mo. 642, 43 S. W. 617, the court said: "A voluntary trust must be created by the donor, and not by the court." And again, in the same case, the court said: "Three things, it has been

said, must concur to raise a trust: 'Sufficient words to create it, a definite subject, and a definite object.' And to these requisites may be added another, namely, that the terms of the trust should be sufficiently declared." See *Pitts v. Weakley*, 155 Mo. 109, 55 S. W. 1062. A voluntary trust could not be complete, unless there be certainty as to the property to be subjected to the trust; nor would it be complete, unless there be certainty as to the cestui que trust; nor would it be complete, unless there be certainty as to the terms of the trust; or, in other words, as to the use to which the trust fund is to be applied, and the manner in which it is to be used. A somewhat different rule applies with reference to implied and resulting trusts (1 Perry on Trusts, § 112), but with that subject we are not called upon to deal at this time.

[3] Beach on Trusts and Trustees, § 52, says: "In the creation of a trust in personality, as well as in real estate, the language employed must be definite and positive. The property which is the subject-matter of the trust must be clearly and definitely described; the purposes of the trust must be plainly indicated, and as well the person or persons who are to be beneficiaries. Ambiguous or vague and indefinite expressions will not be held to create a trust. In addition to this, the proof of the trust must be unequivocal. The declaration of a purpose to create a trust is of no value, and a promise to make a donation at some future time, where there is no consideration, at best is only an imperfect gift, and will not be upheld as a trust."

[4] In the light of the foregoing general principles applicable to cases of this kind, we turn to the evidence in this case to see if it is reasonably certain and definite on the principal requisites to a valid trust. In the first place, if the language used or the transaction which took place can be held or construed to look to a trust, it is reasonably certain as to the property to be administered, namely, the receipts from the insurance policy. It is likewise equally certain as to the beneficiaries of that trust, namely, Ida Bliss and her daughter, Naomi Bliss. As to the terms and conditions of the trust, however, it is by no means certain. It is conceded by all parties that it was not intended by Ray Bliss that this fund should be paid over to or handled by his wife, Ida Bliss. She was considered by all parties, on account of her youth and inexperience, to be an unfit person to have the handling of any considerable sum of money. It is therefore clear that the husband never intended that the money should be paid over to his wife. It is also evident that he feared, if it should be paid to her, that his father-in-law, Cook, would get hold of the money, and that was a very important consideration with him. There is no attempt to show, however, that if this money was to be used for the

benefit of the wife and daughter whether the principal was to be kept continually intact, and the interest and income only used for their benefit, or whether the principal itself was to be used from time to time, and, if so, to what extent, and in what amount.

Counsel for respondent when they commenced this action realized the necessity of definiteness and certainty as to the terms of the trust; and they therefore alleged that the money received should be "held in trust by the defendants for investment by them, and the income and proceeds of said investment provided and paid for the support and maintenance of the plaintiffs herein." In other words, the action has been prosecuted on the theory that a trust was established, whereby the beneficiaries named in the policy were to collect the money and invest it and use the income and receipts therefrom for the maintenance and benefit of the respondents. No evidence whatever was introduced to support this, except proof that the appellant Friend J. Bliss stated on different occasions after he collected the money from the insurance company that he intended to invest it in stocks or bonds, or some safe security, and use the interest for the maintenance and support of the wife and daughter of his deceased son. There is nothing, however, to show or indicate that this was a part of any trust agreement, or that the son in his lifetime ever mentioned such terms or conditions, or indicated any such wish or desire. Again, if this were true, there is an utter lack of even suggestions or indications as to what should eventually become of the principal sum, whether that sum should eventually be divided between the cestuis que trust, or become the absolute property of the trustees, or be used in the judgment and discretion of the trustees as they might think best.

The court in this case did the very thing that it is absolutely certain from the record herein that the insured never intended to happen, and that is it ordered all this money paid over to Ida Bliss, the wife of the insured. This would result in accomplishing the very thing that the insured intended should never happen; that is, render it possible for this money to find its way into the hands of John Cook, the father-in-law. So we see upon the very threshold of our investigation that this so-called trust is wholly lacking as to the *terms and manner of use and disposition of the fund*. It might, however, be within the power of a court of equity to direct, as the trial court did in this case, that the whole fund be turned over to the cestuis que trust if it were clear and unmistakable from the evidence in the case that the trustor or settlor positively intended that the entire fund should be so paid over or disposed of. It is in evidence by all parties that when the father mentioned the matter to his son of changing the beneficiaries in the policy that the son de-

clined to do so, and said, "I want it to stand just as it is." Now it is clear from the evidence, and no one disputes it, and no circumstance refutes it, that if the son intended that the wish he expressed to his father should be *imperative and mandatory*, and constitute him a trustee, *he never completed or perfected the trust, in that he never gave any directions as to the manner or method of use, payment, or disposition of the trust fund.*

It has proven to be one of the most difficult problems which has confronted courts of equity to determine just when expressions of wish, hope, recommendation, or request used by a donor or trustor should be construed as imperative and obligatory, or as mere suggestions, to be acted upon according to the discretion of the party to whom they are directed. Such expressions have produced a fertile field of litigation in the courts of chancery of both England and this country. *Knight v. Knight*, 3 Beav. 148; *Perry on Trusts*, §§ 113 and 114.

In *Knight v. Knight*, *supra*, Lord Langdale said: "It is not every wish or expectation which a testator may express, nor every act that he may wish his successors to do, that can or ought to be executed and enforced as a trust; and in the infinite variety of expressions employed and of cases which arise there is often the greatest difficulty in determining whether the act desired or recommended is an act which the testator intended to be executed as a trust."

In *Barrett v. Marsh*, 126 Mass. 213, Justice Ames, speaking for the court in considering whether a testator had by his will imposed a trust, said: "It is not every expression of a wish in the interpretation of a will that is to be construed as a command, or as the creation of a trust. In order to have such an effect, it must appear that the words used were intended by the testator to be imperative."

In *Hess v. Singler*, 114 Mass. 56, the court, in considering this question, announced the following general principle as applicable in such cases: "In order," said the court, "to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction a trust is not to be lightly imposed, upon mere words of recommendation and confidence." The foregoing rule was quoted with approval and followed in *Sears v. Cunningham*, 122 Mass. 538.

In *Cheston v. Cheston*, 89 Md. 465, 43 Atl. 768, the testator inserted in his will the following residuary clause: "All the rest and residue of my property, real, personal, and mixed, I give, bequeath and devise to my dear wife, Sallie C. Cheston, believing that she will manage it judiciously, and perfectly satisfied that she will make a fair distribution of it among our children at her death." It was claimed by the children that

the foregoing declaration constituted the wife a trustee of the residuary estate for the use and benefit of the children as cestuis que trust. The court, in disposing of the question, said: "The testator in so many words devises his estate to her absolutely; and then explains that he does so because he believes she will manage it judiciously and distribute it fairly. In other words, his motive for giving the estate absolutely to his wife, without making any provision for their children, is his conviction, his belief, that she will provide for them judiciously and fairly. It is as though the testator had said: 'Believing that my wife will make a just and fair distribution of my estate, I devise the same to her.' The words which, it has been suggested, may passably create a trust in favor of Mrs. Cheston's children, are not precatory in their character; and therefore the doctrine of precatory trusts cannot be properly applied to them. The testator makes no recommendation and expresses no wish as to the final disposition of his residuary estate to be made by the residuary devisee. He leaves that absolutely to her, because he has entire confidence in her discretion, and believes she will do what is fair and just. If this be the fair construction of the clause under consideration, we think it unnecessary to discuss the application of the doctrine of precatory trusts to the language here used."

The foregoing case is in many respects very similar to the one under consideration. Here no change of property or position took place. No change in the policy was made in any respect. The policy already named the father and mother of the insured as beneficiaries. The policy was not at the time in the possession of either the insured or the beneficiaries, but was on deposit in the bank, apparently available upon demand of either the insured or the beneficiaries. The subject of the change of beneficiaries was not mentioned by the insured, and it seems clear from the evidence that he never would have mentioned it, as he did not desire any change. The discussion was brought about by the father. The insured was not prevented or delayed from making a change in the beneficiary by reason of any promise made by the beneficiary previously named. *No transfer of any property or right of any expectancy was then made. The only estate then existing which could then be the subject of a trust or trust agreement was a mere expectancy in the benefits of a life insurance policy.* It was not then tangible property, but only an expectancy, dependent upon the demise of the insured prior to that of the beneficiary. According to the evidence, the insured then informed his father, "I intend to leave it that way;" that is, the way it then existed, naming the father and mother as beneficiaries. Then he added: "I know you and mother will take care of my family in case of my death,

and never allow them to want for anything, and you know that would be my wish." This seems to indicate that the son wanted the policy paid to the father and mother, and that he was willing to rely wholly upon their discretion and sense of the needs of the wife and child, in the event of the son's death. That was a hope and expectation that the father and mother would "take care of his family in case of death, and never allow them to want for anything." It might have required, so far as they could then anticipate or foresee, a great deal more than the proceeds from the insurance policy to accomplish that end; or it might have required little or none of it whatever. It was merely the expression of a sentiment and confidence which any son might well entertain concerning his parents, and the treatment and relation he would expect them to sustain toward his own wife and child in the event of his demise. This sentiment and confidence might equally as well have been expressed, had there been no insurance involved in the conversation, or had there been no property belonging to the son, or over which he had control or dominion, referred to in such conversation.

A case very similar and very much in point is that of *Pitts v. Weakley*, 155 Mo. 109, 55 S. W. 1055. There the plaintiffs sought to establish a trust in stock of a corporation formed to administer their father's property. The father, in anticipation of early demise, had caused certain stock to be delivered to the plaintiff's sister; and the only evidence as to the terms and conditions of the delivery was an alleged statement, made by the sister to whom the stock was delivered, that the father, when handing her the stock, had told her to keep it, as it was all he had on earth, and statements made by her subsequent to the death of the father as to the terms of the delivery, and the fact that she was to hold it for herself and certain of the plaintiffs. The Supreme Court of Missouri considered the case in detail, and reviewed the evidence and the authorities bearing on the subject at great length. In discussing the character of evidence introduced in the case, and upon which it was necessary to predicate a trust, the court said: "The plaintiff's testimony tending to establish the trust consists entirely of the statements of witnesses as to admissions that Mrs. Weakley is said to have made. Even in ordinary lawsuits, that is not a high grade of evidence. Every text-writer on the subject treats it rather with toleration than favor. Greenleaf says: 'With respect to all verbal admissions, it may be observed they ought to be received with great caution. The evidence, consisting, as it does, in the mere repetition of oral statements, is subject to much imperfection and mistake.' Greenl. Ev. § 200. A note to that section by Judge Redfield is: 'In a somewhat extended experience of jury trials, we have been com-

pelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of the party, and especially where they purport to have been made during the pendency of the action, or after the parties were in a state of controversy.' 'With respect to verbal admissions, it may be observed they ought to be received with a great deal of caution.' 1 Phil. Ev. 479." And in finally reaching a conclusion, the court said: "It is only upon such vague, equivocal, and shadowy testimony that the plaintiffs ask the court to establish a trust, name its beneficiaries, and define its limits. We would have to overthrow all precedents, and disregard all rules of evidence, to do so. This we could not do, even if there was an apparent hardship in the case demanding it; but there is none such."

[5] The foregoing is applicable to the evidence produced in the case at bar. Here the entire case rests upon the oral statements and admissions of the parties, and those were made at times and under circumstances when they could, out of the very nature of the case, have had but little bearing upon the specific subject of a trust here under litigation. The insured was an insurance agent, and it would have been only natural that he should have made the statements with reference to his own insurance, where he was seeking to write insurance for others. Besides, there is nothing inconsistent between the statements he is claimed to have made and the fact of his policies running in favor of his father and mother. On the other hand, the statements attributed to the appellants herein were only natural, and might have been expected from parents in comfortable circumstances, even though there was no insurance involved, and they did not anticipate receiving anything under an insurance policy. If they were financially able, as they were, they would naturally expect to contribute toward the support of their daughter-in-law and the education of their granddaughter. Viewing the matter from another standpoint, it is not at all improbable that the son thought it best to carry this insurance in favor of his father and mother, for the reason that his wife, Ida Bliss, was an only child of wealthy parents, and he may have thought that in the event of his death the father-in-law was amply able to take care of his wife and daughter, and would do so; and, if anything further should be needed, his own father and mother would contribute as the exigencies of the occasion might demand. The fact that he was an insurance agent renders it quite conclusive that he knew the rules and regulations of the company with reference to the change of beneficiary, and that, had he intended to change the beneficiary, either absolutely, or convert the old beneficiaries into trustees, he would have done so in the manner pointed out by the rules and regulations of his company.

The insured had ample opportunity to make any change he desired to make with reference to the beneficiaries, and to impose any trust or restrictions he saw fit. It appears conclusively, however, that he did not desire to make any change or alteration, and, judging from the evidence as given by both sides, he never would have made any mention of the matter, had not his father called it to his attention. Had nothing whatever been said about it, and had no conversation taken place, it is clear there would have been no trust relations existing, and no court would have assumed to declare a trust under such circumstances. In our opinion, it would be just as easy and just as consistent with well-established rules of equity to have declared a trust, had none of the conversations enumerated in the record taken place, as it would be for us to undertake to do so as the record stands in this case. Courts of equity may *declare and enforce* a trust, but they have no authority whatever to create a trust, or to make a contract for the parties, where they did not see fit to make the contract themselves; nor can we impose a restriction which the parties themselves did not see fit to place upon the transaction.

We have considered it immaterial, for the purposes of this case, to discuss the question as to whether or not the beneficiaries had acquired such an interest under the policy as to render it necessary to have their consent before a new beneficiary could be named. The view we have taken of the case renders that discussion entirely useless.

Counsel for respondents have cited us to several cases where courts have held the beneficiaries to be trustees under the expressed wish of the insured for the benefit of third parties. Among those cases, the following are the leading and most prominent to which our attention has been called: *Kendrick v. Ray*, 173 Mass. 305, 53 N. E. 823, 73 Am. St. Rep. 289; *Clark v. Callahan*, 105 Md. 600, 66 Atl. 618, 10 L. R. A. (N. S.) 616; *Hirsh v. Auer*, 146 N. Y. 13, 40 N. E. 397, affirming 79 Hun, 493, 29 N. Y. Supp. 917; *Hurd v. Doty*, 86 Wis. 1, 56 N. W. 371, 21 L. R. A. 746; *Silvey v. Hodgdon*, 52 Cal. 363. No one of these cases is parallel with the case under consideration. We will briefly point out the dissimilarity.

In *Kendrick v. Ray*, the policy was made out, in the first place, to R. A. Taft, trustee. Neither the nature or character of the trust nor the name of the cestui que trust appeared on the face of the policy. During the lifetime of the insured, however, he declared to the intended cestui que trust the purpose of the trust, and upon his death left written directions with his will as to the terms of the trust and the name of the cestui que trust, so there was nothing left to be determined or ascertained by the court with reference to the nature or character of the trust, and the only duty of the court was

simply to declare the trust and order it executed.

In *Clark v. Callahan*, the certificates were transferred on specific conditions, and it was shown to the satisfaction of the court in that case that the transferee, Mrs. Callahan, accepted the substitution of her own name, and undertook to carry out the trust; and that this understanding was the moving consideration for Colonel Raphun (the insured) naming the trust beneficiary and making the substitution.

In *Hirsh v. Auer*, at the time the policy was issued and Clara Auer was named as the beneficiary, it was agreed and understood between her and the insured that she should collect the policy upon the death of the insured, and expend not to exceed \$500 thereof in paying the insured's funeral expenses and for a monument, and to divide the remaining \$1,500 equally between insured's two minor children.

In *Hurd v. Doty*, the real question which was considered and passed upon by the court is stated as follows in the syllabus: "Where one, after procuring insurance on her life, payable to plaintiff, had the policy changed so as to make it payable to defendant, the latter agreeing to receive the proceeds in trust for plaintiff, who accordingly delivered up for cancellation the former insurance certificate, which had been delivered to him, defendant cannot, after receiving the proceeds, refuse to pay it over to plaintiff, on the ground that the latter had no insurable interest in the life of deceased."

In *Slivey v. Hodgdon*, 52 Cal. 363, an agreement was had between the insured and the beneficiary named in the policy, prior to the issuance of the policy, that the beneficiary should be named therein solely as a trustee, without any beneficial interest to accrue under the policy; and that she would collect the policy for the use and benefit of the children of the insured.

In the foregoing and other cases cited by respondent, where a beneficiary has been held as trustee for the benefit of a third party, there was some specific understanding between the insured and the beneficiary, or some act was done in pursuance of an express or implied trust. In most of the cases, either the policy was taken out on the faith of that understanding, or the name of the beneficiary was changed, and a new beneficiary substituted in pursuance of such faith, and under such understanding and agreement. In every one of the cases, some positive act was done or performed, or the insured made some change in his position, in the belief that the trustee would carry out this wish, and execute such wish and desire as an imperative trust.

In the present case, the insurance had been taken out some years before the insured had either a wife or child, and the parents had been named as beneficiaries. In our opinion, the insured never thought of creat-

ing a trust or naming his parents as trustees, but rather preferred to rely on their sentiments of love and affection and the ties of consanguinity for the care, protection, and maintenance by his parents of the wife and babe in event of misfortune overtaking him. Although his parents strenuously resist this action, it does not appear from this record that these old people will prove recreant to the filial faith and confidence thus reposed, or that they mean to abandon this mother and child, or give them no aid or assistance. It is to be sincerely hoped that in the contest between the parents of Ray and Ida Bliss over the right to handle and expend this insurance money the comfort and welfare of the widow and child may not be entirely ignored or disregarded. The old people, both Bliss and Cook, apparently have abundance and to spare, and both families have only this widowed daughter and grandchild on whom to bestow their care and patrimony; and it occurs to us that if they would do less quarreling and give a little more attention to the needs of those to whom they owe a paternal duty they would get along much better.

We have been wholly unable to find any evidence in the record which would justify us in affirming the judgment in this case, unless we ignore the most fundamental rules of equity, and create and define a trust for the parties which the trustor or donor declined to do himself in his lifetime.

Another thing must not be lost sight of in this case. This suit involves the benefits under an insurance contract, which is one of the most sacred contracts that can be made. Such a contract is entered into by the insured in cool deliberation, and not ordinarily under stress of business exigencies or importunities of creditors or business associations. The insured names his beneficiary (a right wholly his own) for reasons wholly his own, and which he is never to be called upon to explain or divulge to any one else, unless he sees fit voluntarily to disclose them. The beneficiary nominated in the policy is of the insured's own naming, and that beneficiary should never be changed or converted into a trustee for any one else, except on clear and convincing proofs. An insurance policy and the benefits thereunder are the property of the beneficiary, and the estate of the insured has no interest whatever therein.

The judgment must be reversed, and it is so ordered, and this case is remanded for further proceedings in accordance with this opinion. Costs awarded to appellants.

STEWART, C. J., concurs.

SULLIVAN, J. (dissenting). I am unable to agree with the majority of the court, either upon the law or the facts as stated and given in the majority opinion. This action was brought upon the theory that Ezra Ray Bliss, deceased, intended that the pro-

ceeds of these life insurance policies should go to the use and benefit of his wife and child. It appears that on the 23d day of June, 1904, Ezra Ray Bliss, being then unmarried, took out a life insurance policy in the Bankers' Reserve Life Company of Omaha, Neb., for \$5,000, and named his father and mother beneficiaries in said policy; and it is the proceeds of that policy that is involved in this case. It also appears that Ezra Ray Bliss took out an accident insurance policy in the Illinois Commercial Travelers' Association of Chicago, for \$5,000, and his mother was named the beneficiary therein. Said policies were taken out prior to his marriage with Ida May Bliss, one of the plaintiffs herein, which marriage occurred on the 1st day of January, 1907. On the 1st day of November, 1907, a female child was born to said deceased and the plaintiff Ida May Bliss. It clearly appears from the evidence that Ezra Ray Bliss thought his wife was incapable of making investments wisely of the proceeds of said policies, and he therefore desired them to be in the hands of parties trusted by himself, and those parties were his father and mother. Said policies were not delivered to the father and mother, but were deposited in the bank at Emmett and delivered to them after his death.

On February 2, 1908, at American Falls, Idaho, Ezra Ray Bliss accidentally received a gunshot wound, of which he died a few hours thereafter. He left no estate, except a homestead and certain personal property, not to exceed the value of \$1,400.

On the trial certain issues were submitted to the jury and upon these the jury, in substance, found that Ezra Ray Bliss did not part with the control of said policy of insurance prior to the time of his death; and that it was the clear intention and desire of said Ezra Ray Bliss that his wife and child should receive the benefits to be derived from said insurance policy; and that the defendants, who are appellants here, admitted that they held the proceeds of said policy of insurance for the benefit of said plaintiffs, the wife and child of said deceased; and that said defendants had paid over some interest or income of the proceeds of said insurance policies to the plaintiffs; and that the defendants received said \$5,000, the proceeds of said insurance policy, as trustees, subject to a trust in favor of the plaintiffs, namely, the wife and child of said deceased, Ezra Ray Bliss; and that said sum of money was received by them, knowing that the proceeds were to be held and used for the benefit of the said wife and child. Upon said special findings and the evidence, the court made findings of fact covering the entire case, in accordance with the special verdict of the jury, and found in favor of the plaintiffs upon all the material issues made by the pleadings; and, as conclusions of law, found that the proceeds of said insurance policy is a trust fund, and

the property of the plaintiffs, and that the defendants are not fit or proper persons to act as trustees of said trust fund, and entered judgment in favor of the plaintiffs.

I think the evidence is amply sufficient to support the findings made by the court and that the findings are sufficient to support the judgment. There is a substantial conflict in the evidence, and under the well established rules of this court, the judgment ought not to be disturbed.

The majority opinion holds that the evidence does not show that the beneficiaries named in the policy were ever constituted trustees, and for that reason the appellants took the absolute title to said \$5,000. It is there held that the oral testimony is exceedingly meager and desultory, and that it revolves about and refers back to a conversation which took place between the insured and his father shortly subsequent to the birth of the child, and my Associates then proceed to quote a very "meager" portion of the evidence, and say: "This constitutes the entire transaction out of which it is claimed this trust arises." I maintain that the testimony quoted is only a meager part of the testimony that tends to show, and does in fact show, that the clear intention of Ezra Ray Bliss was to establish a trust in favor of his wife and child; and that the appellants were intended to be the trustees, and nothing more.

It appears from the evidence that the plaintiff's father was unfriendly toward her husband, and the husband in turn conceived a violent dislike for his father-in-law, Mr. Cook; that the deceased was engaged in the life insurance business, and after his marriage talked very often to other persons about said policies held by him for the protection of his wife and child. To some of them he stated that his wife was not competent to care for the proceeds of the policies, and, knowing that she would naturally look to her father, a successful business man, whom he very much disliked, for the investment of the funds, did not change his policy so as to give the proceeds to her directly. It was natural, therefore, for him to be satisfied with his own father and mother as trustees, the beneficiaries named in the policy before his marriage; and I think it was natural to assume that the young man would not allow the only asset, or prospective asset, which he had, of any considerable value, to be given to his father and mother, who already were possessed of ample means, and leave his wife and child almost penniless. It certainly would be a shocking commentary on the character of the young husband to hold that he was willing to leave his wife and child penniless, and give substantially all of his property to his father and mother, who were in good financial circumstances, and thus place his wife and child under their absolute control and power; and it seems to me that it reflects on

the character of the father and mother who are sordidly and avariciously trying in this case to prove their son devoid of all feeling for his wife and babe, and of the honorable principles and natural impulses which young men like him usually possess. The testimony shows that the young people were hard up, and the question as to paying the premiums on said policies was discussed between them; and the young husband suggested that the amount of money to be paid annually as premiums on said policy, which was about \$300, would give to his wife many comforts and conveniences which she could not have if the policies were kept alive by paying the premiums. She testified that during the money panic in 1907 they were short of funds, and were in very straitened circumstances for quite a while; and her husband said the premium would be due in a short time, and he thought he could not meet it, and spoke of giving up the policies, so that his wife might enjoy more comforts and things she could not have if he paid the premiums, and she told him not to give up the policies; that she would help in every way she could to make the payments, and testified that she did do so by doing her own washing and living as economically as possible, and ate only two meals a day for a time; that she saved \$5 a week on living expenses; and that she did everything she could to assist him in the payment of the premiums. This, it seems to me, is a very significant fact. The young husband must have been of a peculiar disposition, indeed, if he wanted to deprive his wife of certain living comforts, and thus save money by which to pay the premium on policies, the proceeds of which were to go to his parents in case of his death, and require her to make personal sacrifices for the benefit of the old people, who were in affluent circumstances. I should hardly think that any right-minded parents would be willing to give their deceased son the reputation they are attempting to give him in this case.

The plaintiff Ida Bliss, testified that she had a conversation with Mr. and Mrs. Bliss shortly after her husband's funeral, on the cars between Pocatello and Nampa, and that Mr. Bliss told her that she was well provided for; that she was very well off, and she asked him in what way, and he said by insurance; that there was \$10,000 insurance that Ray had, and, of course, it would be paid; and that Mrs. Bliss in that conversation said substantially the same thing. It was repeated that the plaintiff was well provided for by insurance, and that she would not need or want for anything. In another conversation she had shortly after that in Emmett, she testified that Mr. Bliss asked her to his house to see him on business, and she went, and they talked over the insurance policy, and he said: "Of course, you know how these papers are made out?" and she said: "No, Mr. Bliss, I don't; I

have never seen the policies that I remember of." And he went on to say that he and Mrs. Bliss were named as beneficiaries in both policies, but stated: "This money is not ours, and we do not claim a cent of it." Mrs. Bliss was present at the time, and she said: "No, we don't claim a cent of it; there is not a cent of it belongs to us, and at any time that we should ever use a cent of it I hope that God will strike us dead." This conversation occurred about the time the money was paid by the insurance company. During that conversation, Mr. Bliss said that they (he and his wife) had agreed between themselves to hold the money in trust for the baby and herself, and that they did not consider that she was competent to loan this money, and thought they would hold it themselves, and make the investments for her, and said they would invest the money in a safe place, and that she could have the accumulations on the money when they came due; and he asked her if she was satisfied with that, and she said she was. She further testified that she told Mr. Bliss during that conversation that she thought she was competent to handle the money herself, and Mr. Bliss replied that it was not Ray's intention that she should hold the money herself; and he went on to tell about being duck hunting with Ray shortly after the baby was born, and that he had insisted on Ray's changing the policy to his wife's name, but Bliss said Ray insisted that it should be left the way it was, and stated that he knew his father and mother would take care of his family, and not let them want for anything as long as they lived; that he had insisted on Ray's changing it, and Ray told him he would not change it; that he would leave it in "trust" with them for the baby and herself.

Some time after that she went to Mr. Bliss, and asked him if he would make some written statement that he would pay her so much a month or so much a year, and he replied that he would not, and said: "You can trust me, Ida, without that." And he promised to give her \$1,000 a year, \$500 every six months, and told her to come to him as she would to her own father. She thereafter went to Mr. Bliss and asked him for money, and he said he would pay her \$500, and in a short time after that he told her that he had something for her at the house, and she thought perhaps it was the \$500 that he had promised, so she went to Bliss' house and Mrs. Bliss gave her an envelope, which she did not open until after she left the house, and when she opened it found an itemized account against her for \$574.50, which account included an itemized statement of money paid out by the appellant for funeral expenses of his son, and other matters, and also contained an item of \$124.50, money which the plaintiff had placed in Mr. Bliss' hands to carry for her from Pocatello to Emmett. About six



months thereafter, she again asked her father-in-law for \$500, and he tried to appear surprised that she should ask him for any money at all, and said, "I don't know what you mean by asking me for money," and said that he did not consider herself and the baby any relation to him at all, and would have nothing to do with them; that he had dropped them completely (meaning the baby and herself); that they (himself and wife) had changed their minds about the money, and Mrs. Bliss had decided they would use it in some other way. They had built a home, which had cost them a good deal of money; and the father-in-law also mentioned a lawsuit he had pending, and said it took all the money he had, and that he was "broke" anyway, and offered her \$2, stating she could have that if she wanted it. He also asked her what she had done with her bank account, and she told him. On cross-examination she testified substantially to the same state of facts as she had on direct examination.

Finley Monroe, a disinterested witness on behalf of the plaintiff, testified that within a few days after the burial of Ezra Ray Bliss he had a conversation with the appellant Mr. Bliss, in regard to insurance policies or insurance money, and testified as follows: "Among other things, he stated to me that Ray had \$10,000 life insurance at the time of his death, and that it was in favor of himself and his wife. Now, he wanted me to see Ida, he said, as a friend of the family, and impress upon her the fact that that insurance was hers and the baby's, and that Ray so intended it, and that she might not feel hard towards him, by reason of the policy not having been transferred to her before his death; that is, that she would have no resentment against him, or feel that he had been instrumental in not doing so. And he stated that not a dollar of it was theirs, and that they would never apply it to their own use at all; that they had plenty, more than they would ever need themselves; that they had nothing in the world to live for, only Ida and the baby, and that he asked—it was his desire to be appointed guardian of the estate, because he said Ida was but a child, and he was satisfied that Ray intended he should look out for them. And he stated that Ray—that he had had a conversation with Ray, and told him that he ought to transfer this policy, now that he had a wife and baby, and that Ray had said, 'No, not now,' or words to that effect; that, 'If anything happens, you will see that they are cared for.' And, again, several times he repeated the words that 'not a dollar of it is ours; that it is hers, and Ray intended it for her.' And he asked that I be sure to see Ida and have a talk with her. He said: 'She is nearly sure to go to you, but if it is convenient for me I will see her myself; she might come to you in regard to the collection of some accounts.' \* \* \*

Mr. Bliss was very much affected, and the tears rolled down his cheeks when he was talking about the death of his boy. He stated that if he would be allowed to act as guardian of the estate he would consider it as a trust from his dead boy to carry that trust out for Ida and the baby; and that he would not invest the money in anything common (mortgages), although he could get 10 per cent. on them in the way of farm mortgages or dwelling mortgages, that a common business man might invest in, but he would invest it so there was no possibility of a loss, and he suggested bonds. He had been to the First National Bank and had a talk with Mr. Hayes, cashier of the bank, with reference to what interest might be gotten from certain bonds, and was informed it would not be over 5 per cent. He said that would not cut any figure. It would only amount to \$500 a year on \$10,000, but it would make no difference, from the fact that the investment would be such that, if at any time Ida might need it, she could get and use part of the principal; and all of the money he and his wife had was hers anyway, and he would consider it a pleasure if she would come to him for any needs she might have; that his money was her money. I told him I was confident such would be the case, if it was agreeable to Ida, and at his request, as a friend, I would see her, and was satisfied she would come to me, because I had always been a friend of the family, and in business matters I was satisfied she would come anyway. A short time after that Ida came to me, and I made known to her what Mr. Bliss had requested, and it was agreeable. Afterwards I met Mr. Bliss on the sidewalk, and stated to him I had seen Ida, and it was entirely agreeable to her; that she had stated to me she was going to suggest it herself; that she felt she wasn't hardly capable from a business standpoint of caring for so much money. Mrs. Bliss was out near the middle of the street in a spring wagon during the conversation, and she drove up to the sidewalk. I repeated to her the conversation I had had with Mr. Bliss; that it was agreeable to Ida that Mr. Bliss be appointed guardian of the estate. Mrs. Bliss said that not a dollar of it was theirs, and not a dollar of it would be used for their benefit; that they had plenty of their own, and had nothing to live for, except Ida and the baby. She said they would like to have the privilege of assisting in taking care of and educating the baby. She said it was Ray's intention that the money should be Ida's, and it was never intended for them, even though it was in their name. That was repeated a number of times. Mr. Bliss repeated that a number of times in the first conversation with him."

It will be observed that according to Monroe's testimony Mr. and Mrs. Bliss repeated a number of times that it was Ray's intention that the money should be Ida's, and

that it was not intended for them, even though it was in their name. They at that time had no doubt of their son's intention, and knew what his intention was; but evidently their avarice and greed thereafter got the better of them, and they concluded to defeat their son's intention, and keep the money themselves.

A Mr. Johns testified on behalf of the plaintiff that he resided in Emmett, and that he had a conversation with Mr. and Mrs. Bliss about four months after the death of their son in regard to appraising the insurance money as a part of the estate of Ezra Ray Bliss; he being one of the appraisers. He testified that they both agreed that the insurance money should not be appraised as a part of the estate, although they did not intend to use any of it for their own use, as they intended it for the baby—mostly to educate the baby—for Ida and the baby.

Mr. Marquis, who was a resident of Portland, Or., and had been affiliated with the Bankers' Reserve Life Insurance Company, and was acquainted with Ezra Ray Bliss in his lifetime, and worked with him in soliciting insurance for that company, testified that he was quite intimate with Ezra Ray Bliss; that they were close personal friends, and that Ray had talked over intimate personal matters with the witness and his wife; that he had a conversation with Ezra Ray Bliss in regard to changing the beneficiaries in his policies, and Ezra stated that his wife had not a great amount of business ability; and that he did not care to have her burdened with the investment of a great amount of money. Said witness testified: "We talked this matter over in common, because I had my estate left in that manner." And that he had some correspondence with the deceased, in which the deceased asked him to advise him what to do regarding his insurance, so as to get the matter in such shape that he would know the policy would be paid to his wife, or that she should receive the benefit of it.

F. J. Bliss, one of the appellants, was a witness in his own behalf, and testified that he had no recollection of having any such conversations as Ida Bliss testified she had with him on the railroad train. He admitted that he had talked with her, but that he had no recollection of any such conversation as she testified to; and he also swore that Ida May Bliss never made any claim to the proceeds of said policies "that he was aware of"; that he had no recollection of telling her what he wanted to do with this money. "Q. What did you tell Ida Bliss with reference to the proceeds of the insurance policy? A. I never told her anything about the proceeds of the policy that I know anything about. I don't recall anything about it." He denied in that equivocal way the conversations had with the plaintiff Ida Bliss, and also denied that he had the conversations testified to by the witness Monroe, and

testified as follows: "There was never any conversation [with Monroe] with reference to the insurance policies. I did state to Mr. Monroe that Ida was very much disappointed in not being the beneficiary in the policies; that the policies were left to Ray's mother and myself, and I knew she would be very much disappointed, as she expected they would be made to her. Don't know why they were not made to her." A fair inference from his testimony would be that he knew it was the least intention of his son to leave the insurance money in his hands in trust for his wife and child. His entire testimony is most unsatisfactory to my mind, and it evidently was to the minds of the jury and the trial court.

Mrs. Adelaide Bliss testified on her own behalf and for her husband. She denied having any conversation with Ida Bliss on the railroad train between Pocatello and Nampa, as testified to by Ida Bliss; that there was no conversation between them in reference to the proceeds of said insurance policies; and denied that she stated to Ida Bliss, in substance, that: "This money is not ours; we don't claim a cent of it, and should we ever at any time use a cent of it I hope that God will strike us dead." The record shows that Mrs. Adelaide Bliss was very likely to make such a statement as this, and it is indicated by the similarity of that language to the language used by Mrs. Bliss when on the witness stand. She was asked the following question: "What can you say with reference to your agreeing to that conversation, and saying that, 'I hope God will strike us dead?'" To which she answered: "I can say—ask God to be my witness—that I never remember saying any such thing." That very answer shows that she was addicted to the use of such language as Ida Bliss testified to. She admits in her testimony that she did have a conversation with Ida with reference to the policy or its proceeds, and that Ida had spoken to her before in regard to the matter; that Ida spoke of "my insurance policy"; and the witness testified that it made her feel queer, and she replied: "Ida, that will come out all right." I should think it would have made her feel "queer," as at that time, under the facts of this case, she and her husband were apparently laying their plans to deprive the wife and baby of her deceased son of substantially all of the estate that he left, and to make them paupers, or objects of charity. She further testified that she had another talk with Ida Bliss, at which conversation Ida mentioned something about "my insurance," or "my insurance policies," and witness said: "Why Ida, you know that you have no insurance policies, as far as I know anything about." And in that conversation she told Ida that Mr. Bliss had said he would give her \$500 a year.

She further testified: "I never once thought when the money came into our hands that

it was Ray's intentions that it should be left to us to provide an income for Ida and the baby." That may be true; the evident avarice and greed of the woman only made her think of retaining it herself. She no doubt concluded that her son was perfectly willing to leave his wife and baby to the charity of the world, and give the proceeds of the insurance policy to his own father and mother, who were in affluence at the time, and did not need it, and was perfectly willing to have it go out to the world that her son was of the character that would leave his wife and infant child penniless and dependent on the charity of others; that the son would be willing that the wife should scrimp and economize and deprive herself, not only of comforts, but many necessities, in order to save money sufficient to pay the premium upon policies, the proceeds of which would go to his already wealthy parents. I should not think parents who had any regard whatever for their deceased son's memory would for \$10,000 place such a stigma upon his name. She denies saying to the witness Monroe what he testified that she said. The jury and the court heard the defendants testify, and they concluded from all the evidence that it was the clear intention of the deceased to leave the proceeds of said insurance policy in trust to the plaintiffs, and I think all of the evidence taken together clearly shows that Ezra Ray Bliss was a decent kind of a young man, and was not so heartless as to leave his wife and child in poverty, and give almost his entire estate to his parents.

The appellant F. J. Bliss testified that he had given some considerable thought to the matter as to how he could make Ida a gift, in order to make her feel that her husband had not forgotten her. From that testimony, one would infer that he did have an idea that Ida might think her husband had forgotten her when she came to realize that the appellant and his wife were claiming nearly all of the property their son had left. It seems from the evidence that he appeared to be very anxious to make her a present, but was ready to turn her down every time she asked for money, and finally did offer her the big sum of \$2.

The majority opinion in effect holds that the deceased was totally wanting in foresight, sentiment, or feeling for his wife and child and states as follows: "In our opinion, the insured never thought of creating a trust or naming his parents as trustees, but rather preferred to rely on their sentiments of love and affection and the ties of consanguinity for the care, protection, and maintenance by his parents of the wife and babe in event of misfortune overtaking him. Although his parents strenuously resist this action, it does not appear from this record that these old people will prove recreant to the filial faith and confidence thus reposed, or that they mean to abandon this mother and child, or

give them no aid or assistance." The evidence clearly shows to me that they have abandoned them, and have refused to give them aid or assistance. The sentiment of love and affection and the ties of consanguinity so pathetically referred to by my Associates evidently did not amount to much, so far as these parents were concerned; for, as testified to by Ida Bliss, when she asked Mr. Bliss for money, he said: "I am surprised that you should ask me for money. I don't know why you are asking me for money. I do not consider you any relation to me. I have dropped you and the baby together." And then he finally offered her the munificent sum of \$2. I suppose this offer of \$2 made my Associates conclude, in their opinion, that appellants had not abandoned them.

From all of the evidence and the admissions of the appellants themselves, it is clear that the intention of Ezra Ray Bliss was to leave said money in trust for his wife and babe; and, as I view it, to hold that the appellants are the absolute owners of the proceeds of said insurance policy is to perpetrate a great injustice upon the memory of the deceased, and upon his wife and child. Ezra Ray clearly intended to create a trust, and did create it, and so expressed himself time and again. He did not care to change the names of the beneficiaries in the policies, because the persons he desired to act as trustees were already named. He did not care to have his wife and child named as beneficiaries in the policies, for that would have given them the proceeds directly, the thing he wished to avoid. I think Ezra Ray Bliss did as every ordinary man would do under all of the facts of this case. The policy was taken out before he was married. After his marriage, he wanted to protect his wife and child, and his intention was to have his father and mother take the insurance money as trustees for his wife and babe. They acknowledged time and again that they had so taken it. No particular form of words is necessary to create a trust. *Gerrish v. New Bedford Inst. for Savings*, 128 Mass. 159, 35 Am. Rep. 365. The existence of a trust is in every case to be determined as a question of fact, having in view the surrounding facts and circumstances of the transaction, the intention of the parties, and the substance, rather than the form, of the instrument. 5 *Ency. of Law*, 2007, Supp.; *Robb v. Washington, etc., College*, 108 App. Div. 327, 93 N. Y. Supp. 92; *Hirsch v. Auer*, 146 N. Y. 13, 40 N. E. 397. Trusts may be created in personal property by parol, and no particular form of words is required to accomplish the result. Trusts of personal property may be created, declared, or admitted verbally, and proven by parol evidence. 2 *Fomeroy on Equity Jurisprudence*, p. 1492; *Clapp v. Emery*, 98 Ill. 523; *Reiff v. Horst*, 52 Md. 255; 19 Dec. Digest, p. 1490, pars. 17 and 18. The proceeds of a life insurance policy may be

made the subject of a trust. *Silvey v. Hodgdon*, 52 Cal. 363; *Austin v. Wilcoxon*, 149 Cal. 24, 84 Pac. 417; *Woodruff v. Tillman*, 112 Mich. 188, 70 N. W. 420.

In *Hirsh v. Auer*, 146 N. Y. 13, 40 N. E. 397, the court said: "The fact that the trust dealt with a contingent interest of the insured in the certificate of insurance is of no moment. That interest became vested at the death of the insured, and, the beneficiary having collected the insurance money, the trust, under the agreement creating and acknowledging it, attached to the fund." See, also, *Catland, Executor, v. Hoyt*, 78 Me. 355, 5 Atl. 775.

The appellants had no vested interest in said life insurance policy or its proceeds, and it was subject to the free disposal of the decedent at any time. They never had possession of the policy until after Ezra Ray's death. There can be no doubt of the intent of Ezra Ray Bliss in this matter, when all of the evidence in the case is taken into consideration. It is a well-established rule that it is not essential for the creation of a valid trust that the trustees know of or consent to the trust. The main contention of the appellants is that the trust was not proven by clear and convincing evidence. The existence of a complete trust is in every case to be determined as a question of fact, having in view the surrounding facts and circumstances of the transaction, the intention of the parties, and the substance, rather than the form, of the instrument.

In *Bollinger v. Bollinger*, 154 Cal. 695, 99 Pac. 196, is a statement as to the meaning of clear, satisfactory, and convincing evidence to show the creation of a trust by parol, and the court said: "Appellant invokes the rule that, to prove a trust by parol under conveyances absolute in terms, the evidence must be clear, satisfactory, and convincing. The rule invoked is amply supported by authority, and is founded in sound reason. But its proper application, where there is substantial evidence to support the existence of a trust, must be left largely to the trial court. As was said in *Harris v. Harris*, 136 Cal. 379, 69 Pac. 23: 'Whether the evidence in any particular case is of this character [clear, satisfactory, and convincing] must be determined by the trial court, and its determination thereon will be accepted by this court as conclusive.'"

This court said, in *Morrow v. Matthew*, 10 Idaho, 423, 79 Pac. 196, as follows: "Where, however, the record discloses such facts that a fair and reasonable person might conclude therefrom as to the execution, terms, and conditions of the contract, I do not see how an appellate court is justified in saying that it did not appear clearly and satisfactorily to the trial court. Evidence entirely clear and convincing to the trial court, who saw and heard the witnesses, might, when in cold type upon the record, leave doubts in the minds of the members of the appellate court,

but I do not think they should reverse the judgment on such grounds."

In the case at bar, the jury and court heard the witnesses testify, saw their demeanor on the stand, and upon directly conflicting testimony found in favor of plaintiffs.

It is stated by Perry, in his work on Trusts (volume 1, § 137), that: "The facts in all cases must be proved with great clearness and certainty, especially when the claim depends upon mere statements; and facts that only base a conjecture that the conditions of a resulting trust existed are insufficient. The certainty required, however, is only such as is sufficient to satisfy the jury of the existence of the trust; and it is error to charge that the 'clearest and most positive proof' must be given." At section 159 the same author says: "If the declaration of trust is too imperfect to establish that purpose, and yet plainly shows that the intention was that the donee should not take beneficially, and that the sole purpose of the gift or grant was to carry out the purpose of the trust, which fails, the donee will take in trust for the donor or his heirs," and not for himself.

In regard to the declarations that were made by the insured as to his intention to make the beneficiaries therein named trustees for the plaintiff, we think such declarations were amply sufficient to show and do show what his intentions were.

In *Garrish v. New Bedford, etc., Bank*, supra, the court said in regard to such evidence: "At the trial, this evidence was rejected, because, in the opinion of the judge, the testator had not done what was necessary to create a trust. But whether he had done enough depended, as we have seen, on whether his conduct and declarations manifested a completed and executed intention in regard to it. Notice to the donee is indeed not necessary when other acts or declarations of the donor are sufficient and complete in themselves; but, where the transaction is capable of two interpretations, and the settlement is merely voluntary, it is plain that notice given by the donor to the donee of the existence of the trust would in most cases be decisive on the question of intention."

\* \* \* It is not only satisfactory evidence of an executed intention, but it is a declaration in the nature of an act necessary to complete the transaction and create the trust."

Counsel for appellants states in his printed brief that appellants were completely heartbroken by the death of their only son, and sought solace in the affection and companionship of his wife and child, and wished, as a matter of parental love, to protect and care for them. This statement, under the evidence in this case, goes to the very limit. Appellants sought solace for the death of their only son, not in the affection and companionship of his wife and child, but in depriving them of the substance of the son's

estate, and sending them out almost penniless on the cold charity of the world, or to her own father, for support and maintenance. It is stated in Holy Writ, Gen. ii, 24: "Therefore shall a man leave his father and his mother and shall cleave unto his wife; and they shall be one flesh." But my Associates have concluded that this case is an exception to the rule, and the husband should desert his wife and child, and cleave unto his father and mother.

The majority in their opinion says: "Another thing must not be lost sight of in this case. This suit involves the benefits under an insurance contract, which is one of the most sacred contracts that can be made." Why talk about the sacredness of this policy when it was taken out long before the insured had married the plaintiff, and when the evidence shows that the beneficiaries were named without their knowledge or consent, and the contract was kept under the control of the insured? They had no vested right in it. Is it any more sacred than a will? I say, "No." Under the statutes of this state (section 5736, Rev. St. 1887), if, after having made a will, the testator marries, and the wife survives him, the will is revoked, unless certain things therein mentioned exist. Why talk about the sacred rights of an insurance contract in a case where the beneficiary has no claim against the insured for an indebtedness due from him, and no claim whatever that would begin to measure up to the claim of the insured's wife and babe, and when it clearly appears from the statements and admissions of the beneficiaries that they knew it was the intention of the insured to leave the amount due on the policy to his wife and child? The sacred rights of the wife and child ought to count for more with a court of conscience than the avarice and greed of the father and mother of the insured.

The judgment of the trial court ought to be sustained, with slight modification.

### RIPPETOE v. FEELY.

(Supreme Court of Idaho. Nov. 22, 1911.)

(Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 1031\*)—REVIEW—PRESUMPTION AS TO EFFECT OF ERROR.

Where it is charged upon appeal that the trial court erred in overruling a challenge to a juror, and the record does not show that the party complaining was compelled to use one of his peremptory challenges upon the juror challenged for cause, and was thereby deprived of a peremptory challenge, it will be presumed that he was not compelled to exercise all of the peremptory challenges allowed him by law, and for that reason could not have been prejudiced by the action of the trial court in denying the challenge for cause.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4038-4046; Dec. Dig. § 1031.\*]

#### 2. APPEAL AND ERROR (§ 870\*)—DECISIONS REVIEWABLE—NATURE OF DECISION APPEALED FROM.

Where a motion is made for a nonsuit at the close of the evidence on the part of the plaintiff, upon the ground that the evidence is insufficient to warrant the submission of the cause to a jury, and the motion is denied, and evidence is thereafter offered by the defendant, the ruling of the trial court upon the motion is not reviewable upon appeal from the judgment, or from the order overruling the motion for a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 8511; Dec. Dig. § 870.\*]

#### 3. NEGLIGENCE (§ 82\*)—CONTRIBUTORY NEGLIGENCE—EFFECT.

In an action to recover for personal injuries, where contributory negligence is pleaded as a defense, the plaintiff cannot recover when it is proven by the evidence that the negligence of the plaintiff was a proximate cause of the injury, notwithstanding the fact that the evidence may also show negligence on the part of the defendant.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 112-114; Dec. Dig. § 82.\*]

#### 4. NEGLIGENCE (§ 82\*)—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE OF INJURY.

To prevent a recovery by reason of contributory negligence, the person injured must be guilty of a want of ordinary care, and it must appear that such want of care was a proximate cause of the injury. The negligence or want of care, however, of the injured person need not be the sole proximate cause of the injury, for that would exclude all negligence on the part of the defendant, and there would be no reason for the application of the rule of contributory negligence on the part of both parties.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 112-114; Dec. Dig. § 82.\*]

#### 5. NEGLIGENCE (§ 83\*)—CONTRIBUTORY NEGLIGENCE—INJURIES AVOIDABLE NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

In an action for personal injury received by the plaintiff at the hands of a defendant, if the evidence shows that the plaintiff contributes to the injury by a want of ordinary care in placing himself in a dangerous position, and where he might be injured, and does not exercise ordinary care in preventing the accident after he so placed himself in such position, then the mere fact that the defendant was negligent would not relieve the plaintiff from the effect of his contributory negligence, unless it also appears that the defendant, after discovering plaintiff's dangerous position, could have avoided the consequences of the plaintiff's negligence; that is, could have avoided the injury which took place by the exercise of ordinary care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 115; Dec. Dig. § 83.\*]

#### 6. APPEAL AND ERROR (§ 1001\*)—REVIEW—QUESTIONS OF FACT.

It is the duty of the appellate court to set aside the verdict of a jury where there is no evidence to sustain it, or where it is against the law given to the jury by the court; and if the appellate court is satisfied that but one conclusion can be deduced from the evidence, and that conclusion is that the negligence of the plaintiff was a proximate cause of the injury, and that the injury would not have occurred, had the plaintiff exercised ordinary care, then, in such case, a verdict for plaintiff for personal injuries must be set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3928-3934; Dec. Dig. § 1001.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from District Court, Kootenai County; R. N. Dunn, Judge.

Action by John Rippetoe against Charles Feely. From a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

Charles L. Heitman and El. N. La Veine, for appellant. Thomas Mullen, for respondent.

STEWART, C. J. This is an action to recover damages for personal injuries. The complaint alleges that at the time of the happening of the injury the defendant was the owner and engaged in the operation of a steam threshing outfit; that on the 26th day of August, 1910, and for some time prior thereto, the plaintiff was employed by the defendant, and during said employment, and immediately prior to receiving the injuries in the performance of his duty, he was engaged in moving certain bundles of grain lying under the wheels of the separator, and which were necessary to be removed in order to allow said separator to be hauled away and forward by said traction engine; and that while plaintiff was so engaged the defendant was in charge of the operation of the engine, and without giving plaintiff any warning of his intention so to do started up said engine attached to said separator suddenly and violently, knowing at the time, or could have known with the exercise of reasonable care, that the plaintiff was in a dangerous position and liable to be injured, but, regardless thereof, the defendant suddenly hauled and propelled said separator over and across and upon the person of the plaintiff, and caused the tongue of said separator to be dropped upon the plaintiff, and the plaintiff to be run over by the separator and thereby injured, and thereby damaged the plaintiff in the sum of \$15,000. The complaint further alleges that \$300 was paid out on account of the injuries and for surgical and medical attendance and medicine.

The answer of the defendant puts in issue the allegations of the complaint, admits the plaintiff's employment by the defendant, and alleges that the plaintiff was an expert machinist, and that it was the plaintiff's duty, among other things, to set, care for, level, plumb, and put in place the separator, and to direct and supervise the other help and assistants among the threshing crew, whose duty was to assist and help in connection with and about the separator, and to give the engineer all needed and necessary signals to go either forward or backward, or for any purpose whatever; that on the 26th day of August, 1910, the plaintiff being in charge of the separator and supervisor of the help, and while engaged in and about the setting of the separator and putting it in readiness and in position to thresh certain grain, and the defendant being in charge of the engine, the plaintiff signaled the defendant to back the

engine in the direction of the separator for the purpose of detaching the separator; that the defendant moved the engine as directed in the direction of the separator, and immediately received a signal from the plaintiff to move forward said engine, and directed the defendant to go ahead; that the defendant thereupon moved the engine forward, and, the plaintiff having failed to detach or cause the separator to be detached from the engine, as it was his duty, the separator was moved forward; and upon information and belief alleges that suddenly, after giving defendant the signal to move forward and advising him to go ahead, the plaintiff carelessly and negligently stepped directly in front of the separator and next to the front axle and beneath the feed box of the separator, and was in a stooping position, and reached into the tool box; that the defendant had no knowledge that the engine was not detached from the separator, and no knowledge of the whereabouts of the plaintiff at the time the engine and separator began to move forward, and no knowledge that the plaintiff had placed himself in front of the separator; that if the plaintiff had detached the separator, or caused the same to be detached from the engine, as it was his duty to do, the injuries would not have occurred; and that the failure of the plaintiff to perform his duty and to exercise due and reasonable and ordinary care was the approximate cause of the injuries received by the plaintiff.

Upon the issues thus formed, the cause was tried to a jury, and a verdict was returned in favor of the plaintiff and against the defendant for the sum of \$3,000. This verdict was signed by nine jurors, and upon their verdict the court rendered judgment in accordance therewith. A motion was made for a new trial and overruled, and this appeal is from the judgment and from the order overruling the motion for a new trial.

[1] The first question presented on appeal is the ruling of the trial judge in denying a challenge made as to the qualification of one O. D. Burns, who was called as a juror, and examined upon his voir dire. The record in this case does not show how many jurors were called and examined in said cause, nor how many were excused for cause, and how many peremptorily; and it does not appear from the record that the plaintiff was required or did exhaust all of his peremptory challenges. Neither does it appear that the juror Burns was excused, or, if excused, by whom. So far as the record is concerned, he may have remained on the jury, and may have been one of the three who did not sign the verdict for the plaintiff, but that does not appear; and, without it appearing in the record that the party complaining was compelled to use one of his peremptory challenges upon the juror challenged for cause, and thereby was deprived of a

peremptory challenge, it will be presumed he was not required to exercise all the peremptory challenges allowed him by the statute. For these reasons he was not prejudiced by the action of the trial court in denying a challenge for cause. *Knollin v. Jones*, 7 Idaho, 468, 63 Pac. 638. For these reasons, we are not called upon to examine the evidence upon the examination of O. D. Burns, or to determine whether he was disqualified.

[2] It is next urged that the trial court erred in overruling the motion of appellant for a nonsuit after the close of plaintiff's testimony. This motion for a nonsuit was based upon a number of grounds, the principal one of which is that the plaintiff was guilty of contributory negligence, which was the proximate cause of the injury received by him, and for which damages are sought in this action. In determining this question, this court is not required to examine the testimony offered by the plaintiff, for the reason that it is the rule of this court that, where a motion is made for a nonsuit upon the ground that the evidence offered by the plaintiff is insufficient to prove the plaintiff's cause of action, and does not warrant the submission of the case to a jury, and the motion is denied, and evidence is thereafter offered by the defendant, the ruling of the trial court upon the motion is not reviewable upon appeal from the judgment or order overruling a motion for a new trial. In the case of *Shields v. Johnson*, 12 Idaho, 329, 85 Pac. 972, this court, in passing upon this question, said: "Without going into the question whether the motion was properly made in this case, it is sufficient to say that defendant waived it by putting in his testimony. A defendant has an undoubted right to stand upon his motion for a nonsuit, and have his writ of error, if it be refused; but he has no right to insist upon his exception after having subsequently put in his testimony and made his case upon the merits, since the court and jury have the right to consider the whole case as made by the testimony." This rule of law was approved in the later case of *Barrow v. B. R. Lewis Lumber Co.*, 14 Idaho, 698, 95 Pac. 682. Upon these authorities, the trial court did not err in overruling the motion for a nonsuit.

[3] The next question, and the principal ground urged upon this appeal, is that the evidence clearly shows contributory negligence on the part of the respondent at the time the alleged injury occurred.

It appears in this case that the plaintiff was engaged, prior to August 26, 1910, in operating and managing and controlling a separator used by the defendant in threshing grain in Kootenai county, Idaho; that at such time the defendant had charge of the engine which drew the separator from place to place, and operated the separator when threshing; that the plaintiff had been engaged in and in charge of the operations

of a separator for some 30 years, and for 23 or 24 years had performed this character of labor during the threshing season in Kootenai and adjoining counties; that the defendant had owned this threshing outfit for 3 years and during the first 2 years of such ownership had had some experience in operating the engine, and during the year of the accident had had charge of the operation of the engine during most of the threshing season up to the time the accident occurred; that in the afternoon of August 26, 1910, the threshing outfit was taken on the Post place, where the injury occurred. It appears that the separator was drawn up between the stacks by a chain about 23 feet long, fastened to the water tank. This chain was double, and ran from the tongue up to the water tank, and was put through a clevis in the shape of a "D" at the rear of the tank, and then ran back and hooked into the end of the tongue of the separator; that this hook at the end of the chain, which hooked into the end of the tongue of the separator, was of such a size that it would pass through the "D" clevis on the rear of the tank without catching the hook on the clevis; the water tank was hitched onto the engine; that when the separator was drawn up between the stacks the wheel caught against some of the bundles in one of the stacks and tore them out, and they were in the way of the separator, and the separator was stopped to remove them.

In describing the accident, the plaintiff testified substantially as follows: "When we got in the stacks, the space was not wide enough, and the wheels hit the stacks and knocked a lot of bundles out. There was quite a lot there pulling out the bundles, and throwing them out of the way, so we could go on with the traction engine, and we got into the stacks, I suppose, 4½ feet or so. I signaled him to stop, and gave him the signal to unhook—to back up and unhook, and go ahead. He did so. I held up my hand for a signal. When he got where I wanted to stop, I held my hand up, and that was a signal for him to unhook. He backed up and unhooked; I gave him the signal. Q. What kind of a signal did you give him? A. When I held my hand up—when he got where I wanted to stop, I held my hand up, and that was the signal for him to unhook. He backed up and unhooked, and I gave him the signal to go ahead; but just at that time he stopped the machine, and he hollered back to me, 'John, are we going to catch the four stacks?' (there was four stacks), 'going to catch the four stacks at one setting?' I says, 'I will see, Charlie,' and I looked around a little, and saw we could pull up a little further, and I says, 'We will pull up a foot and a half or two feet further, and we can catch them all at this setting.' And Mitchell—he was the fellow that uncoupled—he says, 'You will have to

back up and uncouple.' I says, 'No; no need of that. Unhook your chain,' I says. 'You can pull it on with the chain.' I stepped back to the separator. I was up in front of the feed, and I stepped back, and Mitchell and Gordon were standing there talking, their backs to me, and I says, 'You fellows ready there, so we can go ahead?' They turned around, and I stepped back to this separator to those bundles, and took my foot and kicked the bundles under the tongue, kicked them from ahead of the wheel, so that the wheel would not run over them. They were right in front of the wheel. When I did that, it started, and it started with a jerk, and the traction slipped and caused the tongue to jerk down. The tongue dropped and caught me, and I hollowed as loud as I could, and kept hollowing, and the wheel struck me on this arm, and ran up onto this shoulder and up on my face, and I kept hollowing until it got up on my ear; and it dragged me along through the sand 10 or 15 feet—I don't know—I guess. Q. Did you give him the customary hand signal? A. No, sir; I didn't; but if he had tooted his whistle I could have got out of the way. Started slow. \* \* \* When the separator man gives the signal to go ahead, they are supposed to give him two toots, indicating they are going to start. Q. Anything of that kind done? A. No, sir. This particular outfit has a custom to give two toots when it is at a stop, one when you stop and two when you want to go ahead. If you give me a signal and I don't answer you back, you would not know whether I got the signal or not. Q. You say there were no signals of that kind given at this time when they started? A. No, sir. Q. But I believe you said you had a talk with him that you had to move a couple of feet further? A. One and a half or two feet further." Defendant could not see under the separator tongue on account of the water wagon piled up as it was with bedding. That the first signal I gave after they pulled in there was to unhook and move ahead. That Mitchell was doing the unhooking. He was working for the defendant. Defendant did not have anything to do with the unhooking of the chain; he was running the engine. That I gave the signal to Mitchell to unhook the chain, and he unhooked it. That after unhooking the engine was stopped, backed up and stopped, and defendant hollowed, and asked if "I was going to catch all four stacks at that setting—that is, the question amounted to that—and I says, 'I will see shortly Charlie;' and I stepped back, and I says, 'You can go ahead a foot and a half or two feet further,' and Mitchell spoke up and says, 'We will,' or something like that. I says, 'No need of that at all.' I says: 'Hook onto the chain, and move it ahead that way.' That is where the chain was hooked when they stopped it. They used the single length of the chain when they started up. The last time they had the full length of

it. When the engine started up, it was too near the engine. When the engine started up the last time, the water wagon was about fifteen feet from the end of the tongue. When I told them to back up, I was standing right there by the feed, in front of the feed. I wasn't then sitting down. I told them to hitch the chain onto the water tank so they could move up, and after I told them to go ahead I sat down to kick out the bundles. I told him we could move up a foot and a half or two feet further, and I went to kick those bundles out of the way. I was standing up in front of the feed when I told them to move up a foot and a half. I said, 'We can move up that far;' then I sat down and kicked the bundles out of the way. I sat down on the ground. I was not ordered by Feely to keep these bundles out of the way. It was not his place to order me to keep them out of the way. It was my place to look out for that and make it easier to set the separator. If I hadn't been sitting down on the ground kicking at the bundles in front of the wheel, it would not have run over me. If I hadn't been sitting down, but standing up, the wheel would not have run onto me."

This witness testified that he had a conversation with the defendant a short time before the accident, in which he says: "I gave Feely the signal to start up, and he started up slow, and I motioned to him, and he stepped away from the engine towards me, and I stepped toward him, and says, 'Look'y here, Charlie, you have got to use the whistle.' He says, 'I didn't come anywhere near catching you, did I?' I says, 'No; but you will catch somebody.' He says, 'Never you fear; I will never catch you. I keep my eye on you. To hell with the rest of them; let them keep out of the way.' That is the remark."

"Q. You said you had given him a signal to move up and unhook, and they unhooked. How did you countermand the signal not to move up? A. We had a talk that he was to hook the chain again and move up with the separator. Q. Then you didn't give him a signal—just talked to him? A. Just talked to him; yes. Q. Where were you? A. Standing by the feed in front of the machine. Q. How far was that from where he was on the engine? A. I judge it was about 30 or 35 feet. \* \* \* I was not then sitting down kicking bundles. After I told them to move up, I sat down on the ground to kick out the bundles."

E. Woodside testified on behalf of plaintiff that he was one of the gang working there, and that he recollected the starting up of the separator, heard the movement of the engine; that the defendant did not give any whistle or signal of the starting of the engine; that is, he did not hear anything of the kind.

James Casey testified for the plaintiff, and said that he was an experienced man in



threshing outfits, and that the duty of the separator man is that he is given control of the whole outfit. The engineer works under the separator man, and the separator man gives him an order to stop or to go ahead, and he is supposed to stop or go ahead.

Walter Green, a witness for the plaintiff, testified: "I was on the engine at the time of the accident." The defendant was running the engine; that no whistle was blown or signal given to start the engine.

Michael D. Dietrich, a witness for the defendant, testified that he had had experience in running threshing machines for 15 or 16 years; that he worked for the defendant two seasons; that during that time Mr. Rippetoe, the plaintiff, was the separator man; that it was the custom among the Feely threshing outfit that the raising of one hand and bringing it down quick meant to stop; that it was Mr. Rippetoe's practice to give the words, "Go ahead;" that was for him to say; that it was the practice of the engineer of the outfit to give signals by sounding the whistle when they were ready to thresh and the belt was on, and when the belt was not on it was the practice of the separator man to give the signal to go ahead. Used his hands the same way very often. Sometimes called, "Go ahead," but the hand signal was the main signal. "Q. What was the practice of the engineer as to sounding or not sounding the whistle at that time? A. Never sounded the whistle at such time for moving the engine." E. Woodside was recalled on behalf of the defendant and testified that the practice of the engineer and the separator man was that no signal was given by the engineer when the separator was moved by the engine.

W. J. Owen testified on behalf of the defendant that he was working for the defendant at the time of the accident, pitching bundles, and that the separator was pulled up between the two first stacks they came to; that Mr. Rippetoe was around between the separator and the tender, and also Mr. Mitchell, and a man by the name of Gordon, and Mr. Rippetoe, after he went in there, turned, facing north, and raised his hand and said, "Go ahead." He was talking to Mr. Feely. Feely was on the ground, and when Rippetoe hollowed, "Go ahead," then he got onto the tender on the back part of the engine there, and said, "Are you all right, John?" and Mr. Rippetoe said, "Yes," and some one back there—he could not tell who it was—said "Yes," and Mr. Feely started the engine. Before that, the chain had been unhooked. Mr. Mitchell unhooked it. Witness stated he was about 16 feet away from Mr. Rippetoe; that after Mr. Rippetoe gave this signal Mr. Feely started the engine. The end of the chain—that is, the hook in the chain—caught the clevis on the tank, and when Mr. Rippetoe gave this signal to Mr. Feely to go ahead Mr. Rippetoe turned his back to witness, and looked as

though he was going to the feed for the level, and at that instant witness turned to see where Mr. Feely was going, and just about a minute, less than half a minute later, there was a cry to stop. The practice followed in giving signals was that after they were belted and ready to start threshing to whistle two short whistles; that when the belt was not on there was no whistle blown. When the engine was started at any time the noise could be heard for 200 or 300 yards, perhaps. Generally, when the engine would start, before it would start to move, you could hear that noise for 100 yards or more. It was caused by the steam exhaust. The drive wheel started first. That was a large wheel. This would make a noise. You could hear it without the exhaust very far—the exhaust made while it was running. No trouble in hearing this noise. When witness got to Mr. Rippetoe after the accident, he had a spirit level in his hand. When he saw him give the signal, it was with the left hand, and when he was taken from under the wheel he had the level gripped in his left hand very tight. He didn't have the level in his hand when he gave the signal. When the engine started right ahead, it moved slowly.

Frank Mitchell, a witness for the defendant, testified that he was standing behind the tender just before Rippetoe was hurt; that he was waiting for him to give the signal to start the machine—waiting for him to give the signal to take the engine out of the way. This was about a minute and a half, probably, before he was hurt. The chain that connected the tender to the separator at that time was double. Just after Rippetoe told Feely to back up, he told witness to unhook the hook off the end of the separator tongue. Witness unhooked it just as Feely backed up. At that time the separator was set. After the chain was unhooked from the separator, Rippetoe was standing about four feet in front of the left-hand wheels—probably about 2 feet. "I was standing behind the binder, probably about 13 feet; no obstruction between me and plaintiff, so I could see everything he did. Just as I unhooked the hook off the separator pole, Rippetoe raised his left hand, and said, 'All right; go ahead.' He was talking to Feely, who at that time was on the ground; but just as he gave the signal he jumped up on the footboard of the engine, and started the engine in motion. Just after he gave the signal to Feely to start, Rippetoe went to the tool box and got out the level. As soon as he gave Feely the signal, he started for the level—stooped down, and got the level out of the tool box. Q. The separator was not moved? A. No, sir. Q. What was the position of the chain at that time? What condition was it in? A. I unhooked it just before he started. Q. You unhooked it from the separator pole? A. Yes; off the end of the pole. Just as he

started, I went up to the chain to see the thing didn't get hooked on the end of the tender reach, with the clevis on the end of the tender reach, and I never got there in time before Charlie—I got there quick as I could, but I didn't get there in time before Charlie started the engine up. Q. State what the hook did. A. Just about the time I got there, the hook hooked into the end of the tender reach—that clevis on the tender reach. I had been doing the job of unhooking the chain from the tender reach. Was so instructed by Feely. I started just as soon as I got the hook off the pulley, and just about that time Charlie started the engine. Rippetoe had given him the signal. Rippetoe could have seen when he gave the signal that the chain was still in the clevis. He knew it was there; saw it. The chain had not been pulled loose from the tender. It was still dragging through the tender hook when he gave the signal to go ahead, but it was as soon as Charlie started. Of course, it did not drag until the machine started. I had given the signal before. The chain made a noise; it rattled some, grinding over that clevis on the end of the tender reach. Pretty heavy chain. It must have been a quarter of an inch. When Rippetoe gave the signal for Feely to start off, he did not have the level in his hand. I never gave the signal to Feely: 'All right; go ahead.' Never said, 'All right.'"

The defendant testifies that it was the duty of the plaintiff to level up the separator when they moved in. "I had the engine and boller. He was to give me signals when I was to go forward, back up, or stop. When he wanted it started, moved up, he gave me a signal to go ahead—raised his hands. Sometimes he said, 'Go ahead.' The same way when we moved. When stopped, had his hand raised, and let it drop. Never known to give any whistle when we moved, or anything like that. I was not to give any whistle back like that when moving or starting to go—pulling—in the field. He asked me once or twice, I believe, shortly after we started out, when belted up and ready to start threshing machine, and I tried every time, but might have neglected it two or three times." At the time of the accident, he says: "He says, 'Go ahead,' and threw up his hands to go ahead, and I got on the engine, and I looked back, and he was standing there, and threw his hand up, and says, 'Go ahead,' so I started ahead. I went, I judge, 10 or 12 feet, maybe 14, probably 10 or 12, and felt the jerk and looked back—glanced over my shoulder—and saw it started to come, and then I heard somebody hollow. I was not thinking of anybody being hurt; I thought this separator was being pulled forward out of position, but I knew that the chain had caught in the 'D.' Some one says, 'The separator is on John,' and I reversed the engine and backed up. Before he gave the signal, the separator was brought up in

its proper place where the separator was to be. When Rippetoe gave the signal, he was standing about 4 or 5 or 6 feet in front of the wheel on the south side. We were heading west in front of it, and a foot or two or so out. He was standing facing the north. I was on the ground, and as quick as he gave the signal I jumped on the footboard of the engine. The signal he gave was, 'All right, go ahead,' and I jumped up on the engine, and he looked up at me; then he says, 'Go ahead,' and I started the engine up. He signaled twice to go ahead before the engine started. Mr. Rippetoe did not tell me to move the separator up a foot and a half or two feet further. He gave me no instructions to that effect. I never had any conversation with him about sounding the whistle in the field, or on the road, or anything like that, but when we threshed. Never told him I would be careful not to hurt him, but, 'to hell with the balance of them.' I understood that I was to obey his signals, and always did. I expect a few times I neglected to whistle when I started up the threshing machine into operation, when ready to thresh in the field—neglected that a few times. He did not tell me to sound the whistle, or I would kill somebody. Never heard him say that. When moving the engine or starting it, you hear the exhaust. It depends on how much steam you turn on as to the exhaust, and then you hear the cylinder drum. As soon as the flywheel gets in good motion, then you put the friction on. You ought to hear the noise 150 feet. I did not see Mr. Rippetoe sitting on the ground, kicking the bundles. He was standing out about 4 or 5 feet or 6 feet in front of the wheel, I judge, about 2 feet or 2½ feet to the south side. I did not see him after I turned around to start the engine. I never heard Mitchell give the signal, 'All right, go ahead.' I didn't think there was any danger that the hook would catch in the clevis, never thought of such a thing. Nothing to indicate it as far as I knew; I understood that he was there. That is what we had him for, to see that everything was clear. I thought everything was clear when I gave him the signal to go ahead. The whistles are given for the purpose of warning people—each fellow to get to his place, and get to work. Rippetoe never told me that if I didn't obey the signals somebody was liable to get killed. When Rippetoe gave the signal to move forward, I could see him. He didn't have anything in his hands. At the time he was taken out from under the machine, he was gripping the level in his left hand."

There is not much conflict in the evidence in this case upon the material questions involved. The evidence is very voluminous, however, and it is somewhat difficult to segregate the particular points really and necessarily involved in the case out of the record and determine the necessary and material parts of the evidence, upon which

there is no conflict whatever. We have, therefore, selected such parts of the evidence, relating to the conduct of the plaintiff and the defendant at the time the accident occurred, in order to show just what each party did, and determine what care each exercised in his conduct at the time the accident occurred. We think it may be conceded in this case, and the evidence seems to prove a state of facts from which one might conclude, that the defendant, Feely, was guilty of negligence in not blowing the whistle of the engine before he moved up the engine. Still, such negligence would not have resulted in an injury to the plaintiff, had not the plaintiff sat down in front of the wheel of the separator, and placed himself in a dangerous position where he might be injured, and where the separator would necessarily pass over him, if moved, unless he could in some way remove himself from such position and avoid any danger; and that he did all this after he had given the signal, and spoken in words, commanding that the defendant move up, so as to move the separator a foot or more. It clearly appears that plaintiff could have removed the bundles of grain in front of the separator in a standing position and by using a fork, and that such method was the proper and usual one employed in such cases; and if plaintiff had adopted such method there would have been no danger, and the plaintiff could easily have escaped from the movements of the separator.

The plaintiff was an experienced man with a threshing outfit. He knew if the engine moved forward, fastened to the separator, it would move the separator forward also. He also knew that if the engine was unhooked from the separator and moved forward the hook on the end of the chain could catch in the clevis on the water tank, through which it would pass, and, if it did so, it would move the separator, and he might be run over and hurt. Yet, knowing all these facts, about which the evidence is not in conflict, he placed himself in a place of danger. There can be no doubt whatever that, had the plaintiff exercised ordinary care, he could have avoided the injury, as well as avoided any consequences to himself of the negligence of the defendant. The plaintiff was the director of the acts of the defendant, as engineer, at the time the accident occurred. He had the power and the control of the signals to be given. That plaintiff gave a signal to the defendant to go ahead and move up before he placed himself on the ground in front of the separator wheel, there is no conflict whatever in the evidence. Whether this signal was given before or after Mitchell released or unhooked the chain from the end of the separator tongue can make no difference; for, in either instance, he would not be relieved of the ordinary care required of him thereafter in placing himself in a position where he might

be injured by a movement of the separator, which would result from the defendant's moving the engine forward as directed by the plaintiff, and drawing the chain through the clevis on the tender up to the hook, where it might be caught, and thus so fasten the engine onto the separator as to move the separator forward when the engine moved. He could not help knowing that this might happen. His experience in connection with the threshing outfit certainly must have informed him of the possibility of such a thing happening. The plaintiff knew very well when he gave the signal to defendant to go ahead and move up that if the defendant moved the engine the distance necessary for it to move, in order to be at a sufficient distance from the separator for the belt to be put in place to operate the separator, that the chain would have to be drawn through the clevis on the tender, and the engine would have to be removed further from the separator than the end of the chain would permit, if it were fastened; and his signal and command to the defendant was attempted to be carried out by the defendant when he moved the engine forward, and the separator was moved, by reason of the fact that the hook on the end of the chain caught in the clevis on the tender, and the movement of the engine thereby moved the separator. And this was a matter that the plaintiff well knew might happen, and his information and experience gave him better knowledge that it might so happen than that of the defendant; and the degree of care required of him was really greater than the degree of care required of the defendant; and his failure to exercise such ordinary care as should have been exercised by a prudent man under such circumstances was certainly a proximate cause which led to such injury.

It is a general rule of law, and has been followed in this state, that in an action to recover damages for personal injuries, where contributory negligence is pleaded as a defense, the plaintiff cannot recover when it is proven by the evidence that the negligence of the plaintiff was a proximate cause of the injury, notwithstanding the fact that the evidence may also show negligence on the part of the defendant. *Pilmer v. Boise Traction Co.*, 14 Idaho, 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254, 125 Am. St. Rep. 161; *Wheeler v. O. R. R. Co.*, 16 Idaho, 375, 102 Pac. 347; *Goure v. Storey*, 17 Idaho, 352, 105 Pac. 794; *Cyc.* p. 505; *Gilbert v. Burlington, C. R. & N. Ry. Co.*, 128 Fed. 529, 63 C. C. A. 27.

[4] The rule above in a broader sense means that to prevent a recovery by reason of contributory negligence the person injured must have been guilty of a want of ordinary care, and that such want of care was a proximate cause of the injury. The negligence or want of care, however, of the injured person need not be the sole proximate

cause, for that would exclude all negligence on the part of the defendant, and there would be no room for the application of the rule of contributory negligence on the part of both parties. 1 Thompson on Negligence, §§ 218, 217; Smith v. O. & O. S. Co., 99 Cal. 462, 34 Pac. 84.

[5] If, then, the plaintiff contributed to the injury which he received at the hands of the defendant by his own want of ordinary care in placing himself in a dangerous place where he might be injured, and did not exercise ordinary care in preventing the accident after he had so placed himself in such position, then the mere fact that the defendant was negligent in not blowing a whistle would not relieve the plaintiff from the effect of his contributory negligence, unless it also appears that the defendant, after discovering plaintiff's dangerous position, could have avoided the consequences of the plaintiff's negligence; that is, could have avoided the injury which took place by the exercise of ordinary care. Pilmer v. Boise Traction Co., 14 Idaho, 327, 94 Pac. 432, 15 L. R. A. (N. S.) 254, 125 Am. St. Rep. 161; Wheeler v. O. R. R. Co., 16 Idaho, 375, 102 Pac. 347; Thompson on Negligence, vol. 1, § 237. In this case, if the plaintiff was negligent and did not exercise ordinary care in placing himself in front of the wheel of the separator, and did not exercise ordinary care in escaping from the probable effects of the separator passing over him, after he discovered that it was moving, the mere fact that the defendant was negligent in not whistling when he started up would not relieve the plaintiff from the effects of his negligence, unless the defendant discovered the negligence of the plaintiff and the dangerous position in which he was, and could have avoided the consequences of such negligence by the exercise of ordinary care on his part.

If there was a risk of danger in the plaintiff taking the position he did in front of the separator, after he had given a signal to move forward, he assumed whatever risk there was, because he knew all about the separator, how it was moved, and when moved by the engine attached thereto. He also had complete control of the orders and directions to be given to the engineer. He knew what might happen if the separator did move as he had directed. He also knew that when he sat upon the ground it would be more difficult for him to get away from the separator in passing over him than if he were standing up, removing the bundles, and in a position whereby he could more easily move himself away from the likelihood of the separator passing over him. So, under all the facts of this case, whatever risk there was about the position the plaintiff took in front of the separator, or the wheel of the separator, he well knew, and assumed such

risk, and is responsible for the results of his action.

[6] It is a rule of law that, if the evidence is of such a character and degree as to lead different minds to different conclusions as to whether there was negligence, then the question is one of fact to be determined by the jury; but, if the evidence is such that but one conclusion can be reached, then the question becomes one of law, and must be determined by the court. Wheeler v. O. R. R. Co., 16 Idaho, 375, 102 Pac. 347; Goure v. Storey, 17 Idaho, 352, 105 Pac. 794; Silcock v. Rio Grande W. Ry. Co., 22 Utah, 179, 61 Pac. 565; Smith v. O. & O. S. Co., 99 Cal. 462, 34 Pac. 84. It is just as strong a duty of the appellate court to set aside the verdict of a jury where there is no evidence to sustain it, or where it is against the law given to the jury by the court, as it is to affirm the verdict of the jury where there is a substantial conflict in the evidence. Looking at the evidence in this case with these principles clearly in mind and as a guide, we are satisfied that but one conclusion can be deduced from such evidence, and that is that the negligence of the plaintiff was a proximate cause of his injury, and that the injury to himself would not have occurred, had he exercised ordinary care.

For these reasons, we think the judgment should be reversed, and a new trial granted. Costs awarded to appellant.

AILSHIE and SULLIVAN, JJ., concur.

#### WHITEHEAD v. JOHNSON.

(Supreme Court of Colorado. Dec. 4, 1911.)  
PLEADING (§ 343\*)—JUDGMENT ON PLEADINGS—MOTION FOR JUDGMENT.

A motion for judgment on the pleadings cannot be made to take the place of a general demurrer to the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055-1059; Dec. Dig. § 343.\*]

Error to District Court, City and County of Denver; John I. Mullins, Judge.

Action by Andrew Whitehead against T. L. Johnson. Judgment for defendant on motion, and plaintiff brings error. Reversed and remanded.

Plaintiff in error brought suit to recover damages from defendant in error for the alleged failure of the latter to carry out the terms of a contract or option for the sale of certain shares of stock to plaintiff. To the complaint the defendant filed a general demurrer, which was overruled. The defendant answered, and then moved for a judgment on the pleadings, which was simply a demurrer, to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. This mo-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tion was sustained. Plaintiff has brought the case here for review on error.

Andrew Whitehead, pro se.

GABBERT, J. (after stating the facts as above). A motion for judgment on the pleadings cannot be converted into a general demurrer to the complaint. *Shuler v. Allam*, 45 Colo. 372, 101 Pac. 350; *Harris v. Harris*, 9 Colo. App. 211, 47 Pac. 841; *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241; *Hoover v. Horn*, 45 Colo. 288, 101 Pac. 55; *Rice v. Bush*, 16 Colo. 484, 27 Pac. 720.

The judgment of the district court is reversed, and the cause remanded.

Reversed and remanded.

MUSSER and HILL, JJ., concur.

### RENO v. RENO & JUCHEM DITCH CO.

(Supreme Court of Colorado. Dec. 4, 1911.)

#### 1. APPEAL AND ERROR (§ 1042\*)—HARMLESS ERROR—STRIKING OUT CROSS-COMPLAINT.

Any error in striking out the cross-complaint of defendant, in a suit to enjoin his interfering with a ditch, alleged by plaintiff to belong to it, which alleges ownership by defendant of an interest in the ditch and seeks to have it quieted in him, is harmless; he having been permitted to introduce testimony touching his ownership and rights in the ditch as fully as though the cross-complaint had not been struck out.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4110-4114; Dec. Dig. § 1042.\*]

#### 2. APPEAL AND ERROR (§ 197\*)—REVIEW—PLEADINGS—OBJECTIONS NOT MADE BELOW.

The sufficiency of the replication to the plea of nul tiel corporation not having been questioned below, but plaintiff having, without objection, been permitted to prove the acts and steps taken to bring it into existence as a corporation, its sufficiency to permit such proof will not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 197; Pleading, Cent. Dig. §§ 1428-1441.]

#### 3. CORPORATIONS (§ 32\*)—CORPORATE EXISTENCE—PRIMA FACIE PROOF.

Prima facie proof of plaintiff's corporate existence is made by introduction of its original articles of incorporation, and of the extension or renewal thereof.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 106-118, 2006, 2007; Dec. Dig. § 32.\*]

#### 4. WATERS AND WATER COURSES (§ 247\*)—IRRIGATION DITCHES—POSSESSION—EVIDENCE.

Evidence, in a suit to enjoin interference with an irrigation ditch, held to authorize a finding that plaintiff was in the actual and exclusive possession of the ditch, and entitled to such possession.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 314; Dec. Dig. § 247.\*]

Error to District Court, Jefferson County; A. H. De France, Judge.

Suit by the Reno & Juchem Ditch Company against Evan E. Reno. Judgment for

plaintiff and defendant brings error. Affirmed.

James P. Wilson, for plaintiff in error.  
J. W. Barnes, for defendant in error.

GABBERT, J. Defendant in error, as plaintiff below, brought suit against plaintiff in error, as defendant, the purpose of which was to enjoin the latter from breaking the Reno and Juchem ditch and diverting water therefrom. By the complaint, the material issues tendered were that the plaintiff was a corporation, and the owner and in possession and control of the ditch in question; that it was engaged in carrying and distributing water to its stockholders and others for the irrigation of their lands; that it has and has had in its employ at all times an efficient and capable superintendent, whose duty it was to measure the water diverted from the ditch to those entitled thereto according to his or her pro rata share, and to fix and adjust the various boxes through which such water is supplied; that the defendant had no interest in the ditch or the water flowing therein, yet, notwithstanding this fact, he had broken the banks of the ditch and diverted water therefrom without right, permission, or authority, and against the will of plaintiff and its superintendent, and, unless restrained, would continue to do so. The prayer of the complaint was to the effect that the court issue a temporary injunction, restraining the defendant from in any manner interfering with plaintiff's ditch; and that, upon final hearing, such injunction be made perpetual. On notice to defendant, a hearing upon an application for temporary injunction was had, and a temporary writ of injunction ordered to be issued, which was accordingly done.

Later the defendant filed an answer, consisting of three separate and distinct defenses. In the first he admitted that he broke the ditch and took the water therefrom, as charged in the complaint; but alleged that he did so because he was the owner of a one-fourth interest in the ditch and water rights to which it was entitled. By his second defense, he pleaded nul tiel corporation. For a third defense he set up, by way of cross-complaint, that he was one of the original builders of the ditch, and by reason thereof an owner of an interest therein; that he had never sold or transferred this interest, which he alleged to be a one-fourth; that for more than 20 years before the commencement of the action he had been in the open, notorious, and peaceable enjoyment of such interest and the water rights thereto belonging, without hindrance or objection from the plaintiff, or any one; that he was, at the time of the commencement of the action, in possession of such interest, using and enjoying the same for the purpose of irrigating his land; that plaintiff

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

had obstructed, was obstructing, and threatens to continue to obstruct, his enjoyment of the interest in the ditch and water rights, unless enjoined by the court. He prayed that his interest in the ditch be quieted in him.

On motion, the court struck out his cross-complaint. Plaintiff then filed its replication, denying every and all allegations of new matter contained in the answer, not expressly admitted. The cause was then tried to the court, and judgment rendered, perpetually enjoining the defendant from committing the acts complained of in the complaint. The defendant has brought the case here for review on error.

On his behalf, the following errors are assigned: (1) The court erred in striking his cross-complaint. (2) That the plea of plaintiff to the plea of nul tiel corporation was not sufficient. (3) The evidence does not establish that plaintiff was a corporation. (4) The evidence does not establish that plaintiff was the owner of the ditch. These several assignments will be considered in the order named.

[1] (1) Conceding that the court erred in striking the cross-complaint, the defendant was not prejudiced. The record discloses that he was permitted to introduce testimony touching his ownership and rights in the ditch as fully as though his cross-complaint had not been stricken out.

[2] (2) In support of the second assignment, it is urged that it was necessary for the plaintiff company to have replied to the plea of nul tiel corporation by setting out the acts by which it became a corporation; that the plaintiff failed to do this; and that a mere denial of the facts alleged in the plea of defendant, attacking the corporate existence of plaintiff, was insufficient. Be this as it may, the plaintiff, without objection, was permitted to prove the acts and steps taken to bring it into existence as a corporation. If the replication was not sufficient to permit such proof, the question should have been raised in the trial court. It was not and will not be considered here.

[3] (3) The testimony was ample to establish that plaintiff was a corporation. Certified copies of the original articles of incorporation and of its extension or renewal were introduced at the trial. This proved *prima facie* the corporate existence of plaintiff. No testimony was offered to rebut it.

[4] (4) The testimony on the part of plaintiff was to the effect that it had been in the open and exclusive possession and control of the ditch for many years. The defendant testified that he had been in possession and control of his interest for a long period of time; that he was one of the parties who constructed the ditch; that by virtue of such construction he became the owner of his interest; and that he had never parted

with or conveyed it. It was for the court to determine from these conflicting statements whether or not the plaintiff was in the actual and exclusive possession of the ditch, and was entitled to such possession. There is testimony which, to say the least, strongly corroborates its claim that it was. It appears from the certificate of incorporation, executed in 1872, that defendant was one of the incorporators of plaintiff company, and by such certificate named a trustee. The ditch described in the certificate is the identical one in controversy, which defendant concedes; and it appears from the articles of incorporation or association that the purpose of the parties in associating by incorporating the company was to cover their rights in the ditch in controversy. It appears that later defendant acted as secretary of the corporation; and, finally, the priority awarded to the ditch by the statutory adjudication was to the Reno and Juchem ditch, the claimant of which, the decree recites, is the "Reno & Juchem Ditch Company," a corporation. There was also testimony on behalf of plaintiff to the effect that from and after its incorporation it had been in the absolute control of the ditch down to the time the plaintiff had committed the acts complained of, which was in June, 1905.

It is clear from the record brought to our attention that the judgment of the district court was right, and should be affirmed, and it is so ordered. In reaching this conclusion, we must not be understood as holding that defendant had any right whatever to have the issues tendered by his answer determined. On behalf of plaintiff, it is contended that he did not, on the authority of *White v. Farmers' High Line Canal & Reservoir Company*, 22 Colo. 191, 43 Pac. 1028, 31 L. R. A. 828. We have not regarded it necessary to determine whether that case is applicable to the one at bar. Counsel for defendant has contended that the judgment was wrong because of the errors assigned, which we have determined are without merit. Having concluded that the judgment should not be disturbed, for the reasons urged upon our attention by counsel for defendant, it is unnecessary to consider any other questions.

Judgment affirmed.

MUSSER and HILL, JJ. concur.

#### JAMISON v. PEOPLE.

(Supreme Court of Colorado. Dec. 4, 1911.)

#### 1. HOMICIDE (§ 203\*)—EVIDENCE—DYING DECLARATIONS.

Statements made in the full realization that death was impending were admissible as dying declarations.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**2. HOMICIDE (§ 338\*)—APPEAL—HARMLESS ERROR.**

Where accused admitted that he shot deceased, the admission of statements by deceased that accused shot him was harmless, if erroneous.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.\*]

**3. HOMICIDE (§ 215\*)—EVIDENCE—DYING DECLARATIONS.**

Where deceased after being shot, stated that accused had murdered him, such statement, though made with a realization of impending death, was inadmissible as a dying declaration, because stating a conclusion, and was not competent as a foundation for other dying declarations.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 451-456; Dec. Dig. § 215.\*]

**4. HOMICIDE (§ 338\*)—APPEAL—HARMLESS ERROR.**

The admission of a remark by deceased that he had been murdered, which was incompetent as a dying declaration, because a conclusion, was prejudicial.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 709-713; Dec. Dig. § 338.\*]

Error to District Court, Pueblo County; J. E. Rizer, Judge.

Henry Jamison was convicted of murder in the second degree, and brings error. Reversed and remanded.

D. M. Campbell and W. J. Kerr, for plaintiff in error. Benjamin Griffith, Atty. Gen., and George D. Talbot, Special Counsel, for the People.

MUSSER, J. Henry Jamison, the plaintiff in error, was convicted of murder in the second degree, and has brought the matter here for review. The shooting, which resulted in the death of Henry Smith, took place in a hall of a rooming house operated by Jamison and his wife. Smith and two others were in a room in this house, when Jamison came into the room and inquired for his wife. Upon observing Smith, Jamison said to him that he (Jamison) wanted Smith to get out of the house. Smith and Jamison went out into the hall, and shortly thereafter the shooting occurred. The circumstances under which the shooting took place in the hall were not shown, except by the evidence of Jamison. He testified that in the hall he ordered Smith to leave the house and let Mrs. Jamison alone; that an altercation then took place in which Smith, as aggressor, struck Jamison, first with a beer bottle, and then with his fist; that Jamison fired two shots at Smith in order to protect himself from Smith's assault. In part, this evidence was corroborated by Mrs. Jamison, who happened to come out into the hall for an instant while the two men were there. Bradley, a witness for the people, testified that, prior to the firing of the shots, he was near the rooming house and heard the shots, and he walked around and saw Smith coming down the back stairway, and met him there. Over objection, the follow-

ing testimony was then admitted: "Q. Did he say anything as to whether or not he was shot? A. Yes, sir." The court then instructed the witness that he might state anything that Smith said about his own condition at that time. He was then asked the question: "Q. He said he was shot, did he? A. He said he was murdered." He was then asked: "Q. You say he said he was murdered? A. Yes, sir. Q. What else did he say about his condition?" And the witness did not testify further what was said.

[1, 2] From the stairway, Smith proceeded to the sidewalk, and there fell. The evidence is ample and undisputed that while Smith was lying upon the walk he felt and knew that he would die, and that in the full realization that death was imminent he stated that Jamison had shot him. Under these circumstances, there can be no doubt that the statement was admissible as a dying declaration. Even if this were not so, the admission of the statement was without prejudice to the defendant, for the defendant himself testified that he had shot Smith. That fact was not disputed.

[3, 4] It is the statement, made by Smith to Bradley, that he (Smith) was murdered which gives us the most concern, and of which the plaintiff in error complains as being a conclusion or the expression of an opinion, which, when admitted, tended to fix the degree of the homicide. The only justification that seems to be urged by the people for the admission of this statement is that it was a dying declaration. The evidence does not show that the deceased made that statement to Bradley with a sense of impending death. It was afterwards—on the walk—that Smith's statement showed that he had that sense of impending death necessary for the admission of dying declarations. Even if it be contended that it was admissible as a dying declaration, because in itself it indicated that Smith thought he was going to die, or that because a few minutes later Smith fully realized that he was going to die, it would be clearly inadmissible, because it was an expression of an opinion or a conclusion. A dying declaration must relate to facts, and not to mere matters of opinion or conclusions of the declarant, and so much thereof as does not come within this rule is incompetent. *State v. Perigo*, 80 Iowa, 37, 45 N. W. 399; *State v. Baldwin*, 79 Iowa, 720, 45 N. W. 297.

The court seems to have admitted this statement for the purpose of showing Smith's condition at the time of its utterance. It cannot be said that the statement was made to describe the condition of the declarant, and not to express his opinion of the circumstances under which he was shot. What need was there for the people to show Smith's condition at that time? It was certainly not necessary in order to lay a found-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dation for a dying declaration, for subsequently ample statements were made by Smith, not of the character of this one, to show what he thought his condition was, relative to the imminence of death, and to lay the foundation for a dying declaration; and his statement then was that Jamison had shot him, and not that Jamison had murdered him. It was not necessary to admit Smith's statement that he had been murdered in order to show who perpetrated the homicide. From a view of all the evidence in the case, the only use that the people had for this statement was to show the degree of the homicide, and it cannot be said that it did not have that effect. It was not competent for that purpose, for it was but a conclusion or an opinion. The degree of the homicide must be established by competent testimony, as well as any other fact. It may be that the jury seized upon this statement of Smith that he had been murdered to fix the degree, when, without it, they might have rendered a verdict more favorable to the defendant.

The judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed and remanded.

GABBERT and GARRIGUES, JJ., concur.

STATE ex rel. MACKEL v. DISTRICT  
COURT OF SILVER BOW  
COUNTY et al.

(Supreme Court of Montana. Nov. 20, 1911.)

PROHIBITION (§ 3\*)—RIGHT TO WRIT—RELIEF  
BY APPEAL.

A judgment having been rendered against relator directing him to pay to his wife \$80 a month for support and maintenance, the court thereafter issued an order directing him to show cause why he should not be punished for contempt for default. *Held*, that relator was not entitled to a writ prohibiting the court from hearing such order on the ground that it had no jurisdiction to enter the judgment because there was no sufficient allegation of residence in the wife's original complaint, since such defense was available in answer to the order to show cause, and, if not sustained, was reviewable on appeal.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.\*]

Application for writ of prohibition of State of Montana out of relation of Alexander Mackel against the District Court of the Second Judicial District in and for the County of Silver Bow, and Hon. George B. Winston, Presiding Judge. Dismissed.

Alexander Mackel, pro se. Jesse B. Roote, for respondents.

SMITH, J. Application for a writ of prohibition. Relator's affidavit sets forth that, in an action for separate maintenance heretofore instituted against him by his wife in

Silver Bow county, the court by its judgment ordered him to pay her the sum of \$80 per month during each and every calendar month, commencing with the month of August, 1911. Thereafter the court issued an order to show cause, returnable on October 28, 1911, why he should not be punished for contempt of court for not paying the monthly alimony aforesaid. It is alleged in the affidavit that the respondent court and judge are without jurisdiction to proceed and never acquired jurisdiction, for "that there never was contained in any of the pleadings in said action an allegation to the effect that plaintiff had been a resident of the state for one year next preceding the commencement of the action." The application of the relator will be denied for reasons analogous to those given by this court in the case of *State ex rel. Browne v. Booher*, Police Judge, etc., 118 Pac. 271, decided on October 21, 1911. He should first present his contention that the judgment is void to the district court. That court has given him an opportunity to show cause, and he must avail himself of it. The presumption is that the court will correctly decide the point, that is to say, if the judgment is void, the court will so determine; in which event the relator will not be aggrieved. That court undoubtedly has jurisdiction to determine the very question which the relator seeks to present to this court. For aught we know, also, he may be able to show a valid excuse for his failure to comply with the judgment, if in fact he has not complied therewith, or he may show a full compliance. If the court decides in his favor, he will assuredly not complain. On the other hand, if the order below is adverse to him (a result we shall not anticipate), he may invoke the power of this court to afford relief therefrom.

The authorities cited by relator seem to indicate that some courts have exercised their discretion to prohibit proceedings in contempt in cases similar to the one at bar. His contention is that, if the district court was without jurisdiction to enter the judgment, it was equally without power to inquire into the question whether its mandate had been violated. We are satisfied, however, that that court has power to afford him the relief which he seeks, if, as he contends, its judgment is void. The application is made to the discretion of this court. Each case should be decided on its own facts. No rigid rule of general application can be laid down.

Our opinion is that all applications like the one at bar should first be made to the court by which the judgment is rendered. Such a course of procedure will in many cases, we believe, relieve the Supreme Court of the necessity of hearing the matter at all and save the costs, expenses, and delays

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



necessarily incident to an appeal to the discretion of this court.

The proceedings are dismissed.  
Dismissed.

BRANTLY, C. J., and HOLLOWAY, J.,  
concur.

### TIGGERMAN v. CITY OF BUTTE.

Supreme Court of Montana. Nov. 20, 1911.)

MUNICIPAL CORPORATIONS (§ 812\*)—TORTS  
—NOTICE OF INJURY—FILING.

Under Rev. Codes, § 3289, providing that the party alleged to be injured by the city's negligence shall "give to the city or town council or trustee, or other governing body of such city or town, within 60 days after the injury, notice thereof, stating the time and place of the injury," notice of injury on a defective sidewalk filed with the city clerk is sufficient.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1696-1707; Dec. Dig. § 812.\*]

DAMAGES (§ 62\*)—MITIGATION—DUTY TO MAKE.

One injured by another's negligence must use ordinary diligence to prevent unnecessary injury and bring about a cure, and cannot recover for damages which might have been avoided by the exercise of ordinary care.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-132; Dec. Dig. § 62.\*]

TRIAL (§ 242\*)—INSTRUCTIONS—REQUESTS—SUFFICIENCY OF REQUEST.

A requested instruction which correctly states a rule of law applicable cannot be refused because the language used is not the most precise and elegant English, if it is not misleading to an intelligent jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.\*]

TRIAL (§ 242\*)—INSTRUCTIONS—REQUESTS—“WANT”—“FAILURE.”

An instruction in an action for personal injuries that, if plaintiff was injured on a certain day, "it then became her duty to use all reasonable care and precaution to minimize the damages that might result, and, if \* \* \* she failed to do this, then you cannot return a verdict for such damages that resulted by her want to exercise such care and precaution," was not so inaptly phrased as to be unintelligible to the jury notwithstanding that the word "want" was ill chosen, it being synonymous with "failure," so that it was error to refuse the charge, if otherwise correct and applicable, on the ground that it was meaningless and misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 569-576; Dec. Dig. § 242.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2646-2647; vol. 8, pp. 7382-7383, 7382.]

DAMAGES (§ 214\*)—INSTRUCTIONS—MITIGATION.

A requested charge in a personal injury action that, if plaintiff was injured on a certain day, it then became her duty "to use all reasonable care and precaution to minimize the damages that might result," and, if she failed to do so, the jury could not allow such damages "that resulted by her want to exercise such care and precaution," was substantially correct; the use of the word "all" before the word "reasonable" not imposing a greater burden upon plaintiff than required by law, since it added

nothing to the instruction, and might have been omitted.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 542; Dec. Dig. § 214.\*]

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

Action by Ella S. Tiggerman against the City of Butte. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed and remanded.

H. Lowndes Maury, John A. Smith, and N. A. Rotering, for appellant. Breen & Jones, for respondent.

HOLLOWAY, J. This is an action for damages for personal injuries. The plaintiff prevailed in the trial court, and the city appealed from the judgment and from an order denying it a new trial. Only two of the questions presented demand special consideration.

[1] 1. It appears that within 60 days after the injury was received the plaintiff filed with the city clerk a notice directed to the city council, stating the time when and the place where the injury occurred. Section 3289, Revised Codes, provides that the party "alleged to be injured, or some one in his behalf, shall give to the city or town council, or trustee, or other governing body of such city or town, within sixty days after the alleged injury, notice thereof; said notice to contain the time when and the place where said injury is alleged to have occurred." Did the plaintiff comply with this statute by filing her notice with the city clerk? Authorities are to be found which answer this inquiry in the negative, but we think the weight of authority and the better reasoning prompt an affirmative reply. If the notice must be presented to the city council while in session, then the mere failure of the council to meet for 60 days after an injury occurs would defeat the injured party's right to sue. Certainly the Legislature did not contemplate any such ridiculous result. The statute was not intended to prohibit actions being prosecuted altogether, or to make the right to sue depend upon the meeting of the city council, but to require prompt notice of the injury as a condition precedent to the right to sue, and in this instance the statute has fixed 60 days as a reasonable period within which such notice shall be given. This view finds support in the following decided cases, and others cited therein: Bacon v. Autigo, 103 Wis. 10, 79 N. W. 31; Doyle v. Duluth, 74 Minn. 157, 76 N. W. 1029; Pyke v. St. James, 15 N. D. 157, 107 N. W. 359. The decision in Hensley v. City of Butte, 36 Mont. 32, 92 Pac. 34, is not applicable here, for the statute considered in the Hensley Case (Laws 1897, p. 219) provides that

the city council shall meet especially to hear objections to the creation of the improvement district. The statute further provides: "Any person or persons who are owners or agents of any lot or parcel of land within such improvement district shall have the right to appear at said meeting either in person or by counsel and show cause, if any there be, why the improvements mentioned therein shall not be made." Section 31. Under that statute we held that a protest in writing left at the city clerk's office was not a presentation of the protest to the meeting of the city council.

2. It appears from the record that the plaintiff was injured on a defective sidewalk on October 6, 1909; that her injuries consisted of a sprained ankle, and a bruised and lacerated leg; that she did not call a physician until October 15th following, when she was taken to the hospital; that in the meantime sepsis had developed, and the pain from her injuries had increased in severity, so much so that she testified: "The folks who ran the place where I roomed took care of me during the interval until I had the doctor. I remained in the room there all of that time until I was taken to the hospital. I did not leave the room that week. I did not go downtown, as I could not walk if I wanted to, and, if I wanted a drink of water, I had to call for it." A physician, called as a witness for the plaintiff, on cross-examination testified that, if plaintiff's injuries had received proper medical attention before the 15th of October, they would have been lessened.

[2] It is a general rule of law that "one who has been injured by the negligence of another must use ordinary diligence to effect a cure, and there can be no recovery for damages that might have been avoided by the exercise of such care." 13 Cyc. 78. The rule was distinctly recognized by this court in *Sweeney v. Montana Central Ry. Co.*, 19 Mont. 163, 47 Pac. 791. With the purpose of invoking the rule just announced, the defendant requested the trial court to give an instruction as follows: "You are instructed that if you find that the plaintiff was injured on the 6th day of October, 1909, it then became her duty to use all reasonable care and precaution to minimize the damages that might result, and, if you find that she failed to do this, then you cannot return a verdict for such damages that resulted by her want to exercise such care and precaution." The request was refused, exception taken, and error is now predicated upon the ruling. Counsel for respondent recognize the rule stated above, but insist that the proposed instruction is defective that, by the use of the word "all" before the word "reasonable," the instruction imposes upon the plaintiff a greater burden than that fixed by law, and that the concluding phrase "by her want to exercise

such care and precaution" renders the instruction meaningless, or, at least, that this phrase itself is meaningless. They invoke the principle announced by this court in *Anderson v. Northern Pacific Ry. Co.*, 34 Mont. 181, 85 Pac. 884, and later cases, that error cannot be predicated upon the refusal of the trial court to correct an erroneous instruction tendered and give it in correct form. But the principle announced in those cases applies only to an offered instruction which does not correctly state the rule of law intended, or to one which combines a correct rule with one which is erroneous.

[3] It does not warrant a court in refusing an instruction which correctly states a rule applicable, on the ground that the language employed to express the rule is not the most precise and refined English. It was never intended to limit a party to those proper instructions only which are clothed in the tersest or most elegant language. The inquiry before the court should be: Is the language employed such as is likely to mislead an intelligent jury as to the meaning of the rule sought to be announced?

[4] Judged by its diction, the instruction is not a model. If it is to be tested by the rules of syntax, it is defective; but that its meaning could be misunderstood by any reasonably intelligent person is beyond belief. The word "want" in the concluding phrase was ill chosen. A more euphonious term might have been used. Had the word "failure" been substituted, objection would not be urged upon us, and yet the words "want" and "failure" are synonymous (*Webster's International Dictionary*), and, when used in the sense of failure, as it obviously was, the word "want" is technically correct.

[5] But it is insisted that the instruction as proposed is defective in substance, in that by the use of "all" before the word "reasonable" a greater burden is imposed upon the plaintiff than is warranted by law. As this court has said frequently with reference to kindred subjects, the standard in all such cases is that of the reasonable person. In other words, in this instance the law enjoined upon the plaintiff the duty to perform all those acts which a reasonably prudent person under like circumstances would have performed to minimize her hurts or limit the injurious consequences, and, if she failed in this respect, she cannot recover those damages which might have been avoided by the exercise of such ordinary care. The word "all," before the word "reasonable," might have been omitted, but its presence does not add anything to the instruction or change the rule of law. Indeed, in stating the rule, so careful and painstaking an author as *Watson* in his work on *Damages for Personal Injuries*, § 180, says: "It is held to be the duty of a person who has sustained injury at the hands of another

er to make all reasonable efforts to limit the injurious consequences of the latter's act."

In view of the facts disclosed by this record, it was the duty of the jury to determine whether plaintiff did in fact exercise ordinary care, and, if she did not, then to limit her recovery to those damages which were shown to be caused proximately by the defendant's negligence. The refusal of the court to correctly instruct the jury, left them free to award to plaintiff damages upon the basis of her condition at the time the physicians were called, irrespective of the question whether ordinary prudence would have prompted her to call for relief at an earlier date, and thereby lessen the consequences of her original injuries. The omission of this instruction left the case to go to the jury upon an erroneous theory, and because of the error the judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and SMITH, J., concur.

#### ROPES v. NILAN et al.

(Supreme Court of Montana. Nov. 22, 1911.)  
CORPORATIONS (§ 443\*)—KNOWLEDGE OF INCORPORATORS—SALE OF PROPERTY.

Holders of an option to purchase an undivided half interest in a mine agreed with plaintiff that if he would perform certain services in taking and assaying samples, and the report was favorable, they would take up the option and convey to him one-third thereof, or a one-sixth undivided interest in the claim. Plaintiff performed the services, and the option was duly taken up, but the option purchasers refused to convey any interest to plaintiff, and thereafter, with the owner of the other undivided interest, organized a corporation, and conveyed the whole claim to it. *Held*, that the knowledge of such option purchasers of plaintiff's equitable interest in the property was not imputable to the corporation; and that it was a bona fide purchaser, freed from any claim of plaintiff, under the rule that, where an officer of a private corporation conveys property to it, his knowledge of an outstanding equity is not notice to the corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 443.\*]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Suit by L. S. Ropes against John M. Nilan and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Harry R. Thompson, for appellant. Heywood & Phelan, for respondents.

SMITH, J. This is an action, brought by the appellant, to obtain a judgment decreeing him to be the owner of an undivided one-sixth interest in the Dandy quartz lode mining claim, unpatented, for an accounting of rents and profits from the respond-

ents Nilan and Weisner, and for general equitable relief. At the close of plaintiff's case, the defendants moved for a nonsuit, which motion was granted, and judgment entered for them. Plaintiff appeals.

The district court evidently treated the motion for a nonsuit as a demurrer to the evidence, or a motion for judgment on plaintiff's evidence, and we shall do the same. This court will also treat the evidence as sufficient to prove all of those allegations which it reasonably tends to prove. Read in connection with the pleadings, it establishes the following facts: In April, 1906, Coffee and Brennan owned the Dandy claim. Defendants Nilan and Weisner had an option to purchase Brennan's half interest. They agreed with plaintiff that, if he would perform certain services in examining and taking samples from the claim, assaying the same, and furnishing a report thereon, they would take up the option, if the report was favorable, purchase the half interest, and give him one-third thereof, or a one-sixth undivided interest in the whole claim. Plaintiff accepted the offer and fully performed the services agreed upon, whereupon Nilan and Weisner acquired Brennan's interest. Afterwards Krug brothers (two persons) bought the Coffee interest. Some time in the fall of 1906 or the spring of 1907, Nilan and Weisner in effect refused to convey any interest in the claim to plaintiff. The latter talked with one of the Krug brothers and with Weisner about organizing a corporation, but Weisner said they were not in any hurry about it, so plaintiff, according to his own testimony, "just dropped the matter." However, it appears that the Rock Rose Mining & Milling Company, a corporation, was organized on October 8, 1906, and on April 15, 1907, Nilan, Weisner, and the two Krugs conveyed to it the Dandy claim. It appears that the corporation has stockholders, other than Nilan, Weisner, and the Krug brothers. The purchase was made through its board of directors, consisting of Nilan, Weisner, the two Krugs, and A. P. Heywood. At the time of purchase, "nothing was said by any one about a claim of Ropes." Heywood had no knowledge "that such an individual as Ropes existed." The reply to the answer of the Rock Rose Mining & Milling Company admits that the corporation purchased the claim for a valuable consideration, but alleges "that said purchase was made with the knowledge on the part of said corporation of plaintiff's claim of interest." The complaint contains no allegation that the respondents Nilan and Weisner have ever received any rents or profits from the claim; their answers allege that they have not done so, and no evidence was offered on the subject, save that it was shown that one car of ore was shipped. Not any

allegations of fraud, deceit, or concealment are found in any of the plaintiff's pleadings. It is quite evident, however, that his theory of the case is that Nilan and Welsner acted fraudulently in conveying away his equitable interest in the claim.

Appellant contends that the testimony is sufficient to show, *prima facie*, that he, Nilan, and Welsner were mining partners, and that the two latter held a one-sixth interest in the Dandy claim as trustees for him; also that their contract was not, as a matter of law, within the statute of frauds. We shall assume, without deciding, that these contentions are correct.

While the evidence discloses that the Krug brothers must have known that the plaintiff was interested in some way in the project on foot, relative to acquiring the Dandy claim, it falls far short of showing that they had any knowledge, either expressly or by implication, that he owned or claimed to own an equitable interest in the claim itself. The knowledge of Nilan and Welsner cannot be imputed to the corporation, for the reason that in transferring to the latter the interest of appellant they were acting adversely to him and to it; and the presumption is that they would not disclose their knowledge of his equities. "The general rule which imputes the knowledge of the agent to his principal, and charges the latter with it, is based upon the principle that it is the duty of the agent to act for his principal upon such notice, or communicate the information obtained by him to his principal, so as to enable the latter to act on it. It has no application, however, to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interest take him out of the operation of the general rule. \* \* \* It would be both unjust and unreasonable to impute notice by mere construction under such circumstances; and such is the established rule of law on this subject. \* \* \* Therefore it may be said that when notice is given to, or when knowledge is acquired by, a director, \* \* \* when acting for himself in his private capacity, it will not be imputed to the corporation. The reason is that his interest is presumed to conflict with that of the corporation, and that there is consequently no presumption that he will divulge to the other officers of the corporation, with whom he is treating, any facts prejudicial to himself in the transaction." 2 Thompson on Corporations (2d Ed.) § 1655.

In the case of *State Bank of Moore v. Forsyth*, 41 Mont. 249, 108 Pac. 914, 28 L.

R. A. (N. S.) 501, this court held that, while the knowledge of an agent is generally imputed to his principal, the rule does not apply where the conduct of the former is such as raises a clear presumption that he would not communicate the fact in dispute, as where, by imparting knowledge to the principal, the consummation of a fraud in which the agent was engaged would be prevented. See, also, *Stanford v. Coram*, 26 Mont. 285, 67 Pac. 1005.

The Supreme Court of Alabama, in *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758, 60 Am. Rep. 736, held that, where an officer of a private corporation conveys land to it, his knowledge of an outstanding equity does not charge the company with notice.

The Court of Appeals of Maryland, in *Winchester v. B. & S. R. R. Co.*, 4 Md. 231, held that, where the president of a corporation executed to certain of its directors a mortgage of land on which his wife held an unrecorded equitable claim, having acted in the transaction, not for the corporation, but solely for himself, his knowledge of his wife's equities was not the knowledge of the company, and could not affect its rights, unless shown to have been communicated to it. See, also, *Santiago Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 1 N. E. 282, 52 Am. Rep. 710; *La Frage Fire Ins. Co. v. Bell*, 22 Barb. (N. Y.) 54; *Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784.

There is nothing in the record to show actual knowledge on the part of the Rock Rose Mining & Milling Company that appellant had or claimed any interest in the Dandy lode claim. Neither are there any facts from which knowledge could be imputed to it. It is therefore in the situation of a grantee for a valuable consideration, without notice, either express or implied, of any outstanding equities against the title conveyed, and plaintiff cannot, under these circumstances, be adjudged to have any interest in the property conveyed as against it. Its title is good.

In disposing of the case, we have considered the rights of the appellant as contended for in his brief. The claim is there made that he is entitled to be adjudged the owner of a one-sixth interest in the Dandy lode claim. In deciding the point against him, we are not to be understood as expressing any opinion whether he has other equitable claims to relief.

The judgment is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

## McCOY et al. v. HUNTLEY.

(Supreme Court of Oregon. Dec. 26, 1911.)

## 1. WATERS AND WATER COURSES (§ 138\*)—IRRIGATION—ADVERSE USE.

Where defendant never did any act which notified plaintiffs or their grantees that he intended to claim a right to constantly divert the waters of the stream or deny their right to use the same share that they had previously employed while defendant's grantor occupied the land, limitations would not attach in favor of defendant's claim to the use of all the water from the fact that at times defendant used all the water, such being his privilege, unless plaintiffs' grantors were in need of an amount equal to their diversion.

[Ed. Note.—For other cases, see Waters and Water Courses, Dec. Dig. § 138.\*]

## 2. WATERS AND WATER COURSES (§ 144\*)—IRRIGATION—USE OF WATER—ROTATION.

Since an appropriator of water for irrigation is only entitled to use so much as his needs require, and at the time of such requirement, if these are satisfied by use of the whole flow every other day or every other week, the court, in cases involving prior and subsequent water appropriations, may require the appropriators to alternate in the use of the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 152; Dec. Dig. § 144.\*]

Appeal from Circuit Court, Wheeler County; H. J. Bean, Judge.

Suit by G. J. McCoy and another against Charles Huntley. Decree for complainants, and defendant appeals. Affirmed.

This is a suit to restrain defendant from diverting and using more than one-half of the waters of Pine creek in Wheeler county. Plaintiffs, whose land adjoins that of defendant lower down the creek, claim in substance by their complaint that in 1883 William Clarno, their predecessor in interest, appropriated 30 inches, miner's measurement, of the waters of Pine creek for the purpose of irrigating his land; that such appropriation was prior to any appropriation by defendant; that defendant, in the years 1903, 1904, 1905, and 1906, during the season of low water diverted all the water of the creek upon his own land, without plaintiffs' consent, and refused to turn back into the stream any portion of the water so diverted, but used it unnecessarily and wastefully, and suffered it to sink upon his own land, leaving plaintiffs without water for irrigation or for domestic purposes. It is alleged that one-half of the water of the creek used all the time, or all of the water used alternately week about, upon the land of plaintiffs and defendant, is sufficient for the needs of each. A preliminary injunction was issued, requiring defendant to alternate with plaintiffs in the use of the water week about until the final hearing. The defendant answered, claiming a prior appropriation by himself and continued use by him of all the water of Pine creek in the dry season when necessary, and denied a wrongful diversion or waste-

ful use. Upon the hearing, the court, after viewing the premises, found for plaintiffs and decreed to them the right to alternate week about with defendant in the use of the water, and from this decree defendant appeals. Other facts appear in the opinion.

Jay Bowerman, for appellant. W. H. Wilson (H. H. Hendricks, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). It appears from the testimony that the land occupied by plaintiffs was originally settled upon about the year 1871 by Harrison Huntley, a brother of defendant, and that about the same time defendant settled upon the lands now occupied by him. While the testimony is not clear, we conclude that the first appropriation was made for the purpose of irrigating the Harrison Huntley tract, that is to say, a small portion of it, and later the land of defendant. Pine creek, at that time, was a stream running near the level of the adjoining land, and it is probable that a portion of the land to some extent was subirrigated by the natural percolation of the waters of the stream. Later a cloud-burst or a succession of such deepened the channel, so that the water in the stream is from 10 to 20 feet below the level of the adjoining land, and subirrigation is not possible, and irrigation by means of dams is much more difficult than when the place was first settled. For a time the two Huntleys used the same ditch, and there does not seem to have been any scarcity of water on either place for several years. In 1879 it transpired upon survey that the land occupied by Harrison Huntley was a school section, and he conveyed his possessory right to Charles Huntley, who, on January 14, 1879, received a deed from the state to the lands now occupied by plaintiffs. In 1880 Charles Huntley conveyed a portion of this tract by warranty deed to W. Lair Hill, N. H. Gates, and Frank Clarno, and in 1882 conveyed the remainder of the tract to Hill and Gates by warranty deed. Plaintiffs deraign title from Hill, Gates, and Clarno. We do not think that the evidence indicates a prior appropriation by defendant. And as water, in the arid parts of the state, is the life of the land, we believe that Hill, Gates, and Clarno took the land in view of the visible improvements upon it, including the ditches and water facilities placed there by Harrison and Charles Huntley, and that the right to use the water, as Harrison and Charles had theretofore used it, became and was appurtenant to the land.

[1] It not appearing that Charles Huntley ever did any act which notified plaintiffs or their grantees that he intended to claim the right to constantly divert and use all the waters of the stream, or to deny their

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 119 P.—31

right to use the same share that had been employed beneficially while he and Harrison Huntley occupied the land, the statute of limitations would not attach from the mere fact that at times defendant used all the water of the creek, since such was his privilege unless the grantors of plaintiffs were in need of it. Nor is adverse user as such specifically pleaded; the defendant making his case upon prior appropriation, which he has failed to prove.

[2] We see no reason why, even in cases involving prior and subsequent appropriations of water, the courts cannot require the appropriators to alternate in the use of the water. The time when water may be used recklessly or carelessly has passed in this state. With increasing settlement water has become too scarce and too precious to justify any but an economical use of it. An appropriator has only the right to use so much as his needs require and at the time his needs require. And if these are satisfied by a use of the whole flow every other day, or every alternate week, he ought not to be heard to complain. It is evident that from some cause or from a variety of causes the waters of Pine creek are diminishing in volume at the point where the parties to this controversy are residing. It is now probable that to divide the water, without alternating, would injure both parties. A test, since the preliminary order was made in this case in 1906, indicates that by the method adopted both parties can raise good crops and both prosper.

It must be conceded that there is a paucity of authority on the subject of requiring rotation in the use of water between appropriators. The remedy has frequently been applied in cases of dispute between riparian proprietors, and it is difficult to discern any difference in principle between the rights of a riparian proprietor and those of an appropriator in the beneficial use of water. The trend of the later decisions is to apply this method where practicable.

In *Helphery v. Perrault*, 12 Idaho, 451, 86 Pac. 417, the court observes: "Rotation in irrigation undoubtedly tends to conserve the waters of the state and to increase and enlarge their duty and service, and is, consequently, a practice that deserves encouragement in so far as it may be done within legal bounds." In *Wiggins v. Muscuplake Land & Water Co.*, 113 Cal. 182, 45 Pac. 160, 32 L. R. A. 667, 54 Am. St. Rep. 337, which is cited with approval in *Hough v. Porter*, 51 Or. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728, the court required riparian proprietors to rotate in the use of water, and in *Becker v. Marble Creek Irr. Co.*, 15 Utah, 225, 49 Pac. 892, 1119, which was a suit between appropriators, the court applied the doctrine of rotation.

The weight of evidence indicates that there

is no material difference in character between the lands of plaintiffs and defendant, and, if defendant is unable to produce as good crops on his land as plaintiffs are producing with the same quantity of water upon double the acreage, it must be attributed to his methods of farming and irrigation, rather than to the lack of water.

The decree is affirmed.

BEAN, J., took no part in this decision.

#### HENDERSON v. LEMKE et al.

(Supreme Court of Oregon. Dec. 19, 1911.)

##### 1. FRAUDS, STATUTE OF (§ 108\*)—CONTRACT OF EMPLOYMENT OF BROKER—CONSIDERATION FOR CONTRACT.

A contract in writing, reciting an agreement to pay a real estate broker a specified commission, provided any customer shown the owner's property shall purchase the same, indicates what the broker shall do to earn his commission, and is not void, under the statute of frauds (L. O. L., § 808), because not stating the consideration in exact terms.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 214-221; Dec. Dig. § 108.\*]

##### 2. FRAUDS, STATUTE OF (§ 112\*)—CONTRACT EMPLOYING BROKER—REQUISITES OF MEMORANDUM.

The contract is not void under the statute, because it does not state the sum which was to be paid for the property.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 238; Dec. Dig. § 112.\*]

##### 3. FRAUDS, STATUTE OF (§ 110\*)—CONTRACT EMPLOYING BROKER—REQUISITES OF MEMORANDUM.

The contract is not void, under the statute, because it does not describe the property; the contract not being for the sale of the property, but for the services of one to find a purchaser.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 110.\*]

##### 4. BROKERS (§ 82\*)—COMMISSIONS—COMPLAINT—REQUISITES.

A complaint, in an action by a broker for commissions for procuring a purchaser of real estate, which describes the property, so that it can be identified, is sufficient, in the absence of a motion to make the description more definite.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. §§ 101-103; Dec. Dig. § 82.\*]

##### 5. DISMISSAL AND NONSUIT (§ 58\*)—COMPLAINT—REQUISITES.

The court, on motion to dismiss, on the ground that the complaint did not state a cause of action, must take as true every allegation of the complaint.

[Ed. Note.—For other cases, see *Dismissal and Nonsuit*, Cent. Dig. §§ 134-139; Dec. Dig. § 58.\*]

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Action by P. W. Henderson against Henry Lemke and another. From a judgment for defendants, plaintiff appeals. Reversed, and new trial ordered.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

This is an action to recover commissions upon a real estate sale. The complaint alleges, in substance, that plaintiff is a real estate dealer in Portland, Or.; that at the date of the alleged contract defendants were the owners of certain real estate, which is described in the complaint; that on August 20, 1909, defendant Henry Lemke, acting for himself and as the duly authorized agent of Agnes Lemke, gave to plaintiff the exclusive right to secure a purchaser for the property described for the period of five days, the purchase price of the property to be \$10,000, and defendants agreed to pay plaintiff, as commissions for his service in securing a purchaser, the sum of 5 per cent. on the first \$2,000 and 2½ per cent. on the balance of the purchase price, which agreement is in the following words and figures: "I hereby agree to pay to P. W. Henderson a legal commission of 5 per cent. on the first \$2,000 and 2½ per cent. on the balance, provided any customer shall purchase my property who has been shown the property by P. W. Henderson at any time. [Signed] H. Lemke." That plaintiff produced a purchaser, within the period, who was able, ready, and willing to purchase the property on the terms of the seller; that thereby the commissions were earned, and became due and payable.

There was a denial of all the material facts stated, and the case was called for trial. On the trial defendants objected to the introduction of any testimony, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and after consideration the objection was sustained. The specific point to defendants' objection was that the alleged contract was within the statute of frauds, and therefore void. That portion of the statute pertaining to the matter in issue is section 808, L. O. L., and reads as follows: "In the following cases the agreement is void unless the same or some note or memorandum thereof, expressing the consideration, be in writing and subscribed by the party to be charged, or by his lawfully authorized agent; evidence, therefore, of the agreement shall not be received other than the writing, or secondary evidence of its contents in the cases prescribed by law. \* \* \* 8. An agreement entered into subsequent to the taking effect of this act, authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission." Plaintiff appeals.

E. S. J. McAllister (McAllister & Upton, on the brief), for appellant. James Cole (Cole & Cole and J. G. Wilson, on the brief), for respondents.

McBRIDE, J. (after stating the facts as above). [1] We are of the opinion that the contract is valid, and not in contravention to the statute of frauds. It amounted to an employment of the plaintiff to show the

property which defendants owned, and practically stipulated that if he did so, and a sale on defendants' terms followed that labor, then defendants were to pay a commission. Here the thing to be done by plaintiff is to show the property. If he does that, he has paid his price for the commissions. It is the consideration for the contract. It is not necessary that the consideration be stated in exact terms, if it can be made out clearly from the whole writing. *Straight v. Wight*, 60 Minn. 515, 63 N. W. 105; *Union Bank v. Coster*, 8 N. Y. 203, 53 Am. Dec. 280; *Barney v. Forbes*, 118 N. Y. 580, 23 N. E. 890; *Laing v. Lee*, 20 N. J. Law, 337; *Marquand v. Hipper*, 12 Wend. (N. Y.) 520.

[2] The objection that the contract is void, because it does not state the sum which was to be paid for the property, is untenable. It was sufficient if a purchaser, who had been shown the property, presented himself, and was ready, able, and willing to purchase for any price that defendants saw fit to ask. The agreement does not limit defendants to any specific price; they had a perfect right under it to make the price \$5,000 or \$100,000; but if they did fix the price, and it was paid, or the purchaser was ready to pay it, they were liable under their promise.

[3, 4] The argument that the memorandum is void, because it does not describe the property, is not tenable. This is not a contract for the sale of real property, but a contract for the services of a person to find a purchaser. It is immaterial what the description of the property is, if it can be identified; and, while the complaint is not so definite in this respect as it could have been made, we think, in the absence of a motion to make definite, it is sufficient. *Baird v. Loescher*, 9 Cal. App. 65, 98 Pac. 49; *Sanchez v. Yorba*, 8 Cal. App. 490, 97 Pac. 205.

The evil, which it was the object of this statute to remedy, was to put a stop to a once prevalent practice of real estate brokers of claiming commissions. Here what both parties were to do clearly appears from the writing, "signed by the party to be charged."

[5] For the purposes of the motion to dismiss, every allegation of the complaint is taken to be true; and therefore we have a case presented in which defendants agreed, in writing, that, if plaintiff should perform a certain act, and a sale upon defendants' terms resulted, defendants would pay plaintiff a specified commission; and that plaintiff performed his part of the contract to the letter. It is true that the statute of frauds ought to be enforced, even though the results may be harsh and inequitable; but courts ought not to give it a forced and far-fetched construction where such interpretation will effect a fraud greater than that which the statute was designed to remedy.

We are of the opinion that upon a fair construction this contract does not contravene the law. The judgment is reversed and a new trial ordered.

**LONG et al. v. HOEDLE et al.**

(Supreme Court of Oregon. Dec. 26, 1911.)

**BILLS AND NOTES (§ 492\*)—EVIDENCE—PRESUMPTIONS.**

Where the execution of a note is denied, there is no presumption in favor of its regularity or the fairness of the transaction.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1649-1651; Dec. Dig. § 492.\*]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Action by A. W. Long and another against Charles Hoedle and others. From a judgment for plaintiffs, defendants Sakuler and Koenke appeal. Reversed and remanded.

This is an action to recover on a promissory note. Defendants answered, denying the execution of the note. They introduced some testimony tending to show that the instrument was a forgery. Among other instructions, the court gave the following: "The plaintiffs allege this was for a valuable consideration. On that point it is presumed that the promissory note was given for sufficient consideration; that is a presumption of the law. But this is a disputable presumption, and may be overcome by other evidence." The court further instructed the jury: "It is presumed that the private transactions about this note have been fair and regular, and that is a disputable presumption which may be overcome by other evidence. These are pieces of evidence which the plaintiffs are entitled to rely upon; that the transaction of taking the note was fair and regular. But the defendants would be entitled to show that the contrary was true."

Carey F. Martin, for appellants. A. O. Condit, for respondents.

McBRIDE, J. (after stating the facts as above). Where the execution of a note is denied, there is no presumption in favor of the fairness or regularity of the transaction, and the instruction given was misleading and erroneous. *Sears v. Daly*, 43 Or. 346, 73 Pac. 5, and cases there cited.

No error appears in other rulings made and excepted to on the trial.

The judgment is reversed, and a new trial ordered.

BURNETT, J., took no part in this decision.

**MUTUAL FIRE CO. OF PORTLAND v. MAPLE**

(Supreme Court of Oregon. Dec. 19, 1911.)

**1. INSURANCE (§ 310\*)—FIRE INSURANCE—FORFEITURE—NONPAYMENT OF PREMIUMS.**

Where a policy of fire insurance in a mutual company provided that, if assessments be not paid within 30 days after the levy of an assessment, the policy should be "null and

void," the policy became ipso facto void upon nonpayment within that time and not merely voidable, so that the company could not maintain an action to recover the assessment.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 703, 761, 780, 826, 840, 904; Dec. Dig. § 310.\*]

**2. INSURANCE (§ 372\*)—FIRE INSURANCE—FORFEITURE—WAIVER.**

If, under the by-laws of a mutual fire insurance company, a fire policy became absolutely void and forfeited on nonpayment of an assessment within 30 days after notice, the company, by afterwards suing for the premium, did not waive the forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 941; Dec. Dig. § 372.\*]

Appeal from Circuit Court, Multnomah County; Wm. N. Gatens, Judge.

Action by the Mutual Fire Company of Portland against F. E. Maple. From a judgment for defendant, plaintiff appeals. Affirmed.

McAllister & Upton and J. G. Richardson, for appellant. W. E. Farrell and W. G. Henderson, for respondent.

EAKIN, C. J. This is an action to recover an assessment made by the Mutual Fire Company upon the holder of a fire insurance policy, which was issued on February 25, 1911, to defendant, indemnifying him for the term of one year against loss of certain goods by fire. The complaint alleges that an advance assessment was made on the policy in the sum of \$25, payable in 30 days, pursuant to the by-laws of the company, no part of which has been paid; that plaintiff is a mutual company; and that each person receiving its policy agrees to be bound by its constitution and by-laws. The answer admits the facts as alleged in the complaint and avers that by-law No. 8 provides that all assessments levied must be paid within 30 days after notice thereof, and if not so paid that the policy of insurance shall be null and void; and that an action may be instituted for the collection of such assessment.

[1] The contention of defendant is that the policy ipso facto became void, the assessment not having been paid by him within the 30 days after notice, and that plaintiff is entitled to a pro rata of the assessment for the time the policy was in force and no more, which amount he tendered to plaintiff before the commencement of the action, and deposited the same in court with his answer.

Plaintiff's contention, as stated in its brief, is, "the sole question for the consideration of the court in this appeal is as to whether the first above-mentioned provision (the forfeiture clause) rendered said policy absolutely void or simply voidable at the option of the plaintiff," contending that it is only voidable; that it may waive the default; and that the bringing of this action by it constitutes such a waiver. In other

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



words, that the nonpayment of the assessment does not render the policy void, but voidable at the option of plaintiff. We cannot agree with this contention. Defendant was in default on March 28th. This action was not commenced until the 19th of August. By reason of such default the policy by its very terms could not have been collected prior to August 19th in case of a loss; and it is plain that for five months after the policy became inoperative defendant was without protection.

[2] The commencement of the action did not waive the default. To constitute a waiver, defendant's insurance must have continued during the time of the default. Such a waiver, as is here contended, might as well have been made at the expiration of the term of the policy, and defendant all that time have been without protection. It was not in plaintiff's power to waive the forfeiture or to revive the policy by the act of bringing this action; there being no new agreement or even payment of the premium.

The terms of the policy as to forfeiture are very different from those involved in the cases cited by plaintiff where the liability of the company is suspended during the default in payment, and may be revived by a subsequent payment. In this case the by-law makes the policy void for nonpayment, and that result is not dependent upon the action of the plaintiff, but is self-executing.

There is no conflict between the authorities cited by plaintiff and those cited by defendant. In cases where the forfeiture by the contract is made a condition of nonpayment, it is not dependent on or affected by the act of the company. *Rood v. Railway Passenger & Freight Conductors' Mut. Ben. Ass'n* (C. C.) 31 Fed. 62; *Lehman v. Clark*, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648. But in cases where the nonpayment only suspends the liability of the company during the default, the policy is revived upon payment. *Jolliffe v. Mutual Ins. Co.*, 39 Wis. 111, 20 Am. Rep. 35; *American Ins. Co. v. Klink*, 65 Mo. 78. The latter cases are in benefit societies where the membership and the benefits are continuing, viz., death or disability benefits; while the risk in question here is upon a fire policy for a limited period, and the by-laws of plaintiff contain no provision for reinstating the policy or making the forfeiture of it optional with the company. The effect of a clause, such as the one here involved, making the policy void for default in payment of a premium, is discussed in a note to *Kennedy v. The Grand Fraternity*, 86 Mont. 325,† in 25 L. R. A. (N. S.) 78, in which the annotator concludes from his review of the case that: "At the present time the rule, as laid down by the best-reasoned cases, would seem to be that, if the contract is such that a

breach of its conditions terminates it without affirmative action on the part of the company, nothing short of a new agreement supported by a good consideration will revive it, except conduct on the part of the company misleading the insured to his expense or harm, and therefore operating as an estoppel. A mere waiver is not enough."

In *Lehman v. Clark*, 174 Ill. 279, 288, 51 N. E. 222, 225 (43 L. R. A. 648), upon a similar clause in the contract it is held that "The provisions of the contract make the forfeiture a part of the contract, and a failure to pay within the time limited causes the forfeiture, and the contract is self-executing in creating the forfeiture."

We think this case comes clearly within the rule stated in these authorities, and the forfeiture clause is self-executing. As this is the only question presented for our consideration, it must be decided against plaintiff.

Judgment is affirmed.

#### MOSSIE v. CYRUS.†

(Supreme Court of Oregon. Dec. 19, 1911.)

##### 1. FRAUDS, STATUTE OF (§ 107\*)—SALE OF REALTY—SUFFICIENCY OF MEMORANDUM.

To satisfy the statute of frauds, the memorandum of a contract to sell land must contain all of the essential terms of the contract, and hence must definitely show the parties, their intention and relation to each other, as, who is the seller and buyer.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 212, 213; Dec. Dig. § 107.\*]

##### 2. SPECIFIC PERFORMANCE (§ 28\*)—SUFFICIENCY OF CONTRACT—CONTRACT OR OPTION.

An instrument, signed by defendant, witnessing that she thereby agreed to sell to E. and plaintiff, "or either of them," the described land for a certain sum, was not a memorandum of an agreement of sale sufficient to authorize specific enforcement, since it showed no purchaser, being at most an offer to sell to either of the persons named at a certain price.

[Ed. Note.—For other cases, see *Specific Performance*, Dec. Dig. § 28.\*]

##### 3. VENDOR AND PURCHASER (§ 16\*)—OPTIONS—EXCEPTIONS.

If no time is fixed within which an offer to sell land must be accepted, it remains open a reasonable time, or until withdrawn.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 17, 20; Dec. Dig. § 16.\*]

##### 4. VENDOR AND PURCHASER (§ 18\*)—OPTIONS—CONSIDERATION.

An option to purchase land, if not supported by a consideration, is not binding, unless accepted before withdrawn, though, if accepted before withdrawn, the price named in the contract would constitute its consideration.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Dec. Dig. § 18.\*]

##### 5. VENDOR AND PURCHASER (§ 18\*)—OPTIONS—CONSIDERATION—CONSTRUCTION OF OPTION.

An instrument, signed by defendant, recited that she agreed to sell to E. and plaintiff, "or either of them," certain described property for a named consideration, "the receipt of forty-five dollars of which is hereby

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

† 92 Pac. 971. ‡ For opinion on rehearing, see 119 Pac. 624.

acknowledged." *Held*, that the \$45 was received as part of the price, and not as consideration for the option, which the instrument in effect was.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.\*]

6. VENDOR AND PURCHASER (§ 18\*)—SEALED CONTRACTS.

A seal, affixed to a signature of one executing an option to purchase land, was only prima facie evidence of a consideration for the option.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.\*]

7. VENDOR AND PURCHASER (§ 18\*)—CONDITIONS—TERMINATION.

If an option to purchase land is not accepted within a reasonable time, it is terminated, though no notice is given the vendee of its withdrawal.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.\*]

8. VENDOR AND PURCHASER (§ 18\*)—OPTIONS.

The tender of the purchase price, under an option to purchase land, should be at the place where the option was executed.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.\*]

9. VENDOR AND PURCHASER (§ 18\*)—OPTIONS—TIME OF ACCEPTANCE.

Where an option to purchase land was executed at the purchaser's solicitation for a speculative purpose, without providing any time for acceptance, an acceptance more than 10 months after its execution was not within a reasonable time; the offer contemplating prompt acceptance.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.\*]

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by Eber D. Mossie against Mary Cyrus. From a decree for defendant, plaintiff appeals. Affirmed.

Wm. P. Lord and W. C. Winslow, for appellant. A. O. Condit and Geo. G. Bingham, for respondent.

EAKIN, C. J. This is a suit for specific performance of an agreement for the sale of land. The memorandum of the agreement is as follows:

"Sisters, Oregon, June 29, 1908. Witnesseth, that I, Mary Cyrus, do hereby covenant and agree to sell to Osburn Edwards and Eber D. Mossie, or either of them, the following described real property, to wit: Thirty lots, now belonging to me, situated in Brooklyn addition, in the city of Salem, county of Marion, state of Oregon, for the consideration of seven hundred dollars (\$700) the receipt of forty-five dollars (\$45) of which is hereby acknowledged. I also agree to give abstract of title and warranty deed to said lands. Witness my hand and seal. Mary Cyrus. [Seal.]

"Witnesses: M. R. Nerll. J. B. Adams."

It is alleged in the complaint that on August 23, 1908, defendant attempted to withdraw from and annul the contract, and duly notified plaintiff of such withdrawal; that on May 8, 1909, plaintiff duly tendered the

purchase price to defendant, and demanded a conveyance of the property to him. Defendant admits the signing of the writing, and that she refused to convey the property to plaintiff, but denies the other allegations of the complaint.

[1, 2] Although the complaint alleges that the defendant entered into an agreement, whereby plaintiff agreed to buy and defendant to sell the lots, of which the writing is the evidence, the writing is not such a memorandum of an agreement as will answer the requirements of the statute of frauds. Such a memorandum must contain all the essential terms of the contract. It must be definite in respect to the intention of the parties; who they are, and their relation one to the other; who is the seller, and who is the buyer. See note to *Ruzicka v. Hotovy*, 72 Neb. 589,† in 9 Am. & Eng. Ann. Cas. 1060-1064. We need but to read the memorandum to see that it is not a memorandum of an agreement of sale. The defendant agrees to sell to Edwards and Mossie, or either of them, thus indicating that there is no purchaser, but the offer was open to both or either. The most that can be claimed for the memorandum is that it was an offer by defendant to sell at a certain price.

[3-6] There being no time fixed in which the offer might be accepted, it would remain open a reasonable time, or until withdrawn. If considered as an option, the effect is the same, unless there was a consideration for the option, and the evidence discloses that there was none. If the offer had been accepted within a reasonable time, and before withdrawn, the price of the lots (\$700) would have constituted the consideration, and have completed the contract. The \$45 mentioned in the offer was received as part of the price only, and not as consideration for the option. See *Friendly v. Elwert*, 57 Or. 599, 112 Pac. 1085. The seal affixed to the signature is only prima facie evidence of consideration. *Olston v. Oregon Water Power & Ry. Co.*, 52 Or. 343, at page 349, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915.

[7] On the other hand, conceding that the writing is an option given upon a consideration, no time for acceptance is provided; therefore it must have been accepted within a reasonable time. 9 Cyc. 291, 611; 29 A. & E. Enc. 600; *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88. And if the acceptance is not made within a reasonable time, the option is terminated, and without notice to the vendee of a withdrawal. 29 A. & E. Enc. 600; *Bowen v. McCarthy*, 85 Mich. 28, 48 N. W. 155.

In *Larmon v. Jordan*, 56 Ill. 208, it is said: "So, if no time be limited, the offer, in the absence of evidence to the contrary, will be presumed to have been renewed every moment during a reasonable time, and no longer. If, therefore, there be no acceptance

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

†101 N. W. 323.

within a reasonable time, there can be no presumption of a meeting of minds, because there can be none of a continuance of the offer to the time of the acceptance."

[§, 9] In this case it seems that Mossie was procuring the option for Edwards who was to pay the money; that within a few days or weeks after the writing was signed defendant called on Edwards to have the deal closed; that he refused to accept the offer, and she notified him that the offer was withdrawn, of which Mossie had notice; and that on August 23, 1908, plaintiff was directly notified that the offer was withdrawn. On May 8, 1909, plaintiff attempted to accept the offer by letter, in which he offered to pay the money at a bank in Salem, if the deed was sent there. But that is not a tender, nor an undertaking to buy. The tender should have been made at Sisters, not at Salem. *Davis v. Brigham*, 56 Or. 41, 107 Pac. 961. Nor has any tender been made in court. If this letter of May 8, 1909, were a formal tender at Sisters, or an acceptance of the offer, it was not made within a reasonable time. More than 10 months had elapsed since the offer, the terms of which were a present offer, and contemplated an acceptance presently. The offer was made at plaintiff's solicitations, for speculation purposes only, and should have been acted upon promptly. The acceptance of the offer was not made within a reasonable time, and plaintiff is not entitled to specific performance.

The decree is affirmed.

BURNETT, J., concurs in the result.

# MARION COUNTY v. WOODBURN MERCANTILE CO.

(Supreme Court of Oregon. Dec. 26, 1911.)

## TAXATION (§ 585\*)—PERSONAL TAXES—COLLECTION—ACTION.

A tax, not being a debt, so that no promise can be implied as a basis of assumpsit therefor, and a method of collecting taxes on personal property being prescribed by L. O. L. § 3683—seizure and sale of the personal property, if it can be found in the county, with right to charge the personal property tax against real estate, and enforce it as a real property lien—no action for personal taxes will lie if, before seizure of the personal property, the taxpayer removes it from the county, or otherwise disposes of it; but, unless he has real estate against which it can be charged, the county is remediless.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 585.\*]

Appeal from Circuit Court, Marion County; Geo. H. Burnett, Judge.

Action by Marion County against the Woodburn Mercantile Company. Judgment for defendant; plaintiff appeals. Affirmed.

This is an action to recover delinquent taxes. The cause being at issue was tried

without a jury, and from the testimony given findings of fact were made substantially conformable to the averments of the complaint, and to the effect that, on March 1, 1908, the defendant was a private corporation, engaged in business in Marion county; that all the property it then owned or held therein consisted of merchandise, money, notes, and accounts, which were valued at \$10,250 by the assessor, who made an entry of the estimate and a description of the property in the assessment roll; that such schedule was duly returned to the county clerk and the appraisal so made was ratified by the board of equalization; that, based on such valuation, certain taxes were levied for various purposes upon the personal property mentioned, and the items thereof entered on the tax roll; that about January 15, 1909, the board of directors of the defendant divided all its property among its stockholders, receiving from them a surrender of their respective shares of stock, but no provision was made by the corporation for discharging the taxes referred to, no part of which has been paid; that a warrant for the collection of the taxes so levied was attached to the roll, February 1, 1909; and that, pursuant to such command, the tax collector, after due and diligent search and inquiry, was unable to find any property in the county belonging to the defendant. Based on these findings, the court deduced the conclusion of law that the complaint did not state facts sufficient to constitute a cause of action, and that the action should be dismissed. A judgment having been rendered in accordance therewith, the plaintiff appeals.

W. C. Winslow (John H. McNary and W. C. Winslow, on the brief), for appellant. Thomas Brown (Carson & Brown, on the brief), for respondent.

MOORE, J. (after stating the facts as above). Are the conclusions of law thus made deducible from the findings of fact? is the question to be determined. This inquiry makes a consideration of whether or not our statute permits the maintenance of an action to recover a delinquent tax levied on personal property. Attention will be attracted to the enactment governing the proceedings in such cases.

All property liable to taxation is required to be assessed to the person or corporation owning it at 1 o'clock a. m. on the 1st of March of each year. L. O. L. § 3586. When a tax levied on personal property becomes delinquent, it is the duty of the tax collector to seize and sell, in the manner prescribed, sufficient of the taxpayer's goods and chattels, if they can be found in the county, to satisfy the demand. If, in the opinion of the tax collector, it becomes necessary to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

charge the tax on personal property against real estate, in order that such tax may be collected, he is required to select some particular tract of land owned by the person or corporation owing the personal property tax, and to note upon the tax roll, opposite the description of such tract, the tax on the personal property, whereupon such tax becomes a charge against the real estate, and is to be enforced, in case of delinquency, in the same manner as other real property liens. Id. § 3683. All taxes levied upon real property, including taxes on personal property that have been charged against real estate, constitute liens upon real property. Id. § 3684. The lien thus declared may be foreclosed in a suit instituted for that purpose, and the land subject thereto sold pursuant to a decree. Id. § 3695. If the premises are not redeemed from the sale, a deed to the real property must be executed to the purchaser. Id. § 3702.

The foregoing provisions are a brief summary of the mode prescribed for the collection of the ratable portion, levied by authority of law, upon property to maintain the power of the state, and to enable it to discharge its various functions. No lien is impressed by our statute upon personal property, and if an owner thereof remove it to another county, or otherwise dispose of it before his goods and chattels are seized for the payment of delinquent taxes levied upon that class of property, and he has no real estate in the county against which such taxes can be made a lien, and no action can be maintained against him to recover the taxes, the county levying them is remediless, and he is not bearing his share of the public burden. No enactment of this state expressly authorizes the bringing of an action in such a case.

When the levying of a tax is prescribed by law, but no provision is made for collecting the burden thus imposed, it may reasonably be inferred that the Legislature intended that legal remedies, available in ordinary civil actions, might be invoked for enforcing the payment. So, too, when a law places upon property a lien, as security for the payment of a tax, but the enactment contains no regulation for barring the equity of redemption, it may fairly be deduced that a suit is maintainable to foreclose the charge enjoined. *Cooley, Tax.* (3d Ed.) 17. This rule of construction is probably based on the doctrine that when a right is conferred by statute a further privilege is also impliedly granted, without which the right itself would be ineffectual.

A statute formerly in force in Oregon required the sheriff, who was the tax collector, to pay the full amount of state and school taxes in gold and silver coin to the county treasurer, and ordered the latter to pay to the State Treasurer the state tax in like medium of exchange. Several owners of

property, situate or held in Lane county, insisting that the act of Congress of February 25, 1862 (12 U. S. Stat. 345), making United States treasury notes legal tender for all "debts," etc., offered to pay their respective taxes with that kind of medium of exchange, but, the sheriff refusing to receive it, they instituted mandamus proceedings to compel him to accept such payment, and it was held that state taxes were not "debts," within the meaning of the federal statute relied upon. *Whiteaker v. Haley*, 2 Or. 128.

Thereafter the county treasurer of Lane county tendered to the State Treasurer United States treasury notes in payment of the taxes due from that county; but, the offer having been rejected, an action was instituted by the state against that county to recover, as its portion of the public burden, \$5,460.96 "in gold and silver coin." The cause having been tried, an appeal from the judgment was taken to this court, which held that a recovery could be had in the specie demanded. The opinion in that case, if any were announced, is not published in our reports. From the judgment thus rendered, a writ of error was taken to the Supreme Court of the United States, which affirmed the determination taken up for review, and held that the act of Congress, making United States notes legal tender for "debts," had no reference to taxes imposed by state authority. *Lane County v. Oregon*, 7 Wall. 71, 19 L. Ed. 101. In deciding that case, Mr. Chief Justice Chase adopts language from the case of *Shaw v. Peckett*, 26 Vt. 482, 486, where it is said: "The assessment of taxes does not create a debt that can be enforced by suit, or upon which a promise to pay interest can be implied. It is a proceeding in invitum." The rule that a tax levied on property for the maintenance of government is not a debt has become well established. *Cooley, Tax.* (3d Ed.) 17; 1 *Desty, Tax.* § 6; 27 *Am. & Eng. Ency. Law* (2d Ed.) 580; 37 *Cyc.* 710.

A contrariety of judicial utterance exists regarding the right to maintain a suit or an action to recover delinquent taxes, when the statute commanding the levy prescribes the remedy to enforce the collection. Thus, notwithstanding the organic law of Louisiana of 1879, art. 210, declared that delinquent taxes should be collected "without suit" by a sale of the property on which the tax was levied, it was ruled that a valid claim against a decedent's estate might be made by a municipal corporation for the payment of delinquent taxes; the court holding that the award was not a judgment, but the allowance of a legal demand, which was to be paid in due course of administration. *Succession of Mercier*, 42 La. Ann. 1135, 8 South. 732, 11 L. R. A. 817. In the notes to that case, the authorities are collated, setting forth the determinations of courts in favor of and opposed to the maintenance of a suit

or an action to recover delinquent taxes. See, also, the case of *State v. Georgia Co.*, 112 N. C. 34, 17 S. E. 10, 19 L. R. A. 485.

Since a tax levied upon property is not a debt, the burden imposed by law for the support of government is not a sum of money due or owing by agreement; and hence there exists no concord of understanding or intention between the taxpayer and a municipality, regarding their respective rights and duties, from which can be implied a promise that forms the basis of an action of assumption.

Upon principle, we conclude that, as our statute prescribes the manner of collecting delinquent taxes levied on personal property, the maxim, "Expressio unius est exclusio alterius," governs making the remedy exclusive. 27 Am. & Eng. Ency. Law (2d Ed.) 783; 37 Cyc. 1241. From this conclusion, it necessarily follows that after the levy of a tax on goods and chattels, and before their seizure to satisfy the demand, if the taxpayer removes to another county his personal property, or otherwise disposes of it, no action can be maintained against him for the recovery of his share of the public burden, and the county levying the tax is remediless, if he has no real estate against which such tax can be charged. Legal remedies cannot be created ex necessitate rei by courts, when no mode of procedure is prescribed by law, but relief for the correction of the evil must be sought from the lawmaking department of the state.

Believing that the conclusions of law made by the trial court were properly deducible from the findings of fact, the judgment is affirmed.

BURNETT, J., having heard this cause in the lower court, took no part at the trial or in the consideration hereof.

#### HART v. PRATHER.

(Supreme Court of Oregon. Dec. 19, 1911.)

#### 1. APPEAL AND ERROR (§ 627\*) — RECORD — TRANSCRIPT—TIME OF FILING.

Failure to comply with L. O. L. § 554, subd. 2, providing that, if the transcript be not filed with the clerk of the appellate court within the time provided, the appeal shall be deemed abandoned, is jurisdictional, and failure to file the transcript within 30 days after the appeal was perfected, as required by subdivision 1, requires a dismissal of the appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2744-2749, 3126; Dec. Dig. § 627.\*]

#### 2. APPEAL AND ERROR (§ 625\*) — RECORD — TRANSCRIPT—PAYMENT OF FILING FEES — NECESSITY.

L. O. L. § 1113, relates to the duty of the clerks of the circuit court in certain counties, and provides that no transcript on appeal, etc., or other papers, in probate proceedings, shall be filed until payment of fees. Held, that the clerk of the circuit court could not waive the

payment of the prescribed fee as a condition precedent to filing a transcript on appeal in a will contest and consent to appellant paying the fee after the transcript was filed because he did not then know the exact amount of the fee; the transcript not being in law filed until after payment of the fee, though L. O. L. § 547, provides that delivery of a paper to the clerk shall constitute a filing.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2743; Dec. Dig. § 625.\*]

Bean, J., dissenting.

Appeal from Circuit Court, Malheur County; Dalton Biggs, Judge.

Will contest by George R. Hart, contestant, against Martin V. Prather. From a judgment dismissing contestee's appeal to the circuit court, he appeals. Affirmed.

This is a proceeding originating in the county court of Malheur county on the contest of a will. When the decision was rendered there, oral notice of appeal was given by the defendant, and the clerk was directed to prepare a transcript. Both parties concede that the 30 days after the perfection of the appeal expired on July 21, 1911, by which time the transcript should have been filed in the circuit court. On the 13th or 14th of July the appellant's attorneys called at the county clerk's office, and were shown the transcript by that officer. Deeming his certificate informal, they dictated another one to his stenographer, and requested the clerk to have it extended, sign, and append it to the transcript, which, when it should be thus authenticated, they directed him to file as of that date. At the same time the attorneys for the appellant offered to pay the clerk the filing fees and the fees for making the transcript, but without either specifying any amount or producing any money so as to make the transaction a valid tender. The officer stated, in substance, that he could not then tell the amount required to cover the filing fees and the charges for making the transcript as he had not computed the latter, but that appellant was financially responsible, and good for the necessary payment. In this state the matter was allowed to rest until August 15th, when the clerk indorsed the transcript, "Filed July 24, 1911." On motion of the respondent the circuit court dismissed the appeal on the ground that the transcript was not filed within 30 days after the appeal was perfected, and the appellant prosecuted a further appeal to this court.

Wm. H. Packwood, Jr. (Wheeler & Hurley, George E. Davis, John L. Rand, and Wm. H. Packwood, Jr., on the brief), for appellant. A. N. Soliss and J. W. McCulloch (McCulloch, Soliss & Duncan, on the brief), for respondent.

BURNETT, J. (after stating the facts as above). [1] "If the transcript or abstract is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not filed with the clerk of the appellate court within the time provided, the appeal shall be deemed abandoned and the effect thereof terminated." L. O. L. § 554, subd. 2. The "time provided" is determined by the first clause of that section to be "within thirty days" after the appeal is perfected. These requirements are jurisdictional, and failure to comply with them is fatal. *Davidson v. Columbia Timber Co.*, 49 Or. 577, 91 Pac. 441; *Burchell v. Averill Machinery Co.*, 55 Or. 113, 105 Pac. 403.

[2] Section 1113, L. O. L., in part reads thus: "It shall be the duty of the several clerks of circuit and county courts in this state in counties of not more than 50,000 inhabitants, at the time of the filing of any suit, action or proceeding for the enforcement of private rights, including appeals, \* \* \* to exact from the plaintiff or moving party" certain fees scheduled in that section, "and no complaint, transcript on appeal, petition, writ of review or any other papers in probate proceedings above mentioned shall be filed until such payment is made." This language is mandatory, not only upon the county clerk, but also upon the courts and we cannot disregard it. The county clerk, as the official servant of the county in the collection of fees as part of its revenue, has no power to waive any of the provisions of the law prescribing his duty. Not only so, but the appellant and his attorneys knew that the scope of the officer's duty was thus restricted. Still further, the fees for making the transcript, as well as the one required to be paid before filing the same, being established in plain terms by the statute, the appellant and his attorneys could easily have computed them and tendered the amount to the clerk; but even this was not done or attempted. The whole transaction as disclosed by the affidavits appears to have been an effort on the part of the appellant to do business with the county clerk on a credit basis when the statute expressly requires it to be done for cash in advance. We are not unmindful of the terms of section 547, L. O. L., providing that "a pleading or paper shall be filed by delivering the same to the clerk at his office who shall indorse upon it the day of the month and the year and subscribe his name thereto." We have no disposition either to overturn the doctrine of such cases as *McDonald v. Crusen*, 2 Or. 258, *Conant's Estate*, 43 Or. 530, 73 Pac. 1018, and *Bade v. Hibberd*, 50 Or. 501, 93 Pac. 364, when considered in the light of the conditions under which they were decided. They hold, in substance, that a paper is deemed filed when left with the clerk for that purpose, although he may not have placed thereon the required indorsement. But that section and these cases deal with the mere physical act of filing the paper, and not with the right to have it filed. They are applicable to the former system under which the fee was the

private perquisite of the officer which he might waive at his pleasure. Now, however, the filing fee is the property of the county the prepayment of which must be exacted by the clerk. Its payment in advance is a condition precedent without the performance of which the right to have the paper filed does not exist. A precedent controlling the case in hand is found in *Hilts v. Hilts*, 43 Or. 162, 72 Pac. 697.

An appellate court can acquire jurisdiction only in the way marked out by the statute. We cannot turn aside from the beaten path thus established, and say that the clerk ought to have disobeyed the law which requires him to exact fees in advance, and forbids him to file the transcript until the filing fee is paid.

The action of the circuit court in dismissing the appeal is affirmed.

BEAN, J. (dissenting). This is an appeal by contestee from a judgment of the circuit court dismissing an appeal from a decree of the county court of Malheur county.

On June 14, 1911, the county court rendered a decree canceling a will of Mary Elizabeth Hart, at which time the contestee gave due notice of an appeal to the circuit court. An undertaking on appeal was served and filed June 15, 1911. Allowing 30 days from the expiration of the time for excepting to the sufficiency of the sureties under the provision of L. O. L. § 550, the appellant was required to file the transcript in the circuit court on or before July 21, 1911, under section 554, L. O. L., as conceded by counsel for both parties. The transcript was indorsed by the county clerk as filed "July 24, 1911." This was done on August 15, 1911, and the contestant moved to dismiss the appeal for the reason that the same was not filed within the time required by law. Affidavits in resistance and in support of the motion were filed. Those on behalf of contestee are to the effect that on July 13, 1911, the county clerk, pursuant to the request of contestee's counsel made at the time of filing the undertaking, had prepared and certified to the transcript. About this time two of the attorneys for contestant examined the transcript, requested the clerk to amend the certificate thereto, and file the same that day. They offered to pay the filing fee, which the clerk declined, saying that he wanted the fee for making the transcript, but did not then know the exact amount. He said that he would inform them later, and that Martin V. Prather could pay the same. There is some contention as to when this occurred, but it appears to have been some time previous to July 21, 1911. R. G. Wheeler and George E. Davis, attorneys for contestee, fixed the date as "July 14, 1911," and Frank L. Morfitt, county clerk, as "July 13 or 14, 1911." The clerk states that the transcript has remained in his custody ever since that time. Nothing further was done in regard

thereto until after the time for filing had expired, when different requests were made by counsel for the parties as to the date of filing marks to be indorsed thereon, and the matter was held in abeyance until the next month. The clerk states that the fees were paid as requested, but that he does not remember of any specific demand being made by counsel for contestee to file the transcript, until July 24, 1911, when he was requested by one of the attorneys for contestee to file the same as of July 13, 1911; but that a request to do so might have been made by them on either July 13 or 14, 1911. The transcript was ordered and made for no other purpose than for filing, and the form of the request is not material. The affidavits of A. N. Soliss, R. M. Duncan, and J. W. McCulloch, attorneys for contestant, in support of the motion, are to the effect that two of the counsel for contestant examined the transcript on the evening of July 21, 1911, and found it not marked as filed; that they were informed by the clerk that no request has been made to file the same, and that the filing fee was not paid until August 14, 1911; that on August 15, 1911, a similar examination was made before the transcript was marked filed; that George E. Davis, one of the attorneys who claimed to have examined the transcript, was not in Malheur county on July 14, 1911, and was absent from Vale from July 11, until July 18, 1911. As it appears from the decree, at the time of the argument, Judge Davis stated that he was not certain whether he was in the county clerk's office on July 14th or 18th. It might be noted that it is the accuracy as to dates, and not the veracity of the affiants, that is questioned. There is no controversy over the fact that the transcript was prepared and certified to, and in the hands of the clerk on July 13, 1911, where it remained. This last date is the only one that serves as a guide; the indorsement of the filing having been made about a month after the controversy arose.

Section 547, L. O. L., provides that a pleading or paper shall be filed by delivering the same to the clerk at his office, who shall indorse upon it the date, and subscribe his name thereto. A paper is said to be filed when it is delivered to the proper officer and by him received to be kept on file. *Bouvier's Law Dict.*; 19 Cyc. 530. In referring to the above provision of section 547, L. O. L., Mr. Justice Bean in *Conant's Estate*, 43 Or. 530, 534, 73 Pac. 1018, 1020, remarks: "It will be observed that this statute does not make the indorsement by the clerk a prerequisite to the filing, or provide that no paper shall be deemed filed without such indorsement. The filing consists in delivering the paper to the clerk with an intention that it shall be filed. The law imposes the duty upon the clerk of making the proper indorsement thereon, but his failure to do so cannot affect the validity of the filing. A paper

or document is filed within the meaning of this statute when it is delivered to and received by the clerk to be kept among the files of his office, subject to the inspection of the parties."

In the case at bar, the affidavits for the motion to dismiss show that on July 21, 1911, the attorneys asked for the transcript, received the same, and examined it. It is urged that it was in a drawer in the clerk's office, but this suggestion is without force, as it is doubtful if in many of the counties there are a sufficient number of appeals to the circuit court to require a certain place for the transcripts on appeal to be regularly kept. The affidavits appear to have been prepared upon the theory that the time for filing expired on July 15, 1911, and show that not only was the transcript prepared, but the same was examined and approved by the attorneys for contestee. The mere matter of an amendment to the certificate thereof would not deprive the appellate court of the jurisdiction which it acquired upon the filing of a copy of the decree of the county court appealed from, notice of appeal with proof of service thereof, and undertaking. Section 554, L. O. L. The transcript should be indorsed as filed July 13, 1911; that being the date of the certificate.

It is also now claimed that the fees required by law for filing the transcript were not paid within the proper time. This, however, was not the basis of the motion to dismiss the appeal, nor was it referred to therein. It is clearly shown by the uncontradicted affidavits that it was not the fault of appellant that the filing fee was not paid, that the clerk desired time to ascertain the number of folios of the transcript, in order to determine the amount to be paid, and when the appellant and his counsel offered to pay the fees, at the suggestion of the clerk, the matter was delayed. The clerk had a perfect right, and it was his duty, to exact and receive the fees for the transcript before filing the same. Such officer of the court, like any other, has the privilege of taking a sufficient time to make a proper investigation and ascertain the correct amount; and the action according to the deposition of the county clerk did not transgress the rule in *Hilts v. Hilts*, 43 Or. 162, 72 Pac. 697, but was in perfect accord therewith. In the last-mentioned case it was held that a filing may depend upon the terms of a statute authorizing it, and will not become operative until the requisites are first complied with, at least in substance. In the above case no fees were paid or tendered, and for that reason the clerk did not file the transcript within the required time, while in the case at bar both appellant and his attorneys offered to pay the fees before the time expired, and the only reason this was not done was the declination of the county clerk to receive the same, owing to his not knowing the exact amount. It

is said in the majority opinion that "the appellant and his attorneys could easily have computed them and tendered the amount to the clerk." In my opinion the counting of the words in the transcript is one of the duties of the clerk for which he is paid a salary, and attorneys for litigants are not required, either under the law or according to the usual practice, to perform this service. In *Templeton v. Lloyd*, 115 Pac. 1068, there was a delay in the payment of the fees in one of two cases of the same name, which were tried together in the circuit court, and, the fee having been paid before the motion to dismiss on account of nonpayment was heard, the motion was denied. In *Anderson v. Robinson*, decided on November 14, 1911, in which no opinion was written, the transcript was received by the clerk of this court September 25, 1911, within the time allowed by law for filing the same. The fees required to be paid for filing did not accompany the transcript. Counsel for appellant, when his attention was called to this matter, mailed the required fee, and it arrived at the Salem, Or., post office, within the time allowed by law, but was not actually received by the clerk until the next day; and the transcript was then indorsed as filed, being a date after the time allowed by law for filing the transcript. On motion to dismiss, it was held that the transcript was filed within the required time, and the motion was denied. There is no reason under the law why any different or stricter rule should be applied in regard to an appeal to the circuit court than prevails in the determination of appeals to this court.

Counsel for contestant cite the case of *Pinders v. Yager*, 29 Iowa, 468, wherein an appeal was taken by defendant from a judgment in a justice court, and the transcript was returned by the justice to the clerk of the circuit court. No fees were paid by defendant as required, and according to a rule of the court the plaintiff paid the fee, had the transcript filed, and the judgment affirmed. Also *State v. Chicago & Eastern Illinois Railroad Company et al.*, 145 Ind. 229, 43 N. E. 226, a case in which the agent of defendant presented articles of consolidation to the Secretary of State for the purpose of filing for record, and, upon being informed that the fees would be \$25,000, to authorize the filing, took the paper away with the consent of the officer; and, in an action by the state to collect the fees, it was held that the articles were not filed, and that the officer properly refused to file the document. All of the cases cited by counsel for contestant are to the effect that an officer has the right to decline to file a document until the fees are paid, which is in no way questioned in the case at bar. Here, as shown by the affidavits of the clerk, the fees were all arranged satisfactorily to him within the time allowed by law, and I think the spirit of the

statute was fully conformed to, and that the letter thereof was substantially complied with. Any other rule would seem to sanction the clerk in unintentionally trapping the appellant, and might defeat the ends of justice. The appellant in this case was diligent, and it was no fault of his that the transcript was filed before the fees were paid. See *State v. Williams*, 55 Or. 143, 105 Pac. 716. To require a party in a proceeding to pay fees for the county, when there is no officer willing to receive the same, or be held in default for want of such payment, would be analogous to requiring the attendance of such party at court at his peril, when there was no court in session.

I know nothing about the merits of this case, but think the appeal should be heard. For these reasons, I am unable to concur in the opinion of the majority of my Associates.

**SHEPPARD v. SHEPPARD.** (L. A. 2,757.)  
(Supreme Court of California. Nov. 22, 1911.  
Rehearing Denied Dec. 22, 1911.)

**1. DIVORCE (§ 182\*)—APPEAL—ALIMONY.**

Where a husband appealed from a decree denying his application for a divorce, and filed a supersedeas, staying execution on the part of the decree awarding alimony to his wife, the court was authorized to grant an order providing for her support and maintenance pending the appeal, and requiring plaintiff to pay such sums as were reasonably necessary therefor, notwithstanding such support was for a period of time covered by the maintenance judgment.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. § 625; Dec. Dig. § 182.\*]

**2. DIVORCE (§ 182\*)—ALIMONY—APPEAL—ORDER FOR MAINTENANCE.**

Where a husband appealed from an order denying his application for a divorce and requiring payment of alimony at the rate of \$50 a month, filing a bond to stay execution on the judgment for alimony pending appeal, and it appeared that \$50 per month was all defendant was entitled to receive for her support pending the appeal, a subsequent order, requiring plaintiff to pay defendant \$50 per month for her support and maintenance pending the appeal, was erroneous, in so far as it failed to provide that, in the event of an affirmance, plaintiff should be credited with the amount paid under the order pending the appeal.

[Ed. Note.—For other cases, see *Divorce*, Dec. Dig. § 182.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action by Samuel Sheppard against Lucinda Sheppard. From an order granting an award of alimony pending appeal, plaintiff appeals. Modified and affirmed.

See, also, 115 Pac. 751.

E. B. Drake, for appellant. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from an order, made after judg-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.



ment and on July 11, 1910, requiring plaintiff to pay defendant the sum of \$50 per month alimony pendente lite from December 17, 1909, to and including the final determination of the cause, which was then pending on appeal, \$350 thereof (being the amount due to and including July, 1910) to be paid forthwith, and \$50 on the 1st day of each subsequent month; also \$50 costs and \$150 attorney's fees, to be paid forthwith.

No question is raised on this appeal as to the correctness of the order, in so far as it gives defendant the amounts specified for costs and counsel fees; the only question being as to the alimony pendente lite.

The material facts are as follows: Plaintiff commenced an action for divorce against defendant. Defendant by her answer denied the charges made against her by plaintiff, and by cross-complaint sought an allowance for her maintenance and support. The trial court found against plaintiff, and also found that he had willfully deserted and abandoned defendant, and that \$50 per month was reasonably necessary to provide defendant with the common necessities of life, and that such amount was a reasonable sum to be allowed her for her support and maintenance. This decision was rendered on December 15, 1909, and on the same day judgment was given, denying plaintiff relief, and awarding defendant "permanent alimony at the rate of fifty dollars per month \* \* \* for her maintenance and support, \* \* \* and continuing during the natural life of said" defendant. The judgment also gave her \$150 attorney's fees and costs. Plaintiff appealed from this judgment to this court, and stayed the execution thereof by giving such an undertaking therefor as is required by law. Thereupon defendant made the motion for alimony pending such appeal, resulting in the order here under review, stating in her affidavit that the sum asked by her (\$50 per month) is necessary for her maintenance and support, and that it is the amount of permanent alimony ordered paid her by the judgment. The evidence before the court on the hearing of the motion was sufficient to warrant the conclusion that such sum was reasonably necessary for the support and maintenance of defendant; that she had no means of support; and that plaintiff was financially able to pay said sum. Upon these facts the trial court made the order here under review.

[1] It cannot be disputed, in view of the authorities, that the trial court was authorized to provide for the support and maintenance of defendant by plaintiff pending the determination of the appeal from the judgment, and to this end to make an order directing plaintiff to pay defendant such sums as were reasonably necessary for that purpose. See *Bohnert v. Bohnert*, 91 Cal. 428, 27 Pac. 732; *Gay v. Gay*, 146 Cal. 237, 79 Pac. 885. And the fact that such support and maintenance for the period of time covered by the order sought was already provided for by the main-

tenance judgment did not compel the absolute denial of the motion. Execution of the judgment was stayed by the appeal therefrom and the stay bond given on such appeal, and consequently there was no enforceable judgment or order providing for her support and maintenance during the pendency of the appeal. Then, too, the appeal from the judgment might result in a reversal, in which event it might result that defendant would never receive anything for her support and maintenance during the period of the pendency of the appeal, although clearly, under the authorities, she was entitled to such support and maintenance pending the appeal.

[2] But the plain effect of the order as made, without reservation or qualification, was that if the maintenance judgment was affirmed, or the appeal therefrom dismissed, and plaintiff required, as he undoubtedly would be in such event, to pay to defendant all the amounts due thereunder, he would be required to pay \$100 per month for the support and maintenance of defendant during the whole time of the pendency of the appeal, viz., \$50 per month under the judgment, and \$50 per month under the order, although on the motion for alimony pending the appeal defendant claimed only \$50 per month for that purpose, and did not attempt to make any showing that more than \$50 per month was necessary for her support and maintenance. There was absolutely nothing before the lower court on the hearing of this motion to support a conclusion by that court that defendant should have more than \$50 for her support and maintenance for any month during the pendency of the appeal. It was plainly shown by the evidence on the motion that all that defendant was seeking, and all that she was entitled to have in the way of alimony pending the appeal from the judgment, was the amount awarded her by the judgment, the payment of which to her had been stayed by the appeal therefrom. As an illustration of the injustice that would follow the affirmance of this order in its present form, we have what has actually happened in this case, according to the showing made on the oral argument. The maintenance judgment has been affirmed, and the judgment became final May 12, 1911 (*Sheppard v. Sheppard* [App.] 115 Pac. 751), and plaintiff has been compelled to pay thereunder to defendant at the rate of \$50 per month from December 1, 1909, to and including October 1, 1911, together with interest; the same being for her support and maintenance between such dates. If this order be now affirmed in its present form, plaintiff would be compelled to again pay defendant at the rate of \$50 per month for her support and maintenance from December 17, 1909, to May 12, 1911, a period fully covered by the amounts already paid, although there was nothing in the showing before the lower court on the hearing of this motion to warrant a total allowance for maintenance and support for any month of more than \$50.

We are satisfied that it was the duty of the trial court in making this order, with the facts as to the maintenance judgment before it, to have protected plaintiff against the possibility of being compelled, by reason of the affirmance of such judgment or the dismissal of the appeal therefrom, to pay twice for any period of time the amount deemed necessary by the court for the support and maintenance of defendant during such period of time. To that much plaintiff was clearly entitled, and, in so far as the order made fails to give such protection, it was erroneous, and, as has developed, most prejudicial to plaintiff. The case of *Smith v. Smith*, 147 Cal. 143, 81 Pac. 411, is full authority for the proposition, if authority be needed, that the maintenance judgment and the liability of the husband thereunder were required to be taken into consideration by the court in making its order for alimony pendente lite. And taking them into consideration it appears to us to necessarily follow, in view of the defendant's own showing as to the amount reasonably necessary for her support and maintenance, that the order was erroneous, in so far as it fails to protect plaintiff against the possibility of being compelled thereby to pay more than \$50 per month for such support and maintenance for any period of time. The effect of the error can be obviated by a modification of the order, and its affirmance as modified. In view of our conclusion on the point discussed, and the facts as to satisfaction of the judgment for the period of time covered by the appeal, shown by the affidavit of plaintiff presented on the oral argument, it will be unnecessary to consider any other point made in the briefs.

It is ordered that the order appealed from be modified by inserting at the end thereof, after the word "forthwith," the following words and figures, viz.: "Provided, however, that all amounts paid hereunder by plaintiff to defendant on account of alimony at the rate of \$50 per month shall, in the event of the affirmance of the judgment in this action, providing for permanent maintenance at that rate, rendered December 15, 1909, be credited in favor of plaintiff in satisfaction pro tanto of such judgment; and provided further, that if, in the event of the affirmance of the portion of such judgment, providing for such permanent maintenance, plaintiff pays defendant thereunder at the rate of \$50 per month for support and maintenance for any period of time covered by this order, such payment shall operate pro tanto as a satisfaction of the requirements of this order as to support and maintenance for such period of time, and plaintiff shall not be required to make under this order any further payment for such period of time"—and as so modified the order is affirmed.

We concur: SLOSS, J.; SHAW, J.

**RHEINGANS v. SMITH (E. L. HOPPER & SON, Intervener). (L. A. 2,718.)**

(Supreme Court of California. Nov. 23, 1911.)

**1. FRAUD (§ 23\*)—MISREPRESENTATIONS—RELIANCE.**

In absence of confidential relations between the parties, a vendor may not rely upon statements by the purchaser as constituting fraudulent misrepresentations, except as to facts of which the vendor was ignorant, and which he had reason to believe the purchaser knew, and except, possibly, as to the law based on facts of which he had reason to believe the purchaser's knowledge was greater than his own.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 20, 23; Dec. Dig. § 23.\*]

**2. VENDOR AND PURCHASER (§ 44\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.**

In an action to cancel a contract for the sale of land for fraud in misrepresenting that an option theretofore given by plaintiff to another had expired, evidence held to show that plaintiff did not rely on defendant's statement that the option had expired.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 69-76; Dec. Dig. § 44.\*]

**3. FRAUD (§ 11\*)—MISREPRESENTATIONS—MATTERS OF OPINION.**

Where both the vendor and purchaser knew the facts as to a prior option given by the vendor, a statement by the purchaser that such option expired on a certain date was merely an opinion, as to a question of law, based on facts known to both, so that the vendor could not predicate fraud upon its falsity.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

**4. FRAUD (§ 12\*)—FRAUDULENT PROMISE.**

In absence of confidential relations between the parties, the mere making of a promise, which the promisor afterwards fails or refuses to perform, is not actionable fraud, unless the promise was made without any intention of performing it; Civ. Code, § 1572, providing that a promise, made without any intention of performing it, in order to induce another to enter into a contract, constitutes actionable fraud.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 14; Dec. Dig. § 12.\*]

**5. CANCELLATION OF INSTRUMENTS (§ 43\*)—ACTIONS—PROOF—VARIANCE.**

In an action to cancel a contract for the sale of land for fraud in misrepresenting that an option theretofore given by plaintiff to another had expired, in which plaintiff did not allege or reply upon fraud by defendant in promising to cancel his own agreement to purchase, if the other option holder accepted his option, without any intention of performing such agreement to cancel, he is not entitled to relief on that ground, though the evidence tended to show such facts, and if alleged it might have been ground for relief.

[Ed. Note.—For other cases, see *Cancellation of Instruments*, Cent. Dig. §§ 96-99; Dec. Dig. § 43.\*]

**6. VENDOR AND PURCHASER (§ 18\*)—OPTION AGREEMENTS—ACCEPTANCE.**

The unconditional acceptance of an option to purchase land constitutes a binding contract, enforceable by the acceptor.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. § 23; Dec. Dig. § 18.\*]

**7. CANCELLATION OF INSTRUMENTS (§ 25\*)—GROUNDS—FRAUD—DEFENSES.**

If defendant fraudulently induced plaintiff to execute a contract to sell land after plaintiff

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

had executed an option agreement to sell to another, the mere fact that, after the acceptance of plaintiff's option by such other, his agreement to purchase from plaintiff was changed slightly as to the terms of payment and the rate of interest would not be a defense to plaintiff's action to annul his contract with defendant for fraud.

[Ed. Note.—For other cases, see Cancellation of Instruments, Dec. Dig. § 25.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Chas Monroe, Judge.

Action by Jacob Rheingans against Oscar B. Smith, in which E. L. Hopper & Son intervened. From a judgment for plaintiff and an order denying a motion for a new trial, defendant appeals. Reversed.

Valentine & Newby, for appellant. Haas, Garrett & Dunnigan, for respondent.

SHAW, J. The defendant appeals from the judgment and from an order denying a new trial.

The plaintiff sues to cancel a contract, executed by him to the defendant, and to quiet his title against all claims of said defendant under said contract. The contract was made on November 29, 1909. It was signed by both parties. Rheingans thereby agreed to sell to Smith a certain tract of land for \$156,500, of which \$1,000 was then paid by check. \$4,000 was to be paid on completion of title to the land, \$31,500 in six months, \$60,000 on June 1, 1913, and \$60,000 on June 1, 1914. It is alleged that Smith induced Rheingans to execute the contract by fraud. The court below made findings to that effect, and gave judgment accordingly for the relief prayed for. In support of his appeal, Smith insists that neither the evidence nor the facts alleged support the charge of fraud.

The facts alleged as constituting the fraud complained of are as follows: Rheingans, being the owner in fee of the land, had given to the intervener, E. L. Hopper & Son, a corporation, an option, in writing, to buy the land at the price of \$155,975, to be exercised within 90 days from its date, which was September 1, 1909. One-third of the price was to be paid on the execution of a deed, and the balance in five equal annual payments at 7 per cent. interest. Smith knew of this option and all its terms. It expired, as must be observed, on November 30, 1909. On November 29, 1909, Smith represented to Rheingans that this option had expired on September 28, 1909, and that Rheingans was then free to sell the land to Smith. Rheingans then declared that he would not sell to Smith, unless the Hopper option had expired, or was not accepted. Smith thereupon further represented that if Rheingans would execute the contract to sell to him, and the option had not so expired, and Hopper & Son should exercise the right within the time actually limited, he (Smith) would regard the

agreement between himself and Rheingans as ineffective, and would cancel the same and return it to Rheingans. Rheingans was not sufficiently conversant with the English language to fully understand the meaning of the phrase "within ninety days from the date hereof." He believed said representations of Smith that the option had expired, and relying thereon, and also upon the promise of Smith to cancel the contract if his statement was wrong, and the option was duly exercised by Hopper & Son, he then and there executed the contract now sought to be canceled, and accepted Smith's check for \$1,000 thereon. The complaint alleges that it was executed on the 30th, but the contract itself and the undisputed evidence shows that it was executed on the 29th. On November 30th Hopper & Son, in writing, accepted the option, and thereupon Rheingans made an agreement to sell the land to that corporation. A few weeks afterward this suit was begun. The findings are substantially the same as the allegations.

[1] Without considering the sufficiency of the facts, as charged, to constitute fraud, and proceeding to the evidence, we think it is clearly insufficient to show legal fraud in the false representation charged. Smith and Rheingans did not occupy confidential relations to each other. One was the seller, the other the buyer; and they dealt as strangers. Rheingans, therefore, had no inducement or right to rely on the statements of Smith, except as to the facts of which Rheingans was ignorant, and which he had reason to believe Smith knew, and except, possibly, as to the law based on facts of which he had reason to believe Smith's knowledge was greater than his own. He could not predicate fraud on a statement by Smith as to the law applicable to facts equally well known to both of them. Rheingans had a duplicate copy of the option to Hopper & Son. At the interview on the evening of November 29th, when the contract in question was made, Rheingans said that the option ran out on the evening of November 30th. Smith said, "It will run out tonight." Rheingans then got his copy of the option agreement and showed it to Smith, who then said, "It will run out tonight at 12 o'clock." Rheingans said, "I don't believe it." Smith then proposed the plan of taking an agreement and canceling it, if Hopper & Son took the land the next day upon the option. Rheingans consented, signed the agreement with Smith, and accepted Smith's check for \$1,000 thereon. This is Rheingans' version of the transaction, and it is not contradicted. There was no claim by Rheingans to Smith, nor upon the trial, that he was not entirely familiar with the language of the option, or that he did not understand its meaning.

[2,3] It is plain from this evidence of Rheingans himself that he did not credit

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes.

Smith's statement as to the time the option expired, and did not rely on it. And, even if he had believed it and relied on it, the statement of Smith was a mere opinion—an opinion on a question of law, based on facts known to both alike. Such an opinion by one occupying no confidential relation toward the person to whom it is addressed does not justify such person in relying upon it, and it is not a sufficient basis to support a charge of fraudulent misrepresentation. *Choate v. Hyde*, 129 Cal. 584, 62 Pac. 118; *Rendell v. Scott*, 70 Cal. 514, 11 Pac. 779; *Nounnan v. Sutter, etc., Co.*, 81 Cal. 6, 22 Pac. 515, 6 L. R. A. 219; *Lee v. McClelland*, 120 Cal. 147, 52 Pac. 300; 20 Cyc. 17; 14 Am. & Eng. Ency. of Law, 34.

[4, 5] The promise of Smith to cancel his agreement, if the option of Hopper & Son was taken up, appears to have been the inducement upon which Rheingans relied in making the agreement with Smith. The mere making of a promise, which the promisor afterwards fails or refuses to perform, does not constitute actionable fraud. 20 Cyc. 20; 14 Am. & Eng. Ency. of Law, 47; *Lawrence v. Gayetty*, 78 Cal. 131, 20 Pac. 382, 12 Am. St. Rep. 29. In the absence of confidential relations between the parties, it is only when such promise is made without any intention, of performing it that it becomes fraudulent in law or equity. Civ. Code, § 1572; *Lawrence v. Gayetty*, supra; *Brisson v. Brisson*, 75 Cal. 527, 17 Pac. 689, 7 Am. St. Rep. 189; *Langley v. Rodriguez*, 122 Cal. 581, 55 Pac. 406, 68 Am. St. Rep. 70. Smith, in his testimony, admitted that he knew all the time that the option did not expire until November 30th, and there is some evidence tending to support the inference that when he made the promise to cancel his own agreement he intended not to perform it. But there is no averment regarding such intent, nor any finding upon it, and the record shows that this species of fraud was not suggested during the trial, and that the case was not tried upon the theory that such fraud was the basis of the action. The briefs on this appeal contain no reference to such fraud. In such circumstances, we must adhere to the rule that a party is required to prove the case as alleged, and cannot recover upon proof of other facts not alleged, which might entitle him to the relief asked. If such fraud is relied on, it can only be done upon a new trial under an amended complaint.

It has occurred to the court that the defendant might be held to be estopped to assert rights under his contract, upon the principles stated in *Seymour v. Oelrichs*, 156 Cal. 794, 106 Pac. 88, 134 Am. St. Rep. 154. But here again we are confronted with the fact that neither in the pleadings, nor upon the trial in the court below, nor upon this appeal, has there been any suggestion to

that effect, and the rule just stated forbids an affirmance on such new grounds.

[8, 7] As the case is to be remanded for a new trial, and there may be amended pleadings, it is necessary to state our views upon another point. When Hopper & Son accepted the option without qualification, it became at once a binding contract, enforceable by that company. Civ. Code, § 1585; *Four Oil Co. v. United O. P.*, 145 Cal. 624, 79 Pac. 366, 68 L. R. A. 226; 29 Am. & Eng. Ency. of Law, 601. If the contract of Smith with Rheingans is found to be fraudulent, the mere fact that Hopper & Son, after accepting their option, agreed with Rheingans upon slightly different terms of payment and a lower rate of interest upon the deferred payment, would be no defense in favor of Smith to the action to set aside his contract for the fraud. What effect it would have if his contract is not found to be fraudulent, and his right to relief upon his cross-complaint to enforce it becomes important, is a question which, upon the record and agreement before us, we think it best not to consider.

The judgment and order are reversed.

We concur: ANGELLOTTI, J., SLOSS, J.

In re HENDERSON'S ESTATE  
(S. F. 5,885.)

(Supreme Court of California. Nov. 22, 1911.  
Rehearing Denied Dec. 22, 1911.)

1. WILLS (§ 457\*)—CONSTRUCTION—"LEGATEES."

Testator by olographic will, after having bequeathed to his wife the homestead with furniture, etc., together with a one-fourth interest in the residue after paying all bequests made, bequeathed the remaining three-fourths of the residue to his three other children, and provided that, if any of the "legatees" died before testator's death, then the legacy provided for him or her should be divided equally among the residuary legatees. *Held*, that the word "legatees" was used in an ordinary nontechnical sense to include bequests of both real and personal property, and that, under the rule that the testator's intention, as disclosed by the language used, must control, such term included the bequest to the wife, and that on her predeceasing the testator her share became a part of the residue within the substitutionary clause.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 975; Dec. Dig. § 457.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4084-4086.]

2. WILLS (§ 522\*)—CONSTRUCTION—"GIFT TO CLASS."

A bequest to a class is a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in definite proportions; the share of each being dependent for its amount on the ultimate number.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1114; Dec. Dig. § 522.\*]

3. WILLS (§ 523\*)—CONSTRUCTION—SUBSTITUTIONARY CLAUSE—GIFT TO CLASS.

Testator, having bequeathed certain legacies, gave the homestead to his wife, and then

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

provided for a division of the residue of his estate equally between her and his three surviving children, providing that, should any of the legatees die before testator's death, the legacy provided for him or her should be divided equally among the residuary legatees. *Held*, that such substitutionary clause provided for a gift to the residuary legatees as a class, so that on the death of the wife before testator her share of the residue was divisible between the surviving residuary legatees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1115; Dec. Dig. § 523.\*]

Department 1. Appeal from Superior Court, Humboldt County; Clifton H. Connick, Judge.

Application for an order of distribution of the estate of James W. Henderson, deceased. From an order denying the claim of certain legatees to a share in the residue, Ruth Henderson appeals. *Affirmed*.

Rehearing Denied; Beatty, C. J., dissenting.

E. W. Wilson, for appellant. Denver Sevier and J. F. Coonan, for respondents.

SLOSS, J. This is an appeal from a decree of partial distribution. James W. Henderson died on July 13, 1910, leaving a will which was admitted to probate in the county of Humboldt. The will, which was olographic, was dated October 3, 1905. By its first and second paragraphs, the testator declares his desire to save trouble to his wife and children, and to deal justly and fairly by all for whom he makes provision, and appoints as executors his wife, Amelia J., his daughters, Ida H. Sevier and Alice J. Henderson, and his son, George Y. Henderson. Paragraph 3, disposing of the estate, reads as follows:

"3rd. That after paying all my just debts and funeral expenses the rest and residue of my estate shall be disposed of as follows, viz.:

"To my grand children Abby J. Sevier one thousand dollars, to Henry Sevier one thousand dollars, to Stanley Sevier one thousand dollars, to Ernest Sevier one thousand dollars, to Randolph Sevier one thousand dollars, to Josephine Sevier one thousand dollars and to Helen Sevier one thousand dollars.

"Also to my grand children of my son E. W. Henderson, deceased: To James W. Henderson ten thousand dollars and to Ruth five thousand dollars, and to their mother, Eda Henderson, five hundred dollars and all my interest in the house and lot on Seventh Street, in Eureka, where she now resides with her family.

"To my sister, Bell H. Love, of Boulder, state of California, one thousand dollars.

"To Cora Cattemole (nee Cora Love) five hundred dollars.

"To my sister, Martha Coombs, now of Windsor, Canada, one thousand dollars.

"To David H. Henderson, one thousand dollars and all interest I have in his farm in the town of Norfolk, in the county of St.

Lawrence, state of New York, where he now resides.

"To my dear wife, Amelia J., the homestead where we now reside on the corner of 4th and H streets, Eureka, California, and all furniture, books and pictures, and all my jewelry and one-fourth interest in all the rest and residue of my estate after paying all the bequests herein provided to be paid.

"To my daughter, Ida Sevier, one-quarter interest in the residue of my estate, after paying the bequests herein provided for.

"To my daughter Alice J. Henderson, one-quarter interest of the residue of my estate after paying the bequests herein provided for.

"And to my son, George Y. Henderson, one-quarter interest of the residue of my estate after paying the bequests herein provided for.

"Should any of the legatees herein provided for die before my death, then the legacy provided for him or her shall be divided equally among the residuary legatees.

"My executors shall have power to collect, buy, sell, or trade in any of the property hereby bequeathed, and so far as possible to avoid the interference of courts."

[1] The wife, Amelia J. Henderson, died after the making of the will and before the death of the testator. Surviving the testator as his heirs at law were his son, George Y. Henderson, and the two daughters, Ida Sevier and Alice J. Henderson, named as executor and executrices of his will, and two grandchildren, James W. Henderson and Ruth Henderson, son and daughter of E. W. Henderson, a son of the testator, who had died prior to the making of the will. The proceedings now before us were instituted by a petition for partial distribution presented by George Y. Henderson, Ida Sevier, and Alice J. Henderson, the surviving children of the testator. By such petition, they asked distribution to them of the entire residue of the estate over and above the amount required for payment of the cash legacies and the devises of interests in real property given by the will to Eda Henderson and David H. Henderson, respectively. The contention of the petitioners was that they were entitled to receive equal one-third shares of the residue, including the property devised and bequeathed to the testator's wife, Amelia J. Henderson. On the other hand, the granddaughter, Ruth Henderson, who was a minor and appeared by her guardian, opposed the application, and filed a petition on her own behalf for partial distribution; her contention being that the bequests and devises to the wife, Amelia J. Henderson, lapsed by her death and passed to the testator's heirs at law, of whom said minor was one. The court below granted partial distribution as prayed by the surviving son and daughters of the decedent. The granddaughter appeals.

The correct solution of the problem so pre-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 119 P.—32

sented depends principally upon the meaning of the following clause of the will: "Should any of the legatees herein provided for die before my death, then the legacy provided for him or her shall be divided equally among the residuary legatees." The widow was herself one of those to whom the residue was given. The distribution to the respondents of the share which she would have taken requires a holding, first, that the widow is included in the phrase "any of the legatees herein provided for" in the substitutionary clause; and second, that the gift over is to the takers of the residue as a class, and is consequently to be divided among those members of the class who may survive the testator.

The primary purpose of all interpretation of wills is, of course, to ascertain the testator's intent, as disclosed by the language he has used. Civ. Code, § 1317. Of this class of questions, it may be said, with more truth, perhaps, than of any other, that each case depends upon its own peculiar facts, and that precedents have comparatively small value. "Except for the establishment of general principles, very little aid can be procured from adjudged cases in the construction of wills. It seldom happens that two cases can be found precisely alike"—says Washington, J., in *Lambert's Lessee v. Paine*, 3 Cranch, 131, 2 L. Ed. 377. *Rosenberg v. Frank*, 58 Cal. 387, 411; *Le Breton v. Cook*, 107 Cal. 410, 416, 40 Pac. 552. It is particularly important to bear this in mind in considering two cases presently to be mentioned as strongly relied on by the appellant.

In the case at bar, the appellant contends that the testator made a distinction between "legatees" and "residuary legatees," and that the latter were not described as among those whose "legacies" were, in the event of their death, to go to the residuary legatees. As a mere matter of definition, the word "legatees" includes residuary as well as other legatees. But, if the two expressions are to be differentiated, the widow (whatever may be said of the surviving daughters and son) certainly answered the designation of "legatee," in addition to that of "residuary legatee." She is given, not only a share in the residue, but the testator's furniture, books, pictures, and jewelry. As to these items, she is clearly a legatee, and the property so bequeathed to her is a legacy. To this extent, at least, the provision for her falls within the express terms of the substitutionary clause. It is hardly to be supposed that the testator designed that the property specifically bequeathed to his widow should go as directed if she should die, while the residuary provision for her should lapse and pass to his heirs as undisposed of. No intent to make such distinction appears on the face of the substitutionary clause.

The appellant argues further that, inasmuch as the estate (and the residue) included both real and personal property, such real

property as was contained in the residue could not be covered by a gift over of "legacies" given to "legatees." But, while technical words in a will are ordinarily to be taken in their technical sense, they will not be so taken when it appears that they were used in another sense by a testator who drew his will without an acquaintance with the technical sense. Civ. Code, § 1327; *Estate of Peabody*, 154 Cal. 173, 97 Pac. 184. The will before us was, as we have said, olographic, and it is perfectly clear from its provisions that the testator was unfamiliar with the distinctions between terms appropriate to testamentary gifts of personal and those of real estate. Although the estate comprised realty, the will does not contain the word "devise" or "devisee." The testator makes gifts of his interest in real estate, and then speaks of the residue, after paying all the "bequests herein provided for." He makes provision for "residuary legatees," but says nothing of "residuary devisees." It is plain, therefore, that the testator used the terms "bequests," "legacy," "legatees," and "residuary legatees" loosely, and without regard to their exact technical meaning. In order to give full effect to these expressions, they must be read as referring to gifts and takers of realty, as well as of personal property.

The position that the widow, unquestionably a legatee taking a specific legacy, is excluded from the operation of the substitutionary clause can be supported only by making the gift over dependent upon the death of legatees receiving *pecuniary* legacies. This construction would, however, require us to write into the clause words of qualification not used by the testator—a course which is unauthorized, unless required to carry out the intent disclosed by the entire instrument. We find nothing in this will tending to show that Henderson meant "pecuniary legatee" when he said "legatee." Again, the construction urged by appellant would lead to intestacy as to one-fourth of the residue, a result that is not presumed to have been intended (Civ. Code, § 1326), particularly where, as here, the will as a whole indicates that the testator intended to dispose of all the property he should leave. *O'Connor v. Murphy*, 147 Cal. 148, 81 Pac. 406; *Estate of Lux*, 149 Cal. 200, 85 Pac. 147.

Two cases are cited by appellant, who confidently asserts that they require a contrary holding to that above indicated. Of each of them it may be said that the language construed differs materially from that used in the Henderson will. As we have suggested, great caution must be exercised in seeking to apply to one will the interpretation which has been given to another. In *Estate of Richards*, 154 Cal. 478, 98 Pac. 528, the will, after providing for the payment of certain enumerated legacies, gave and bequeathed the rest, residue, and remainder of the estate, of whatever kind and character, to testator's two

brothers, William S. and Francis Richards. It then went on: "In the event of the death of any one or more of the legatees herein named, before they, or either of them, shall have received their bequests, the share of such deceased legatee or legatees shall be paid to my brother William S. Richards." Francis died before distribution. The court held that his share of the residue did not, by virtue of the substitutionary clause, pass to William S. Without going into the matter at length, we may point out that this conclusion was based upon and fully justified by a number of considerations which are not applicable to the Henderson case. The will of Richards did not speak of the brothers to whom the residue of real and personal property was given as legatees. It provided for a gift over in the event of the death of one or more of the "legatees" (a term not including, as it does here, any of the residuary beneficiaries); it made these gifts over take effect in case of death of legatees before receiving their bequests, thus referring to payment of bequests in course of administration, rather than to the receipt of a part of the residue, which would take place only upon distribution. It provided that the share of the legatee dying should be "paid" to W. S. Richards, a form of expression apt with reference to money legacies, but inappropriate if applied to a devise and bequest of a residue comprising real and personal property. The other case referred to is *Lyman v. Coolidge*, 176 Mass. 7, 56 N. E. 831. There a codicil to the will provided that, in case of the death of certain legatees, their legacies should be paid to their legal representatives. It then declared that "if any of the other legatees named in my will or codicils thereto shall die before my decease, the legacies therein given shall lapse, and the amount thereof shall be included in the residue of my estate." The last part of the clause, i. e., "shall be included in the residue," was held by the court to "show that the testatrix had in mind something outside of the residuary estate which was to fall into it." But this reasoning cannot be said to control the meaning of the very different language now before us. The Henderson will does not say that anything is to be "included in the residue," but that "legacies" (a word used in the will as equivalent to "legacies and devises") "shall be divided equally among the residuary legatees."

[2, 3] The remaining point to be considered is whether the gift over is to the residuary legatees as a class. In *Estate of Murphy*, 157 Cal. 63, 106 Pac. 230, 137 Am. St. Rep. 110, this court quotes with approval the following definition found in 6 *Jarman on Wills* (section 232): "In legal contemplation, a gift to a class is a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or some other definite proportions; the share of each being

dependent for its amount upon the ultimate number." Taking the substitutionary clause alone, its gift of legacies of legatees dying to "be divided equally among the residuary legatees" would seem to fulfill every requirement of this test. Thus it is said in the *Murphy Case* that a devise to "the four children of my late sister Catherine," without further words, would amount to a devise to a class. In that case, however, the words quoted were coupled with the further language: "That is to say, I give, devise and bequeath all the rest of my \* \* \* estate, \* \* \* share and share alike, to Timothy J. Flynn, William D. Flynn, Mary Jane Logan and Kate I. Prendergast." The fact that the clause, read as a whole, made a gift to the devisees nominatim was held to indicate an intent that they should take individually as tenants in common. It is true that in the original gift of the residue in this case undivided one-fourth interests are given to the widow and children by separate individual provisions. But the substitutionary clause is separate and distinct from this. It deals with a different subject, and is not necessarily controlled by the preceding designation of individuals. Neither the *Murphy Case* nor the other decisions of this court, relied on by appellant (*Estate of Morrison*, 138 Cal. 401, 71 Pac. 453; *Estate of Hittell*, 141 Cal. 432, 75 Pac. 53), present a form of disposition like the one here involved. The *Hittell* will simply bequeathed all the testator's property to two persons named. It contained no element of a class designation. The will of *Morrison* contained a gift of the residue to be divided between testator's sister (named) and her daughters and a brother (named) of the testator. There were two daughters of the sister. It was held that this was a gift to the four beneficiaries as individuals, and not a gift of one-half to a class composed of the sister and her two daughters, nor a gift of a third to a class composed of the daughters. There was no claim, and no room for a claim, that the four persons who were to take constituted a class. These circumstances, coupled with other indications of the entire will, fully justified the conclusion that gifts to four individuals were contemplated. But the case is very different from one where a gift, complete in itself, is to the residuary legatees.

The cases above cited emphasize the point that, in seeking to ascertain whether a gift is to a class, the paramount consideration is the intent of the testator, as derived from the entire instrument. To this apparent intent, rules of construction must always yield. In the case at bar, the interpretation of a gift to a class is strengthened by a view of the will as a whole. The substitutionary clause, including, as we read it, gifts over of the residue itself, was added for the very purpose of preventing intestacy as to any part of the estate. This purpose would be accomplished by division of the share of any legatee dying

among the survivors of those who were to take the residue. It would be defeated, and an inharmonious result would follow, if a part of such share were to pass as undisposed of, while the rest would go to the survivors of the residuary legatees. In the particular event which has occurred, i. e., the death of the widow, it will be observed that the construction contended for by appellant would result in having three-fourths of her share go over, while creating a lapse as to one-fourth of the very interest with respect to which the testator designed to prevent a lapse. The rule favoring a construction against intestacy applies with special force to this feature of the case.

Without undertaking to review all of the many cases cited by the respective parties, we state our conviction that the conclusions reached by the court below on both questions herein discussed are in harmony with the weight of authority, and that they give effect to the testator's actual intention.

The decree is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

PEOPLE v. BORELLO. (Cr. 1,616.)

(Supreme Court of California. Nov. 23, 1911.)

CRIMINAL LAW (§ 519\*)—CONFESSIONS—VOLUNTARY CHARACTER.

A confession, obtained by threats, intimidation, invective and false statements by the sheriff and district attorney while accused was under arrest, was not voluntary and was not admissible in evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163-1174; Dec. Dig. § 519.\*]

In Bank. Appeal from Superior Court, Amador County; R. C. Rust, Judge.

Agostino Borello was convicted of arson, and from a judgment rendered by the District Court of Appeal, affirming the conviction, he appeals. Reversed.

James H. Creely, Alfred H. Cohen, and Milton Shepardson, for appellant. U. S. Webb, Atty. Gen., J. Charles Jones, Deputy Atty. Gen., C. P. Vicini, Dist. Atty., and Benjamin P. Tabor, Special Prosecutor, for the People.

LORIGAN, J. This appeal was ordered here for further consideration after judgment rendered by the District Court of Appeal for the Third Appellate District affirming the judgment of conviction and the order of the trial court denying a motion for a new trial, from both of which the defendant appealed.

Defendant was accused and convicted of the crime of arson, and during his trial a purported confession made by him was admitted in evidence, and the principal point

on this appeal is as to the correctness of the ruling of the court in that respect.

The crime of which the defendant was accused was the felonious burning, on February 5, 1906, of the "Summit House Hotel," situated on the road leading from the town of Jackson to the town of Sutter Creek, Amador county. It appears that this property was for several years and at the date of its destruction owned by one G. B. Vicini, who, in April, 1905, leased it at a monthly rental of \$60, and for a term of six years to C. Lepori and L. C. Bertin, who then, and at the time of the fire, were engaged in business in San Francisco under the firm style of Bertin & Lepori. These lessees placed this defendant and a man named Faracone in possession of the property, who thereafter conducted it as a hotel and saloon. In July, 1906, defendant executed a chattel mortgage covering all the hotel and kitchen furniture, bar fixtures, etc., in the hotel and saloon in favor of said Bertin & Lepori to secure a promissory note for \$500 executed by defendant to them. In March, 1907, defendant took out two policies of insurance on the personal property in the hotel for \$1,000 each, one of which, however, expired by its terms before the fire. Thereafter defendant sold his interest in the hotel and saloon business to one Rossi, who alone seems to have thereafter conducted it until a few days before the fire when he abandoned the business, closed the hotel, and left that part of the country. A few days afterward and while the hotel premises were vacant they were destroyed by fire. The defendant for several months before the fire had been living in San Francisco but, a few days before it occurred, had been seen in the vicinity of the Summit House, once in company with Lepori of the firm heretofore mentioned, lessees of the hotel; another time with one Manzo, a resident of San Francisco; and some 11 months prior to the fire defendant had endeavored, but unsuccessfully, to prevail on one James Bryant to burn the hotel, offering him \$200 to do so.

There was considerable other evidence in the case—conduct on the part of the defendant and circumstantial evidence—relied on by the people to establish the guilt of the defendant, but no positive evidence except his alleged confession directly connecting him with the commission of the crime. We make no further reference to the evidence because our purpose has been to only state such of it as will make intelligible the matters to which the confession of defendant is claimed to have been addressed, and the condition and circumstances under which it was made.

It was not claimed by the people that the defendant himself actually set the hotel on fire. The theory was that the defendant, at the instigation of Lepori, engaged a man named Manzo to go from San Francisco to burn it, and that he actually did so; the mo-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



tive prompting Lepori being that by the destruction of the property the firm of which he was a member would be relieved from further payments on their lease, which still had three years to run and was an unprofitable investment, and the motive of defendant was to secure the insurance money on his personal property situated in the hotel.

Now as to the conditions and circumstances under which the confession of defendant was made:

On February 8, 1908, three days after the hotel was burned down, the defendant, who had left San Francisco for Jackson, Amador county, was arrested by the sheriff of that county at Martell, a railroad station a short distance from Jackson, and taken to the county jail. The next evening, Sunday, February 9th, he was brought from the county jail to the office of the district attorney of the county, where were present the district attorney, the sheriff of the county, a deputy sheriff, the official stenographer of the superior court, and a constable of Amador county, the latter being present at the request of the district attorney, to act as interpreter, the defendant being an Italian, who, though able to speak the English language, did so brokenly. This interview in the district attorney's office lasted at least two hours and a half, although some of the parties present testified that it lasted nearly five hours. It resulted, after defendant had been interrogated by both the district attorney and the sheriff, in what purported to be a confession of the defendant. The statement made by him was dictated to the stenographic reporter, who transcribed it at once. It was this statement which was admitted in evidence as the confession of defendant, and in which he admitted having taken part in the burning of the building, having at the instigation and request of Lepori employed a man whose name is not disclosed in the written confession who agreed to and did burn it.

On the preliminary showing the sheriff, district attorney, and the deputy sheriff testified generally that no promises were held out to defendant or any threats or intimidation or other improper means used to procure him to make the confession. As to what took place at the interview the district attorney testified: "I was in that meeting or investigation for a period of about two hours. Both Mr. Gregory and myself asked defendant, Borello, some questions. Of course he willingly made the statement, the whole statement himself, and then we asked him as to little points and one thing and another that we wanted to find out, and that took up about two hours. \* \* \* Mr. Willis, the stenographer who was present during all the interview which culminated in the making of the alleged confession, was not called by the prosecution at the preliminary showing, and his presence as a witness had not been required by it.

On the part of defendant he himself testified, among other things, that both the sheriff and district attorney told him that it would be better for him if he would tell the truth about the burning of the hotel; also, that if he would do so both he and his brother Marco (who was then under arrest also accused of burning the hotel) would be allowed to "go free"; that the district attorney told him that he did not want to keep him in jail, but that he wanted to get Lepori. He stated further that the sheriff had told him that his brother Marco had made a full statement of the cause and origin of the fire, and that the sheriff stated other facts tending to convey the impression that, in this statement so claimed to have been made, his brother had implicated defendant in the crime, and that, if defendant would not tell the truth and sign a statement, his brother Marco could get 14 years. Other matters were testified to by defendant and other witnesses on the preliminary showing tending to support the claim of defendant that his confession had not been procured from him freely and voluntarily. All these statements of defendant and the other witnesses in his behalf were specifically denied by the sheriff and district attorney.

The prosecution then offered the confession of the defendant in evidence, to which the defendant objected on the ground that it had not been shown to have been freely and voluntarily made. Before a ruling thereon the defendant asked for a continuance in order to procure the testimony of Mr. Willis, the stenographer, who was present when the interview between the sheriff, district attorney and the defendant was had, and the alleged confession was obtained. The court refused the continuance and said: "If you gentlemen want to argue upon the evidence that is in, you can do that, with the understanding that hereafter, if Mr. Willis comes, you can introduce his evidence. If the court should sustain your objection, there will be no necessity for the evidence of Mr. Willis. If the court should overrule your objection, and admit the confession, you can have Mr. Willis hereafter in rebuttal on your case, and the court then can get the benefit of his evidence as well as the jury; and if necessary, after such a showing is made, the court can rule at that time, withdraw the confession from the jury, and instruct them not to entertain it. I think that is the only way out of it."

After argument, the court, over the objection of defendant, admitted the confession in evidence, which confession consisted of but three pages of the record, and amounted only to a declaration by defendant, as heretofore stated, that Lepori had engaged him to employ a man, to be paid by Lepori, to burn up the hotel, and that defendant employed such a man and the hotel was burned.

At a subsequent session of the court, the defendant in the meantime having procured

the attendance of Mr. Willis, the official stenographer of the court (not then, however, reporting the trial of defendant) called him as a witness. While the testimony on the preliminary showing on the part of the prosecution was that, in the interview with the defendant on the 9th of February, the defendant made his statement freely and willingly, and that the sheriff and district attorney "then would ask him as to little points and one thing and another that we wanted to find out," the notes taken by the stenographer and from which he testified show very clearly just what took place, and how the interview with or investigation of the defendant was held as far as the notes speak on the subject. What the stenographer took down he had not been requested to do by any one, but did it of his own volition. He testified that all the public officers heretofore named were present in the office of the district attorney with the defendant and that the latter was questioned by both the district attorney and the sheriff directly, and also through the medium of an interpreter, and that they were all in the office of the district attorney engaged in that matter from about a quarter to 7 in the evening until half past 10 or 11 o'clock that night. All the conversation which was had between the officers, the interpreter, and the defendant was not taken down by the stenographer; but the greater and more important part of it was, and shall be referred to as the undisputed evidence in the case of what actually took place at the interview and bearing on the question whether the confession was freely and voluntarily obtained from the defendant or not. Before doing so, it is to be said that, when this appeal was before the District Court of Appeal for determination, that court, as appears from its opinion, was strongly persuaded that if the confession of defendant had been obtained solely through the declarations of the sheriff, and his conduct and that of the district attorney on the evening of the 9th, as disclosed by the stenographer Willis, such confession would have been shown to have been improperly obtained and inadmissible in evidence. That court was of the opinion, however, that the declarations of the defendant on the evening of the 9th of February when the notes were taken and the confession signed by the defendant were but repetitions of admissions of guilt which he had made to the officers, (the sheriff and district attorney) the night previous (February 8th), and, having voluntarily confessed the crime on the previous evening, the subsequent conduct of the sheriff and the district attorney on the night of February 9th, however threatening or otherwise reprehensible it might have been, could not be said to have anything to do with causing defendant to then admit his guilt, because he had already admitted it on the previous evening. But there is not a particle of evidence in the record that the defendant

made any confession of guilt or stated any circumstances of an incriminatory nature on the evening of February 8th or at any other time than during the interview of February 9th. No such claim is made in the brief of respondent. Nowhere in the record is there even a suggestion that he had done anything of the kind excepting as might appear from some declarations of the sheriff and district attorney in questions they asked him on the evening of the 9th and which imported that the defendant had made them the previous evening. But, in as far as any questions by the sheriff or district attorney stated or implied that defendant had made any incriminatory admissions on the evening previous to February 9th, such statement or assumption was untrue and was a species of deception employed to embarrass, disconcert, and entrap the defendant, because it affirmatively appears from testimony directed specifically to the fact that the defendant made no admissions of guilt or statements of any incriminatory character at any time previous to the evening of the 9th of February. This is directly shown by the testimony of the sheriff and district attorney themselves, who explicitly state that on the evening of the 8th the defendant would not talk about the burning of the hotel, denied any knowledge about it; the district attorney testifying that, while he asked and the defendant answered some unimportant questions, the important ones which he asked him were not answered by the defendant at all.

Recurring now to the testimony of Willis as to the actual occurrences and the true situation and circumstances under which the alleged confession was obtained: Reasonable limits of an opinion preclude a detailed statement of all that occurred. It appears that on the afternoon of the 9th the district attorney had visited the defendant in jail; that the defendant made no statement to him, but said, "I will see you to-night"; and that it was on account of this statement that defendant was subsequently brought to the district attorney's office, where the various officers of the county heretofore referred to were assembled. If defendant intended by the expression, "I will see you to-night," to convey the impression that he would then make a confession to the officers of any connection with the offense charged, it is quite apparent that he abandoned any such intention before he was brought before them. It does not appear that he was then asked to make, nor did he make, any spontaneous statement of his connection with the burning of the building, but, on the contrary, the sheriff and district attorney at once proceeded to interrogate him respecting the matter, and this investigation on their part continued for a long period of time before he made any confession respecting his connection with the commission of the offense. His general attitude when he was brought in, and which continued during the examination and while

he was being subjected to examination by the officers, is stated by the district attorney himself: "He would hem and haw about it. \* \* \* When I say he hemmed and hawed, I mean he would not say anything. He was holding his head down a great deal. One minute he would want to tell and the next minute he did not want to tell. \* \* \* The reason why he wanted to tell I could not tell you. I would say it was because he was scared, and then he would want to tell and hem and haw about it, and finally came out and told the whole story. \* \* \* Mr. Gregory (the sheriff) and I just kept on asking questions relating to the matter."

But it is these very questions put by the sheriff and district attorney, the continuous and searching examination to which the defendant was put by both of them in an endeavor to wring out a confession when it was apparent that he was not disposed to make one, and their statements and conduct toward him, which showed that the confession was not freely and voluntarily made, but was the result of threats, intimidation, invective, accompanied with coarse profanity, mental coercion, and false statements used to procure it, the employment of which the law absolutely discountenances and prohibits.

The notes of Willis—the correctness of which are not questioned—show that the sheriff and district attorney, principally the former, in English, and through the medium of the Italian interpreter, interrogated the defendant persistently for upwards of an hour, if not for several hours; that they persisted in making repeated inquiries on the same matters to which the defendant gave them what in their judgment were unsatisfactory replies to such an extent as to elicit from the defendant through the interpreter this declaration to the sheriff, his interrogator: "He says he cannot say anything more than he knows. It looks as if you are not satisfied with what he says." Responded to by the sheriff with, "He says one thing and then he wants to take it back."

During the long inquisitorial ordeal through which he was put by the officers and before he had made any admission of guilt, he was told by the sheriff that he would have to tell all he knew and was accused by both the sheriff and district attorney of not telling the truth in the answers he was giving. The sheriff declared to him that he had absolute proof of his guilt and could convict him before a jury; charged him with another crime in connection with the crime of arson; declared that he could prove he had offered a man money to burn the hotel and could prove that fact whether it was so or not; stated that they had sufficient proof without any confession on his part to convict him; that his brother Marco had made statements in which he implicated the defendant in the burning of the hotel, and if his brother went back on it he would go to the penitentiary for 14 years; they asserted that he had made statements to them the

night before of an incriminatory character, when in fact he had made no such statements at all; charged him with repudiating in his answers the statements declared to have been so previously made; and indulged in coarse profanity throughout their examination relative to the statements he was making and to emphasize their disbelief in their truth.

Supplementing these references to the conduct of the officers during the examination with a few extracts from the notes of Willis: Almost at the beginning of his examination when the defendant had stated, among other things, that he did not know the name of the man who it was assumed by the officers had actually burned the hotel, the district attorney declared: "Don't you think if I told you those things, then you would ask me what was the man's name, and I would say, 'I don't know,' you would tell me I was a damned liar. That is what you would say. You would tell any reasonable man under the sun; you can't tell any man that has got a damned ounce of sense, and tell them that state of facts, that you don't know a man's name, he would be a God damned fool if he believed you."

Following a large number of interrogatories by both the officers based on purported statements made the night before by the defendant, which questions however elicited no answer from the defendant incriminating himself, he was further asked why he had said his brother Marco had gone to San Francisco with him, to which he answered, "It don't make any difference." The district attorney then said: "I understand you now, that you don't want to tell the truth; that is the way I understand you. A. I am telling the truth. Q. You don't want to when you say it is none of your business, when your brother go to San Francisco. Suppose my brother and I go to San Francisco and a man asked me whether I knew. You know damned well I would lie if I said I didn't know. A. You ask my brother. Q. Does he tell the truth? You don't. Can't you tell the truth? A. Yes. Q. Don't you know whether he went down with you? It is the God damndest proposition I ever heard of."

It also appears from a consideration of the notes of Willis that after an unremitting, searching, and protracted questioning by the officers in regard to the burning of the hotel had failed to draw any admission from defendant of his connection with it, he was finally asked who had telegraphed to Lepori at San Francisco that the hotel had been burned. Defendant made no answer. Asked if he knew the name of the person who had done so, and answering in the negative, the sheriff addressed him as follows: "I ain't going to let you go. I won't lie to you. I got too much proof. I am not going to let you go; that is all there is about it. You are going to stand trial as I told you last

night, and you don't have to tell me anything if you don't want to; but, if you want to tell me anything, it must be free and voluntary. I want the truth. I want to know the truth. That is all I do want. Now, do you think that when I can prove that you offered a man \$200—I can prove it whether it is so or not—that you offered a man \$200 to burn that place, that you told him that you had got the coal oil, that you went down to Rose's and had the place insured, and you came back and told a man it was all right, and he told you that you were crazy? Now, I can prove that, and when I can prove that you came up here and shipped away the goods, and I can prove that you said Lepori told you to ship the goods away, and I can prove to you that you told other people that Lepori told you there was going to be a fire, and if your brother goes back on it, he will go to the penitentiary for 14 years; I don't lie to anybody. I don't lie to anybody. I am telling you what he said. But he said that. I am not telling you all that your brother said. I am not going to tell you all your brother said. I will tell you right now I won't tell you all your brother said; but you did tell your brother that, and your brother swore that you told him that Lepori was going to have a man come up here to set that house afire. I can prove that by every man in this room. They all heard it, by God, every man in this room heard that. Now, I can prove that you went to work and you did ship this stuff as Lepori told you. I can prove that man came up here from San Francisco with you, and that you stayed here with him and stayed until your brother came up and you—at the Summit House—and when your brother came up here, then you took your brother into his bedroom, the first night, and told him this story. Now, you shipped this stuff away, and you shipped stuff that didn't belong to you—not a God damned bit of it. That cash register didn't belong to you or Lepori. It belonged to Rossi. You said this that you sold it to Rossi, and you shipped the wine and you shipped the bedding and you shipped the mineral water, and, by God, it is selling goods that don't belong to you. That belongs to Rossi, and Rossi has got a bill of sale for that."

Here the district attorney intervened with: "When you went to San Francisco, you went with Rossi and your brother, and they got off at Galt for Sacramento. You told us that Lepori told you to pack that stuff, and that Lepori didn't own it any more than you did. You told us that Lepori told that when you went back to San Francisco. You went down to Lepori's store to tell him that you had shipped that stuff and you was also going to tell him that the man that went up with you was at your brother's house. Do you suppose that when I can prove that—"

Here the sheriff, interrupting the district attorney, proceeded: "Do you suppose now

that when I can prove that to you that any jury in the world is going to let you go? You have got to show where you got all this news. That is all there is about it. You have already told us that Lepori told you, but that won't clear you. You asked me if you could go, and I told you no. I am telling you I can't turn you loose. Suppose I turned you loose with all that evidence against you, what would people say about me? Here is a God damned pretty sheriff and a God damned pretty district attorney, to have all this proof against a man and turn him loose. \* \* \* If he (defendant) wants to say anything, he can say it now, because if he don't I am going to strike out to-morrow morning and I am going to round up this whole God damned bunch. I can't stay here for a week, and I am not going to do it. If he wants to say anything, he can say it now. I want to say to you right now, Borello, that if you don't want to say anything you don't have to. If you don't want to make any statement, you don't have to, but if you do it must be free and voluntary on your part, without any concessions, promises, rewards, or anything else. Now, if you want to do it, you can."

Immediately following these declarations by the sheriff and district attorney, the defendant, in response to further questions, stated that Lepori had instigated the burning of the hotel and had asked him to employ a man to do it, Lepori agreeing to pay the man a hundred dollars if the destruction was successful; that the defendant employed one Dominico Morozzi, or a man having some such similar name—defendant could not tell exactly—to do it; that he took him to the Summit House from San Francisco for that purpose, left him there, and the hotel was burned.

Additional excerpts from the notes of Willis might be given showing highly improper conduct on the part of the officers to procure a confession from defendant, but the above will suffice. In this connection it is to be observed that in the lengthy and forceful declaration of the sheriff to the defendant last above quoted the sheriff did not specifically state to the defendant how far the statement of his brother implicated him in the burning of the hotel; but there can be no reasonable doubt but that the sheriff intended to convey the idea and have the defendant believe, as he naturally would, that his brother had made a statement to the sheriff directly implicating him in it. The defendant knew that his brother Marco was under arrest and had made a statement, but did not know what it contained. No other meaning or intention could be taken by defendant from the language of the sheriff when referring to the statement made by Marco: "I am not telling you all your brother said. I am not going to tell you all your brother said. I will tell you right now I won't tell you all your brother said; but you did tell your brother that

and your brother swore that you told him that Lepori was going to have a man up there and set that house on fire"—except that its emphatically reiterated character was to suggestively and insinuatingly impress the defendant with the belief that his brother's statement had in fact implicated him.

No attempt was made on the part of the prosecution to question the accuracy of what is shown by the testimony of Willis to be the exact circumstances and method employed by the officers to procure the confession.

On this showing made, the defendant moved the court to set aside the order theretofore made admitting the confession in evidence, under the right reserved to him by the court to do so at the time the confession was originally admitted in evidence, and on the ground that it was not freely and voluntarily made, which motion the court denied. This was error. The court should have granted the motion. While, upon the preliminary showing made by the prosecution and upon which the admission of the confession was made, it appeared in answers to general questions that the confession had been obtained freely and voluntarily, the uncontradicted testimony of the stenographer showed exactly how it was obtained and by what method and conduct on the part of those who had testified to its free and voluntary character, and conclusively showed that it was not so made, but was obtained by a method inquisitorial in its nature and of the "third degree" in character; the assumption of a dominating and browbeating attitude of the officers toward the defendant, and the employment of deceptions, threats, and intimidations, emphasized with coarse profanity.

That a confession so extorted cannot be admitted in evidence is firmly established in the jurisprudence of this country. *Bram v. U. S.*, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568; *People v. Loper*, 159 Cal. 6, 112 Pac. 720.

The judgment and order appealed from are reversed.

We concur: BEATTY, O. J.; HENSHAW, J.; MELVIN, J.; SHAW, J.

SLOSS, J. I concur. The methods employed to induce the defendant to confess were, I think, more extreme and unfair than those which were held by a majority of the court in the *Loper* Case to require the exclusion of the confession there obtained. It is impossible in the present case to avoid the conclusion that the confession was forced from the defendant by means of intimidation. Apart from anything else, there was a direct threat that defendant's brother would be subjected to a long term of imprisonment for perjury if he did not so testify as to fasten upon the defendant the guilt of the crime with which he was charged. A con-

fession resulting from the use of such means cannot in any fair sense be said to have been free and voluntary.

ANGELLOTTI, J. I concur.

MARSIGLIA v. DOZIER et al. (L. A. 2,746.) (Supreme Court of California. Nov. 29, 1911.) NEGLIGENCE (§ 111\*)—PLEADING—PROXIMATE CAUSE.

Defendants maintained a fire escape, consisting of a ladder, attached at one end by hinges to the building at the second-floor level. From the other end of the ladder, a rope passed over a pulley, attached to the building at the third-floor level; there being at the other end of the rope a weight, constituting a counterbalance. Children at play moved the loose end of the ladder up and down, and the pulley became detached, allowing the weight to fall on one of them. Held, that the proximate cause of the accident was the defective construction or fastening of the pulley, so that the complaint, alleging no negligence with respect thereto, but simply in respect to leaving the ladder lowered, within the reach of children, stated no cause of action; negligence not being presumed, but being required to be pleaded.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 182-184; Dec. Dig. § 111.\*]

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Vincent Marsiglia, by Malkola Marsiglia, his guardian, against Melville Dozier and others. Judgment for defendants; plaintiff appeals. Affirmed.

Peyton H. Moore and H. A. Massey, for appellant. Leslie R. Hewitt and H. E. Riggin, for respondents.

SHAW, J. A demurrer to the complaint was sustained, and thereupon judgment was given for the defendants. Plaintiff appeals therefrom.

The action is to recover damages suffered by plaintiff from an injury caused by a heavy weight falling against him. The defendants are the members of the board of education of the city of Los Angeles. The board maintains a high school in a high school building under its control. The building was more than two stories high. The law requires the board of education to provide such buildings with fire escapes. Pol. Code, § 1890. The fire escape provided by the defendants for this building consisted of a stepladder attached at one end by a hinge at the level of the second-story floor, and so arranged that the other end could be lowered to the ground, if necessary for use. To facilitate this lowering, a wire rope was run from the movable end over a pulley, attached at third-floor level, and thence to a weight or counterpoise suspended in the air some 12 feet from the ground. The proper position

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the ladder when not in use was at such a height that the lower end could not be reached by a person on the ground. When the end was lowered, it would, of course, raise the weight. The injury was caused by this weight falling against the plaintiff's shoulder.

The alleged negligence is as follows: When the end of the ladder was down within reach of a person on the ground, it could be raised, lowered, and made to oscillate by a child. Consequently it formed an attractive plaything for children in the vicinity. It did attract the plaintiff and other children thereto, as defendants well knew. Plaintiff was 10 years old. In the position just stated, the fire escape was a dangerous thing for children to play with. The reason why it was dangerous in that position is not stated. At the time of the injury, the defendants had negligently allowed the ladder to be lowered so as to be accessible to children on the ground, and to remain there unguarded and without fastenings. Plaintiff and other children, by the negligence of defendants, as aforesaid, were attracted to it. Plaintiff was standing beneath the weight. The other children were moving the ladder. By reason of their so moving the ladder, the pulley above, over which the rope ran, became loosened and detached from its fastenings, and allowed the weight to fall against plaintiff's shoulder, causing the injuries complained of.

The only negligent act here stated is the act of allowing the ladder to be lowered so as to be within reach of the children, and to remain there unguarded and unfastened. This allowed the children to move the lower end of the ladder up and down, and thus raise and lower the weight. But it was the purpose and plan of the apparatus that the weight as a counterpoise should thus move as the ladder was moved. This would turn the pulley, of course. It was so designed and constructed. Given a proper condition of the pulley, and the ladder might have been moved freely, with no result, except the turning of the pulley and corresponding moving of the weight. Such movement would not have detached the pulley from its place, or caused the weight to fall. Therefore the direct and proximate cause of the injury must have been the defective construction or defective fastening of the pulley. There is no allegation that the pulley was either negligently made or negligently affixed, nor any averment of negligence in respect to it. If the moving of the ladder caused the pulley to break loose and the weight to fall, it was solely because of the condition of the pulley. Unless that condition was the result of the negligence of the defendants, they cannot be held liable for the injury. Negligence is not presumed. The plaintiff must allege and prove that the negligent act of the defendants was the direct or proximate cause of

the injury, or he cannot recover. No negligence being alleged with respect to the thing which caused the injury, it must be presumed that the defect was a latent defect, with notice of which the defendants are not chargeable, or that the detachment of the pulley was brought about by the act of some third person for whom they are not responsible. The consequence is that the complaint does not state a cause of action.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

# CONSOLIDATED LUMBER CO. v. FIDELITY & DEPOSIT CO. OF MARYLAND. (L. A. 2,735.)

(Supreme Court of California. Nov. 29, 1911.  
Rehearing Denied Dec. 29, 1911.)

## 1. **BILLS AND NOTES (§ 537\*)—PRESENTMENT—WAIVER—EVIDENCE.**

Evidence that an indorser of a note did not waive its presentment to the maker when due *held* sufficient to go to the jury.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 537.\*]

## 2. **EVIDENCE (§ 471\*)—QUESTION INVOLVING CONCLUSION.**

Even if the question, asked of the indorser of a note, whether he ever agreed with any one to waive presentment of it to its maker, on the day it became due, for payment, calls for a conclusion, it is in the discretion of the court to allow it.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 471.\*]

## 3. **WITNESSES (§ 269\*)—CROSS-EXAMINATION.**

Plaintiff, in an action by the holder of a note against the surety of a notary, for failure of the notary in protesting the note to present it to K., its maker, by reason whereof plaintiff, in an action against S., its indorser, was defeated, may, on cross-examination of S., ask if he ever agreed with any one to waive presentment of the note to K., though defendant, in his examination in chief of S., had merely asked about his conversations with W., plaintiff's agent, about the note before it became due, and he had answered that, while he had such conversations, he was then unable to give their substance; W., having, in the action of plaintiff against S., testified that S., in conversations with him, waived such presentment; and plaintiff, from the pleadings, having good reason to suppose that defendant would offer in evidence the testimony of W., given in the former action; the question, in view of these facts, being germane to the examination in chief and proper cross-examination.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 269.\*]

## 4. **BILLS AND NOTES (§ 526\*)—MATURITY—OPTIONS—EXERCISE—EVIDENCE.**

Evidence, in an action in which a defense was that an option given by a note to declare the principal due for nonpayment of interest had been exercised, *held* to authorize a finding that it had not been exercised.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 526.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**5. BILLS AND NOTES (§ 226\*)—ACCOMMODATION INDORSERS—CONSIDERATION.**

One who, before execution of a note, signed it as accommodation indorser, in effect making him a surety, was liable, though he personally received no consideration from the payee, but the only consideration was credit to the maker on a prior obligation due by him to the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 534-541; Dec. Dig. § 226.\*]

**6. DEPOSITIONS (§ 111\*)—NOTICE AND AFFIDAVIT FOR TAKING—WAIVER BY STIPULATION.**

Notice and affidavit, required by Code Civ. Proc. § 2031, for taking a deposition, are waived by a stipulation that the deposition of a certain person may be taken before a certain person, and when so taken may be used on the trial.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 329-339; Dec. Dig. § 111.\*]

**7. DEPOSITIONS (§ 99\*)—USE IN ANOTHER ACTION—DEPOSITION ON STIPULATION.**

That a deposition is taken under a stipulation, waiving notice and affidavit required by Code Civ. Proc. § 2031, for taking a deposition, makes it none the less admissible in another action, under section 2022, providing that a deposition, "taken and returned as provided in this chapter," may be used in another action; such notice and affidavit being no part of the taking of the deposition.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 288-296; Dec. Dig. § 99.\*]

**8. DEPOSITIONS (§ 99\*)—USE IN ANOTHER ACTION—LIMITATION OF USE BY STIPULATION.**

The provision of a stipulation for taking a deposition, that when so taken it "may be used on the trial of said action," does not limit its use to the action in which it is taken, and so take it out of Code Civ. Proc. § 2022, providing that a deposition may be used in any other action between the same parties on the same subject.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 288-296; Dec. Dig. § 99.\*]

**9. DEPOSITIONS (§ 99\*)—USE IN ANOTHER ACTION—ACTIONS BETWEEN SAME PARTIES.**

The parties to the two actions, both on the same cause of action, are the same, within Code Civ. Proc. § 2022, providing that a deposition taken in one action may be used in any other action between the same parties on the same subject, where the action in which it is taken is against both the obligors on a joint and several obligation, and the second action is against only one of them.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 288-296; Dec. Dig. § 99.\*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by the Consolidated Lumber Company against the Fidelity & Deposit Company of Maryland. From a judgment for plaintiff, and from an order denying a motion for new trial, defendant appeals. Affirmed.

Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for appellant. W. W. Middlecoff, for respondent.

SHAW, J. Appeals are presented from the judgment and from an order denying a new trial.

Plaintiff sued to recover damages arising from a breach of duty by one C. T. Gifford, notary public; the defendant being the surety upon his official bond. Plaintiff held a note for \$5,000, executed by L. E. Kiefhaber, and indorsed by C. F. L. Kinnear and G. H. Seaton. It was dated September 20, 1906, and was due on April 1, 1907, with interest at 6 per cent. per annum, payable monthly. It provided that if the interest was not paid as it became due the whole amount of principal and interest should thereafter be due and payable at the option of the holder; such option to be exercised within 90 days after such default. Kiefhaber resided in Redlands. A short time before April 1, 1907, plaintiff sent the note to the First National Bank of Redlands for collection. It was not paid on April 1st, and thereupon the Redlands Bank delivered it to Gifford, as notary, to be protested. Gifford appended thereto his official certificate in due form, showing a regular protest thereof by him and the sending of proper notices to the indorsers. In fact, however, he did not present the note to Kiefhaber for payment, and by that omission the indorsers were released. Kiefhaber and Kinnear were insolvent, and Seaton was the only party financially responsible upon the note. The plaintiff sued him on the indorsement, and was defeated in the suit, and lost the debt because of the non-presentation to Kiefhaber. This action is based on said failure of Gifford, as notary, to properly protest said note.

In defense the defendant claimed (1) that Seaton had waived the presentment to Kiefhaber for payment; and (2) that the plaintiff had exercised its option as provided in the note, and had declared it due and payable long before April 1st. Upon the first ground, it claimed that no protest was necessary; and hence that Seaton was bound, notwithstanding his successful defense to the suit on the indorsement. Upon the second ground, it claimed that the plaintiff itself had suffered the note to become due without protest, or demand upon Kiefhaber for payment, and thereby released Seaton. The general verdict of the jury in favor of the plaintiff implies that neither of these defenses were proved. In answer to special interrogatories, the jury found that neither of them was true. It is claimed that these findings are contrary to the evidence.

[1] We think this claim cannot be sustained. The testimony relied upon to prove the waiver of presentment consisted of the complaint filed by the plaintiff in the suit against Seaton, and the testimony of Wheatley, the plaintiff's general manager, and of Seaton. The said complaint stated that some time prior to March 27th Seaton had requested plaintiff not to protest the note, or to resort to any legal action, or to incur any expense, and had positively promised to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pay it at maturity; but it further stated that on March 27th he had informed plaintiff that he had decided not to pay the note at maturity. In his answer in that action, he denied all the allegations of the complaint. The judgment roll was introduced in evidence, and the judgment was in his favor. The testimony of Wheatley consisted of extracts from the transcript of his testimony in the trial of the suit against Seaton. He testified at that time, in substance, that prior to April 1st Seaton had asked and he had promised to give further time on the note; that Seaton said he would pay it, but could not do so at maturity, and that it would not be necessary to go to any expense; that Wheatley told Seaton that he would have to protest the note on account of the other indorser, but that it was not necessary, so far as Seaton was concerned. Seaton's deposition was taken and introduced in evidence. One of the questions and answers was as follows: "Did you at any time ever agree with any one to waive the presentment of this note to Mr. Kiefhaber, on the day it became due, for payment? Answer: No, sir." It is apparent that this evidence does not conclusively show the waiver of presentment by Seaton. There is no express declaration of such waiver, and it is a fair inference that the parties did not understand that they were waiving such formality. The testimony of Seaton directly contradicts it. This raised a conflict in the evidence which was for the jury to resolve. The finding upon either side of the question would be beyond the power of this court to set aside. The court properly left the matter for the jury to determine.

[2,3] Defendant insists that the aforesaid question and the answer of Seaton were improperly admitted. The objection made to it was that it was not cross-examination, and that it called for the conclusion of the witness. Whether it called for a conclusion or not, we think it was within the discretion of the court to allow it in the form in which it was put. In the previous part of the deposition, defendant's counsel had asked Seaton about his conversations with Wheatley concerning the note before it became due, to which he answered that he had such conversations, but was unable at that time to give the substance of them. Plaintiff knew of the testimony of Wheatley in regard to these conversations, given in the former action against Seaton, and from the pleadings in this action it had good reason to suppose that Wheatley's testimony in the former action would be offered in evidence by the defendant. The aforesaid question to Seaton related to the same subject, and in view of these facts we think it was germane to the examination in chief and proper cross-examination.

[4] With regard to the exercise of the option to declare the note due before its ex-

pressed maturity, the testimony of Wheatley upon the trial of the suit against Seaton was introduced. He there stated that he had many times notified Seaton, both orally and by letter, that he had elected to declare the note due for nonpayment of interest; but he said further that on March 28, 1907, which was the last interview he had prior to its expressed maturity, he asked Seaton if he was going to pay the note when it became due on the 1st of April, and Seaton said he could not pay it, and thereupon asked for an extension. On redirect examination, he said he did not understand from the questions put to him that he was asked whether the note itself was made due before the 1st of April. We have not given the testimony in full, but taking it as a whole, in connection with that of Seaton on the same subject, it tends to show that neither himself nor Seaton understood that the note had been declared due in advance of its expressed maturity on April 1st. It was a fair inference that any declarations previously made to that effect had been withdrawn, or that they were not understood to intend to declare the immediate maturity of the note.

[5] The court properly refused to instruct the jury that if there was no consideration for the indorsement of the note by Seaton, and the plaintiff knew that fact at the time it accepted the note, the verdict should be for the defendant. There was no evidence to justify such a finding. Kiefhaber was the principal debtor, and Seaton was an accommodation indorser. His indorsement was made prior to the execution of the note. The consideration to Kiefhaber was a credit of \$5,000 upon a prior obligation due from him to the plaintiff. Seaton was, in effect, a surety. There was no dispute about these facts, and Seaton fully understood them. His testimony that he personally received no consideration from the plaintiff for his indorsement was, under these circumstances, immaterial.

[6-8] It is further claimed that the court erred in admitting in evidence the deposition of C. T. Gifford, taken in a former action by the plaintiff against the defendant and C. T. Gifford upon the same bond and for the same breach. That action had been dismissed. The complaint in that action and in this were identical, except that Gifford is not a party to this action. The deposition of Gifford was taken in the former action under a stipulation providing "that the deposition of C. T. Gifford, one of the defendants, as a witness in behalf of the plaintiff, may be taken before Charles L. Allison, \* \* \* and when so taken the said deposition may be used on the trial of said action." It is conceded that Gifford's absence at the trial of the present action was duly accounted for, and that, except as to the formality of giving the notice and making the affidavit required by sections 2031 and 2021 of the Code of



Civil Procedure, the deposition was in all respects taken and returned as provided in chapters 1-3, tit. 3, article 4, of that Code, sections 1981 to 2054, inclusive. The claim is that the stipulation aforesaid limited the use of the deposition to the trial of the action in which it was taken. Section 2022, Code of Civil Procedure, provides that: "A deposition taken and returned, as provided in this chapter, may \* \* \* be read in evidence by either party \* \* \* in any other action or proceeding between the same parties or their privies or successors in interest upon the same subject." Nothing is here said about the preliminary notice and affidavit. It is sufficient, so far as this section goes, if the deposition was "taken and returned" in the manner provided. The notice and affidavit were waived by the giving of the stipulation. In such cases the deposition is admissible in a second action for the same cause between the same parties, just as it would have been if the affidavit had been made and due notice had been given of the time and place of the taking. The taking of a deposition consists of the examination of the witness, reducing it to writing, and the signing of the same by the witness. Doubtless a party might, by such stipulation, limit the use of the proposed deposition to the trial of the action in which it was taken, or in any other manner he sees fit. But he does not so limit it by inserting in the stipulation the statement that it "may be used on the trial of said action." The fact that Gifford was not a party to this action is not material; the cause of action being the same, the obligation being joint and several, and the other parties being the same. Code Civ. Proc. § 1910; *Briggs v. Briggs*, 80 Cal. 253, 22 Pac. 334.

These are the only questions presented upon the appeal.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

FRASER v. BENTEL et al. (L. A. 2,755.)  
(Supreme Court of California. Nov. 28, 1911.)

# 1. SPECIFIC PERFORMANCE (§ 114\*)—COMPLAINT—CONTENTS.

A complaint for specific performance must allege that the contract sought to be enforced is just and reasonable as to the defendants, and that the consideration is adequate.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 356-372; Dec. Dig. § 114.\*]

# 2. SPECIFIC PERFORMANCE (§ 114\*)—NATURE OF ACTION—PLEADING.

Where the complaint was in the ordinary form of an action to foreclose a mortgage lien alleging defendants' execution of a promissory note and mortgage securing it and nonpayment of the note, the action was one to foreclose a mortgage lien, and not for specific

performance of an agreement to sell land, though the mortgage, a copy of which was embodied in the complaint, stated that the amount of the secured note was the balance due on the purchase price of the mortgaged property; the original agreement for the purchase and sale of the land having been executed by the conveyance of the land, and the payment of part of the price, and the giving of a note and mortgage for the balance.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 114.\*]

# 3. COVENANTS (§ 42\*)—COVENANTS AGAINST "INCUMBRANCES"—"INCLUDES."

Civ. Code, § 1113, provides that the use of the word "grant" in a conveyance shall imply a covenant that the estate is free from incumbrances, at the time of the execution of the conveyance. Section 1114 provides that the term "incumbrances" includes taxes, assessments, and all liens upon realty. *Held* that, aside from the statutory definition, an "incumbrance," as used in the phrase "covenant against incumbrances," is any right or interest in land which may subsist in third persons to the diminution of the value of the estate to the grantee, but consistently with the passing of the fee, and both within such definition and under the statute a restrictive covenant against the use of firearms on the premises was an "incumbrance"; the word "includes" being ordinarily a word of enlargement and not of restriction (quoting Words & Phrases, vol. 4, p. 3519.)

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 43; Dec. Dig. § 42.\*]

# 4. COVENANTS (§ 127\*)—INCUMBRANCES—EFFECT OF BREACH—DAMAGES.

Since a covenant against incumbrances is one of indemnity, only nominal damages may be recovered for an incumbrance which causes the grantee no actual injury, whether the grantee's claim be made as a counterclaim, or otherwise.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 238-242, 258; Dec. Dig. § 127.\*]

# 5. COVENANTS (§ 127\*)—ACTIONS FOR BREACH—MEASURE OF DAMAGES—COVENANT AGAINST INCUMBRANCES.

The usual measure of damages, and that prescribed by Civ. Code, § 3305, for breach of a covenant against incumbrances, which is the amount the covenantee actually expends in removing the incumbrance, not exceeding the value of the property at the time of the breach, only applies to incumbrances which may be satisfied by money payments, and does not apply to incumbrances which cannot be so extinguished, such as restrictive covenants on the use of land; the damages recoverable in such case being those naturally and proximately resulting to the covenantee by the existence and continuance of the incumbrance by reducing the market value of the land, in accordance with the general rule for measuring damages from breach of contract.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 238-242, 258; Dec. Dig. § 127.\*]

# 6. COVENANTS (§ 127\*)—ACTION FOR BREACH—MEASURE OF DAMAGES—COVENANT AGAINST INCUMBRANCES.

Under Civ. Code, § 3300, providing that the measure of damages for breach of a contractual obligation is the amount which will compensate the injured party for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom, a grantee could not recover, as damages for breach of a covenant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

against incumbrances by the existence of a restrictive covenant, a loss which he sustained by failure to resell the land because of the existence of such restrictive covenant, where it is not shown that the grantor was informed when he conveyed that the grantee was buying to resell; such damage not being the ordinary consequence of the breach of the covenant.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 238-242, 258; Dec. Dig. § 127.\*]

**7. DAMAGES (§ 40\*)—MEASURE—BREACH OF CONTRACT.**

The profits of collateral enterprises, in which a party claiming damages for breach of contract has been induced to engage by relying upon the performance of the contract, are not recoverable if the other party had no notice of such collateral undertaking.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 75, 76; Dec. Dig. § 40.\*]

Department 1. Appeal from Superior Court, Los Angeles County; W. P. James, Judge.

Action by A. R. Fraser against George R. Bentel and another. From a judgment for plaintiff, defendants appeal. Affirmed.

H. C. Millsap and Millsap & Sparks, for appellants. Anderson & Anderson, for respondent.

**SLOSS, J.** Appeal by defendants from a judgment foreclosing a mortgage of real property. The complaint was in the ordinary form, setting forth the making by defendants of a promissory note, the execution of a mortgage to secure the same, the plaintiff's ownership of the note and mortgage, and the nonpayment of a part of the principal and the interest due. Copies of the note and mortgage were incorporated in the complaint. The mortgage contains a statement that the amount of the promissory note secured by it (\$15,200) is the balance due the mortgagee on the purchase price of the mortgaged property. To this complaint the defendants demurred, and they now assign the overruling of their demurrer as error.

[1] Their contention is that the action is in effect one for the specific performance of an agreement for the purchase and sale of real estate, and that it is incumbent on plaintiff in such action to allege and prove that the contract sought to be enforced is just and reasonable as to the defendants, and that the consideration is adequate. Civ. Code, § 3391. That allegations showing the existence of these conditions are necessary to the sufficiency of a complaint for specific performance is not to be questioned. See *Herzog v. A., T. & S. F. R. R. Co.*, 153 Cal. 496, 95 Pac. 898, 17 L. R. A. (N. S.) 428, and cases cited.

[2] But we are unable to agree with appellants that the case at bar is of the character claimed. It is an action to foreclose the lien of a mortgage. The defendants do not contend that the relief sought in a foreclosure suit, as such, amounts to the specific

performance of a contract. But it is said that, inasmuch as this mortgage recites that it is given to secure the payment of a note for the balance of the purchase price of land, the purpose of the action is to compel the payment of such balance, and the plaintiff is, in reality, seeking to enforce the performance of the original agreement for the sale of the land. The fallacy in this argument lies in the failure of appellants to recognize that the original agreement for purchase and sale has been fully executed. See *Bryan v. Swain*, 56 Cal. 616. On the part of the vendor, it has been executed by the conveyance; on the part of the vendee, by the payment of a part of the purchase price and the giving of a note and mortgage for the balance. In foreclosing, the plaintiff is proceeding upon the note and mortgage, not upon the precedent contract out of which the note and mortgage arose. Herein the case differs completely from *White v. Sage*, 149 Cal. 613, 87 Pac. 193, relied on by appellants. There the vendor in an executory contract of sale, having tendered a deed, sought to compel the vendee to comply with his agreement to pay the purchase price. He further sought to foreclose his vendor's lien upon the defendant's equitable interest under the contract. This, as the court said, was clearly a suit to enforce the specific performance of the contract of purchase and sale. The decision, which is the only one cited to sustain the claim that the present action is one for specific performance of a contract, has no relevancy to the facts here shown. The demurrer was properly overruled.

The defendants answered, setting up, by way of counterclaim, that the note and mortgage were given in consideration of a conveyance of land to defendant George R. Bentel, whereby the grantors (of whom plaintiff was one) covenanted that the land was free and clear of incumbrances done, made, or suffered by them, or either of them. It is alleged that the land was, in fact, subject to an incumbrance created by the deed under which plaintiff acquired title; such incumbrance consisting of a covenant running with the land, forever prohibiting the use of firearms upon the premises conveyed. Defendants averred that the land had been depreciated in value by reason of said incumbrance to the extent of \$20,000. A second counterclaim sets forth, further, that the defendant George R. Bentel took the conveyance from plaintiff and his associates, and made the mortgage without knowledge of the incumbrance, that he had contracted to sell parcels of the land, unincumbered, to various purchasers for sums aggregating over \$74,000, that such purchasers had refused to carry out their contracts by reason of the afore said incumbrance, and that the property can not now be sold for over \$40,000.

The court found against the allegations of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

damage and found, in addition, that Bentel had knowledge of the restrictive provision concerning the use of firearms at, and long prior to, the execution of the mortgage, and that he expressly waived any and all objections to the said restrictive provision.

[3] The covenant against incumbrances, relied on by defendants in their answer, was that implied, under section 1113 of the Civil Code, from the use of the word "grant" in the conveyance from plaintiff and his associates to the defendants. Section 1114 of the same Code declares that "the term 'incumbrance' includes taxes, assessments, and all liens upon real property." A restrictive covenant against the use of firearms is not covered by this enumeration, and the respondent contends that the existence of the restriction in question, though it be binding upon subsequent purchasers of the land, does not constitute a breach of the covenant against "incumbrances." But the authorities cited to this point (Weber v. McCleverty, 149 Cal. 318, 86 Pac. 706; Wm. Ede Co. v. Heywood, 153 Cal. 615, 96 Pac. 81, 22 L. R. A. [N. S.] 562) lend no support to the claim that section 1114 excludes from the meaning of the word "incumbrances" every kind of limitation of a perfect title other than those described in the section. Nor does the language of the section itself justify this interpretation. The word "includes" is not, ordinarily, a word of limitation, but rather of enlargement. In re Goetz, 71 App. Div. 272, 75 N. Y. Supp. 750; Cooper v. Stinson, 5 Minn. 522 (Gil. 416); Calhoun v. Memphis & P. R. Co., 4 Fed. Cas. 1045. In the absence of any statutory definition, an "incumbrance," within the meaning of a covenant such as that under consideration, has been defined as "any right to or interest in land which may subsist in third persons to the diminution of the value of the estate to the tenant, but consistently with the passing of the fee." Prescott v. True-man, 4 Mass. 627, 3 Am. Dec. 246; Rawle, Cov. for Title, § 75; 4 Words & Phr. 3519, and cases cited. This definition, sustained by a great weight of authority, is broad enough to include easements and restrictions like the one in the case at bar, limiting the right of the owner of land to freely use it in any lawful way. Kuhn v. Parker, 56 N. J. Eq. 286, 38 Atl. 641; Mitchell v. Warner, 5 Conn. 497; Huyck v. Andrews, 113 N. Y. 81, 20 N. E. 581, 3 L. R. A. 789, 10 Am. St. Rep. 432. This interpretation has been applied to building restrictions (Roberts v. Levy, 3 Abb. Prac. [N. S.] 311 [N. Y.]; Ayling v. Kramer, 133 Mass. 12) and to covenants prohibiting the sale of spirits on the premises (Hatcher v. Andrews, 5 Bush [Ky.] 561; Rawle, Cov. for Title, § 77). We see no reason for holding that the term incumbrances, as it is used in our Civil Code, is to be taken in any narrower sense.

[4] Inasmuch, however, as the covenant against incumbrances is merely one of indemnity (Rawle, Cov. for Title, § 188), no

more than nominal damages can be recovered on account of an incumbrance which has inflicted no actual injury upon the grantee. (Id.). Accordingly, where, as here, the breach is set up by the defendant as a counterclaim, the defense will be of no avail without proof that the grantee has suffered damage from the alleged breach. Thurgood v. Spring, 139 Cal. 596, 73 Pac. 456. The court below found that the defendants have not been damaged in any sum. The judgment against the counterclaim properly followed, unless, as is asserted by the appellants, this finding is not supported by the evidence.

We think the finding was fully justified. The answer seeks to set up two elements of damage: First, that the land as conveyed was worth \$20,000 less than it would have been without the incumbrance; second, that the defendant George R. Bentel made contracts for the resale of parts of the land, and that he lost the benefits of such contracts because the existence of the incumbrance made it impossible for him to convey to his proposed grantees the unincumbered title upon which they insisted.

There was no proof to sustain the first element of damage claimed. The defendants showed the value of the lots remaining unsold, but failed to establish that they would have had any greater value if there had been no restriction against the use of firearms. On the contrary, the admissions of George R. Bentel himself were such as to warrant the conclusion that the restriction had no effect whatever on the value of the land.

[5] The other element, i. e., the loss of resales, was too remote to be allowed as an item of damages. The measure of damages for the breach of a covenant against incumbrances is, ordinarily, the amount which the plaintiff has actually expended in removing the incumbrance, not exceeding the value of the property at the time of the breach. Rawle, Cov. for Title, § 188 et seq.; 2 Suth. Dam. § 622. This rule, which has been embodied in section 3305 of our Civil Code, refers to such incumbrances (e. g., mortgages and other liens) as may be satisfied by the payment of money. It is not applicable to incumbrances like easements or restrictions on the use of land, which cannot be extinguished, at the will of the owner, by the payment of any sum. In such cases the damages are based upon "the natural and proximate consequences to the plaintiff of the existence and continuance of the incumbrance." Rawle, Cov. for Title, § 191. "Just compensation in such cases has generally" (as is said in 2 Suth. Dam. § 627) "been estimated by the amount which the existence of the easement reduces the market value of the land." And so, in a case similar to the present one, where the land was subject to a building restriction, it was ruled that the damages were measured by the difference in the value of the property unrestricted and restricted. Foster v. Foster, 62 N. H. 532.

[6] This is in accord with the general rule providing for the measure of damages for the breach of an obligation arising from contract, i. e., "the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom." Civ. Code, § 3300. But the loss resulting to the grantee from his inability to complete a particular sale does not meet the requirements of this test. There is in the record before us, neither allegation nor proof that the plaintiff and his associates, in conveying to the defendants, were informed that the latter were buying for the purpose of resale. In the absence of such showing, at any rate, it cannot be said that the failure of the purchaser to sell the lots at a price which he might have obtained was the proximate result of the breach of the covenant, or a detriment, likely, in the ordinary course of things, to result therefrom.

[7] "In awarding damages for the nonperformance of an existing contract, the gains or profits of collateral enterprises in which the party claiming them has been induced to engage by relying upon the performance of such a contract, and of which no notice has been given the other party, cannot be included." 1 *Suth. Dam.* § 47. The claim of the defendants for loss of resales falls within the principle thus stated, which has often been recognized by this court. *Friend, etc., Co. v. Miller*, 67 Cal. 464, 8 Pac. 40; *Mitchell v. Clarke*, 71 Cal. 163, 11 Pac. 882, 60 Am. Rep. 529; *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563; *Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; *Shoemaker v. Acker*, 116 Cal. 239, 48 Pac. 62. An authority more directly in point is *Harrington v. Murphy*, 109 Mass. 299, where, in an action for breach of a covenant against incumbrances, it was held that the plaintiff could not recover expenses incurred in making a sale which the purchaser refused to complete upon discovering the incumbrance. Such expense, said the court, was "too remote and indirect to be an element of damages."

Concluding, as we do, that the finding on the issue of damage is supported by the evidence, and is sufficient to sustain the judgment against the counterclaim, we see no other point requiring notice.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

#### DUNPHY v. DUNPHY. (S. F. 5,685.)

(Supreme Court of California. Nov. 28, 1911.  
Rehearing Denied Dec. 27, 1911.)

#### 1. MARRIAGE (§ 58\*)—ANNULMENT—MENTAL INCOMPETENCY.

In order that a marriage may be set aside because of mental incapacity of one of the par-

ties, the mental derangement must be shown to have been one having a direct bearing on the particular act; the test being whether the party was capable of understanding the obligations assumed by the marriage.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 117; Dec. Dig. § 58.\*]

#### 2. APPEAL AND ERROR (§ 1010\*)—FINDINGS—REVIEW.

In a suit to annul a marriage because of plaintiff's alleged unsoundness of mind at the time it was contracted, a finding that he had not sufficient mental capacity to legally contract a marriage would be sustained on appeal, unless there was a total lack of substantial evidence to support it.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

#### 3. APPEAL AND ERROR (§ 994\*)—REVIEW—CREDIBILITY OF WITNESSES.

Where, in a suit to annul a marriage on the ground of plaintiff's mental incapacity, non-expert witnesses testified to their opinion concerning his sanity and assigned reasons therefor, which at least had some bearing on the question of mental capacity, the weight to be given to such opinions, which were admissible under Code Civ. Proc. § 1870, subd. 10, was for the trial court.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3901-3906; Dec. Dig. § 994.\*]

#### 4. MARRIAGE (§ 60\*)—CAPACITY OF PARTIES—MENTAL INCAPACITY—EVIDENCE.

In a suit to annul a marriage, evidence held to warrant a finding that by reason of plaintiff's intoxication at the time and his previous habits of inebriety he was mentally incompetent to contract the marriage.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. § 131; Dec. Dig. § 60.\*]

#### 5. INSANE PERSONS (§ 94\*)—ACTION—GUARDIAN AD LITEM.

Where suit was brought by an incompetent to set aside a marriage for incapacity, a relative was authorized by Code Civ. Proc. § 373, to apply for and be appointed guardian ad litem for plaintiff under section 372, authorizing such appointment when the court or judge thereof deems the same expedient.

[Ed. Note.—For other cases, see *Insane Persons*, Cent. Dig. §§ 164, 165; Dec. Dig. § 94.\*]

#### 6. APPEAL AND ERROR (§ 959\*)—REVIEW—DISCRETION.

Whether complainant shall be permitted to file an amended complaint is within the discretion of the trial court and will not be reviewed unless abused.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3825-3833; Dec. Dig. § 959.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; James M. Seawell, Judge.

Action by James C. Dunphy against Lydia M. Dunphy to annul a marriage. Judgment for plaintiff, and defendant appeals. Affirmed.

See, also, 118 Pac. 445.

Timothy J. Lyons and Bishop, Hoefler, Cook & Harwood (Raymond Benjamin, of counsel), for appellant. J. D. Meredith and Perry Evans, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

SLOSS, J. On the 22d day of June, 1909, a marriage ceremony was performed between James C. Dunphy and Lydia M. Valencia. Six days later, the plaintiff, James C. Dunphy, commenced this action to annul said marriage by filing a complaint in which he alleged that, at the time of the ceremony, he was so intoxicated from alcoholic drinks that he had no comprehension of what he was doing, or of the nature or effect of said ceremony, and that, by reason of said intoxication, he was then mentally incompetent to contract marriage. He alleged, further, that at all times after the ceremony and until the commencement of the action he had been intoxicated and had not had normal control of his mental faculties; that as soon as he realized the purport and effect of said ceremony, on the 26th day of June, 1909, he had left the defendant, and had not thereafter cohabited with her. The defendant demurred, denying the allegations of plaintiff's intoxication and incompetency, and averring that he had voluntarily cohabited with her. She also cross-complained, alleging the marriage, desertion of her by plaintiff, his possession and her want of means, and asking a judgment for maintenance. The plaintiff answered the cross-complaint. Subsequently, on November 15, 1909, an amended complaint, seeking annulment of the marriage upon an allegation that plaintiff, at the time of the marriage and ever since, had been of unsound mind, was filed in the name of plaintiff, by Jennie C. Dunphy, his guardian ad litem. The appointment of the guardian was alleged to have been made on November 10, 1909. To this amended complaint, after filing a demurrer, which was overruled, the defendant answered, denying the appointment of the guardian and the unsoundness of mind of the plaintiff, and averring voluntary cohabitation. The case was tried, and the court found as facts the due appointment of the guardian, that the parties were married as alleged, that plaintiff at the time of said marriage was of unsound mind, that plaintiff had never, since the marriage, freely cohabited with the defendant as her husband, and that he had continued to be of unsound mind from the time of the marriage until after the 21st day of July, 1909, the day upon which he finally left the defendant. Judgment annulling the marriage followed. The defendant appeals from the judgment, bringing up the evidence by means of a bill of exceptions.

The principal contention of the appellant is that the evidence is insufficient to sustain the finding that plaintiff was of unsound mind at the time of the marriage and during the time of his cohabitation with the defendant.

[1] This court has never had occasion to define the degree of unsoundness of mind which will authorize a judgment annulling a marriage. But we take it that the question

of what is an unsound mind must, in cases of this character, be determined by the same tests which are applied in any case where it is sought to set aside the contract or other act of a person alleged to be insane. It is universally held that a variation from a normal mental condition is not in itself enough to avoid every act. The mental defect or derangement must be one having a direct bearing upon the particular act which is brought in question. Thus, in will contests, the validity of the testamentary effort is not affected by delusions on the part of the testator, unless the delusions are such as to have been "operative in the testamentary act." In *re Redfield*, 116 Cal. 637, 48 Pac. 794. They must have a relation to some person or object affected by the will. *Id.* In *Estate of McKenna*, 143 Cal. 580, 77 Pac. 461, this court upheld an instruction to the effect that it was only such insane delusions as actually influenced the testatrix in the making of the will, and which caused its production to the prejudice and injury of the contestants, which would invalidate the will. So, in criminal cases, a partial insanity, or an insanity with respect to certain subjects, is not incompatible with the possession of mental capacity sufficient to make the party liable to punishment for his acts. *People v. Willard*, 150 Cal. 543, 89 Pac. 124. The same reasoning is to be applied when the question is the mental capacity of a party to contract marriage. "The true test in actions to annul a marriage on account of insanity at the time of the marriage," says Nelson (Div. & Sep. § 658), "is whether the party was capable of understanding the obligations assumed by marriage." The capacity requisite to a valid marriage is defined, in *Durham v. Durham*, 10 Prob. Div. 80, as "a capacity to understand the nature of the contract, and the duties and responsibilities which it creates." See, also, *Kern v. Kern*, 51 N. J. Eq. 574, 26 Atl. 837; *Lewis v. Lewis*, 44 Minn. 124, 46 N. W. 323, 9 L. R. A. 505, 20 Am. St. Rep. 559; *St. George v. Biddeford*, 76 Me. 593. The learned judge below undertook, as appears from his opinion contained in the transcript, to apply this test to the evidence before him, and, so applying it, reached the conclusion that Dunphy, at the time of the marriage and while he was cohabiting with the defendant, did not possess the mental capacity to understand the nature of the duties and obligations imposed by the marriage contract. Was there enough evidence to justify this conclusion?

[2] The testimony, the greater part of which deals with this issue, is voluminous, covering almost 650 pages of the printed transcript. It would prolong this opinion beyond all reasonable bounds to give more than the briefest summary of the facts testified to by the large number of witnesses called. In referring to the testimony, we

must constantly bear in mind that the determination of issues of fact is primarily for the trial court, and that the findings of that court are to be overthrown on appeal only when they totally lack the support of substantial evidence. We are not empowered to determine, as an original question, whether the plaintiff was or was not of unsound mind. Our duty begins and ends with the inquiry whether the trial court had before it evidence upon which an unprejudiced mind might reasonably have reached the conclusion which was reached. Conflicts of testimony are deemed to have been finally resolved in the court below. Accordingly, the testimony in support of the finding attacked, if sufficient to support that finding, is all that need be mentioned in this opinion, and this testimony must, so far as it is subject to differing inferences, be read in the light most favorable to the party prevailing below.

The plaintiff was the only son of wealthy parents, and from his early youth had followed no regular occupation, with the exception of giving some casual and intermittent attention to the affairs of his father's estate, in which he was interested. For many years, he had been addicted to the habit of drinking intoxicating liquors to excess, taking, as one witness testified, from 20 to 40 drinks of whisky in a day. On one or more occasions his excesses in this direction had brought on attacks of delirium tremens. He was frequently seen in public places in a condition of helpless intoxication. He was unable, in conversation, to concentrate his mind upon a subject under discussion, showed little intelligent interest in his own business affairs, was vacillating and uncertain, as well as suspicious, and showed signs of failing memory.

In support of the allegations of the complaint, a number of witnesses, having first qualified as intimate acquaintances of Dunphy, expressed the opinion that he was of unsound mind. In accordance with the provision of the Code of Civil Procedure (section 1870, subd. 10), each of these witnesses gave "the reason for the opinion." The appellant undertakes to analyze the various reasons so given, and argues that they are not adequate to justify the conclusion drawn from them. Reliance is placed upon *Estate of Dolbeer*, 149 Cal. 227, 86 Pac. 695, where it was said that the opinion of an intimate acquaintance respecting the mental sanity of a person "can have no weight other than that which the reasons" (upon which it is based) "bring to its support." We do not understand this to mean that the appellate court is to put itself in the position of the trial court, and, from an examination of the reasons assigned, determine as an original question whether the opinion of the witness is to be given any weight or is to be rejected. No doubt the reasons assigned may be so irrelevant or inconsequential as to deprive the

opinion, professedly based upon them, of any probative value. This, as the court viewed it, was the situation in the *Dolbeer* Case.

[3] But where the reasons assigned have some bearing on the question of mental capacity, it is for the court below to determine the weight to be given to the opinion of the witness. The statute expressly permits such opinion to be given in evidence, and it must contemplate that some weight may be attributed to the opinion, over and above that which would follow, as matter of necessary inference, from the reasons assigned. If this were not so, there would be no justification for permitting an intimate acquaintance to state his opinion at all. He should then be restricted to a statement of his observations of the person whose sanity was questioned, and a conclusion on the ultimate question of soundness or unsoundness of mind would have to be drawn by the trial court or jury from the facts so stated. But it may be that an intimate acquaintance has a well-founded opinion on this subject, without being able to recall, or to formulate in words, all of the impressions which by their cumulative force have led his mind to the opinion. (Indeed, some of the witnesses here declared that this was, virtually, their situation.) The opinion itself is not for that reason worthless; nor is its weight to be judged solely by the conclusion which another mind might draw from a recital of the reasons which the witness is able to give. If, as we have said, those reasons furnished any logical support for the opinion declared, the opinion, in and of itself, is to be given such weight as the trial court may think it deserves.

[4] With reference to the testimony in this case, it would be impracticable to follow counsel into the field they have entered, and to discuss the multitude of incidents, many of them no doubt trivial in themselves, brought forward by those testifying to their opinion that Dunphy was of unsound mind. We must content ourselves with the statement that some, at least, of these witnesses fortified their opinions by a recital of reasons which had some legitimate bearing upon the question at issue. In this connection, we may cite, in addition to the facts stated by intimate acquaintances regarding Dunphy's habits of life, the account given by himself to witness Curtis of a former marriage contracted by him. On January 3, 1903, he notified Curtis that he had been married on the preceding night, and requested that his family be informed. On the following day he told Curtis that he had not wanted to marry the lady, that the marriage had taken place, in effect, at a moment's notice, that he did not know what he was doing at the time, and that he thought a thousand dollars would "call it off." We mention this, out of many circumstances shown in the record, because it has a more direct bearing on the question

of the plaintiff's capacity to understand the nature of the marriage relation and the obligations attendant upon it.

Besides this, the plaintiff introduced the testimony of three medical experts. In response to hypothetical questions, embodying the showing made by plaintiff's witnesses concerning his intemperate life, each of these witnesses testified that a person who had led such life would be of unsound mind. One of them said that drinking to the extent stated "would have the effect of inducing a mental disease by producing an organic change in the brain. \* \* \* He would necessarily be of unsound mind. \* \* \* His brain has so degenerated by the use of whisky that his thoughts are as liable to be abnormal as normal," even when he is "not under the influence of liquor." The others testified that the person supposed was "of unsound mind."

The circumstances attending the marriage of the parties were, to say the least, peculiar. Dunphy and the defendant had been acquainted for a number of years. The exact nature of their relations does not appear. It was shown, however, that, while both resided in the same city (San Francisco), Dunphy had not, prior to the day of the marriage, visited the defendant at her home. There was no engagement, no exchange or giving of a ring or other presents. According to the testimony, the parties agreed, on the morning of the 22d of June, 1909, to be married, and on the same day, without any further preparation, without having made a change of clothing, or any provision for a wedding journey or a place of residence following the proposed marriage, they went in an automobile, accompanied by several friends of the defendant, to Redwood City, where a license was obtained, and a marriage ceremony was performed by a justice of the peace. On the road to Redwood City, and a few hours before the ceremony, the party had stopped at a roadhouse. A witness who saw them there testified that Dunphy was "very badly under the influence of liquor, or extremely intoxicated"; that he appeared disheveled, and his dress seemed to be more or less disarranged. While the evidence makes it probable that the demeanor of plaintiff at the time the ceremony was performed did not indicate to those who were present that he was intoxicated, the trial court may well have concluded, from all the facts before it, that he was still under the influence of liquor to such an extent as to affect his capacity for rational thought and action. In this connection it may be noted that there was testimony that Dunphy had been seen in a state of pronounced intoxication during every day from the 13th to the 17th of June, 1909, while he was in Sacramento, and that he was intoxicated after his return to San Francisco on the 20th of June, and again on the 21st, the day preceding that

of the ceremony. Following the ceremony, the parties returned to San Francisco, and took up their abode in the defendant's flat. On the next day, the morning newspapers of San Francisco, containing articles relative to the marriage, were read by Dunphy. Among these publications was one which depicted the plaintiff as a dissipated spendthrift, and described the defendant's character and antecedents at some length in terms that would necessarily have been extremely offensive to any one entertaining any feeling of respect for her. The ceremony itself was represented as preceded and followed by drunken revels. Without going into greater detail regarding the contents of this article, we may say that it is almost inconceivable that they would not have aroused the deepest resentment and indignation in Dunphy, if he had possessed a rational understanding of the nature and the obligations of marriage. Yet, after reading the papers, he expressed himself as "not at all displeased with them," and said that "they were all very easy."

The testimony concerning Dunphy's condition during the period following his advent at the defendant's flat was such as to justify the inference that his mental capacity, so far as it depended upon his freedom from the influence of alcohol, did not improve during the time of his residence with the defendant. It was testified to that on the 26th day of June he was under the influence of liquor, and "was tapering off." On the 27th he was intoxicated, and on the 28th, the day on which the original complaint was filed, he was in a state of helpless intoxication. On the same day, he returned to defendant's flat, remained there two days, during which he did not become sober, and then left with his nurse for Paraiso Springs. After having been at the springs a few days, he again became intoxicated, and remained so until the 7th of July, when a friend of the defendant appeared and brought him back. He arrived at the defendant's flat on July 9th and remained there until the 21st or 22d of July, when he finally left the defendant. While there is a conflict of testimony on this point, the trial court had before it enough to justify the conclusion that he did not regain a condition of complete sobriety during this period.

Under this showing, we think it cannot be said, as matter of law, that the evidence was not sufficient to sustain the trial court in its finding that Dunphy was incompetent, mentally, to contract marriage, and that his incompetency continued while he was cohabiting with the defendant. His excessive indulgence in alcoholic drink, persisted in for so many years; the testimony of qualified experts regarding the effect upon the mind of such excess; the evidence of irrational and peculiar conduct; the unusual circumstances attending the marriage; the fact that the

ceremony took place in the midst of a prolonged debauch or "spree," and that he continued to be more or less affected by liquor while he remained with the defendant; the actions of the plaintiff indicating a want of proper understanding of the relation and obligations of matrimony; the opinions of many reputable persons, who, after an intimate acquaintance with Dunphy, thought he was of unsound mind—all of these considerations, taken together, made a case which vested in the trial court the power of drawing an inference, conclusive upon the appellate court, of the soundness or unsoundness of the plaintiff's mind. That a finding contrary to the one made would find adequate support in the record is beyond question. But, even though we might think, on a mere reading of the transcript, that the preponderance of the evidence was with the appellant, we would not be authorized to overthrow the finding. As we said at the outset of this discussion, the determination of the trial judge on issues of fact is binding, unless it be without substantial evidence to support it. It does not lack such support here.

[5] The other points urged for reversal require but brief consideration. There was no error in appointing a guardian ad litem for plaintiff. Such appointment on behalf of an insane or incompetent party may be made "when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient. \* \* \*" Code Civ. Proc. § 372. The order was made on the application of a relative, as provided by section 373 of the Code of Civil Procedure, and there was evidence tending to show that plaintiff was incompetent.

[6] It is also claimed that the court erred in permitting an amended complaint to be filed. The granting of leave to file amended pleadings is a matter peculiarly within the discretion of the trial court. There is nothing to indicate that the discretion was abused in this instance.

The appellant suggests that the court erred in failing to find upon certain issues. But we think these issues, so far as they were material, were met by the findings which were made.

The judgment is affirmed.

We concur: ANGELLOTTI, J.; SHAW, J.

CHANDLER et al. v. HART et al.  
(S. F. 5,815.)

(Supreme Court of California. Nov. 29, 1911.  
Rehearing Denied Dec. 29, 1911.)

#### 1. MINES AND MINERALS (§ 58\*)—LEASES—EXECUTION—REQUISITES.

A lease to a corporation to explore and develop land for oil, gas, and minerals, execut-

ed in consideration of the delivery by the corporation to the lessor of stock of the corporation, on condition that the same shall remain nonassessable, or otherwise the lease shall terminate, and subject to the right of the lessee to reside on and farm the land, contains no covenants on the part of the lessee to which its signature is necessary as evidence of its consent thereto, and the lease executed by the lessor, and delivered by him to the corporation which accepts it, is sufficiently executed.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 163, 169; Dec. Dig. § 58.\*]

#### 2. LANDLORD AND TENANT (§ 31\*)—LEASES—EXECUTION—WAIVER.

A lessor who delivered the lease to the lessee, without requiring him to sign the same, waived the formality of the signature of the lessee, and the lease, though containing covenants to be performed by the lessee, became at once operative against the lessor, his heirs and assigns.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 88-91; Dec. Dig. § 31.\*]

#### 3. MINES AND MINERALS (§ 73\*)—OIL AND GAS LEASE—RIGHTS ACQUIRED—"DEMISE."

An instrument purporting to "lease and demise" land described for a specified term, and giving the lessee the right to explore and develop the land for oil, gas, and other minerals, and to erect thereon necessary machinery, tanks, and pipes, conveys rights in land to the lessee for the purpose of extracting oil, gas, and minerals from the land and selling the same when acquired; a "demise" being more than a license to enter and occupy for a specified purpose, and being a conveyance in fee, for life, or for years, and creating an implied warranty of title and a covenant for quiet enjoyment; and the right to develop, extract, and market oil, gas, and mineral from the land continued for the specified time, unless forfeited by a breach of the conditions of the lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 201, 210; Dec. Dig. § 73.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1978, 1979.]

#### 4. LANDLORD AND TENANT (§ 20\*)—"LEASE."

A "lease" is a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own, and it passes a present interest in the land for the period specified.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 50-54; Dec. Dig. § 20.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4043-4049; vol. 8, pp. 7702, 7703.]

#### 5. MINES AND MINERALS (§ 78\*)—LEASES—CONDITIONS.

A lease of land for a specified term to develop the land for oil, gas, and mineral and sell the same when acquired, on specified conditions which have not been broken, is not forfeited by a mere failure of the lessee to develop and extract oil, gas, and mineral, unless the right of forfeiture is reserved on that ground, either expressly or by necessary implication.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 205-207; Dec. Dig. § 78.\*]

#### 6. MINES AND MINERALS (§ 74\*)—LEASE—INTERESTS ACQUIRED.

A lease of land for a specified term to explore and develop the land, to remove therefrom oil, gas, and mineral, reserving to the lessor

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



free access over the land, not actually used for the business of the lessee, and the right to farm the land, and containing no covenant forbidding the lessee to assign the lease, or to sublet the premises or part thereof, gives to the lessee a present, subsisting estate for years, which may be transferred, as authorized by Civ. Code, § 1044, and not a mere possibility, not coupled with an interest, which, by section 1045, is not transferable, so that the lessee may sublet a part of the land to a third person to develop the same for oil, gas, and mineral.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 202; Dec. Dig. § 74.\*]

**7. CORPORATIONS (§ 432\*)—CONVEYANCES—VALIDITY—PRESUMPTIONS.**

Where the corporate seal is affixed to a contract purporting to be regularly executed for a corporation by one of its officers, the seal is prima facie evidence of the authority of the officer to execute the contract for the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1729; Dec. Dig. § 432.\*]

**8. CORPORATIONS (§ 425\*)—STOCKHOLDERS—QUALIFICATIONS—OBJECTIONS.**

The objection that the consideration for corporate stock, represented by certificates of stock regularly issued to persons elected directors, was not lawfully sufficient cannot be raised to invalidate the action of the directors, when third persons have dealt in good faith with them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1697-1705; Dec. Dig. § 425.\*]

**9. CORPORATIONS (§ 289\*)—OFFICERS—DE FACTO DIRECTORS.**

The stockholders of a corporation, at a stockholders' meeting, increased the number of directors from three to seven, and at the same meeting elected the additional directors. A certified copy of the amendment to the articles of incorporation, declaring the increase, was properly filed in the offices of the county clerk and Secretary of State, and the additional directors, from the date of their election, acted as directors, without objection from any stockholder, and the stockholders at a subsequent meeting ratified the action. *Held* that, under Civ. Code, § 290, making the number of directors of a corporation dependent on the will of the majority of the stockholders, the additional directors were at least de facto officers, and their acts were valid, so far as they were acted on in good faith by third persons.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1240-1245; Dec. Dig. § 289.\*]

**10. CORPORATIONS (§ 424\*)—DIRECTORS—TRANSACTIONS—VALIDITY.**

Where the de facto directors of a corporation directed the execution of a lease of corporate property, and empowered the secretary to execute the lease, the lessee, acting in good faith, acquired a valid lease, whether the meeting of the directors was regular or not, and though the by-laws authorized the president to sign corporate contracts; and one having no status as a stockholder, but claiming under a lease from a stockholder of the corporation, could not attack the transaction.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 424.\*]

**11. MINES AND MINERALS (§ 74\*)—LEASES—RIGHTS OF LESSEES.**

Where a lessee in an oil and gas lease, with a right to develop 160 acres of land for oil, gas, and mineral, and sell the same when

acquired, executed a lease to a third person to develop 120 acres for oil, gas, and mineral, the third person, if acquiring the right of possession, could sue for the possession, and to restrain others from interfering with his possession and taking oil from the land.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 74.\*]

**12. MINES AND MINERALS (§ 74\*)—LEASES—RIGHTS OF LESSEES.**

An oil and gas lease for 50 years gave the lessee the right to develop the land described for oil, gas, and mineral, and to sell the same when acquired. The lessee leased to a third person, for 20 years, the exclusive right to drill wells on a part of the land and take oil therefrom, but required the drilling to begin within a specified time, and to continue with diligence to a specified depth, unless oil was sooner found. The lessee agreed to protect the third person in his possession during the term, and to give him the further right, after the 20 years, to remain in possession of such part of the premises as should be required to enable him to operate wells thereon that were then producing oil. The lessee reserved the right to enter on the land to inspect the work done by the third person, and the right of the original lessor to reside on the premises, and to farm the land not actually needed for the oil business. *Held*, that the lease gave to the third person a present right of possession for the specified purposes, and vested in him a corporeal interest in the land for years, and he could enjoin another, claiming under a lease from the original lessor, from interfering with him.

[Ed. Note.—For other cases, see Mines and Minerals, Dec. Dig. § 74.\*]

Department 1. Appeal from Superior Court, City and County of San Francisco; Walter Bordwell, Judge.

Action by W. F. Chandler and another against William H. Hart and others. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. *Affirmed*.

Wm. H. H. Hart and Aylett R. Cotton (M. F. McCormick, of counsel), for appellants. Sutherland & Barbour, M. B. Harris, and E. M. Harris, for respondents.

SHAW, J. The defendants appeal from the judgment and from an order denying a new trial.

The complaint alleges that the plaintiffs at all times mentioned were the owners of a tract of land containing 120 acres; that they were in possession thereof in March, 1909; and that the defendants on that day ousted them, took possession of the land, and have ever since held the same. They pray for the recovery of possession and damages, and for an injunction to prevent defendants from boring wells or extracting oil from the land. Judgment was given, declaring that plaintiffs were entitled to the possession of the land, with the right to occupy it for the purpose of mining and developing it and carrying out a certain lease, executed on March 6, 1909, by the Fearon Oil Company to the plaintiffs. This lease

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

purported to let, lease, and demise to the plaintiffs, for the period of 20 years, the exclusive right, privilege, and easement of sinking wells in the land, and taking, appropriating, and selling oil and gas therefrom, yielding to the lessor a royalty thereon.

At the time this lease was executed, the only right or title which the Fearon Oil Company had to the land was under a certain instrument, executed by Joseph Fearon and wife to said Fearon Oil Company on September 6, 1907, leasing a tract of 160 acres, including the 120 acres afterwards leased, as aforesaid, by that company to the plaintiffs. Joseph Fearon at that time owned the land in fee. Defendants claim under a lease, made by Fearon and wife to the defendant the California-Coalinga Oil Company on March 6, 1909. The respective rights of the parties to this action in the land depend upon the validity and effect of the lease by Joseph Fearon to said Fearon Oil Company. Omitting the formal description of the parties and property, we give this lease in full. Fearon and his wife were named as parties of the first part and said Fearon Oil Company as the party of the second part:

"That the said parties of the first part for and in consideration of the issuance and delivery to them of five hundred and twenty-five thousand (525,000) shares of the capital stock of the Fearon Oil Company, full paid up, receipt whereof is hereby acknowledged, does by these presents lease and demise unto the said party of the second part and to its successors and assigns (subject to the provisions and limitations hereinafter mentioned) (describing the 160-acre tract) for a term of fifty years from the 24th day of August, A. D. 1907.

"It is mutually agreed and understood that the said Fearon Oil Company shall have the right to explore and develop said lands for the purpose of removing therefrom oil, gas and such other minerals as the same may contain; to erect thereon the necessary works and machinery, tanks, pipes, and all other appliances required for carrying out the purposes mentioned in the articles of incorporation of the Fearon Oil Company; and to establish and maintain any business or enterprise allowed within the scope of the business of said corporation.

"This lease is made upon the express provision and agreement that the shares of stock delivered to the said parties of the first part in payment therefor shall never be assessed while the same or any of said shares of stock shall remain the property of the said parties of the first part, and in the event said party of the second part shall levy an assessment upon the same or the attempt to collect from the said first parties, or either of them, any assessment upon said shares of stock, then, and in that event, this lease shall immediately terminate, and the

said parties of the first part shall have, and they are hereby given, the right to eject therefrom all agents, officers or employees of the said party of the second part.

"It is further understood and agreed that there is now standing upon the land described a residence owned and occupied by the said parties of the first part, and the said parties of the first part are hereby given the right to continue and maintain said residence where the same is now located, together with all necessary buildings in connection therewith and to have free and uninterrupted access over and upon said lands not actually used or needed for the business of said second party, for the purpose of farming the same; and the right to farm said lands is hereby expressly reserved to said parties of the first part.

"This agreement shall bind the successors, assigns, heirs, executors and administrators of the said parties of the first part."

The said articles of incorporation of the Fearon Oil Company show that the capital stock of that corporation was \$1,000,000, divided into 1,000,000 shares, of the par value of \$1 each. The articles state the purposes of the corporation to be "to explore, acquire, exchange, develop and deal in oil and gas lands; to acquire, build, maintain, operate and dispose of pipe lines for conveying and conducting oil, gas, water and fluids of every description and to acquire, hold, enjoy and dispose of rights of way for the purposes thereof and for other purposes; to purchase, sell, lease, deal in, exchange, convey and accept conveyances of real property, and to mortgage and hypothecate the same; to improve, develop and cultivate lands whether mineral or agricultural, or adapted for any other use whatsoever; to refine, manufacture, buy, sell and deal in minerals and mineral products and personal property of every description and generally to acquire, hold, manage, improve and dispose of such real and personal property and to do such other things necessary and proper for the full and complete execution of the purposes set forth above, and for the exercise of the powers and transactions of the business of the corporation for the creation of which we have hereby associated ourselves."

[1, 2] 1. The lease above set forth was duly executed by Fearon and his wife, but it was not signed by the Fearon Oil Company, or by any one in its behalf. Defendants contend that it could not have any effect, unless it was duly executed by the corporation as the party of the second part. There is no merit in this objection. The lease contains no covenants on the part of the lessee to which its signature was necessary as evidence of its consent thereto. The conditions contained therein became binding upon the lessee by virtue of its execution by the lessors and its acceptance by the lessee. Its

execution became effectual and complete upon delivery to and acceptance by the Fearon Oil Company. Thornton on Oil Leases, § 85; *Castro v. Gaffey*, 96 Cal. 424, 31 Pac. 363; *Crescent, etc., Co. v. Simpson*, 77 Cal. 290, 19 Pac. 426; 1 Underhill on L. and T. § 232. The evidence shows, without conflict, that the instrument was delivered to the Fearon Oil Company, and that it was accepted by that company with intent to take under it. This was sufficient to bind the company to the performance of the conditions expressed therein. Even if it is true that Fearon might have insisted upon a formal execution by the company, as suggested in *Castro v. Gaffey*, supra, where there were covenants to be performed by the lessee, his conduct in delivering it without such formality was a waiver thereof, and it became at once operative against him, his heirs and assigns.

2. It is next claimed by defendants that the lease was inoperative, because the Fearon Oil Company did not explore or develop the land, or any part of it, or discover oil thereon, or take oil therefrom, prior to the lease to the plaintiffs of the 120 acres, on March 6, 1909, or at all, nor do anything on the land to carry out the purposes expressed in the instrument. It is argued that, under the terms of the instrument, no estate or interest in the land would vest in the lessee, unless it did something upon the land in performance of the purposes for which it took the lease, and that, having no interest itself, it could not transfer any to the plaintiffs.

[3] The instrument purports "to lease and demise" the land to the Fearon Oil Company for the term of 50 years from its date, September 6, 1907. It further declares that that company shall have "the right to explore and develop said lands for the purpose of removing therefrom oil, gas" and other minerals, and to erect thereon the works, machinery, tanks, and pipes necessary to carry out the purposes stated in its articles of incorporation. These articles give the company power to acquire, develop, improve, buy, sell, deal in, and dispose of real and personal property and mineral products. These powers and purposes are very broad and comprehensive. They clearly include the business of extracting oil from the land described in the lease, and selling such oil when acquired in that manner. When the entire lease is considered in connection with the articles and the circumstances disclosed by the writings, there can be no doubt that the lease was intended to convey these rights in the land.

[4] It is for these purposes that the instrument demises and leases the land to the company for 50 years. A demise or lease is more than a license to enter and occupy for a specified purpose. A demise is defined as "a conveyance, either in fee, for life, or for years," and as "a lease or a conveyance for a term of years." 1 Bouv. Law Dic. The

use of the word "demise" creates an implied warranty of title and a covenant for quiet enjoyment. Id.; *Anderson's Law Dic.*; 1 Taylor on Landl. & Ten. § 252. A lease is a "conveyance by way of demise" (1 Bouv. Law Dic.), or "a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own" (*Anderson's Law Dic.*). It passes a present interest in the land for the period specified. 1 Taylor Landl. & Ten. § 14a. This instrument, therefore, granted to and vested in the Fearon Oil Company a present interest and estate in the land for the term of 50 years, for the purposes specified. The right to develop, extract, and market oil therefrom must likewise endure for that period, unless forfeited by a breach of the conditions of the lease.

[5] A lease may, of course, limit the uses which the tenant may make of the land, and the purposes for which he shall have the right of possession. This lease does limit the rights of the tenant by particularly describing them. The implication is that it shall not be used by it for other purposes. The result is that the lessee was granted an estate in the land for 50 years for the purposes of discovering oil therein, and of extracting and selling it, with the other incidental rights mentioned. The only conditions of the lease are those referring to the effect of an assessment upon the shares of stock given to Fearon as a consideration for the lease, and reserving to Fearon the right to reside on the land and farm it. There is no claim that either of these conditions have been broken. The lease does not require the lessee to begin operations under the lease within any specified time within the term. Forfeitures are not favored in law or equity. We know of no rule declaring that a demise of land for such purposes, upon a full consideration received in advance, is forfeited by a failure of the lessee to develop and extract the oil, unless such right of forfeiture is reserved in the demise, either expressly or by necessary implication, from the expressed terms.

There are so-called "oil leases" of which this may be true. In them, the so-called lessee is granted the right to enter upon the land within a limited time, for the purpose of making a discovery of oil. If, upon due search, none is found, the right of entry and possession ceases. If oil is found, the lessee is then given a further right, which then usually becomes a vested right in the oil in place, it being while so situated a part of the land, and this right carries with it the vested right to occupy the land for the purpose of extracting it, usually for a named period, or until the oil is exhausted, and conditioned upon the diligent prosecution of the work. A contract of this character was considered in *Brookshire Oil Co. v. Casmalia, etc., Co.*, 156 Cal. 211, 103 Pac. 927. Defend-

ants' counsel cite this and other similar cases, wherein it is held that, under such contracts, no title to the oil or interest in the lands passes until the oil is found, or, in some cases, that no title to the oil passes until it is extracted, and that the estate and right of possession of the lessee in the premises ceases if he does not diligently prosecute to success the work of discovery and the work of extraction after discovery. These decisions are not in point here. In each of them the rights of the parties were controlled by the particular conditions expressed in the contract limiting or forfeiting the right of the licensee or the estate of the lessee. No such conditions are found in the Fearon lease. Cases are also cited of leases for farming purposes upon an annual rent, consisting of a part of the annual crops raised by the tenant, in which it is decided that the tenant forfeits his term if he fails to plant the crop which was to provide the rent. It is said that in such cases there is an implied covenant to plant such crop in due time. Manifestly these cases do not apply where the rent is paid in advance, as in the case at bar. No conditions have been violated, the rent is fully paid, and consequently the estate and right of possession continues to exist, notwithstanding the failure of the company to do any of the work contemplated by the parties to the lease, or to make a discovery of oil in the land.

[8] The estate of the lessee is not a mere possibility, not coupled with an interest, which, by section 1045 of the Civil Code, is not transferable, but is a present, subsisting estate for years, which may be transferred, the same as any other species of property. Civ. Code, § 1044. There is no condition or covenant in the lease forbidding the lessee to assign the lease, or to sublet the premises or part thereof. Hence the conclusion necessarily follows that the lessee had the right to make the sublease to the plaintiffs for only 120 acres of the land, unless there is something in the nature of the estate demised by the original lease which forbids such subletting of a part.

3. It is earnestly contended by the defendants that the estate and right given by the lease to the Fearon Oil Company is indivisible; that a part of the premises could not be lawfully sublet without Fearon's consent; and that by attempting to sublet the 120 acres to the plaintiffs the entire estate of the lessees was terminated and extinguished. In support of this proposition, they cite the following cases: *Mountjoy's Case*, 1 Godbolt, 17; *Caldwell v. Fulton*, 31 Pa. 475, 72 Am. Dec. 760; *Grubb v. Bayard*, 2 Wall, Jr. 81, Fed. Cas. No. 5,849; *Funk v. Haldeman*, 53 Pa. 229; *Harlow v. Lake Superior I. Co.*, 36 Mich. 105; *Smith v. Cooley*, 65 Cal. 46, 2 Pac. 880; *Hughes v. Devlin*, 23 Cal. 502; *Hall v. Vernon*, 47 W. Va. 297, 34 S. E. 764, 81 Am. St. Rep. 791.

The foundation of all these decisions is the

*Mountjoy Case*. It was decided in 1583, during the reign of Queen Elizabeth. It is reported in Godbolt, as above, and also in *Anderson*, 307, *Moore*, 174, 4 *Leonard*, 147, and in *Coke on Littleton*, 1646. The case, as reported in Godbolt, states the reasons for the rule briefly, but clearly. We give the report on this point in full, retaining the archaic orthography:

"The Lord Mountjoy by deed, indented and inrolled, did bargain and sell the manor of Camford to Brown in fee; and in the indenture this clause is contained, provided alwayes, and the said Brown covenants, and grants to, and with the Lord Mountjoy, his heirs and assigns, that the Lord Mountjoy, his heirs and assigns, may digg for ore within the land in Camford, which was a great waste; and also to digg turffe there to make allome and coperess, without any contradiction of said Brown, his heirs and assigns. They agreed, that the Lord Mountjoy could not devide the said interest, viz., to grant to one to digg within a parcel of said waste. And they also agreed, that notwithstanding that Grant, that Brown, his heirs and assigns, owners of the soille, might digg there, also, like to the case of common sans number. The case went further, that the Lord Mountjoy had devised this interest to one Laicott for one and twenty years, and that Laicott had assigned the same over to two other men; and whether this assignment was good or not was the question; forasmuch that if the assignment might be good to them, it might be to twenty; and that might be a surcharge to the tenant of the soille. And as to that the justices did agree, that the assignment was good; but that the two assigness could not work severally, but together with one stock, or such workmen as belonged to them both."

The reservation in the deed was as follows: "That it shall be lawful for the said Lord Mountjoy, his heirs and assigns, at all times hereafter to have, take and dig, in and upon the heath ground of the said premises, from time to time, sufficient ores, heath, turves, and other necessities for the making of alum and copperas." See *Anderson*, supra, and *Caldwell v. Fulton*, supra, 31 Pa. 485.

It will be seen that the main reason here given for the proposition that a right to mine in the land of another cannot be divided and transferred as to a parcel only, and cannot be enjoyed by co-owners separately, but only "together with one stock," is that if this could be done a similar right might be given to 20 persons, which "might be a surcharge to the tenant of the soil;" that is, to the lessor or owner of the fee. The idea is twofold: First, that the owner of the soil has a common right to dig for the same ore, and the giving of the same right, separately, to more than the number originally provided, would permit mine openings in many different places, thereby unduly interfering with the owner in the enjoyment of his own min-

ing right, contrary to the intent of the reservation, which implies a single right and a single use of it; and, second, that the owner has the right to make other uses of the land, and this multiplying of the persons and places where the mining right was to be exercised by others, under a reservation which was construed to give only a right to mine "with one stock," would impair the other uses of the owner to a greater extent than the reservation intended.

It is clear that the lease to the Fearon Oil Company, in effect, gives to the company the exclusive right to develop and take the oil, and that Fearon thereafter had no right to do so in common with the company. This is not expressly declared, but the respective provisions necessarily imply it. It leases and demises "all" the land described. This, as above stated, covenants for the quiet enjoyment of all by the lessee. It provides that the lessee shall have the right to explore, develop, and take oil from all of it, except that required for the Fearon residence. The only restriction as to area, and the only reservation as to possession or enjoyment by Fearon, is the paragraph giving Fearon and his wife the right to occupy the house then standing on the land, and the buildings in connection therewith, as a place of residence, and the right to "free and uninterrupted access over and upon said lands, *not actually used or needed for the business of said second party*, for the purpose of farming the same," and reserving the right to farm said lands. Nothing is here said about Fearon and wife taking oil, or using the land for any purpose, except for farming and in part as a residence, and the language quoted does, in effect give the company the paramount right to the exclusive use and possession, so far as necessary for its business of raising the oil. See, on this point, *Caldwell v. Fulton*, supra, 31 Pa. 479, 483; *Funk v. Haldeman*, supra, 53 Pa. 247. Therefore, so far as the rule of the Mountjoy Case is based on the fact that the lessor and lessee have a common right to develop and take the oil, the reason is wanting, and the rule, being in derogation of the right conveyed, should not prevail.

Whatever force there may have been in the second branch of the reason under the conditions of law and fact prevailing in England in the sixteenth century, or as applied to the mining of coal and mineral ores, it does not seem to justify the application of the rule of the Mountjoy Case to a lease of a large body of land for the purpose of extracting the oil from it, and especially to the particular lease here involved. The basis of it is the inconvenience to the owner of the land in his use thereof that would arise if a large number of persons were occupying the land in the exercise of the granted right at the same time. Because of this inconvenience, it will not be presumed that he intended such right to be exercised by more

than one, unless he so declares in the lease or grant, either directly or indirectly. Thus, it is said, a grant of common of pasture, without stint as to amount, was nevertheless limited at common law to the use by a reasonable number only of the grantee's cattle, and it could not be aliened to several, so as to be enjoyable by each separately, because in each case the right would be enlarged by the additional use, and the grantor's estate would be burdened more than was contemplated. In the case of ores and coal, the usual method of taking them, and perhaps the only practicable one, is to sink a shaft or run a drift to the ore bed or vein, and obtain the mineral by means of underground workings from such shaft or drift. A grant or lease of a mining right for coal or ores would create a presumption that this method was understood and intended, and that it was expected to cause little interference with the ordinary use of the surface.

This is not true with respect to mineral oil. It lies far below the surface. It can be extracted only by means of wells. Each well is separate from every other, and by means of it the oil can be taken only from a limited area of four or five acres immediately surrounding it. For this reason, the extraction of oil from the whole of a large tract granted by an ordinary oil lease requires, not one "stock," or one well, as a means of access to the whole deposit of oil, but a separate and independent well upon every few acres of the oil-bearing territory. The tract must be dotted with wells, each as separate and distinct in its installation and operation as if owned by different persons. Consequently, one who leases his land for this purpose necessarily understands and intends that as many wells will be sunk and operated thereon as may be required to raise all the oil in it. His own possession and use of the surface will be substantially as much interfered with by the operation of all these wells under one management as it would be if each well was operated independently by a different person. If his rent is paid by a royalty, as is common, it will be to his advantage to have the oil taken out rapidly, and this may often be better done by subletting in tracts to different persons than by keeping it in control of one person or corporation. The conditions are the very opposite of those which support the rule of the Mountjoy Case. "When the reason of a rule ceases, so should the rule itself." Civ. Code, § 3510.

If this is so with respect to an ordinary oil lease upon a royalty, it is much more so in the case of the lease to the Fearon Oil Company. That company was organized on August 24, 1907, with 1,000,000 shares of stock, of which only 653,000 have been issued. The lease was made 12 days after the company was incorporated. As a consideration for the lease, the company issued to Fearon 525,000 shares of its capital stock.

The lease constitutes practically all of the property of the company. Fearon owned nearly all of the stock, and was in potential control of the company. In practical effect, he leased the land to himself. The consideration for the lease was complete, and fully paid upon its execution, by the issuance to him of said stock. But his actual profit must come from the dividends to be paid by the company upon that stock. The amount of these dividends would depend upon the number of wells in operation and the quantity of oil taken. It was to his interest to have as many wells in operation as possible. The corporation had no means, and could obtain money to develop and extract the oil only by borrowing or by selling some of the treasury stock. It is easily to be seen that it would be greatly to its advantage, and to Fearon's advantage also, to have the power to sublet parcels to others, who would extract the oil and pay a rental or royalty.

For these reasons, we are of the opinion that the rule of the Mountjoy Case is inapplicable, and that the estate of the Fearon Oil Company, whether capable of being justly partitioned between tenants in common or not, could be sublet in smaller parcels to different subtenants. In *Hughes v. Devlin*, supra, the court held that mining claims upon public lands of the United States were corporeal interests in land, and, as such, were subject to partition, if owned by tenants in common. The case, in effect, supports our conclusion. In *Smith v. Cooley*, supra, *Smith*, being the owner in fee, had granted to *Cooley* a "mining right" in the undivided one-third of the land, and he afterward sued *Cooley* in partition. The right of *Cooley* was declared to be an incorporeal hereditament, and not capable of partition. The case is distinguishable from an exclusive oil lease upon the grounds heretofore stated.

4. The clause imposing the condition that the lease shall terminate, if an assessment be levied on the stock of the Fearon Oil Company, provides that upon a breach thereof the lessors shall have the right to eject from the land "all agents, officers or employes" of said company. Appellants, from the phrase quoted, endeavor to deduce the conclusion that the lessors could not eject any person who was not such agent, officer, or employe, and that, therefore, there is an implied covenant against subletting in parcels. The same argument would apply to an assignment or sublease of the whole tract. Without discussion, we think it sufficient to say that, in our opinion, the conclusion is not justifiable on any allowable theory of interpretation.

5. It is claimed that the lease from the Fearon Oil Company to plaintiffs is void, because its execution was not authorized by the lawful board of directors of the company. It runs in the name of the Fearon Oil Company. It is signed by the plaintiffs and by "Fearon Oil Company, by Wm. W. Goldnamer, its Secretary." The corporate

seal of the company is attached, and the execution was duly acknowledged. A resolution, authorizing Goldnamer, as secretary, to execute the lease for the company, purporting to have been adopted by the board of directors of the company, was received in evidence.

[7] When the corporate seal is affixed to a contract, purporting to be regularly executed for a corporation by one of its officers, the seal is *prima facie* evidence of the authority of the officer to execute the contract for the company. *Underhill v. Santa Barbara, etc., Co.*, 93 Cal. 314, 28 Pac. 1049; *Colton L. & W. Co. v. Swartz*, 99 Cal. 284, 33 Pac. 878; *Burnett v. Lyford*, 93 Cal. 117, 28 Pac. 855; *Mills v. Boyle M. Co.*, 132 Cal. 97, 64 Pac. 122; *Schallard v. Eel R. N. Co.*, 70 Cal. 146, 11 Pac. 590; *Reid v. Clay*, 131 Cal. 213, 66 Pac. 262; *Potts Drug Co. v. Benedict*, 158 Cal. 327, 104 Pac. 432, 25 L. R. A. (N. S.) 609; *McKee v. Cunningham*, 2 Cal. App. 687, 84 Pac. 260.

The defendants assert that the authorization to the secretary to execute the lease to plaintiffs was invalid upon a number of technical grounds. They say the meeting of the directors at which it was authorized was not properly called; that three of the four persons who assumed to act as directors at said meeting were neither directors nor stockholders of the company; that the articles of incorporation limited the number of directors to three persons; that *Joseph Fearon*, *Addison Fearon*, and *Wm. W. Goldnamer* were thereby appointed, and have ever since held and exercised office as such directors; that an attempted increase of the number to seven was illegal, because it was made at a stockholders' meeting illegally called and held by persons not stockholders; that the four additional directors thereupon elected, namely, *H. Z. Austin*, *H. G. Traeger*, *M. B. Harris*, and *J. H. Fearon*, were not and could not be directors, because there were no additional lawful offices of director to be held or filled; that the only persons present and assuming to act as directors at the meeting were *Goldnamer*, *Austin*, *Traeger*, and *Harris*, and that *Goldnamer* alone was a lawful director; and that the by-laws empowered the president to execute the contracts of the company, and did not authorize the secretary to do so.

[8] The evidence shows that the meeting of stockholders at which the increase in the number of directors was made was held on December 13, 1907; that the additional directors were elected on the same day; that a certified copy of the amendment to the articles of incorporation, declaring such increase in the directorate, was duly filed in the offices of the county clerk and Secretary of State; and that, from December 13, 1907, to the day the lease was authorized (March 6, 1909), these persons continued to act as directors of the company, without objection on the part of any stockholder. At the

stockholders' meeting of December 13, 1907, all of the 653,000 shares of issued stock were represented, either in person or by proxy, except 2,600 shares. Another meeting of stockholders was held on January 11, 1908, which was attended by the holders of stock amounting to 650,800 shares, at which meeting the proceedings of the stockholders' meeting of December 13, 1907, were ratified. There is no merit in the claim that these persons were not stockholders. They held certificates of stock regularly issued. The objection that the consideration for the stock was not lawfully sufficient cannot be raised to invalidate their action, when third persons have dealt in good faith upon it.

[9] The persons thus chosen as directors, and recognized and permitted to act as such, were at least de facto directors, and their acts were therefore valid, so far as they were acted on in good faith by third persons. "Persons who hold office as directors, or other officers, with the consent of the corporation, and under color of an election or appointment, are de facto officers, although their election or appointment may have been illegal, and their acts as such, in so far as third persons are considered, are just as valid and binding upon the corporation, as if they were officers de jure." 3 Clark & Marshall on Corp. p. 2035, § 6002; *Waterman v. Chicago, etc., Co.*, 139 Ill. 658, 29 N. E. 689, 15 L. R. A. 418, 32 Am. St. Rep. 228, and notes; *Bradford v. Frankfort, etc., Co.*, 142 Ind. 392, 40 N. E. 741, 41 N. E. 819; *San Jose Savings Bank v. Sierra L. Co.*, 63 Cal. 180; *Balfour, Guthrie Co. v. Woodworth*, 124 Cal. 173, 56 Pac. 891; *Barrell v. Lake View L. Co.*, 122 Cal. 133, 54 Pac. 594; *San Joaquin, etc., Co. v. Beecher*, 101 Cal. 80, 35 Cal. 349; *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191.

[10] Joseph Fearon was a large stockholder in the Fearon Oil Company, it is true, but he was also its lessor, and as such he stood in the position of a third person to that company, so far as this question is concerned. Defendants have no relation to that company, other than that which they had as privies in estate with Joseph Fearon as such lessor. They have no status as stockholders, and cannot attack the corporate action in that capacity. They are not entitled to act on behalf of that company. The plaintiffs, so far as appears, acted in the honest belief that the persons who authorized the secretary to make the lease were lawful directors. They are therefore protected by the rule above stated against all attacks of the defendants upon the validity of the lease, grounded upon the claim that the directors were usurpers. And as to the plaintiffs the question whether the meeting of directors was a regular meeting or was duly called is immaterial. 2 Cook on Corp. §§ 713a, 725. And so is the objection that the by-laws do not expressly authorize the secretary to sign corporate contracts, but

do authorize the president to do so. 2 Cook on Corp. p. 1825, § 725.

We do not think that the principle that there cannot be a de facto officer, unless there is a de jure office for him to hold, is applicable to this case. The same strictness does not obtain as in the case of public offices, which can be created only by law. Stockholders are private persons, and are subject to the principle of estoppel by conduct, as such, and in their relation to the corporate affairs, the same as in any other business matters. They are the human components of the corporation. The statute itself creates the office of director. Civ. Code, § 290. The number of the directors, in excess of three, is entirely dependent on the will of the majority of the stockholders. They have full power to increase the number. If that majority meets and regularly adopts, certifies, and files in the proper offices an amendment to the articles of incorporation, increasing the number of directors, and then suffers the persons so constituted directors to transact the business of the company without objection, the plainest principles of equity and justice would prevent them, or the corporation in their behalf, from asserting the lack of authority of such board of directors, or a lawful quorum thereof, to do business and make contracts for the corporation. We think the better rule is that the corporation is bound by such conduct to this extent, at least, that a third person may safely deal with the corporation on the faith of such a certificate, regular on its face, and without inquiring whether or not the stockholders had been regularly called to meet at the time the change was made; and that a contract authorized by such board, made by a third person in good faith, with the authorized corporate officers, binds the corporation. The plaintiffs' lease is therefore valid.

[11] 6. Appellants contend that the finding that plaintiffs took possession of the land under their lease on March 10, 1909, is not supported by the evidence. There was evidence that they went upon the land on that day and deposited a wagon load of well-drilling tools thereon, intending to bore a well thereon, and that they returned the next day with more tools for that purpose, but were excluded by Joseph Fearon. This was a sufficient entry, if any entry was necessary, to enable them to maintain the action. We do not regard this part of the finding as important or necessary to the judgment. The plaintiffs were thereafter and ever since excluded from the land by the defendants, and the findings so state. The suit is for the recovery of possession, and to enjoin the defendants from extracting oil therefrom. If the plaintiffs had and have the right of possession, this was sufficient to support the judgment given, to the effect that plaintiffs are entitled to the possession of the land for the purpose of drilling wells and taking

oil therefrom under their lease from the Fearon Oil Company; and that defendants be enjoined from interfering with plaintiffs' work of well drilling thereon and taking oil therefrom; and that defendants be also enjoined from drilling wells thereon themselves.

[12] There is no merit in the claim that the lease of the Fearon Oil Company to the plaintiffs did not give them any right to the possession of the 120 acres. That lease purports to let, demise, and lease to plaintiffs, for 20 years, the exclusive right to drill wells on the 120 acres and take oil therefrom, the said drilling to begin within 90 days, and to continue with diligence to a depth of 2,500 feet, unless oil was sooner found, and the right to continue thereafter to drill at least eight other wells thereon, and to operate the same; the company agreeing to protect the plaintiffs in their possession during the term, and giving them the further right, after the 20 years, to remain in possession of such part of the premises as should be required to enable them to operate all wells thereon that were then producing oil. It also contained a covenant, in favor of plaintiffs, that they should quietly hold and enjoy the premises for the term. The company reserved only the right to enter upon the land to inspect the work done by plaintiffs, and the right of Joseph Fearon to reside in the house then on the land, and to farm the land not actually used or needed for the business of drilling the wells or removing the oil. This clearly gave the plaintiffs the present right of possession for the purposes specified in the judgment. It vested in them a corporeal interest in the land, an estate for years, with right of possession for a limited purpose. *Frisbie v. McClerkin*, 38 Cal. 571; *Gracioso Oil Co. v. Santa Barbara Co.*, 155 Cal. 144, 99 Pac. 483, 20 L. R. A. (N. S.) 211; *Brookshire Oil Co. v. Casmalia Oil Co.*, 156 Cal. 215, 103 Pac. 927. The question whether plaintiffs became the absolute owners of the oil, or had any title to it at all before it was raised to the surface, is not material to the case. The issue concerns only the right to the possession of the surface, and the right to protect and keep the oil in place while the plaintiffs are engaged in obtaining it, as provided in their lease.

7. Certain rulings upon the admission and rejection of evidence are assigned as error. The conclusions reached upon the points hereinbefore discussed disposes of all these objections. They are all based on the propositions advanced by defendants, which we have held to be untenable. We do not deem it advisable to extend this opinion by stating or considering them.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

**BLAEBOLDER v. GUTHRIE.** (Civ. 968.)  
(District Court of Appeal, Second District,  
California. Oct. 23, 1911.)

**1. LIFE ESTATES (§ 25\*)—LEASE BY LIFE TENANT—RIGHT TO CROPS.**

The death of a life tenant does not deprive his tenant for a year or at will of his right; as against the remainderman, to the crops resulting from the tenant's labor.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. § 47; Dec. Dig. § 25.\*]

**2. LIFE ESTATES (§ 25\*)—LEASE BY LIFE TENANT—RIGHT TO CROPS.**

A life tenant executed a lease for a year to a tenant who should be entitled to a half of the crops. After the death of the life tenant, the remainderman gave to the tenant a lease for a year under similar terms. At the time of the execution of the lease, a crop produced under the lease given by the life tenant was matured, but was not harvested. *Held*, that the subject of the lease made by the remainderman was the crop to be raised during the year specified in the lease, and did not refer to the crop produced the preceding year under the lease executed by the life tenant.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. § 47; Dec. Dig. § 25.\*]

**3. LIFE ESTATES (§ 25\*)—LEASE BY LIFE TENANT—SHARES OF CROPS—ACTIONS—EVIDENCE.**

Where, in an action by a tenant for his share of the crops produced during the term of the lease, defendant claimed that a crop which was matured, but not harvested at the time of the execution of the lease, was the crop referred to in the lease, the tenant could show that he was the owner of such crop, having produced the same while in the possession of the property under a lease given by the life tenant.

[Ed. Note.—For other cases, see *Life Estates*, Dec. Dig. § 25.\*]

**4. CONTRACTS (§ 169\*)—CONSTRUCTION—SITUATION OF PARTIES—EVIDENCE.**

Where there is any uncertainty in a contract, it is competent in aid of its interpretation to show the situation of the parties and the surrounding circumstances at the time of the execution of the contract.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 752; Dec. Dig. § 169.\*]

**5. TRIAL (§ 29\*)—MISCONDUCT OF TRIAL JUDGE—RULINGS ON EVIDENCE—STATEMENTS.**

A statement by the trial judge, on overruling an objection to evidence, which embodies a correct statement of the law does not amount to misconduct.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 29.\*]

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Henry Blaeholder against Sallie Knox Guthrie, as executrix of J. E. Guthrie, deceased, substituted for J. E. Guthrie. From a judgment for plaintiff, defendant appeals. *Affirmed*.

F. O. Daniel, for appellant. Clyde Bishop and Williams & Rutan, for respondent.

SHAW, J. On May 1, 1906, plaintiff and J. E. Guthrie, defendant's testator, entered into a written contract of lease, whereby

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.



plaintiff was to take care of defendant's ranch, and in consideration of the performance of certain covenants on plaintiff's part, as provided in the contract, defendant was to sell the oranges and walnuts grown thereon and pay plaintiff 50 per cent. of the net proceeds of such sales; it being provided that plaintiff should continue in possession of the property and care for the same, subject to the termination at the will of either party of the relations so created.

Plaintiff's possession of the property under the terms of the contract covered the period from May 1, 1908, to May 31, 1909, when, pursuant to notice given by Guthrie, requesting him so to do, he removed therefrom. At the time of his removal, there was a crop of Valencia oranges, consisting of 1,077 boxes, ripe and matured, and which were picked in the month of June following his removal, and which Guthrie sold and received therefor the sum of \$1,186.36. The action was brought upon the contract to recover 50 per cent of this sum. A jury trial was had, with the result that a verdict was rendered in favor of plaintiff for one-half of the proceeds from the sale of the Valencia oranges, and also for the amount of another item, as to which there appears to be no controversy on this appeal. From the judgment entered upon this verdict, and an order denying a motion for a new trial, defendant appeals.

It appears that on May 1, 1908, when plaintiff and Guthrie made the contract, the crop of oranges grown the preceding year, during which period plaintiff occupied the property under a lease in like terms given him by Guthrie's father, who held a life estate therein, although matured and ready to harvest, had not been gathered; that it was thereafter gathered and plaintiff received one-half of the proceeds of the sale thereof. It is appellant's contention that the oranges grown on the ranch, and which Guthrie, as provided in the contract, was to sell and pay one-half of the proceeds thereof to plaintiff, had reference to the then existing crop grown and produced by plaintiff the preceding year under the lease from the owner of the life estate in the property, and not to the crop which was grown and produced during the year that plaintiff was in possession of the property as a tenant of Guthrie. We cannot assent to this contention. The existing crop had been produced by plaintiff under the terms of the lease for the preceding year. At the time of executing the lease (May 1, 1908), it was matured and ready to harvest and was picked in June.

[1, 2] The death of the holder of the life estate did not deprive the tenant of his right to the crop, the production of which was the result of his year's labor. This by reason of what is termed "the doctrine of emblements," the basis of which is "the justice of assuring to the tenant compensation for his labor, and also upon the desirability of en-

couraging husbandry as a matter of public policy." Section 231, *Tiffany's Landlord and Tenant*. "If a life tenant, after making a lease, dies before the end of the term thereby created, the lessee is entitled to take the crops as against the remainderman." Section 251, *supra*. And the same is true where a tenancy at will is terminated by the death of the holder of the life estate. Plaintiff was the owner and entitled to one-half of the existing crop grown by him in the years 1907 and 1908 as lessee of the life tenant. This being true, it must follow that the subject of the contract, made May 1, 1908, with defendant's testator, was the crop to be grown the year following the making of the lease, one-half of the proceeds from the sale of which was the subject of the action. To hold otherwise would be to place an interpretation upon the contract, the effect of which would deprive plaintiff of any compensation for the labor performed by him in the care and cultivation of the orchard.

[3, 4] At the trial, the defendant interposed objections to certain questions touching the possession and occupancy of the property by plaintiff under the lease given him by the life tenant, claiming that the same were outside the issues. The objections were overruled. There was no error in the rulings, for the reason that the defendant based his defense upon a claim that the crop picked in June, and which had been grown the preceding year, was the one to which the contract had reference. It was, therefore, competent for the plaintiff to show that he was the owner of this crop, having produced the same while in possession of the property under the lease given him by Guthrie's father. If there was any uncertainty or ambiguity in the contract, or the application of the same, it was competent in aid of its interpretation to show the situation of the parties and the surrounding circumstances as they existed when the contract was made. *Preble v. Abrahams*, 88 Cal. 245, 26 Pac. 99, 22. Am. St. Rep. 301.

[5] With reference to the crop of oranges produced in the years 1907 and 1908, plaintiff was asked: "Were you in possession of the premises from the time that crop of oranges set until the time they were picked?" To this question defendant interposed an objection. In overruling the objection, the court stated: "It is so conclusive to the court that the position of counsel for plaintiff is correct that I will have to overrule this objection, and permit counsel for plaintiff to show the condition under which the first crop of oranges was made. It certainly cannot be that this plaintiff should be required to be content with accepting and receiving a crop he was already entitled to at the time of making the lease, unless there is some stipulation or understanding by the lease that that was to be so." It is claimed that the statement so made by the court con-

stituted misconduct on its part. What we have said in regard to the interpretation to be given the contract, and the subject to which the contract applied, sufficiently answers appellant's contention in this regard. Moreover, as the language of the court embodied a correct statement of the law, we are unable to perceive wherein the same constituted misconduct.

There are other alleged errors, but an examination of the same convinces us that they merit no discussion.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

**TALMAGE v. MONROE**, Superior Judge.  
(Civ. 1,063.)

(District Court of Appeal, Second District, California. Oct. 19, 1911.)

**MANDAMUS (§ 162\*)—PERFORMANCE—EFFECT.**

Where a return shows that the respondent has complied with the directions of an alternative writ of mandamus, the writ will be quashed.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 338-340; Dec. Dig. § 162.\*]

Application by George Talmage for a writ of mandamus to be directed against Charles Monroe, as Judge of the Superior Court of the State of California, in and for the County of Los Angeles. Writ discharged.

Miner P. Goodrich, for petitioner.

**PER CURIAM.** This court having heretofore issued an alternative writ of mandamus, directing the respondent to set for trial the case of Talmage v. Talmage, otherwise to show cause for his refusal so to do, and the respondent having made answer to said alternative writ, and by said return it appearing that said respondent has complied with the direction of this court, and has set the above-entitled action for trial, it is now, therefore, ordered that the writ heretofore issued be and the same is hereby discharged, and that petitioner recover his costs herein.

**Ex parte SULLIVAN.** (Cr. 223.)

(District Court of Appeal, Second District, California. Oct. 20, 1911.)

**1. ADULTERY (§ 1\*)—STATUTORY OFFENSES.**

An unmarried man is incapable of committing the offense denounced by Pen. Code, § 269a, as amended by Act March 21, 1911 (St. 1911, p. 426), providing that every person living in a state of cohabitation and adultery is guilty of a misdemeanor; Civ. Code, § 93, defining adultery as the voluntary intercourse of a married person with a person other than accused's husband or wife.

[Ed. Note.—For other cases, see Adultery, Cent. Dig. §§ 1-6; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 212-214.]

**2. LEWDNESS (§ 5\*)—PARTIES TO OFFENSE—PRINCIPALS—ADULTERY.**

Under Civ. Code, § 93, defining adultery as the voluntary intercourse of a married person with a person other than accused's husband or wife, and Pen. Code, § 31, providing that all persons concerned in a crime are principals, and section 269a, as amended by Act March 21, 1911 (St. 1911, p. 426), providing that every person who lives in a state of cohabitation and adultery is guilty of a misdemeanor, a complaint alleging that accused, an unmarried man, lived in a state of cohabitation and adultery with a married woman, and which does not purport to charge the married woman with any offense, and which does not allege that accused knew that she was a married woman, does not state an offense against accused, on the theory that accused was guilty as a principal in aiding the woman to commit the offense.

[Ed. Note.—For other cases, see Lewdness, Dec. Dig. § 5.\*]

**3. CRIMINAL LAW (§ 59\*)—PARTIES TO OFFENSES—PRINCIPALS.**

Pen. Code, § 31, providing that all persons concerned in the commission of a crime are principals, does not declare a person guilty of aiding and abetting another in the commission of a crime where such person by reason of his status is himself incapable of committing the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 71-74, 76-81; Dec. Dig. § 59.\*]

Application of Francis A. Sullivan for a writ of habeas corpus for his discharge from custody. Prisoner discharged.

Charles S. McKelvey, for petitioner. Guy Eddle, City Prosecutor, and Ray E. Nimmo and Frank W. Stafford, Deputy City Prosecutors, for respondent.

**PER CURIAM.** Petitioner was committed to the custody of the chief of police on account of nonpayment of a fine imposed by a police judge in a certain proceeding wherein petitioner was charged with cohabitation and adultery with a married woman named. The affidavit of complaint upon which the proceedings before the police court were based charged that on a day named, in the city of Los Angeles, "the crime of adultery and cohabitation was committed by Francis A. Sullivan (petitioner herein), who at the time and place last aforesaid did willfully and unlawfully live with one Corinne Royse in a state of cohabitation and adultery, the said defendant Francis A. Sullivan being then and there an unmarried man, and the said Corinne Royse being then and there a married woman." The sufficiency of this affidavit is the question for determination. The proceeding was based upon section 269a of the Penal Code, as amended March 21, 1911 (St. 1911, p. 426), which provides that "every person who lives in a state of cohabitation and adultery is guilty of a misdemeanor and punishable by a fine," etc.

[1] Adultery is defined by section 93 of the Civil Code as "the voluntary sexual intercourse of a married person with a person other than the offender's husband or wife."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

It was made to appear in the affidavit of complaint that petitioner was not a "married person"; hence, he was shown to be incapable of committing the offense.

[2] Conceding that petitioner was not, for the reason given, charged with committing the substantive offense as the same is defined by the Code, it is, nevertheless, insisted by respondent that, inasmuch as the complaint alleged the woman with whom he cohabited to be a married woman, and therefore guilty of adultery, he must be deemed a principal under the provisions of section 31 of the Penal Code, which provides that "all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, \* \* \* are principals in any crime so committed." The theory of respondent is that, inasmuch as the woman named in the complaint was shown to have been guilty of the offense, in aid of the commission of which petitioner contributed, therefore he is properly charged therewith as a principal. The complaint, however, does not purport to charge the woman with any offense; neither does it appear therefrom that petitioner knew that she was a married woman. Hence, in no event, under the circumstances here disclosed, can the complaint be said to state a public offense against petitioner.

[3] While unnecessary to the decision of this case, we are of the opinion that it manifestly was not the intent of the Legislature, by said section 31, to declare a person guilty of aiding and abetting another in the commission of a crime where such person, by reason of his status, is himself incapable of committing the offense.

The prisoner is discharged.

#### PEOPLE v. ROBINSON. (Cr. 336.)

(District Court of Appeal, First District, California. Oct. 20, 1911.)

#### 1. CRIMINAL LAW (§ 1023\*) — APPEAL — MOTION IN ARREST OF JUDGMENT.

No appeal lies from an order denying a motion by accused in arrest of judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2591; Dec. Dig. § 1023.\*]

#### 2. CRIMINAL LAW (§ 1068½, \* New, vol. 13, Key No. Series)—APPEAL—ORDER DENYING A NEW TRIAL.

Since Pen. Code, § 1237, authorizes an appeal from an order denying a motion for a new trial, but neither the Code nor the rules of the appellate court prescribes any procedure on such an appeal, the appellate court is authorized, by Code Civ. Proc. § 187, to adopt any proper method which may have been employed by the aggrieved party in perfecting his appeal.

#### 3. CRIMINAL LAW (§ 1087\*)—APPEAL—ORDER DENYING NEW TRIAL—PROCEDURE.

Pen. Code, § 1237, having authorized an appeal from an order denying a new trial, but

no procedure having been prescribed, a record on appeal from such an order, in the form prescribed for use on an appeal from final conviction, purporting to show in full the proceedings and evidence at the trial, including the hearing and determination of the motion for a new trial, is sufficient to move the court to dispose of the appeal on its merits.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1087.\*]

#### 4. CRIMINAL LAW (§ 564\*) — VENUE — EVIDENCE.

In a prosecution for embezzlement, evidence held to justify a finding that the embezzlement occurred in the city and county of San Francisco, where accused was tried, and not in another county.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1277-1284; Dec. Dig. § 564.\*]

#### 5. EMBEZZLEMENT (§ 47\*)—PLACE—QUESTION FOR JURY.

In a prosecution for embezzlement, evidence held to require submission to the jury of the question when and where a definite and final demand for the return of the money alleged to have been embezzled, and defendant's refusal to repay the same, was made.

[Ed. Note.—For other cases, see Embezzlement, Dec. Dig. § 47.\*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Francis H. Robinson was convicted of embezzlement, and from an order denying a new trial, and denying his motion in arrest of judgment, he appeals. Affirmed.

Thos. A. Keogh, for appellant. Attorney General Webb, C. M. Flickert, Dist. Atty., and Jas. F. Brennan, Asst. Dist. Atty., for the People.

LENNON, P. J. The defendant was convicted of the crime of embezzlement. He has appealed only from the order of the lower court, refusing him a new trial, and denying his motion in arrest of judgment.

The Attorney General, upon behalf of the people, has interposed a preliminary motion to dismiss the appeal, upon the grounds (1) that an order denying a motion in arrest of judgment is not appealable; (2) that there is no statutory procedure provided for the presentation to this court of an appeal from an order denying a motion for a new trial in a criminal case; and therefore, if such an order can be reviewed at all, it must come here upon an appeal from the judgment.

[1] It is clear that no appeal lies in a criminal case from an order denying a motion in arrest of judgment; and therefore the appeal in this case, in so far as it relates to the order denying defendant's motion in arrest of judgment, cannot be considered. People v. Markham, 64 Cal. 157, 30 Pac. 620, 49 Am. Rep. 700; People v. Majors, 65 Cal. 100, 3 Pac. 401; People v. Henry, 77 Cal. 448, 19 Pac. 830; People v. Cline, 83 Cal. 374, 23 Pac. 391; People v.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Dolan, 96 Cal. 815, 81 Pac. 107; People v. Sansome, 98 Cal. 241, 38 Pac. 202; People v. Ford, 138 Cal. 140, 70 Pac. 1075; People v. Jackson, 138 Cal. 463, 71 Pac. 566.

[2] It is true that nowhere in the Codes, or the rules which govern this court, is there to be found a prescribed procedure for perfecting an appeal to this court from an order denying a motion for a new trial in a criminal case. The Code, however, does grant to a defendant in every criminal case an appeal from such an order (Pen. Code, § 1237); and it may now be considered the settled law of this state that, where a court has been by the Constitution invested with appellate jurisdiction in a particular class of cases, that court has inherent power, in the exercise of its jurisdiction, and for the purpose of bringing before it a cause in which an appeal has been granted and taken, to adopt any appropriate and approved mode of procedure which may have been employed by an aggrieved party in the perfecting of his appeal, even though the Legislature and the rules of this court have failed to prescribe the means or method of taking such an appeal. Code Civ. Proc. § 187; People v. Jordan, 65 Cal. 644, 4 Pac. 683; Cummings v. Conlan, 86 Cal. 413, 5 Pac. 796, 903; Somers v. Somers, 81 Cal. 616, 22 Pac. 967; In re Jessup, 81 Cal. 479, 21 Pac. 976, 22 Pac. 742, 1028, 6 L. R. A. 594.

[3] The record before us upon the defendant's appeal from the order denying his motion for a new trial is in the form prescribed by the statute for use upon an appeal from a judgment of final conviction; and, as it purports to show in full the proceedings and evidence had and taken in the lower court up to and including the hearing and determination of the motion for a new trial, we deem it our duty to resort to that record and dispose of the appeal upon its merits.

[4] In support of his appeal, the defendant relies mainly upon the claim that the evidence shows that the offense of which he was convicted was wholly committed in a county other than that in which the information against him was filed. The information upon which the defendant was tried and convicted charged, in substance, that on the 17th day of May, 1910, the defendant, in the city and county of San Francisco, embezzled the sum of \$500 which had been intrusted to him as the agent of one Esther Hoover. The evidence in the case shows that at several different places and times the defendant was intrusted by the complaining witness with large sums of money, among which was the \$500 mentioned in the information. The complaining witness testified that this money was to be returned to her by defendant upon demand. The case was tried apparently upon the theory that a demand upon the defendant for the return of the money was necessary, before he could be charged with the crime of embezzlement,

and the people depended for a conviction solely upon proof of a demand, made in the city and county of San Francisco, and the refusal of the defendant to comply with the same. Such demand was made upon the defendant for the return of the money at the Von Dorn Hotel in the city of San Francisco, some time during the month of April, 1910. The defendant then refused, and ever since has refused, to return or account for the money. This demand, coupled with the refusal of the defendant to comply therewith, and all of the circumstances surrounding the demand and refusal, were sufficient evidence of the fraudulent appropriation by the defendant of the property which had been intrusted to him.

It is the contention of the defendant that a previous positive and unqualified demand for the return of the money had been made upon him by the complaining witness in Los Angeles county, and that by reason of his failure to comply with that demand the crime charged against him was then and there consummated, and that therefore the venue of the offense was in the county of Los Angeles, and not in the city and county of San Francisco. The record does not sustain the defendant's contention in this regard. It nowhere clearly appears in evidence that the complaining witness made a positive and unequivocal demand upon the defendant in the city of Los Angeles for the return of the money. The testimony referred to in support of the defendant's contention shows that some time in the month of January, 1906, the plaintiff and defendant, at the city of Los Angeles, had a general conversation concerning the status of the money; but it cannot be fairly said that the sum and substance of this conversation constituted an unequivocal demand for the return of the money, which was met by a positive refusal, and thereby evidenced the commission and completion of the crime at that precise time and place. That the defendant himself did not consider or construe this conversation to be in the nature of a full and final demand is best shown by his own testimony upon cross-examination, where he said: "I don't know whether it was a demand, but [she] requested me to send this money to her father. \* \* \* This was the point: She wanted me to send it, and I said 'You will have send to Salt Lake City and get the drafts and send them back.' \* \* \* She requested me to send her father the money."

[5] The evidence upon the whole case is sufficient to warrant the finding of the jury, implied from the verdict, that the only demand and refusal occurred at the city and county of San Francisco; and, even if the testimony of the complaining witness as to what occurred at Los Angeles could be construed as a complete, unqualified demand and refusal, this would do no more than create a conflict of evidence upon the point

involved. The question as to when and where a definite and final demand was made was exclusively for the jury to determine. They were fully and fairly instructed upon that phase of the case; and, as there is some evidence in the case which tends to support the verdict upon the point of proof here challenged, the verdict is conclusive, and must stand.

There is no merit in the suggestion, made in the closing brief of the defendant, that the evidence does not show that the defendant was in fact the agent of the complaining witness.

The order appealed from is affirmed.

We concur: HALL, J.; KERRIGAN, J.

**STEVENSON v. SUN INS. OFFICE**  
(Civ. 867.)

(District Court of Appeal, First District, California. Oct. 20, 1911. Rehearing Denied by Supreme Court Dec. 13, 1911.)

**1. INSURANCE (§ 103\*)—BROKERS—AUTHORITY—CANCELLATION OF POLICY.**

Ordinarily the authority of an insurance broker terminates when he has placed insurance and delivered the policy to his principal, so that mere employment to secure insurance gives no authority to cancel the same.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 130; Dec. Dig. § 103.\*]

**2. INSURANCE (§ 238\*)—BROKERS—AUTHORITY—CANCELLATION OF POLICY.**

Authority to cancel a policy may be shown to have been conferred on an insurance broker, and, when shown, his acts or agreements in that behalf will be imputed to, and will be binding on, the insured.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 238.\*]

**3. INSURANCE (§ 665\*)—CANCELLATION—AUTHORITY OF BROKER.**

Evidence held to warrant a finding that insured in modifying an order given to an insurance broker for insurance, so as to reduce the amount from \$30,000 to \$25,000, authorized the broker to cancel a policy for \$3,000, so as to effect the reduction.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 665.\*]

**4. INSURANCE (§ 236\*)—CANCELLATION—SURRENDER OF POLICY.**

Where an insurance broker was authorized to cancel \$5,000 of plaintiff's insurance, and, pursuant to such authority, notified defendant of the cancellation of a \$3,000 policy in which defendant acquiesced, the policy was canceled from the date of the notice, though the policy was not formally and physically surrendered until after a fire had occurred.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 236.\*]

**5. INSURANCE (§ 103\*)—CANCELLATION—INSTRUCTIONS.**

In an action on a policy claimed to have been canceled before loss, an instruction that, if plaintiff's insurance broker was directed to cancel any particular policy, he would be bound by the direction, but, if he was given a general and unqualified order to cancel so much of the insurance ordered as might be necessary to reduce the amount carried to \$25,000, then

the broker's designation of the policy or policies to be canceled would be binding on plaintiff, and, if the minds of the parties met on the subject of cancellation, it was not necessary that it be physically delivered and surrendered prior to the fire, was proper.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 103.\*]

**6. INSURANCE (§ 103\*)—CANCELLATION—KNOWLEDGE OF INSURED.**

Where plaintiff ordered her insurance broker to reduce plaintiff's insurance from \$30,000 to \$25,000, whether plaintiff knew that the original order to place \$30,000 insurance had been executed before the order to reduce it to \$25,000 was given was not material as a matter of law to plaintiff's right to recover on one of the policies which the broker attempted to cancel in order to comply with the modified order.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 103.\*]

**7. EVIDENCE (§ 243\*)—DECLARATIONS OF AGENT—COMPETENCY.**

Where an insurance broker attempted to cancel the policy sued on in order to effect a reduction of plaintiff's insurance, in accordance with plaintiff's direction, a conversation prior to loss between the broker and defendant's manager with reference to cancellation of the policy, indicating that it had been actually canceled before the fire, was admissible on the theory that the broker was plaintiff's agent to place, and, if necessary, to cancel a part of the insurance.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 908-915; Dec. Dig. § 243.\*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Rebina Longwill Stevenson against the Sun Insurance Office. Judgment for defendant, and plaintiff appeals. Affirmed.

A. P. Black and W. C. Sharpstein, for appellant. L. A. Redman, for respondent.

LENNON, P. J. The plaintiff brought this action to recover upon two policies of insurance. The case was tried with a jury, and this appeal is from the judgment rendered and entered upon a verdict which awarded the plaintiff the sum of \$1,410.07 upon the first cause of action stated in her complaint, and in effect denied her the relief which she sought upon the facts stated in her second cause of action. The appeal, which was taken from the judgment only, is prosecuted under the provisions of section 941b, Code Civ. Proc. It was taken to the Supreme Court in the first instance, and by that court transferred here for hearing and determination. The record before us is the judgment roll and a bill of exceptions which purports to contain all of the evidence adduced at the trial.

The first cause of action stated in the plaintiff's complaint is founded upon a policy of fire insurance which called for \$1,000 on the stock, and \$1,000 on the furniture and fixtures of the plaintiff. To this cause of action the defendant interposed no defense.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The second cause of action was stated upon a policy of insurance for \$3,000 on a stock of merchandise, which was destroyed by fire on the 29th day of February, 1908. While admitting the execution and delivery of the policy, the defendant, as a defense to this cause of action, pleaded that "on February 28, 1908, the plaintiff and defendant agreed to cancel said policy, and said policy was on said day, at the request of the plaintiff theretofore made, canceled by the defendant, and thereafter, in conformity with said agreement and cancellation, plaintiff surrendered said policy to the defendant."

The plaintiff excepted to the verdict at the time of its rendition, upon the ground of the insufficiency of the evidence to support it, and in that behalf clearly and succinctly specified the particulars in which it was claimed that the evidence was insufficient. Those particulars in the form in which they were originally specified are incorporated in and plainly made a part of the duly authenticated bill of exceptions, which purports to contain all the evidence; and, as the specifications of insufficiency fully notified opposing counsel and the trial court of the precise points relied upon to support the appeal, the evidence and its sufficiency to maintain the judgment must be reviewed and determined.

The circumstances surrounding the procurement of the policy in controversy were these: The plaintiff was the owner of a toy and notion store originally located in Post street in the city and county of San Francisco. The plaintiff was about to remove her business to a new location in Market street, and through her son and manager directed and authorized one Kenna, an insurance broker, to procure insurance upon incoming stock, which was to be installed in the plaintiff's store at the new location. In accordance with his instructions, Kenna placed a portion of the insurance with the defendant, and the policy in controversy, covering merchandise to the amount of \$3,000, was issued and delivered to the plaintiff, and remained in her possession until after the building and its contents were destroyed by fire. When the plaintiff's stock of merchandise had been fully removed from the old to the new location, Kenna, by direction of the plaintiff's manager, did what was necessary to have this policy transferred to the new location. The plaintiff, in addition to the \$3,000 policy sued on, had, through the agency of Kenna, placed and was carrying insurance in several other companies, aggregating the sum of \$20,000. All of the various policies which covered the latter amount had not been written and delivered to plaintiff at the time the premises were destroyed by fire; but, shortly after the change of location was made, Kenna by letter informed plaintiff of the status of all of the insurance which she was carrying, and advised and notified her that he "was having the policies that were to be transferred canceled and reissued" so as to have

all of the insurance expire at one time. After the receipt of this information, plaintiff's manager, while taking stock, concluded that it was not fully covered, and directed Kenna to increase the insurance to \$30,000. Upon receipt of this order Kenna placed the additional insurance, but did not immediately notify plaintiff of that fact. Later, however, when plaintiff had concluded taking stock, she found that \$25,000 insurance was all that was necessary to protect her from loss by fire. Thereupon plaintiff's manager called at the office of Kenna for the purpose of readjusting the amount of insurance originally ordered. Kenna was not at the office, and plaintiff's manager testified that he left an order with the clerk in charge to amend the previous order for insurance so as to have it read \$25,000 on stock and \$1,000 on furniture and office fixtures. However, the original order for insurance in the sum of \$30,000, although not actually written in the form of policies, had been in fact executed by Kenna arranging for and securing covering notes, which bound the several companies undertaking the risks until such time as regular policies could be written and delivered. The order modifying the original request for insurance as given by the manager of plaintiff was taken down in writing by the clerk of Kenna, and subsequently verified by Kenna in a conversation over the telephone with Stevenson. As communicated to Kenna, he understood the modified order to mean that the plaintiff desired to cancel \$5,000 of the \$30,000 insurance already secured upon the stock of merchandise. In this behalf Kenna testified: "I had done this (procured the \$30,000 on the stock) prior to February 27th, on which day I received an order through my assistant that Mr. Stevenson (plaintiff's manager) wanted \$5,000 of insurance on the stock canceled, and to place \$1,000 on furniture and fixtures. I got the order late on February 27th. On Saturday morning I went to the office of the office manager of the defendant, Mr. Henry, as was my practice at the end of the month, in regard to policies canceled. \* \* \* I told Mr. Henry that Mr. Stevenson had ordered a part of their insurance canceled, and that the policy of \$3,000, the policy in controversy, was canceled. Mr. Henry told me to obtain the policy and get it into the office to go along with the other cancellations before the books were closed for the month. I told him that I would. The fire occurred that night. \* \* \* There was a policy of \$2,000 in defendant, which is the policy described in the first cause of action. I did not discuss with Mr. Henry the changing of the \$2,000, but it was fixed in my mind to change that policy. The actual change (on the \$2,000) was made after the fire. I then indorsed the policy to cover \$1,000 on stock and \$1,000 on furniture and fixtures. I executed the order to give him \$1,000 on furniture and fixtures by a rider on the \$2,000 policy. I saw Mr. Stevenson on Monday aft-

er the fire. Before seeing him I arranged for an adjuster so that the loss could be adjusted without delay. I called upon Mr. Stevenson after I had arranged for the adjuster. I told him that I had canceled the \$3,000 Sun policy and wanted it. \* \* \* Mr. Stevenson obtained the policy and handed it to me. I told Mr. Stevenson that he was fortunate that the whole amount of \$5,000 he had ordered canceled had not all been canceled, because I had only attended to the canceling of the Sun policy. I had not time after getting his order to order the cancellation of any other policy. He thanked me for the interest I had taken in his loss and looking after him. I told him that the adjustment was going along. He made not a bit of objection to turning over the Sun policy to me, and it has ever since been in the office of the defendant. \* \* \* The order to cancel \$5,000 on stock was never fully completed. There was not any cancellation of any policy except the Sun. Actually there was only a reduction to \$26,000, so that they had \$1,000 more than they would have had if their order had been completed." The defendant's manager, Mr. Henry, in response to Kenna's notification that the policy in controversy was canceled, clearly indicated his assent to the cancellation, and requested Kenna to procure the policy and include it in his report of cancellations for the month. Some time after the fire David B. Wilson, as the representative of the insurance companies, called upon the plaintiff's manager for the purpose of adjusting the loss. At the request of Wilson, Mr. Stevenson, plaintiff's manager, produced all the outstanding policies so that they might be adjusted. The policy in controversy, however, was not among them, and nothing was said about it by Stevenson. At that time Stevenson told Wilson that he had but \$26,000 insurance upon the property at the date of the fire, and that he had produced all of the policies of every company that he was insured in.

It was conceded at the trial that Kenna was the agent of the plaintiff for the purpose of negotiating and placing the required insurance; but it is now urged upon behalf of the plaintiff that the evidence shows that Kenna's employment was only that of a broker, and as such his authority extended solely to the placing of insurance, and not to its cancellation. With this contention we cannot agree.

[1] It is undoubtedly the rule, as suggested by counsel for plaintiff, that ordinarily the authority of an insurance broker terminates when he has placed the insurance and delivered the policies to his principal, and that under a mere employment to secure insurance no authority to cancel the same is given or implied.

[2] Authority to cancel, however, may be shown to have been conferred upon the broker, and, when shown, his acts and agree-

ments in that behalf will be imputed to and are binding upon the insured.

[3] The evidence in the case at bar is without conflict that the plaintiff's original order for insurance in the sum of \$30,000 was in effect executed by Kenna before the modified order was given, and that Stevenson, the plaintiff's manager, did not know at the time he gave the modified order whether or not the original order had been executed. Stevenson, in giving the modified order, proceeded—so he testified—"just exactly as if it (the original order) had not been executed by sending in a new order for \$25,000 instead of \$30,000." In brief, all that was said, done, and understood by the plaintiff through her manager and Kenna, her agent and broker, warranted Kenna in the conclusion and belief that Stevenson, in the event that the original order had not been executed, wanted merchandise insurance only to the extent of \$25,000; but if, on the other hand, the original order had been executed, he wanted the merchandise insurance reduced to that amount. It is obvious that in either event the result to the plaintiff was the same, and the conclusion is unavoidable, it seems to us, that, if Stevenson intended to withhold from Kenna authority to cancel any particular policy of the insurance already placed, the general and unqualified order for a reduction to \$25,000 would not have been given. However that may be, it is clear that the plaintiff's modified order as conveyed to Kenna could not have been executed except by canceling one or more of the policies previously negotiated, and it necessarily follows that the modified order impliedly authorized and required Kenna to cancel so much of the insurance placed in the first instance not exceeding \$5,000, and without regard to any particular policy or company, which, if cancellation was necessary, would bring the total insurance of the plaintiff within the desired limit of \$25,000. That Stevenson so understood the situation, and fully recognized the fact that the policy in question had been actually canceled prior to the fire, may be fairly deduced from his acquiescence in the surrender of the policy after the fire for the express reason that it had been previously canceled. This deduction is strengthened by the further fact that Stevenson not only failed to include this particular policy in his list of adjustable insurance, but stated to the adjuster that at the time of the fire he had all told only \$26,000 of insurance. It is true that Stevenson denied having surrendered the policy for the reason stated by Kenna; but Stevenson's explanation of what occurred in that connection evidently was not accepted by the jury, and, in so far as his evidence conflicts in this and other particulars with the testimony adduced upon behalf of the defendant, it must be ignored upon this appeal.

[4] There is no merit in the contention dis-

cussed and urged by plaintiff that the contract of insurance in the case at bar cannot be considered as canceled merely because the policy in controversy was not formally and physically surrendered into the possession of the defendant prior to the fire. A contract of insurance must be governed and interpreted by the same rules which ordinarily apply to other contracts, and it will be enforced only according to the manifest intention of the parties. It is a self-evident proposition that a contract of insurance may be as readily rescinded, as it was made, by the mutual agreement of the parties or their authorized representatives; and, while the surrender of a policy of insurance by the insured and its acceptance by the insurer is usually prima facie evidence of cancellation, yet a formal physical surrender is not absolutely necessary to a rescission and cancellation of the contract. The formal surrender and acceptance of the policy is at best a piece of evidence tending to show a cancellation, and, if the fact of rescission is established (as we think it was in this case) by the mutual agreement of the parties, the rescission is as complete and effectual as if the policy had been actually indorsed "canceled," and surrendered into the possession of the defendant.

[5] It is claimed that the trial court erred in its charge to the jury wherein it was in substance declared that, if the jury found from the evidence that Kenna was directed to cancel any particular policy, he would be bound by the direction; but, on the other hand, if the jury found that Kenna was given a general, unqualified order to cancel so much of the insurance ordered as might be necessary to reduce the amount thereof to \$25,000, then his designation of the policy or policies to be canceled would be binding upon the plaintiff; and (2), if the minds of the parties had met upon the subject of cancellation, it was not necessary to a valid cancellation of the policy in suit that it be physically delivered and surrendered to the defendant prior to the fire.

The charge of the court upon these subjects is in harmony with our previously expressed understanding of the law of the case, and, as it accords with our conception of the evidence, we must hold that in these particulars the charge of the court was free from error.

As heretofore indicated, we are of the opinion that, upon the whole case, the evidence was sufficient to justify the finding of the jury, which must be implied from their verdict, that the plaintiff had empowered and authorized Kenna to effect and cancel her insurance; and, this being so, the trial court did not err in charging the jury that the plaintiff would be bound by anything done by Kenna within the scope of his authority as the broker and agent of plaintiff.

[6] Complaint is made of the refusal of the trial court to give, upon behalf of the plaintiff, a requested instruction which in effect required a verdict for the plaintiff if the jury found that, at the time the order to reduce was given, the plaintiff did not know that Kenna had already executed the order first given. The record does not disclose any dispute upon the question of Stevenson's knowledge as to whether or not the original order had been executed before the modified order was given. It seems to be conceded that Stevenson had no information upon the subject, and that he did not seek to be informed thereon. The order to reduce was absolute and unqualified, and, as it was to be executed in any event, we are unable to perceive how as a matter of law the knowledge or lack of knowledge on Stevenson's part, in the particular stated in the requested instruction, could alter the situation, or modify the duties and responsibilities of the parties to the transaction.

[7] The trial court did not err in admitting testimony as to the conversation had prior to the fire between Kenna and Henry, the defendant's manager, with reference to the cancellation of the policy in controversy. This testimony tended strongly to show that the policy had been actually canceled before the fire, and it was properly admitted upon the theory, amply sustained by the evidence, that Kenna was the agent of plaintiff for the purpose of placing, and, if necessary, canceling a part of the insurance in question.

The judgment appealed from is affirmed.

We concur: HALL, J.; KERRIGAN, J.

#### ROSE v. LELANDE, County Clerk. (Civ. 1,070.)

(District Court of Appeal, Second District, California. Oct. 24, 1911.)

#### 1. APPEAL AND ERROR (§§ 612, 616\*)—CERTIFICATION OF TRANSCRIPT.

The clerk of the superior court is not required to certify or attest the transcript containing the reporter's notes, or the papers desired to be included therein, not included in the judgment roll.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2694, 2714-2718; Dec. Dig. §§ 612, 616.\*]

#### 2. APPEAL AND ERROR (§ 113\*)—ORDERS APPEALABLE—SETTING ASIDE DEFAULT.

An order setting aside a default is not appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 766; Dec. Dig. § 113.\*]

Application for a writ of mandate by Ruth M. Rose against J. Leland, Clerk of Los Angeles County, Cal. Denied.

E. M. Barnes, for petitioner.

PER CURIAM. [1,2] This application must be denied for two reasons: First, there

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't indexes



is no duty devolving by law upon the clerk to certify or attest the transcript containing the reporter's notes, or the papers desired to be included therein, not included in the judgment roll. Second, the notice of appeal is from an order of court setting aside a default. This is not an appealable order.

The writ is denied.

#### READICKER v. DENNING et al.

(Supreme Court of Kansas. Dec. 9, 1911.)

##### 1. APPEAL AND ERROR (§ 695\*)—RECORD—TRANSCRIPT—DUTY TO FURNISH.

The burden is upon an appellant contending that there was no evidence to support the judgment to file a transcript containing all of the evidence introduced, consisting of the stenographer's transcript as authorized by Code Civ. Proc. § 574 (Gen. St. 1909, § 6169), or a statement therein that the transcript contains all the evidence on the subject, in absence of agreement that the part filed contains everything material; such transcript being necessary to make available appellee's right to challenge the correctness of the abstract as to the evidence introduced, so as to entitle him to print a counterabstract containing all of the evidence which he claims is material.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2915; Dec. Dig. § 695.\*]

##### 2. APPEAL AND ERROR (§ 604\*)—RECORD—AGREED TRANSCRIPT.

The practice of shortening the transcript by agreement between the parties as to what parts of the record are material on appeal is commendable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2655-2659; Dec. Dig. § 604.\*]

Appeal from District Court, Allen County.

Action by Joseph Readicker against H. Denning and others, in which defendants appeal from an adverse judgment. On motion to dismiss the appeal. Motion denied, and cause continued to permit completion of the record.

Bennett & Cullison, for appellants. Ewing, Gard & Gard and A. F. Florence, for appellee.

PER CURIAM. A principal contention of the appellants is that there was no evidence to support the judgment rendered. The appellee has prepared neither a brief nor an abstract, but has filed a motion to dismiss the appeal upon the ground that the appellants have not caused a transcript of all the evidence to be made by the official stenographer, and filed with the clerk of the trial court. Only a portion of the evidence was so transcribed and filed.

[1] In order to give effect to the right of the appellee to challenge the correctness of an abstract, so far as it relates to the evidence introduced, a record must be available to which this court can refer to determine the facts. Such a record under the present Code is made by filing the stenogra-

pher's transcript. Civ. Code, § 574 (Gen. St. 1909, § 6169). The burden of doing this is upon the appellants. *Baker v. Readicker*, 84 Kan. 489, 115 Pac. 112; *Underwood Typewriter Co. v. Anderson*, 85 Kan. 867, 118 Pac. 879. An appellant may in his abstract assert that no evidence was introduced tending to prove a particular proposition. It then becomes the duty of the appellee, if he disputes the assertion, to print in a counterabstract all the evidence which he contends to be of that character. But to obtain this evidence he is entitled to go to a record already in existence. He is not required to bring the matter upon the record himself. Therefore whenever an appellant contends that there was no evidence to support the judgment rendered, whether the contention relates to the general issue, or to some specific matter, he must, in order to obtain a hearing upon that question, procure and cause to be filed an official transcript of all the evidence introduced, except as the necessity therefor may be avoided by agreement of counsel, or by a statement in the transcript that it contains all the evidence on a particular matter.

[2] A commendable practice exists, and appears to be growing, of shortening records by co-operation, by agreements as to what portions are material; but, where the right is insisted upon, the appellee may require the appellant to provide a record sufficient in itself to test the soundness of his contentions, even if this involves transcribing all the evidence introduced.

In the present case the appellee's objection has been so long delayed that fairness requires that the appellants should have an opportunity to obviate it. The cause will be continued to February. The appellants are allowed until January 1, 1912, to cause the transcript of the evidence to be completed, and to make any desired addition to their abstract. The appellee is allowed until January 20th to serve a counterabstract and brief.

#### SHEPARD v. CARTER et al.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

##### MARRIAGE (§ 40\*)—EVIDENCE—PRESUMPTION.

Appellant and intestate were married, but never lived together. The intestate left the state declaring he would obtain a divorce, and returned two years later, saying one had been obtained. Appellant, acting on the belief that a divorce had been granted, married another, and children were born of this marriage. Later intestate obtained a license and formally married another, and lived with her about eighteen years, and until his death, and eight children were born of that marriage. When he died, appellant, in a partition proceeding, claimed that no divorce had been granted, and no record or documentary proof of the divorce was introduced. Under the facts of the case, it is held that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep' Indexes

it will be presumed that the first marriage was dissolved by a divorce, and that when appellant claimed to inherit land as the surviving widow of intestate it devolved on her to prove that no divorce had been granted.

[Ed. Note.—For other cases, see *Marriage*, Cent. Dig. §§ 58-69, 79; Dec. Dig. § 40.\*]

Appeal from District Court, Leavenworth County.

Action in partition by Carrie Shepard against Henderson Carter and others. From the judgment, defendants Henderson Carter and others appeal. Affirmed.

R. B. McWilliams, John Clark, and M. A. Gorrill, for appellants. Lee Bond and M. N. McNaughton, for appellee.

JOHNSTON, C. J. This was an action in partition, brought by Carrie Shepard, in which Henderson Carter and other claimants were named as defendants. Subsequently, in an amended petition, Belle Overton was brought in as a defendant, and as one claiming an interest in the land sought to be partitioned. She alleged that she was the wife of Thomas L. Carter, known as Lewis Carter, at the time of his death, and therefore she claimed a share of the property which he had inherited from his father and mother. At the trial it was shown that on January 10, 1880, Belle Overton was married to Lewis Carter by the probate judge. They parted at the courthouse door, and never lived together, but she gave birth to a child a few weeks after the ceremony. Shortly afterwards Lewis Carter went West, supposedly to California, and, after two years absence, he returned to his former home in Kansas. He told Belle Overton he was going to obtain a divorce, and when he returned he told her that a divorce had been procured. Acting on this information and belief, Belle Overton married Edward Overton, of Lawrence, and two children were born of this marriage. After the marriage of Belle Overton, and on November 25, 1889, Lewis Carter, her former husband, married Hattie Shepard, and they lived together as husband and wife until his death in 1908, and of that union 8 children were born, whose ages ranged from 2 to 16 years at the time of his death.

Before his marriage to Hattie Shepard, Carter informed her that he had been divorced from Belle Overton, and she saw a document which was called his divorce paper. He made the statement to others, and repeated it to her mother in the probate judge's office, where they were married. No record or documentary evidence of the divorce was introduced to prove that a divorce was granted, but all the parties concerned, including his first and second wives, proceeded on the theory that there was a valid divorce for a period of about 25 years. While the appellee was unable to, or at least did not, produce

record proof of the divorce, yet from the facts stated the presumption arises that the second marriage, so long recognized by the parties as legal, is valid, and it devolves on Belle Overton, who attacks the validity of the marriage, to prove that it is illegal; that is, that a divorce from her had not been granted. As a basis for this presumption, there is the license and authority granted by the probate judge for the second marriage, the formal entry into the marriage relation, consummated by cohabitation, the maintenance of the relation for 18 years, and until the death of Lewis Carter, and the birth of 8 children, the declaration by him to his first wife that a divorce would be procured, and afterwards that one had been procured, the recognition of the existence of a divorce by the first wife when she married again, and the status of the children born of her second marriage. Now, when a marriage has been entered into in apparent good faith, as here, and children have been born of it, courts go to the limit in upholding the validity of the union and the legitimacy of the children. In 1 Bishop on Marriage and Divorce (6th Ed.) § 457, it is said: "When a marriage, therefore, has once been shown, however celebrated, whether regularly or irregularly, or however proved, whether directly or by circumstantial evidence, the law raises a strong presumption in favor of its legality, so that the burden is with the party objecting throughout, and in every particular, to prove, against the constant pressure of this presumption of law, that it is illegal and void." Every intendment of the law is in favor of matrimony, and wherever there is room for a presumption it always operates in favor of validity. This is especially true where the status of children is involved, and, as stated in *Hynes et al. v. McDermott et al.*, 91 N. Y. 451, 459, 43 Am. Rep. 677: "The law presumes morality, and not immorality; marriage, and not concubinage; legitimacy, and not bastardy." So, when it appears that a person who was married before is living in wedlock, the presumption operates in favor of the second marriage, it being presumed that the first marriage has been dissolved by death or divorce; and it has been held that if it appears that a man has been married three times the presumption is in favor of the third, rather than the second, marriage. *Palmer v. Palmer*, 162 N. Y. 130, 56 N. E. 501.

In a case in Iowa, where there was a forced marriage, the husband left his wife, going to a distant place, and after a time was married again, and lived with that wife until he died. The first wife also married again, and a number of children were born of that marriage. When her first husband died, she set up the claim that there had been no divorce, and that she was his surviving

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

widow, and entitled to a share in his estate. There was no record of a divorce in any of the places where he had lived, but, in view of the acts of both parties, it was held that the presumption of a divorce should be indulged. It was said: "The acts of both parties, when wholly inconsistent with continuance of marriage bonds between them, will raise such a presumption. \* \* \* In addition to the facts we have enumerated, it is in evidence, without objection, that Tuttle, while living in Chicago, and before he married the second time, stated to a disinterested witness that he had been married, and was divorced. Altogether we think the facts justify the presumption of a legal annulment of the first marriage." *Tuttle v. Raish*, 116 Iowa, 331, pages 338, 339, 90 N. W. 66, 69.

In *Hadley v. Rash*, 21 Mont. 170, 175, 53 Pac. 312, 313 (69 Am. St. Rep. 649), the plaintiff and Rash intermarried, and six years later they separated, and some years afterwards she married another. Rash also married again, and lived with that wife until he died. Plaintiff, although married again, insisted that there had been no divorce, and that she was the legal surviving widow of Rash, but the court held that the burden of proving the absence of a divorce from Rash rested on plaintiff. It was said: "It was incumbent on her to show this fact, notwithstanding it required her to prove a negative. It was no more difficult for her to prove that there had been no such divorce than it would have been for respondent to prove that there had been a divorce granted to Rash. The appellant, when she married Hadley, certainly acted upon the presumption that Rash was either dead, or had obtained a divorce from her. Why, then, might not the respondent, with propriety, and lawfully, presume, 30 years after Rash had separated from appellant, that there was no legal impediment in the way of her marriage in good faith with him? We are unable to discover a circumstance in this case that does not move us strongly to indulge the legal presumption of the validity of the marriage between the respondent and Rash. We are impelled to such conclusion in the interest of morality, innocence, and the sanctity of the marriage relation. We are given no good reason why we should depart in this case from what seems to us to be a well-settled and just rule of legal presumption simply to gratify the cupidity of the claimant that hesitates at no consideration of morality or innocence, or even the preservation of her own good name and honor, in her reckless struggle for gain." Other authorities sustaining this view are: *Nixon v. Wichita Land & Cattle Co.*, 84 Tex. 408, 19 S. W. 560; *Harris v. Harris*, 8 Ill. App. 57; *Greensborough v. Underhill*, 12 Vt. 604; *Teter v. Teter*, 101 Ind.

129, 51 Am. Rep. 742; *Boulden et al. v. McIntire*, 119 Ind. 574, 21 N. E. 445, 12 Am. St. Rep. 453; *Goldwater v. Burnside*, 22 Wash. 215, 60 Pac. 409; 26 Cyc. 880; 19 A. & E. Encycl. of L. 1202; *Bishop on Mar. and Div.* § 457.

In the case of *Renfrow v. Renfrow*, 60 Kan. 277, 56 Pac. 534, 72 Am. St. Rep. 350, which was cited by appellant, the existence of a divorce was not in question, and no consideration was given to the presumption of the validity of a subsequent marriage, or to the proof necessary to overcome it.

Appellant contends that, as the first marriage was proven, the presumption, in the absence of evidence of death or divorce, is that such matrimonial relation continued. The authorities cited show that where the circumstances are such as appear in this case the presumption mentioned is outweighed by the stronger presumption of innocence and morality, and of the validity of a second marriage solemnized according to law. The presumption of the continuance of a status shown to have existed may, of course, be overcome by slight evidence, but when a second marriage has been entered into in good faith, and all parties have acted on the assumption that the first is no longer in force, the natural inference and the prevailing presumption is that no legal impediment existed to entering into the new matrimonial relation. The other presumption referred to must yield to this presumption, said to be one of the strongest known to the law, and those who seek to impeach the second marriage take upon themselves the burden of showing that the first has not been dissolved. *Boulden v. McIntire*, supra.

This view was taken by the trial court, and its judgment is sustained. All the Justices concurring.

# FIRST NAT. BANK OF PITTSBURG, PA., v. LAWRENCE

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

## FRAUDULENT CONVEYANCES (§ 96\*)—TRANSACTIONS INVALID—CONVEYANCE BY SON TO MOTHER.

Under the facts of this case, it is held that a deed of real estate is void under the statute of frauds and perjuries (Gen. Stat. 1909, § 3834), because it was intended to hinder and defraud an existing creditor of the grantor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 289-322; Dec. Dig. § 96.\*]

Appeal from District Court, Finney County.

Action by the First National Bank of Pittsburg, Pa., against J. W. Lawrence. From a judgment confirming an attachment sale of property levied on as that of the defendant, after motion to set the sale aside, Ella L. Lawrence appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Hoskinson & Hoskinson, for appellant. Edgar Foster and H. A. Gaskill, for appellee.

BURCH, J. The plaintiff attached and sold the real estate in controversy as the property of the defendant, J. W. Lawrence. Ella L. Lawrence, the mother of the defendant, moved to set aside the sale, on the ground that she owns the land. The motion was denied, the sale was confirmed, and Ella L. Lawrence appeals.

The Lawrences reside in Allegheny county, Pa. The land, which consists of two quarter sections in Finney county, Kan., was conveyed to the defendant in July, 1907. In August, 1907, the Howell Car & Foundry Company, a corporation of which the defendant was an officer, borrowed \$2,000 from the plaintiff, giving its promissory note therefore, which was indorsed by the defendant and by E. W. Howell and M. I. Greenstone, also officers of the company. As an inducement to the bank to make the loan, it was furnished with a list of personal references of the defendant and a property statement, showing him to be the owner of 320 acres of land in Finney county, Kan., valued at \$16,000. On December 2, 1907, a renewal note for \$1,700 was given, which furnished the basis for the attachment suit. The attachment was levied on April 3, 1908, and judgment on the note for the sale of the attached property was rendered on September 24, 1908. On January 15, 1909, a deed from the defendant to Ella L. Lawrence was filed for record, which was dated October 31, 1907, and acknowledged on November 2, 1907. The land was sold, notwithstanding the deed, and the proceedings followed which have been stated.

The evidence offered at the hearing on the motion was in the form of depositions, which are presented to this court in the abstract. From them it appears that the deed was delivered on or about the date it was acknowledged. The grantee said that after delivery she "put it away with other papers" in a box she had at her home for papers of that kind, where "all the family papers" were kept. She could not give the date it was recorded, and no satisfactory explanation was given for withholding it from record. She stated that she did not know why it was not recorded at once, unless it was because one quarter section of the land had been used as security for money owed by her son in Kansas. She first said "money that we had borrowed," and then said money borrowed by her son. She said she thought the money had been paid, and she did not want to record the deed until after it had been paid. The deed recited a valuable consideration, but she admitted that no consideration passed from her to her son. She was asked the following question by her counsel: "This property originally belonged to your husband, and the title came to your son without him paying anything?" She answered the

latter part of the question only, as follows: "No money passed." She then said that no money passed from her son to her husband, and none from her to her son. If Mrs. Lawrence was in possession of any other information respecting the subject of her claim to the land, she did not reveal it.

The testimony of the defendant is even less satisfactory, because of the equivocal character of some of it. He claimed the only portion of the credit statement he was responsible for was that containing his personal references. When asked flatly if the reference to the Kansas land in the credit statement was not given with his consent, he evaded answering by saying that the matter of securing the loan was taken up by Mr. Greenstone with very little consideration for what he might have said about it. He then confessed that Mr. Greenstone might have gotten the information respecting his ownership of the land from him, and said he had already explained to Mr. Howell that he had that property. When asked if he was the owner of the land in August, 1907, he answered: "It was in my name; yes, sir." Afterward he said: "It was family property. The property was deeded to me by my father, originally, without any consideration." Then he said his father gave it to him. The deed he gave to his mother recites that the land it describes is the same land which was conveyed to him, on July 24, 1907, by Winnie L. Humrichouser and husband. The only basis of his recollection of delivering the deed to his mother was that he would hardly carry it around with him, and that his mother "always takes care of these things. Any private papers that we might have in our family are taken care of by our mother." The only reason he had for giving the deed at the time it was given was that his mother requested it, and he said he did not know why she requested it at that time. This is the substance of the evidence, except that Mrs. Lawrence proved the acknowledgment of the deed by the notary whose certificate of acknowledgment was already attached to the instrument. She stands upon the fact that she has a warranty deed to the land antedating the attachment, and upon the rule of law that an attachment reaches only the actual and not the apparent interest of the attachment debtor.

It seems from the evidence that the defendant held the title to this land by deed of record as a gift from his father. He explained to Howell that he had the land, without doubt claimed ownership of it to obtain credit from the plaintiff, and actually used a portion of the land as his own to secure other borrowed money. His ownership is therefore fairly proved. The financial skies of this owner having become clouded, he made a deed of the land to his mother, for which no rational explanation was given. It was not pretended that it was a gift to her; love and affection did not enter into the

transaction, and the monetary consideration recited in the deed was disproved. The expression "family property" has no legal significance; no specific meaning, as applied to this land, was assigned, and it was evidently employed to befog the subject of ownership. The grantee did not wish to appear as the record owner of the land while the defendant was using it as security for debts owed where the land lies, did not dispatch her deed for record as owners usually do, and only made use of the deed when the land was about to be taken for her son's debt. All this tends very strongly to refute ownership by the grantee, and indicates that the real purpose of the deed was to embarrass and defeat the defendant's creditors. The plaintiff was an existing creditor when the deed was made, and without discussing the evidence further the court holds that the deed was void, as to the plaintiff, under the statute of frauds and perjuries, which reads as follows:

"Every gift, grant or conveyance of lands, tenements, hereditaments, rents, goods or chattels, and every bond, judgment or execution, made or obtained with intent to hinder, delay or defraud creditors of their just and lawful debts or damages, or to defraud or to deceive the person or persons who shall purchase such lands, tenements, hereditaments, rents, goods or chattels, shall be deemed utterly void and of no effect." Gen. Stat. 1909, § 3834.

The judgment of the district court is affirmed. All the Justices concurring.

# WAPLES-PLATTER GROCER CO. v. KINKAID.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

PRINCIPAL AND AGENT (§ 51\*)—AUTHORITY OF AGENT—CONSTRUCTION OF POWER OF ATTORNEY.

The defendant, who had been a contractor, and who had purchased supplies on credit to enable him to carry on his contract, had money owing to him on the work done, and he owed several parties for supplies, by whom a number of garnishment proceedings had been begun. Having removed to a distant place, he executed a power of attorney, authorizing his agents to "settle, negotiate and sign and release any and all indebtedness due me or due by me, \* \* \* and to negotiate and settle with" certain parties (naming them), adding that he gave his attorneys "full power to do everything whatsoever requisite and necessary to be done in the premises as fully as I could if personally present." In the settlement made by the attorneys, the money received for work done, being insufficient to satisfy all claims against him, was apportioned among his creditors, and notes were given by the attorneys for the unpaid indebtedness. *Held*, under the circumstances of the case, that the attorneys in fact had authority to execute the notes given in the settlement.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 83; Dec. Dig. § 51.\*]

Appeal from District Court, Shawnee County.

Action by the Waples-Platter Grocer Company against Robert Kinkaid. From a judgment for defendant, plaintiff appeals. Reversed and remanded for new trial.

T. D. Humphreys and L. A. Laughlin, for appellant. Otis E. Hungate, for appellee.

JOHNSTON, C. J. This was an action by the Waples-Platter Grocer Company, the appellant, against Robert Kinkaid, the appellee, to recover on three promissory notes for \$140 each, alleged to have been executed by Louis Davison and J. S. Kinkaid, as attorneys in fact for Robert Kinkaid.

In his answer Kinkaid denied that he had executed, or authorized Davison or his brother, J. S. Kinkaid, as his attorneys in fact, to execute the notes. At the trial it was shown that Robert Kinkaid had contracted to do some railroad work in the Indian Territory for another contractor, and while engaged in the work purchased supplies on credit from the appellant. He contracted other debts, and several garnishment proceedings were brought, which tied up the money due him for his work. Before making a settlement on his Indian Territory work, he secured some work in Kansas, and, being unable to go to the territory to settle his business there, he authorized his brother, J. S. Kinkaid, and Louis F. Davison to settle with his creditors and his debtors, including the appellant. These attorneys in fact went to the territory and made a settlement of Kinkaid's business, collecting the money that was due him, and settling the claims held against him. They adjusted appellant's claim by paying 65 per cent. of it in cash, and for the balance the three promissory notes in suit were executed, due in 30, 60, and 90 days after the time of execution. Upon the testimony offered at the trial by appellant, none being offered by appellee, the court gave judgment for appellee.

The question involved here is whether the action of the attorneys in fact for appellee, in settling the claims and executing the notes, was within the scope of their agency. The power of attorney executed by appellee provided, among other things, that they were appointed as "my true and lawful attorneys in fact for me and in my place and stead, and to my use, to settle, negotiate and sign and release any and all indebtedness due me or due by me, and to collect and receive all moneys, notes and other securities for debts due me, and to negotiate and settle with Luttgarding Bros., Patton & Gibson, Ltd., and the Missouri, Kansas & Texas Ry., by reason of my contract with the above parties, giving unto my said attorneys full power to do everything whatsoever requisite and necessary to be done in the premises as fully as I could if personally present."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

These agents were given full authority, it appears, to settle all claims in his favor and against him arising out of his railroad contract work in the territory, and to accomplish this they were authorized, not only to collect money and release indebtedness to him, but to negotiate and sign indebtedness due by him. Now the testimony is that the agents found that the claims against Kinkaid for supplies purchased to enable him to carry out his contract exceeded the amount that was due to him. In order to effect a settlement, it was necessary to make a distribution of the cash received among appellee's creditors, and so they paid appellant its proportion of the money, and signed acknowledgments and promises to pay the remaining indebtedness. Each of his creditors were given notes for the unpaid indebtedness due from him.

The power of attorney appears to authorize the signing of the notes. It is true that such authority is to be strictly construed according to the natural import of its language. If the language is plain, the power is not to be either extended or restrained by implication. Every such grant of authority should, so far as is possible, give effect to the purpose of the principal who conferred it. 34 Cyc. 1405. In answer to an argument that such writings should be strictly construed, the Supreme Court of Illinois said: "This may be true, but it does not require that it shall be so construed as to defeat the intention of the parties. Where the intention fairly appears from the language employed, that intention must control. A strained construction should never be given to defeat that intention, nor to embrace in the power what was not intended by the parties." *Hemstreet v. Burdick*, 90 Ill. 444. See, also, *Muth et al. v. Goddard et al.*, 28 Mont. 237, 72 Pac. 621, 98 Am. St. Rep. 553.

A fair interpretation of the instrument is that his agents, in making a settlement, should sign indebtedness, as well as to release it. No new indebtedness was created by the execution of the notes. They only represented what was an existing indebtedness in another form. The agents were specifically authorized to settle with creditors by signing indebtedness—that is, some form of indebtedness—and one of the most common forms of acknowledging unpaid indebtedness is by a promissory note. They were given full power to do everything requisite and necessary in signing a form of indebtedness, the same as the appellee could have done, if personally present. Appellee's affairs were complicated, and garnishment proceedings made it impossible to collect what was due him on his contract. That money could not be obtained and disbursed until adjustment was made with all his creditors. He was unable to go there, and, recognizing that obligations of indebtedness would have to be signed, that general power was includ-

ed in the appointment. In order to arrive at the intention of the appellee in conferring power on his agents, the writing must be read in the light of the surrounding circumstances. The court must keep in view the object to be accomplished and the means usually employed in carrying it out. 1 A. & E. Encycl. of L. 999. In this view, the execution of the notes seems to have been authorized. *Layet et al. v. Gano*, 17 Ohio, 466; *James v. Mrs. M. J. Lewis and Husband*, 26 La. Ann. 664; *Tanner et al. v. Hastings*, 2 Ill. App. 283; *Stothard v. Aull & Morehead*, 7 Mo. 318; *Holladay v. Daily*, 86 U. S. 606, 22 L. Ed. 187.

The appellee had the benefits of the settlement made by his agents, and, so far as it appears, he has retained those benefits, and only repudiated that part of the settlement involved in the execution of the notes.

The testimony does not support the ruling of the court, and therefore its judgment is reversed, and the cause remanded for a new trial. All the Justices concurring.

#### DOSBAUGH NAT. BANK v. JELF. (Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

SALES (§ 82\*)—CHATTEL MORTGAGES (§ 41\*)—EXEMPTIONS (§ 65\*)—TRANSFER OF TITLE—VALIDITY OF MORTGAGE—RIGHTS OF WIDOW.

Under the facts stated in the opinion, it is held that the sale of a span of mules was a sale for cash; that delivery of the mules was conditioned upon payment of a check upon a bank, given for the price; and that an oral chattel mortgage, given by the purchaser to the bank which furnished the money to meet the check, was valid, and, as a purchase-money mortgage, was superior to exemption rights claimed by the widow of the mortgagor.

[Ed. Note.—For other cases, see *Sales*, Cent. Dig. §§ 229-233; *Dec. Dig. § 82*; \**Chattel Mortgages*, Cent. Dig. § 84; *Dec. Dig. § 41*; \**Exemptions*, Cent. Dig. §§ 97-99; *Dec. Dig. § 65*.]

Appeal from District Court, Chautauqua County.

Action by the Dosbaugh National Bank against Pearl Jelf. Judgment for plaintiff, and defendant appeals. Affirmed.

W. H. Sproul and J. A. Ferrell, for appellant. Jackson & Noble, for appellee.

BURCH, J. The action in the district court was one of replevin for a span of mules. The plaintiff claimed under an oral chattel mortgage, given by W. T. Jelf to secure the payment of money advanced by the bank to enable Jelf to purchase the mules. The defendant, the widow of Jelf, claimed under the statute setting off the property to her as exempt, upon his decease. Judgment was rendered for the plaintiff, and the defendant appeals.

The transaction between Jelf and Hamil, the seller of the mules, is related by Hamil

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

as follows: "He came up there to buy a span of mules from me, and we talked on the price and finally agreed; and he said if he could have until the 1st of March he would take them, and I told him I was selling him the mules worth the money, and I wanted the money; and he said he did not have the money, and would have to make arrangements for it. And he came back in a day or two, and said that he could get the money down at Dosbaugh's, but that he had not made any arrangements, but that he would give me a check, if I would keep it for a day or two, and make arrangements, and I told him it would be all right. And when he went to give me a check he said that he did not have any checkbook, but that he would leave it at the house for me, and when I went down there he had assigned over one check for \$3.50, and that was on Grenola, and one for \$324, on the Dosbaugh bank."

The first conversation with Hamil occurred about April 1st. Jelf took the mules away with him at the conclusion of the second conversation.

The conversation between Jelf and the bank is related by its cashier as follows: "Mr. Jelf said that he had bought a team of mules, and wanted to borrow the money to pay for them. He said that he would give us a mortgage on the mules to secure the money; that about March 1st he would have some money coming to him from his farm, which he was selling; and that he could pay the note then. I told him that we would not want to go to the trouble of writing and recording a chattel mortgage for so short a time; that we were willing to loan him the money, and would let him give us the note for the amount until March 1st, until which time we would consider the mules ours—consider the mules ours until paid for. He said: 'All right, and if you want a chattel mortgage on them at any time I will give it.' Whereupon I drew up a note for \$325, which he signed, and which we discounted, taking out the interest from February 6th until March 1st, and passed the proceeds to his credit." Jelf's check was presented and paid a few days after his note was given.

The sale by Hamil was a sale for cash, and not a sale on time. The delivery of the mules was clearly conditioned upon the payment of the price by means of the check, and if the check had not been paid Hamil could have reclaimed possession of the property. *Bank v. Brown*, 80 Kan. 520, 103 Pac. 102, 23 L. R. A. (N. S.) 824, and authorities reviewed in the opinion.

Jelf had no money to pay the price, except the Grenola check of \$3.50, until he borrowed it of the plaintiff, and at the time he borrowed it he gave the oral mortgage on the mules to secure repayment. The mortgage was therefore a purchase-money mortgage, by

means of which Jelf obtained title. That the mortgage ran to a third person does not change its character as a purchase-money mortgage. The consent of the defendant was not essential to its validity, and, there being no instant of time when her husband was the unqualified owner of the property, no exemption rights attached. *Beach v. Fireovid*, 84 Kan. 357, 360, 114 Pac. 206; *Boggs v. Kelly*, 76 Kan. 9, 11, 90 Pac. 765, 15 L. R. A. (N. S.) 461. Although oral, the mortgage was valid between the parties (*Bank v. Taylor*, 69 Kan. 28, 76 Pac. 425, and cases cited in the opinion), and the recording act (Gen. Stat. 1909, § 5224) has no application, because the defendant is neither a purchaser nor a creditor. The defendant took title, subject to the rights of the plaintiff, and the judgment of the district court is affirmed. All the Justices concurring.

### FEAR v. FIRST NAT. BANK OF CLAY CENTER.

(Supreme Court of Kansas. Dec. 9, 1911.)

(*Syllabus by the Court.*)

TRIAL (§ 251\*)—INSTRUCTIONS—APPLICABILITY TO CASE.

It is reversible error to instruct the jury to determine a disputed question of fact which is only incidentally involved in the issues, and to base the verdict upon their finding as to such collateral issue.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 251.\*]

Appeal from District Court, Clay County.

Action by John Fear against the First National Bank of Clay Center. From a judgment for defendant, plaintiff appeals. Reversed, and new trial ordered.

F. B. Dawes and R. C. Miller, for appellant. F. L. Williams, for appellee.

PORTER, J. The appellant sued the bank to recover certain moneys which he claimed to have deposited, and which the bank refused to pay. The bank answered, admitting that at various times the appellant had made deposits, amounting to \$1,632.46, but alleged that from time to time he had checked out all his account, except a small balance, which it tendered in court. It specially denied that appellant, a short time after the 2d day of January, 1909, deposited \$250, or that he ever at any time made a deposit of that amount; and further alleged that by error the bank had inadvertently made an entry upon his passbook which indicated a deposit of that sum on the 19th day of January, 1909, but that no deposit of any amount was at that time made by appellant, and that the entry was a mistake.

The jury returned a verdict for appellant for the small balance which the bank admitted to be due. The court overruled a motion

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for a new trial and rendered judgment in appellant's favor for \$17.81, and taxed the costs which accrued subsequent to the filing of the answer against him. He appeals from the judgment, and assigns as error the giving of certain instructions and the overruling of the motion for a new trial.

The only question of fact about which there was any dispute on the trial was in respect to the \$250 item of January 19, 1909. Was this entry a mistake, or was that sum of money deposited by the appellant? He testified that he went to Clay Center on that date with \$250 in cash, which he had agreed to loan to a neighbor, who was to meet him there; that, after waiting until about noon and failing to meet the borrower, he took the money and deposited it in the bank; that E. L. Lindner, assistant cashier of the bank, received the money and made the entry in appellant's book. The wife of appellant testified that she accompanied her husband to town on January 19th, and that he had with him some bills, but she did not know the amount. C. M. Mugler testified that he had arranged with appellant for a loan, and met him on that day at Clay Center shortly after noon; that they went to the bank; and that appellant gave him a check for \$250, in exchange for which the bank gave the witness a draft for that sum. E. L. Lindner, assistant cashier, was a witness for the appellee, and testified that he was in the bank on January 19, 1909. He testified, also, that he had searched the books of the bank, and could find no deposit slip for the \$250, nor any entry showing such deposit. He was afterwards recalled to the stand, and testified that since his first examination he had discovered that on the 19th day of January, 1909, he was in Kansas City, Mo.; that he left Clay Center on the 17th, and did not return until about 11 o'clock at night on the 19th, and was not in the bank until the 20th; that he made no entry in appellant's passbook on that date, but made the entry some time after his return from Kansas City. He did not recollect making it, but knew that he made it. Several disinterested witnesses testified that he was in Kansas City all of the 19th, and it was shown that no other entries were made by him on any of the books of the bank on that date.

After defining the issues and instructing the jury with respect to the burden of proof, the preponderance of evidence, and the prima facie effect of entries made by officers of a bank in depositors' books, the court gave the following instruction, which is complained of: "Plaintiff contends, and has testified in support of his case, that on the 19th day of January, 1909, he made the deposit claimed by handing the money to E. L. Lindner in person, and that E. L. Lindner then and there made the credit entry of the amount upon plaintiff's bank passbook. Upon this proposition, much evidence has been offered, tending to show that on the whole

of the day of January 19, 1909, the said E. L. Lindner was in Kansas City, Mo., and physically absent from said bank the whole day, and upon this important branch of the case you are instructed that, if you feel satisfied from the evidence that on the 19th day of January, 1909, that said E. L. Lindner was not in said bank, but was at Kansas City, Mo., with Mr. Cultra and other persons, transacting business in that city, then you must find against the plaintiff's contention as to the \$250, and must return a verdict in favor of the plaintiff and against the defendant for the sum of \$17.93; if, however, you shall be satisfied by the preponderance of the evidence that the said plaintiff did in fact deposit in said bank, by handing to the said E. L. Lindner in said bank, the sum of \$250, as testified to by said plaintiff, then you would find in favor of the plaintiff and against said defendant in the sum of \$269.65."

It is manifest that this instruction was erroneous. It directed the jury to determine, first, a collateral fact, which was only incidentally involved in the issues to be tried, and to rest their verdict upon that collateral fact. The whereabouts of E. L. Lindner on the 19th day of January was a circumstance, evidence of which was proper as tending to disprove the claim of the appellant; but it was not a question of fact, the determination of which could be decisive of any material issue in the case. There was therefore no occasion for an instruction singling out the proof concerning his presence or absence on the particular day, and commenting upon it, any more than there would have been to mention the testimony of Mr. Mugler, and specially direct the jury's attention to that.

The issue raised by the pleadings was not whether the disputed deposit was made on the 19th day of January, nor whether the entry in the passbook was made on that day, nor whether E. L. Lindner was in Kansas City or in Clay Center. The question of fact to be determined was whether the appellant deposited that sum of money to his credit in the bank. Suppose the bank had answered with a mere denial that on the 19th day of January, 1909, the appellant made a deposit of the sum of \$250. This would have been the pleading of a negative pregnant, and would not have amounted to a denial that he had made the deposit at some other time. Counsel who prepared the answer understood that the issue was not narrowed to whether the money was deposited on the 19th day of January, 1909, and were careful to deny expressly that such a deposit was made on that day, or at any time. Suppose the answer had been a general denial. The bank would hardly have been willing to rest its case after merely proving that on that day E. L. Lindner was absent from the bank. It must be obvious that the bank would be liable if it received the deposit in controversy on the 19th, or at any



other date, and the entry in appellant's book had been made at another day. The assistant cashier admits that he made the entry, and that he must have done so at some later date than the entry purports to have been made. All the witnesses were testifying to what had occurred almost 11 months previous to the trial, and may have been misled as to the time when the entry was made by the date in the passbook. It was established by overwhelming evidence that Mr. Lindner was in Kansas City on the 19th day of January; but the appellant may have been mistaken as to the date, just as Lindner himself was mistaken when he first testified that he was present in the bank on that day.

The appellant was entitled to have the verdict of the jury upon the issues raised by the pleadings and evidence, and the instruction deprived him of this right. The judgment will be reversed, and a new trial ordered. All the Justices concurring.

**McLAUGHLIN et al. v. WALL et al.**  
(Supreme Court of Kansas. Dec. 9, 1911.)

*(Syllabus by the Court.)*

**1. ASSOCIATIONS (§ 1\*)—ANTI-HORSE THIEF ASSOCIATION.**

The Anti-Horse Thief Association of Kansas is a voluntary, benevolent association.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 1; Dec. Dig. § 1.\*]

**2. ASSOCIATIONS (§ 3\*)—ARTICLES OF AGREEMENT—EFFECT.**

"The articles of agreement of a benevolent association, whether called a constitution, charter, by-laws, or any other name, constitute a contract between the members which the court will enforce if not immoral, or contrary to the public policy or law of the land." *Brown v. Stoerckel*, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 1; Dec. Dig. § 3.\*]

**3. ASSOCIATIONS (§ 3\*)—SUPERIOR AND SUBORDINATE BODIES—ORGANIZATION.**

By the provision of the State Order constituting the State Order is the supreme tribunal within its jurisdiction, and without its sanction no subordinate order can exist.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 1; Dec. Dig. § 3.\*]

**4. ASSOCIATIONS (§ 25\*)—SUPERIOR AND SUBORDINATE BODIES—DISSOLUTION.**

The State Order having, in effect, decided that a subordinate order has ceased to exist, the decision, not being contrary to law or public policy, is final.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 47; Dec. Dig. § 25.\*]

*(Additional Syllabus by Editorial Staff.)*

**5. COURTS (§ 222\*)—SUPREME COURT—DECISIONS REVIEWABLE—AMOUNT IN CONTROVERSY—RECOVERY OF PERSONAL PROPERTY.**

Gen. St. 1909, § 6161 (Code Civ. Proc. § 566), providing that no appeal shall be had to the Supreme Court in any civil action for the recovery of money unless the amount or value in controversy, exclusive of costs, shall exceed

\$100, does not apply to an action for the recovery of specific personal property.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 595-599; Dec. Dig. § 222.\*]

**Appeal from District Court, Neosho County.**

Action by Wm. McLaughlin and others against John W. Wall and others. From a judgment for plaintiffs, defendants appeal. Reversed, with instructions to render judgment for defendants.

W. R. Cline and J. Q. Stratton, for appellants. C. S. Denison, for appellees.

SMITH, J. [5] The appellees have filed a motion to dismiss the appeal in this case on the ground that the amount or value in controversy does not exceed \$100. The motion is overruled. It is sufficient to say that this is an action for the recovery of specific personal property, and is not "an action for the recovery of money," and the limitation on the right of appeal in section 6161, Gen. Stat. 1909 (Civ. Code, § 566), has no application to this case. This action was brought by Wm. McLaughlin and 33 others as plaintiffs against John W. Wall, N. J. Randall, and 24 others as defendants. The case has been in this court before on appeal. 81 Kan. 206, 105 Pac. 33. To explain any conflict which may seem to exist between that decision and this one, it is proper to state that appeal was taken from the order of the court sustaining an objection to the introduction of any evidence by plaintiffs on the ground that the petition did not state any cause of action. The appeal in this case is from the result of a jury trial on the petition and answer, which consisted of a general denial. At the close of the evidence, the court sustained the demurrer of John W. Wall to the sufficiency thereof, and overruled a like demurrer of all the other defendants thereto. Thereafter the court gave the jury an instruction on its own motion, and refused eight requests for instructions asked by the appellants. The refused instructions are set forth in the abstract. Some of the refused instructions were applicable to the issues involved, were correct statements of the law, and should have been given. They are in accord with the views herein expressed and a separate discussion of them is unnecessary.

The instruction given reads as follows: "In the light of the evidence in this case, as it now stands, there is only one question to be submitted to the jury, and that is the question of damages for the unlawful detention of the property of subordinate lodge No. 5 of the A.-H. T. A. by the defendants. You are instructed as a matter of law that the plaintiffs in this action are entitled to a verdict for the return of the property unlawfully detained, or, if the same cannot be returned or any part of it, its fair value to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

said lodge in money, together with such sum, if any, as you may believe will fairly compensate plaintiffs for the unlawful detention of said property. In fixing the value of any said property that may be detained, you will consider what the evidence may show you it was fairly and reasonably worth for lodge purposes." The jury returned a verdict in favor of the plaintiffs for the recovery of the property in controversy, and found the value of the property to be as follows: Charter \$3; secretary's book \$.75; treasurer's receipt book \$.25; lodge seal \$1.72; silk banner \$3.10; and as damages for the unlawful detention thereof \$50. Judgment was rendered accordingly, and defendants appeal.

As indicated in the former decision (81 Kan. 206, 105 Pac. 33), the action was really brought by the old order No. 5 in the name of the appellees. The appellees have no right to recover unless as and for the order. It follows that, if the old order No. 5 had ceased to exist before the trial, the appellees should not have recovered in this action. We are not to be understood as saying that, if a voluntary association should cease to exist possessing property of a substantial value for other than lodge purposes, in a proper action the members thereof might not be entitled to a distribution thereof; but that is not this case. The property in question is evidently worthless except for the particular use of the order. The vital question in this case, then, is whether the old order No. 5 was in existence at the time of the trial and judgment in this case—July, 1910. We assume that the effort to disband the order March 12, 1908, was abortive for failure to notify all members thereof that the question would be presented at that time.

[4] It appears from the evidence without dispute that the charter came into the hands of N. J. Randall, president of the State Order, some time after that date, as surrendered; that he destroyed it, as was the custom; that a petition by the appellants for a new charter was presented to him, and, after investigation, he granted it, and issued a charter to them of the same number as the old one, subordinate order No. 5, which charter was signed by the president and secretary of the State Order. In October, 1908, the annual meeting of the State Order was held at Salina, to which representatives of the old order No. 5 and of the new order No. 5 applied for admission. Under the provision of the State Order constitution each subordinate order in the state was entitled to representation in such meeting. After investigation the State Order admitted the new order No. 5 and excluded the old order No. 5. This, in effect, constitutes a decision of the supreme tribunal of the order that old subordinate order No. 5 no longer existed. And, there being no suggestion that it was in violation of the laws of the land or that any appeal therefrom was taken to the National Order, the decision is binding and final.

[3] A copy of the constitution of the State Order is attached to the petition of appellees. Sections 1 and 2, art. 1, thereof, read:

"Section 1. This body shall be known as the State Order of the Anti-Horse Thief Association for the State of Kansas and its jurisdiction. It shall be composed of its officers and representatives from the subordinate orders.

"Sec. 2. This State Order shall have jurisdiction over all localities in which there are at present, or may be hereafter, orders located. It shall be the supreme tribunal of the order in its jurisdiction, and without its sanction no subordinate order can exist. It possesses the sole right and power, in the manner hereinafter provided, of granting or suspending charters, of receiving appeals and redressing grievances arising in orders, of originating and regulating the means of its own support, of deciding all questions arising out of the constitution or rules of order, and doing all other acts necessary to promote the interests of the order; provided, the same are not in violation of the laws of the land or consent of the National Order."

The state and subordinate orders of the A.-H. T. A. are not corporations, but are voluntary associations, and such orders and the members thereof are bound by the constitution of the state order. See *Reno Lodge v. Grand Lodge*, 54 Kan. 73, 37 Pac. 1003, 26 L. R. A. 98; *Moore v. National Council*, 65 Kan. 452, 70 Pac. 352; *Miller v. National Council*, 69 Kan. 234, 76 Pac. 830.

[2] In *Brown v. Stoerckel*, 74 Mich. 269, 41 N. W. 921, 3 L. R. A. 430, it is well said: "The articles of agreement of a benevolent association, whether called a constitution, charter, by-laws, or any other name, constitute a contract between the members which the courts will enforce if not immoral, or contrary to public policy or the law of the land." As shown in the decision in 81 Kan. 206, 105 Pac. 33, the plaintiffs in no event, as individuals, had any right of recovery, but that they recovered as and for the association, old order No. 5, aggregate, if at all. As the highest tribunal of the State Order had in 1908 adjudicated, and its decision was final, that old subordinate order No. 5 had no existence, and no resurrection thereof was proved or even suggested, it follows that the appellees could not in 1910 recover as and for that order. It is equally apparent that a new trial would be fruitless.

Other questions are involved which, in view of the conclusion at which we have arrived, it is unnecessary to decide.

From the foregoing it follows that the court erred in overruling the demurrer of appellants to the evidence of appellees, also in its instruction to the jury, and in overruling the motion for a new trial and entering judgment upon the verdict.

The judgment is reversed, and the case is remanded, with instructions to render judgment in favor of the defendants. All the Justices concurring.

POWELL v. BRADLEY, Clerk of District Court.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

**1. MANDAMUS (§ 55\*)—SUBJECTS OF RELIEF—ISSUANCE OF EXECUTION.**

Mandamus will lie to compel a clerk of the district court to issue an execution upon a judgment or final order from which no appeal has been taken, notwithstanding the filing and approval of a supersedeas bond.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 100-112; Dec. Dig. § 55.\*]

**2. APPEAL AND ERROR (§ 459\*)—SUPERSEDEAS BOND—EFFECT.**

A supersedeas bond is an essential part of an appeal, where it is sought to stay execution pending appeal. The mere filing and approval of such bond, where there has been no service of notice of appeal, will not operate to stay execution upon the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2218-2221; Dec. Dig. § 459.\*]

**3. NEW TRIAL (§ 12\*)—EFFECT OF MOTION—STAY OF EXECUTION.**

The pendency of a motion for a new trial in the action wherein the judgment has been rendered will not operate to stay execution.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 17, 253; Dec. Dig. § 12.\*]

Original application by John Powell for mandamus to B. E. Bradley, Clerk of the District Court of Linn County. Peremptory writ granted.

John H. Crain, for plaintiff. John A. Hall, for defendant.

PORTER, J. This is an original proceeding in mandamus to compel the defendant, as clerk of the district court of Linn county, to issue a writ of possession. On August 4, 1911, J. B. Powell obtained a judgment in the district court, in an action wherein he was plaintiff and Peter Boyd and others were defendants, for the possession of a certain quarter section of land, and directing that if the defendants failed to surrender possession on or before September 4, 1911, a writ of ouster immediately issue, putting plaintiff in possession. On September 7, 1911, the plaintiff filed with the clerk a præcipe for the writ which the clerk refused to issue.

In answer to the alternative writ, the defendant sets up as reasons for his refusal (1) that the judge of the district court fixed the amount of the supersedeas bond in the sum of \$700, with sureties, to be approved by the clerk, and that on August 31, 1911, the defendants in the original action presented to him as clerk a supersedeas bond in that amount, which he approved and filed; that afterward, and on September 7, 1911, the plaintiff filed a motion to vacate the supersedeas bond, which the court upon the hearing of the motion refused to do; and (2) that on September 11, 1911, the defendants in the original action filed a motion for a

new trial, which is still pending and undetermined. The motion to quash the answer presents the case upon the merits.

[1] No appeal has been taken from the judgment. The bond recites that the defendants intend to appeal from the judgment, and it is the contention of defendant that the giving and approval of the bond has the effect to stay execution on the judgment, notwithstanding no appeal has been taken. The Code provides that:

"No appeal from any judgment or final order rendered in any court from which an appeal may be taken, except as provided in the next section and the fourth subdivision of this section, shall operate to stay execution, unless the clerk of the court in which the record of such judgment or final order shall be shall take a written undertaking, to be executed on the part of the appellant to the adverse party, with one or more sufficient sureties, as follows: \* \* \*

"Third. When it directs the sale or delivery of possession of real property, the undertaking shall be in such sum as may be prescribed by any court of record in this state or any judge thereof, to the effect that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon, and if the judgment be affirmed he will pay the value of the use and occupation of the property from the date of the undertaking until the delivery of the possession pursuant to the judgment, and all costs." Civ. Code, § 586 (Gen. St. 1909, § 6181).

It is the "appellant" who must give the bond, not some defeated party who may or may not conclude to appeal from the judgment or final order. The bond which the defendant as clerk approved was given under the third subdivision, supra, of section 586, and describes the obligors as "the appellants."

[2] In the brief the defendant contends that if the supersedeas be held ineffectual to suspend execution the defendants in the original action will be deprived of their statutory right to one year in which to appeal from the judgment. But this does not follow. An appeal may be taken without superseding the judgment or final order; if, however, the appellant wishes to stay execution pending the appeal, he must file a supersedeas bond. The real and only question to be determined is, Does the giving of a supersedeas bond, without an appeal, suspend proceedings to enforce the judgment or final order? Obviously no, because the only purpose of the bond is to stay proceedings pending an appeal. The statute makes no provision for the giving of such a bond for any other purpose. It is an essential part of the appeal where the defeated party seeks to stay execution. Where no stay is required, an appeal is permitted, but in such case no bond is given.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The statutory provisions of the bond are that "the appellant" will not commit or suffer waste, "and, if the judgment be affirmed, he will pay the value," etc. Civ. Code, § 588. Suppose no appeal is taken within the year, and no affirmance of the judgment obtained, might not the sureties urge that as a defense to an action on the bond? The situation presented by the pleadings and answer is one which the law will not tolerate. The defendants in the original action were defeated, and judgment was rendered against them. They must either abide the judgment, or adopt the procedure provided for staying execution thereon. They have one year from the rendition of the judgment in which to appeal, but, in the meantime, unless execution is stayed, the judgment may be enforced. The only way in which execution can be stayed is for the defendants to appeal, and, as part of the appeal, supersede the judgment by giving the bond as provided by the statute. No authorities are needed in support of statutory provisions so plain and unmistakable. However, the Supreme Court of Iowa have so construed their statute, which appears to be substantially the same as ours: "An appeal is not perfected until service of notice thereof. Merely filing a supersedeas bond does not amount to an appeal; and the execution of a judgment should not be stayed, unless, in addition to the filing and approval of the supersedeas, there is also notice of appeal served, at least upon the clerk." *Pratt v. Western Stage Co.*, 26 Iowa, 241, Syl. par. 2.

[3] The defendant says in his brief that an appeal may never be necessary, because there is a motion for a new trial pending, which the court may grant; but the pendency of a motion for a new trial does not operate to stay execution on the judgment. *Church v. Goodin*, 22 Kan. 527.

The petition, which is verified, sets forth ample reasons why the action was not commenced in the district court, and complies with rule 5 of this court.

The peremptory writ will issue. All the Justices concurring.

**MOREY v. CHICAGO, R. I. & P. RY. CO.**  
(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

**1. CARRIERS (§ 283\*)—INJURIES TO PASSENGERS—ACTS OF EMPLOYEES.**

A carrier is liable for a wrongful assault upon a passenger by a brakeman, at least while such brakeman is acting within the line of his employment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1119-1124; Dec. Dig. § 283.\*]

**2. CARRIERS (§ 318\*)—INJURIES TO PASSENGERS—SUFFICIENCY OF EVIDENCE.**

Where a train reached a terminal station at which train crews are changed, and the coach in which passengers were riding was tak-

en out of the train without notice to passengers and placed on a siding about 400 feet away while one of the passengers was in the dining room eating his breakfast, and when the passenger returned to the train and found a new crew in charge of the train and the car in which he had been riding and which contained his baggage had been set out, and when he went to that car for his baggage the brakeman who had been with the train up to that point was present with uniform and assuming to be in control of the car, and, when chided for not warning the passengers that the car containing their baggage was to be cut out, made a violent assault on the passenger, *held*, that although it was the end of the brakeman's run, and that ordinarily his duty ceases when the new crew takes charge of the train, the testimony is sufficient to make a question of fact whether the brakeman was a servant of the company and in the line of his employment when the assault was made and is sufficient to support the verdict of the jury finding the company liable for the injuries inflicted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1307-1314; Dec. Dig. § 318.\*]

Appeal from District Court, Sumner County.

Action by Amos F. Morey against the Chicago, Rock Island & Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

M. A. Low and Paul B. Walker, for appellant. Houston & Brooks, for appellee.

JOHNSTON, C. J. A brakeman of the Chicago, Rock Island & Pacific Railway Company, named York, made a personal assault upon Amos F. Morey, who was a passenger on one of the trains of the railway company, and to recover damages for the injuries inflicted this action was brought.

Morey boarded the train at Enid, Okl., to go to Wichita, Kan. Caldwell is an intermediate terminal station, and when the train approached that station it was announced that there would be a 20-minute stop for breakfast. At this station there is a change of train crews and, to some extent, of equipment. When the train arrived at Caldwell, Morey went to the dining room, where he remained for about 15 minutes. On his return to the train, he discovered that the car in which he rode and which contained his valises had been taken out of the train and set on a siding about 400 feet away. Another brakeman had taken the place of York, and different employes had taken charge of the outgoing train. Finding that the car had been detached and his baggage taken with it, Morey expressed his indignation in a forcible manner. He was directed to the car containing his baggage, to which he proceeded, and finding York at the car he complained about the carrying off of his baggage, and, after an angry colloquy in the car, York attacked Morey, striking him on the head and body with a moulding, and continued the attack until Morey had reached the ground, when others came to his relief. Whether York was acting within the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

scope of his duty and employment so as to make the company liable for his acts was the principal controversy. York testified that, when the train arrived at Caldwell and he had assisted the passengers to alight, he went at once to the baggage car, got his train box, and took it to the boxhouse near the depot, where he changed his coat and hat, and that then his duties to the railway company ended until he reported for duty for his next run. He states that then, in company with his child, he started home, and that his route took him near the car in which Morey's baggage was left. Morey, he says, used opprobrious language and applied vile epithets to him which led him to jump on the car in search of an iron poker with which to strike and punish Morey, and, not finding it, he picked up the piece of wood moulding with which he clubbed Morey. On the other hand, there was testimony that when Morey reached the car he found York there with his uniform on, and when Morey asked why he did not tell him that the car was to be cut out he replied with much profanity that he was not going to take any more abuse for that, and that if Morey wanted his baggage to take it out, as he had to lock up the car, and while Morey was getting his grips York continued to curse and abuse him, and as Morey passed out with his grips he was repeatedly struck and kicked by York.

[1] In answer to special questions, the jury found that York was the aggressor in the occurrence; that he had not put away his train box and lamps before the difficulty arose; that he had not started home, as he had stated, prior to the assault; and that he did not notify the passengers in the car in which Morey had been riding that the car was to be set out at Caldwell. It is insisted by the railway company that under the evidence no liability was shown and that a verdict in its favor should have been directed. The contention is that the assault was committed when York was not acting in the line and discharge of his duties to the railway company or, rather, was not engaged in carrying out the contract of transportation between appellant and appellee.

Among the duties of a brakeman is to "open and close the car doors, and assist the conductor in the proper disposition of the passengers and in preventing them from riding on the platform or in any way violating the regulations provided for their safety, in preserving order, and in all things requisite for the prompt and safe movement of the train and the comfort of the passengers." There was testimony that it was the duty of the brakeman to assist passengers with their baggage, and that he usually stays with the car until passengers get their baggage. On the part of appellee, it is insisted that the carrier is liable for the assault of its servant upon a passenger on one of its coaches even where the serv-

ant has departed from his duty and has committed it under circumstances that have no connection with the discharge of his duty, and he cites *Railroad Co. v. Cusick*, 60 Kan. 590, 57 Pac. 519; *Railway Co. v. Divinney*, 68 Kan. 776, 71 Pac. 855; *Dwinelle v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; *Commonwealth v. Brockton St. R. Co.*, 143 Mass. 501, 10 N. E. 506; *Railway Co. v. Dowgiallo*, 82 Ark. 289, 101 S. W. 412; *Baltimore, etc., R. Co. v. Davis*, 44 Ind. App. 375, 89 N. E. 403, 32 L. R. A. (N. S.) 1201, note; *Shelby v. Met. Street Ry. Co.*, 141 Mo. App. 514, 125 S. W. 1189; *Zeccardi v. Yonkers R. R. Co.*, 190 N. Y. 389, 83 N. E. 31, 17 L. R. A. (N. S.) 770; 3 *Thompson on Negligence*, § 8169; 2 *Hutchinson on Carriers*, § 1093.

It is unnecessary to determine the scope and application of this rule in this case, as there is testimony tending to show that York was engaged in the discharge of his duties at the time of the assault. The baggage of Morey and other passengers was still in the car, and, according to the findings, there had been no warning that the car was to be set out and no opportunity given the passengers to transfer their baggage to another car. Morey was still a passenger, and the contract of carriage between him and the appellant was only partially performed. In *A. T. & S. F. R. Co. v. Henry*, 55 Kan. 715, 721, 41 Pac. 952, 954 (29 L. R. A. 465), it was said: "As the relation of carrier and passenger existed, he was entitled to the highest degree of care and protection against violence or interference by others so long as he conducted himself in a proper manner. If, through the negligence of the company in affording him the care and protection to which he was entitled, the passenger had suffered an injury, the company would be liable, and certainly the liability is no less where the injury is intentionally inflicted by an employé of the company who was required to exercise care and protection towards the passenger."

While York claims that he had laid aside his uniform and his character as a brakeman for the time being, and that he was no longer in the performance of any duty to the company, there is testimony to the contrary, and testimony that he was acting in the line of his employment when the assault was made. It was found that he had not taken off his train box and started home, as he claimed, and witnesses stated that he was in the car with his uniform on when he made the assault. Since the baggage of passengers was still in the car, it was necessary that some employé of the company should protect it and provide for its transfer. According to York's testimony, other passengers had come for their baggage and had irritated him by their complaints. Brakemen, it seems, carry keys for cars,

and York told Morey to take his baggage out and do it "d— quick," as "I have got to lock this car up."

[2] There is a conflict in the testimony as to York's conduct, statements, and the capacity in which he was acting. There is testimony that at terminal stations cars to be set out are cared for by the yard crew, and not by the train crew, and that the duties of the incoming crew cease as soon as the outgoing crew takes charge, and that the train crew sometimes transfers baggage when a car is set out without notice, and the conductor said that if a car was to be set out and he knew that baggage remained in the car he would see that it was transferred. The fact that the brakeman was in the car wearing his uniform and assuming to control the car and hurrying passengers in removing the baggage so that he could lock up the car strongly tends to show that he was still acting for the company. It was obviously a question of fact for the determination of the jury whether the brakeman was acting within the scope of his employment at the time of the assault or whether his duties to the company for the day had ceased. There is no dispute that appellee was a passenger who had not yet reached his destination, and that he was still entitled to the protection and care from the company which the law requires of carriers. Since the car in which he rode was set out of the train without notice to the passengers, it devolved on the company to care for the baggage left in the car. From some of the testimony it appears that the brakeman was attending to this duty for the company, and it was fairly a question for the jury whether York was acting as a brakeman and servant of the company down to the time the assault was made.

There is some criticism of one instruction given, but a special finding of the jury rendered the objection immaterial.

The judgment of the district court is affirmed. All the Justices concurring.

#### GEO. H. PAUL CO. v. SHAW.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

#### 1. VENDOR AND PURCHASER (§ 151\*)—PERFORMANCE OF CONTRACT—CONVEYANCE.

Where a contract has been made for the sale of real property and its conveyance by warranty deed, the purchaser ordinarily has a right to insist that such deed shall be executed by the person with whom he contracted.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 296, 297; Dec. Dig. § 151.\*]

#### 2. VENDOR AND PURCHASER (§ 141\*)—PERFORMANCE OF CONTRACT—OBJECTIONS.

Where a vendor, as a performance on his part of a contract for the conveyance of real property, tenders a warranty deed from another

person, the vendee, in order to avoid the effect of the tender on the ground that the deed does not include the warranty of the person with whom he contracted, must make that specific objection, and allow a reasonable opportunity for it to be met.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 265; Dec. Dig. § 141.\*]

#### 3. SPECIFIC PERFORMANCE (§ 116\*)—DEFENSES—PERFORMANCE BY DEFENDANT—PLEADING.

In an action by the vendor for the specific performance of a contract for the sale of real property, an allegation in the answer that the plaintiff has never tendered a deed executed by himself is met by allegations in the reply that no previous objection had been made upon that ground to the deed which he had tendered, and that he had at all times been, and was still, able and willing to furnish such a deed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 374; Dec. Dig. § 116.\*]

Appeal from District Court, Sedgwick County.

Action by the Geo. H. Paul Company against T. W. Shaw. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Foulke & Matson, for appellant. Holmes & Yankey, for appellee.

MASON, J. The George H. Paul Company, a corporation, sued T. W. Shaw upon a promissory note. Shaw answered, alleging in substance, among other things, that the note had been given as part payment for a tract of land in Texas, under a written contract by which the plaintiff had agreed to convey it to him, giving a warranty deed and furnishing an abstract of title, upon the execution of notes for the balance of the purchase money; that he had been induced to enter into the contract by false representations as to the character of the property; that the plaintiff had failed to comply with the terms of the contract in these respects, among others: That the title was defective, that the plaintiff did not own the property, and that the only deed tendered was executed by a stranger to the contract. A reply was filed which included a general denial and allegations to the effect that the deed tendered would have conveyed a merchantable title; that the defendant made no objection to the deed or abstract until the filing of his answer, but refused to examine either; and that the plaintiff had at all times been, and was still, able and willing to cause a deed to be made to it by the owner of the land, and then to execute a warranty deed to the defendant, and would have done so if the defendant had so requested. Upon these pleadings the court rendered judgment for the defendant, and the plaintiff appeals.

The plaintiff understands that the trial court held the contract to be void because the vendor had no title to the property, and a reversal is asked upon the strength of decisions that one who is not the owner of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

real estate may make a valid agreement for its sale and conveyance. *Trust Co. v. McIntosh*, 68 Kan. 452, 75 Pac. 498; *Krhut v. Phares*, 80 Kan. 515, 103 Pac. 117; *Robertson v. Talley*, 84 Kan. 817, 115 Pac. 640; 29 A. & E. Encycl. of L. 667.

[1] The defendant, however, disclaims any reliance upon the proposition that the plaintiff committed a fraud in making the contract without at the time having the title. He defends the judgment by this reasoning: The contract called for a warranty deed from the plaintiff, and provided that, if it failed to furnish a deed and abstract as specified, the defendant should be relieved of liability; the plaintiff tendered no deed except one made by another person; therefore it failed to perform its part of the agreement, and thereby lost all claim against the defendant.

The contract did not say in so many words that the plaintiff was to execute a deed. It did, however, recite that the plaintiff had sold and agreed to convey the land to the defendant, and by its terms the plaintiff agreed to "give" the defendant a warranty deed. This fairly implied that the deed was to be signed by the plaintiff, and gave the defendant a right to insist that, however good the title might be upon the record or in fact, he should be protected against any subsequently developed defect by the personal guaranty of the plaintiff. 29 A. & E. Encycl. of L. 701.

[2] But the objection to a deed, that it is executed by one person rather than by another, is of such a special character, and so readily remedied, that before a vendee can upon that ground justify the refusal of a tender, he should in fairness to the vendor call attention to the matter, make a specific requirement, and allow a reasonable opportunity for it to be met. It is said of such a situation in a headnote to *Bigler v. Morgan*, 77 N. Y. 312: "An objection to the form of a deed, capable of being remedied if suggested, as that it does not contain covenants of warranty to which the grantee is entitled, is waived by failing to specify it when the deed is offered." And in *Backman v. Park*, 157 Cal. 607, 613, 108 Pac. 686, 688 (187 Am. St. Rep. 153): "The vendor entered into a contract to make a conveyance within a given time. She made tender of full and complete title, and the tender was refused. True, the title tendered was not her own, and it is recognized that the vendee might have insisted upon title deraigned through the vendor. But their failure to object upon this ground was a waiver of the irregularity."

Such an objection may not be absolutely waived by the failure to make it at the time

a deed is tendered (*Linscott v. Moseman*, 84 Kan. 541, 114 Pac. 1088); but ordinarily it can be made available as a ground of rejecting a tender, only when it has been seasonably suggested. This necessarily results from the principle underlying the familiar rule that he who assigns one reason for his conduct cannot afterward justify it for another (*Redinger v. Jones*, 68 Kan. 627, 75 Pac. 997), which is often applied where specific objections have not been made to a proffered title. *Stevenson v. Polk*, 71 Iowa, 278, 32 N. W. 340; *Prichard v. Mulhall*, 140 Iowa, 1, 118 N. W. 43; *Papin v. Goodrich*, 103 Ill. 86; *Reynolds v. White*, 134 App. Div. 248, 118 N. Y. Supp. 979; *Logan v. Bull*, 78 Ky. 607; *Ballou v. Sherwood*, 32 Neb. 666, 49 N. W. 790, 50 N. W. 1131.

[3] In such a situation as that here presented, one who gives no reason at all for refusing a deed is in no better position than if he had given an untenable one. The plaintiff alleges that until the answer was filed it had received no notice of a requirement that the warranty deed it was to deliver should be one executed by itself. It at first demurred to the portion of the answer which alleged that the deed it had tendered was not of that character. The demurrer does not appear to have been acted upon, but in its reply, filed 36 days later than the answer, the plaintiff offered to procure title and execute a deed, and alleged that it had at all times been able and willing to do so. No definite time of performance had been fixed, and under the circumstances the offer to furnish the kind of deed suggested by the answer was made without unreasonable delay. The omission to produce and tender such a deed was not important, especially in view of the fact that the deed was to be delivered in exchange for the deferred-payment notes, and that the defendant was contesting the enforcement of the contract upon other grounds.

It results from these views that the defendant's motion for judgment on the pleadings must be overruled. It should perhaps be added that the plaintiff can only recover on the theory that, considering its petition and reply together, its action is substantially one for the specific performance of the contract. It cannot recover upon the note and retain full title to the land, whatever may be the attitude or conduct of the defendant. *Linscott v. Moseman*, 84 Kan. 541, 114 Pac. 1088; 29 A. & E. Encycl. of L. 720.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith. All the Justices concurring.

## GRIFFITH v. CARROTHERS et al.

(Supreme Court of Kansas. Dec. 9, 1911.)

*(Syllabus by the Court.)*

## 1. FENCES (§ 16\*)—PARTITION FENCE—CONTRIBUTION.

In settling a controversy between owners of adjoining lands as to their rights in a partition fence, and where one of them has voluntarily built the whole of the fence, the fence viewers are authorized to assign to each a certain one-half of the fence, which he will be required to maintain, and to ascertain the value of the part assigned to the delinquent owner, and for which he will be required to pay, but in making such award the viewers may not consider or include anything in excess of its value as a fence, of construction from material and of the height, size, and character of a legal fence, allowing nothing more than is reasonably necessary in material and workmanship to make it appropriate to the purpose for which it is designed.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 36-38; Dec. Dig. § 16.\*]

## 2. FENCES (§ 16\*)—PARTITION FENCE—CONTRIBUTION.

If he has built an extravagantly ornamental or needlessly expensive fence, or has put in it more than is necessary to make it a legal and practical fence for the turning of stock, the cost of such excess cannot be recovered from the owner.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 36-38; Dec. Dig. § 16.\*]

## 3. FENCES (§ 16\*)—PARTITION FENCE—CONTRIBUTION.

And where a hedge has been planted and has grown on the division line until it contains trees, sustained by the soil of both farms, so large as to be suitable for telephone poles and fence posts, the viewers are not warranted in including the value of such trees in the award made against the delinquent owner.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 36-38; Dec. Dig. § 16.\*]

*(Additional Syllabus by Editorial Staff.)*

## 4. FENCES (§ 26\*)—PARTITION "FENCE"—RIGHT TO REMOVE.

Gen. St. 1909, § 3753, authorizing a person who has laid a fence on a division line to remove it, is not applicable to trees and timber grown on the line.

[Ed. Note.—For other cases, see Fences, Dec. Dig. § 26.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2745-2747; vol. 8, p. 7662.]

Appeal from District Court, Sumner County.

Action by Hugh Griffith against J. T. Carrothers and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Herrick & Herrick and W. W. Schwinn, for appellant. Elliott & McBride and S. B. Amidon, for appellees.

JOHNSTON, C. J. This was an action to recover an award of \$180 made by fence viewers after a view of a hedge fence 160 rods long which had grown between the farms of appellant and appellee. It appears that the hedge was planted by the predeces-

sor in title of appellant, about 35 years ago, and, not being trimmed, Osage orange trees had grown in it large enough for telephone poles, fence and corral posts. The viewers, called under the fence law, divided the fence and assigned the north half of it to appellant as the share to kept up by him and assigned the south half as the share to be maintained by appellee and assessed the value of his half at \$180. Appellee, deeming the award to be too large, and that the viewers had not made it on the correct basis, refused to pay the award. Action was brought in the justice court, and there a jury awarded appellant \$40, and, upon an appeal to the district court, a verdict of \$64.80 was returned in his favor. The appellant is here complaining of rulings excluding testimony offered by appellant that the hedge was worth more than \$180, and also testimony to show that, in addition to its value as a fence, there was timber in it of considerable value and for which a recovery was sought.

[1] The court restricted the evidence to the value of the hedge as a fence and instructed the jury that they could only consider the value of the fence for the purpose of turning stock. The court took a correct view of the statute and the rights of the parties. The statute contemplates the erection of partition fences designed to turn stock and prescribes the height and character of a legal fence that may be made from the designated materials commonly used for fencing. Gen. Stat. 1909, c. 41. In section 2 of the act it is provided that "all hedge fences shall be of such height and thickness as will be sufficient to protect the field or inclosure." The theory of the law is that owners of adjoining lands, that are occupied or improved, are under mutual obligations to maintain partition fences in equal shares. If either owner does not build or repair his share of such fence, it may be done at his expense by the adjoining owner. Or if an owner has voluntarily erected the whole fence, or more than his share, the other owner may be compelled to pay for the share assigned to him by the viewers, and the recovery of the ascertained value of such share will become a lien on his land. An agreement between owners of adjoining land, with respect to the partition fence, is just as effective as the decision of viewers in a compulsory proceeding and may likewise be made a matter of record in the office of the register of deeds. If a party builds the whole of a division fence, as he may, he is necessarily limited to one of the character known as a legal fence and to a reasonable selection and use of material and workmanship. He can compel the adjoining owner to contribute his share of a fence built out of materials and of the height, size, and character of the fence prescribed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



in the statute and which is reasonably adapted to the purpose of restraining or turning ordinary stock.

[2] He cannot build an unduly expensive or ornamental fence and impose the cost of it as a lien upon an unwilling neighbor. Contribution can only be enforced for a legally sufficient fence, one reasonably appropriate to turn stock, and neither viewers nor courts are warranted in considering or including in any award anything beyond its value as a fence. If he should plant and grow a privet hedge fence or erect an extravagantly ornamental stone wall 10 feet high on the division line, he could not expect the adjoining owner to contribute one-half of its cost.

The Supreme Court of Connecticut approved an instruction to the effect that a party might build or repair a partition fence so as to make it a legal one, "provided he acted reasonably and did not make it needlessly expensive, but that he would have no right in such case to be extravagant either in the materials used or in the workmanship; and that if the jury should find that the fence so built by the plaintiff was not extravagant or needlessly expensive, but reasonable and proper, then in such case they should presume that the fence viewers had valued the fence at its just value." *Guyer v. Stratton*, 29 Conn. 421, 427, 428.

In an Ohio case, where a recovery was sought for one-half the value of a partition fence, which involved the character and quality of the fence, the court said: "It is also to be observed, in this connection, that, whatever its character, the fence in question, in any case arising under the statute, is to be dealt with as a fence. It is to be appraised by the township trustees; but the question which it is their duty to determine is not what the materials are worth for any other purpose, and not, necessarily, what the materials and labor cost, but what, in the condition in which they find it, is its value as a fence. This may or may not equal the cost, depending, among other things, upon what economy was used in its construction, the suitability of the materials, the character of the work, and whether, by reason of decay or other cause, it has deteriorated in value." *Robb v. Brachmann*, 24 Ohio, 3, at page 11.

That viewers are limited to the value of a fence reasonably sufficient was the view of the court in *Scott v. Jackson*, 93 Ill. App. 529, where it was remarked: "Even if the viewers exceed their authority in prescribing the exact kind of fence to be built, yet if the owner notified does not build any fence at all, and if the fence built by the other owner is a legal fence, and answers the purpose for which the fence is designed, and it is not shown it cost more than a legal fence of any other kind, the party build-

ing the fence can recover its cost of the other owner." Syl. 4.

When viewers come to place a value on a fence, a share of which is to be charged to the adjoining owner, that "which it is their duty to determine is not what the materials are worth for any other purpose, and not, necessarily, what the materials and labor cost, but what, in the condition in which they find it, is its value as a fence." 19 Cyc. 474. See, also, *Miles v. Thompson*, 110 Iowa, 322, 81 N. W. 587; *Voelz v. Breitenfeld*, 68 Wis. 491, 32 N. W. 757. If he puts in a division fence more than is reasonably necessary, he cannot recover for its value and can never recover more than its value as a fence.

[3] The fact that trees, suitable for telephone poles and for fence posts, had grown in the hedge, did not give appellant the exclusive ownership of them, nor warrant the viewers in assessing the value of all to appellees. These trees were sustained as much by the soil of appellees' farm as by that of appellant. These are no more the property of appellant than if fruit, nut-bearing, or ornamental trees had grown in the hedge or on the division line along a board fence. They grew on the common property of both and, necessarily, belong to both. So far as appears, the hedge, from end to end, was of the same general character, and there were as many trees suitable for poles and posts in the half assigned to appellant as in the half assigned to appellees. Manifestly the appellant received his share of the timber in so much of the hedge as constitutes no part of the fence, and hence he has no cause to complain.

[4] Trees so planted and nourished and sustained from the soil of appellees cannot be treated as a part of the fence under the law, and the provision (section 23) authorizing a person, who has laid a fence on a division line, to remove it, is not applicable to trees and timber grown on the line, as in this case.

The judgment of the district court will be affirmed. All the Justices concurring.

LIVERMORE et al. v. AYRES.†  
(Supreme Court of Kansas. Dec. 19, 1911.)

(Syllabus by the Court.)

1. EXECUTORS AND ADMINISTRATORS (§ 29\*)—APPOINTMENT—COLLATERAL ATTACK.

Whether a person appointed administrator of an estate is a resident of the state is a question of fact to be determined by the court appointing him, and its judgment cannot be impeached collaterally.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 177-182; Dec. Dig. § 29.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 29\*)—APPOINTMENT—JURISDICTION.

The statute declares that no person who is a nonresident shall be appointed administrator

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

† Rehearing denied.

of an estate (Gen. Stat. 1868, c. 37, § 28; Gen. Stat. 1900, § 3463), but, where facts exist which give the probate court jurisdiction to appoint some person administrator, it will not lose jurisdiction by appointing one who is a nonresident. The order in such case is erroneous, but not void.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 177-182; Dec. Dig. § 29.\*]

### 3. CORPORATIONS (§ 432\*)—OFFICERS—AUTHORITY—EVIDENCE.

Where it is sought to show authority of the general manager of a milling company to execute the promissory note of the company, evidence of the custom of the company to execute its notes in that way, and that the same officer had executed similar notes in the name of the company before and after the execution of the note in question, and that the company had ratified such acts, is competent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1717-1762; Dec. Dig. § 432.\*]

### 4. EVIDENCE (§ 21\*)—PRINCIPAL AND SURETY (§ 200\*)—JUDICIAL NOTICE—DISCHARGE OF SURETY—EXTENSION OF TIME FOR PAYMENT.

A cosurety, sued for contribution, set up as a defense that the bank, payee of the note, had extended the time of payment without his knowledge or consent. He offered no proof of any such extension, but it appeared that the note was not fully paid until four years after maturity. This court declines to take judicial notice of the alleged custom of banks to require renewal of notes, not paid promptly at maturity, and to presume that the time of payment of the note in question was extended by a valid contract upon a sufficient consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 25; Dec. Dig. § 21.\* Principal and Surety, Cent. Dig. §§ 641-650; Dec. Dig. § 200.\*]

### 5. APPEAL AND ERROR (§ 585\*)—RECORD—ABSTRACTS—NECESSITY FOR COUNTERABSTRACT.

Where appellants' abstract sets forth only such portions of the evidence as are necessary to present the questions raised by the appeal, a statement therein that there was no evidence upon a question which, it appears, is not raised by the appeal is not a challenge requiring the appellee to file a counterabstract or showing, within the rule declared in *Railway Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2586-2604; Dec. Dig. § 585.\*]

*(Additional Syllabus by Editorial Staff.)*

### 6. CONTINUANCE (§ 40\*)—GROUNDS—DILIGENCE OF APPLICANT.

In an action by an administrator, there was no abuse of discretion in refusing a postponement of the trial, in order that defendant might have a hearing upon his application to revoke the letters of administration; the application not having been filed in the probate court until the day of the trial, although the suit had been pending for nearly six months.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. § 124; Dec. Dig. § 40.\*]

### 7. APPEAL AND ERROR (§ 193\*)—PRESENTATION OF QUESTIONS IN TRIAL COURT—MISJOINDER OF CAUSES.

Where the question of misjoinder is not presented in the pleadings, but is raised for the first time in the Supreme Court, it will not be considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1226-1240; Dec. Dig. § 193.\* Pleading, Cent. Dig. §§ 1355-1374.]

Appeal from District Court, Johnson County.

Action by H. C. Livermore and another against Oscar O. Ayres. From a judgment for plaintiffs, defendant appeals. Affirmed.

I. O. Pickering, for appellant. J. W. Parker, for appellees.

PORTER, J. On December 20, 1905, the Olathe Milling & Elevator Company, a corporation, by its manager, D. Hoch, executed and delivered to the Patrons' Co-Operative Bank, of Olathe, its promissory note for the sum of \$11,000, payable 60 days after date, with interest at the rate of 6 per cent. per annum. The note was signed by D. Hoch, Oscar O. Ayres, H. C. Livermore, and M. G. Miller, as sureties. This is an action by H. C. Livermore and J. C. Nichols, administrator of the estate of M. G. Miller, deceased, against Oscar O. Ayres, as cosurety, for contribution. Plaintiffs recovered judgment, and the defendant appeals.

The petition alleged the death of M. G. Miller and the appointment by the probate court of Johnson county, Kan., of J. C. Nichols as administrator of the estate; that the milling company was accustomed to borrow money for the purpose of paying its debts; that Hoch had authority to execute the notes of the company therefor; that D. Hoch, one of the cosureties, was insolvent and not within the jurisdiction of the court; and that, on November 15, 1900, the plaintiffs were compelled to and did pay to the bank the balance due upon the note. The defendant filed a verified answer, alleging that the note had been extended a number of times without his knowledge or consent, denied the appointment and authority of J. C. Nichols, as administrator, and set up a number of other defenses.

[1] On the trial the defendant objected to the prosecution of the action by J. C. Nichols as administrator, on the ground that at the time of his appointment he was and ever since has been a resident of the state of Missouri, and a nonresident of Kansas, and therefore ineligible to serve as administrator of an estate in Kansas. It is contended that it was error to refuse to permit the defendant to attack the validity of Nichols' appointment as administrator by proof of his residence, and that the court abused its discretion in refusing to adjourn the trial to permit defendant to procure an order of the probate court, revoking the letters of administration. The court rightly held the attack to be collateral, and sustained an objection to the evidence. At the time of his death, Miller was a resident of Johnson county. This fact and his intestacy are conceded, and the probate court had jurisdiction to appoint some person administrator.

[2] It is true the statute declares that no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

person who is a nonresident shall be appointed administrator of an estate (Gen. Stat. 1868, c. 37, § 28; Gen. Stat. 1909, § 3463), but one of the facts which the probate court had to determine was the residence of the person appointed. The court had jurisdiction to decide that question, and did not lose jurisdiction by deciding it erroneously. When a court has jurisdiction of the subject-matter and the parties, it has jurisdiction to proceed and to determine the matter involved, and necessarily has jurisdiction to decide a question of fact or of law erroneously as fully as to decide it rightfully. If error is committed, the remedy is by appeal. The difference between the present case and that of *Ewing v. Mallison*, 65 Kan. 484, 70 Pac. 369, 93 Am. St. Rep. 299, is that there the court was wholly without jurisdiction to appoint an administrator, because the deceased was not at the time of his death a resident of the county. The death of a person with an estate to be administered, and the place of residence, are necessary to give the court jurisdiction to act at all; and neither the question of the death nor the place of residence are concluded by the decision of the court. If it should afterward appear, as it sometimes does, that the person is not dead, or that his residence at the time of his death was in another county or state, the validity of the order appointing the administrator is subject to collateral attack, as all judgments are which are wholly, or, as the phrase is, "absolutely void." Where the court is without jurisdiction, any judgment rendered is void, and may be attacked collaterally; and so it was held in the *Mallison Case*, supra, that it was error for the district court to refuse "to permit an inquiry into the actual residence of the deceased at the time of his death, and in holding that the proceedings had in the probate court" were *res adjudicata*. The defendant's argument is that there is no law conferring jurisdiction on a probate court to appoint a resident of Missouri administrator of an estate in Kansas; that, on the contrary, there is a statute which in express terms prohibits such appointment. But the appointment of a particular person may be erroneous without being void. Where the court has jurisdiction to appoint some person administrator, it must determine the competency of the person appointed, and this involves a question of fact which the probate court alone must primarily solve.

The same principle was involved in *Taylor v. Hosick*, 13 Kan. 518, 527, where it was said in the opinion: "Letters of administration can be attacked collaterally only when the probate court for some reason has no jurisdiction to make the appointment, and never when the court has merely committed an error by appointing one person (who is eligible) when the court should have appointed some other person." To the same effect are *Brubaker v. Jones*, 23 Kan. 411; *Anderson*

*v. Walter*, 78 Kan. 781, 783, 99 Pac. 270; *Parnell v. Thompson*, 81 Kan. 119, 136, 105 Pac. 502, 33 L. R. A. (N. S.) 638; and the recent case of *Ekblad, Adm'r, v. Hanson*, 85 Kan. 541, 117 Pac. 1028. And this is the universal rule. *Simmons v. Saul*, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054; *Pick v. Strong*, 26 Minn. 303, 3 N. W. 697.

[6] There was no abuse of discretion in refusing a postponement of the trial, in order that defendant might have a hearing upon his application to revoke the letters of administration. The application was not filed in the probate court until the day of the trial, although the suit had been pending for nearly six months.

[3] It was proper to admit evidence of the custom of the milling company to execute promissory notes by its general manager, and to show that on other occasions, before and after the execution of the note in question, the same officer had executed similar papers in the name of and in behalf of the company. Where the corporation has held the agent out to the public as having such authority, it is liable for his acts in the general course of its business, and proof of acquiescence by the company in similar acts is competent. *Thompson on Corporations* (1st Ed.) § 4881, (2d Ed.) § 1608, and cases cited; *Fifth Ward Savings Bank v. First Nat'l. Bank*, 48 N. J. Law, 513, 7 Atl. 318; *Evansville Public Hall Company v. Bank of Commerce*, 144 Ind. 34, 42 N. E. 1097.

[4] Judicial notice, it is true, dispenses with proof; but the court declines to take judicial notice of the alleged custom of banks to require prompt payment of notes at maturity, or else to have them extended, and from such notice, together with the fact that the bank brought no suit upon the note, and that it matured four years prior to the institution of this action, to presume, in the absence of any proof, that the time of payment of the note in question was extended. The defendant in his answer pleaded the fact, not the custom; and if he intended to rely upon the defense the burden was upon him to prove that, without his knowledge or consent, a valid contract upon a sufficient consideration was made for such an extension. He cannot rest his defense upon mere presumption.

[7] It is too late for the defendant to raise the question of misjoinder. The abstract nowhere refers to any objection of this nature, and there is nothing in the pleadings which challenged the court's attention to the question. It is raised for the first time in this court, and cannot be considered. *Railroad Co. v. Beets*, 75 Kan. 295, 290, 89 Pac. 683, 10 L. R. A. (N. S.) 571; *Blodgett v. Yocum*, 80 Kan. 644, 103 Pac. 128. Besides, it is not claimed that any of the defendant's rights were prejudiced. Had the question been raised at the trial, the court would have permitted separate petitions to be filed and separate trials to be had.

[5] The defendant makes the claim that there was no evidence showing that Nichols, as administrator, ever paid any sum upon the note as surety or otherwise. Having in his abstract made the statement that there was no proof of such payment, he relies upon rule 10a (92 Pac. viii) of this court, as construed in *Railway Co. v. Conlon*, 77 Kan. 324, 94 Pac. 148; and, since the plaintiffs (appellees) have failed to meet the challenge by counterabstract or otherwise, setting forth such evidence, he insists that the judgment must be reversed. The plaintiffs (appellees) answer this contention fully by setting forth the certificate attached to the abstract prepared by the defendant, which reads, "I certify that the above and foregoing is a correct abstract of the record in said cause, so far as the same is necessary for an examination of the questions raised on this appeal," and the specifications of error found on the same page of the abstract, which make no reference to such a claim. Obviously the situation presented is one where the rule of the *Conlon* Case, *supra*, has no room for application. All the evidence is not abstracted; the defendant's challenge is limited by the certificate to the abstract and the questions raised by the appeal. The failure of proof now complained of is nowhere suggested as a ground for reversal. Had it been, the challenge, unless met by counterabstract or otherwise, would have concluded the plaintiffs upon that question.

The fourth alleged specification, that "the court erred in rendering judgment for the plaintiffs; said judgment should have been for the defendant for his costs"—is not a specification of error, within rule 9, and raises no question for this court to consider. *Lumber Co. v. Smith*, 84 Kan. 190, 114 Pac. 872.

The judgment is affirmed. All the Justices concurring.

SAUNDERS et al. v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Kansas. Dec. 9, 1911.)

(Syllabus by the Court.)

1. TRIAL (§ 351\*)—SUBMISSION OF ISSUES TO JURY—ANSWERS TO INTERROGATORIES.

Where a party does not present questions of fact to be submitted to a jury, he may, if he chooses, adopt as his own questions submitted by the adverse party and join in the request that they be answered; but it is too late to insist upon this privilege after a general verdict against him has been received, and the questions so submitted by the other party have been returned unanswered.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 351.\*]

2. TRIAL (§ 352\*)—INTERROGATORIES TO JURY—PROCEDURE.

Special questions presented by the defendant written under the caption "Interrogatories

Propounded by the Defendant to be Answered in Case the Verdict is for the Plaintiffs" were submitted to the jury and returned unanswered; the verdict being for the defendant. It is held that the submission of the questions in this form was not an inducement to the jury to find for the defendant affording grounds for setting aside the verdict.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 352.\*]

3. EVIDENCE (§§ 512, 554\*)—OPINION EVIDENCE—ANSWERS OF EXPERT.

The answers of an expert witness concerning the distance to which sparks could be thrown from a certain type of locomotive, and that the engineer in charge of the locomotive which it is alleged caused the fire for which damages were sought was a competent and skillful engineer, are considered, and, without deciding upon the competency of the testimony under the issues presented, it is held that it does not appear that the rulings, if erroneous, injuriously affected the substantial rights of the party objecting thereto, and that the judgment cannot be reversed therefor.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. §§ 512, 554.\*]

4. APPEAL AND ERROR (§ 1026\*)—HARMLESS ERROR.

The provisions of section 141 of the Civil Code (section 5734, Gen. St. 1909), relating to errors and defects that do not affect substantial rights, and section 531 (section 6176), relating to technical errors and irregularities, are compared and applied.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4029-4037; Dec. Dig. § 1026.\*]

Appeal from District Court, Johnson County.

Action by Edward Saunders and Bert Saunders against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

E. C. Fletcher, for appellants. Wm. R. Smith, O. J. Wood, and A. A. Scott, for appellee.

BENSON, J. This was an action to recover damages by fire alleged to have been caused by operation of the defendant's railroad. Gen. Stat. 1909, § 7079. The verdict was for the defendant.

[1] Two errors were assigned: (1) The refusal of the court to direct the jury to answer certain questions of fact; (2) that incompetent evidence was received. At the proper time the appellee presented questions of fact and asked that they be submitted to the jury. The appellants submitted no questions and made no request or objection concerning those presented by the appellee. On the return of the jury, and when their verdict was read, it appearing that the questions so submitted had not been answered, the appellants requested that the court should direct the jury to return to their room and answer these questions. This request was refused. The statute provides: "In all cases the jury shall render a general verdict, and the court shall in any case at the request of the parties thereto or either of them, in addition to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the general verdict, direct the jury to find upon particular questions of fact, to be stated in writing by the party or parties requesting the same. \* \* \* Gen. Stat. 1909, §5888. If the appellants had so desired, they might have adopted the appellee's questions as their own when they were submitted to the court, or perhaps at any time before the jury retired to consider of their verdict; but it was too late, after the jury had returned with a general verdict, to submit questions or to adopt those already submitted by the other party, which would amount to the same thing. It may be that the court, in the exercise of judicial discretion, might have complied with appellants' request and required the jury to answer the questions even then, but the refusal was not an abuse of that discretion.

[2] The questions presented by the appellee were written under this caption: "Interrogatories Propounded by the Defendant to be Answered in Case the Verdict is for the Plaintiffs." It is insisted by the appellants that this heading permitting the jury to refrain from answering the questions if their general verdict should be for the defendant was an inducement to the jury to find for the defendant, and thus avoid the labor and weariness incident to a consideration of the questions. It is not unusual in preparing questions to require an answer to one in case a certain specified answer is made to another, thus: "If you answer the above question in the affirmative, then state," etc. This practice has never been criticized, and the situation now presented is not materially different in principle. We do not suppose that jurors will have so little regard for their high duties as to find contrary to their judgment in order to save a little further effort and possible inconvenience, and, besides, the defendant had the right to withdraw its questions when they were returned unanswered. The caption only indicated in advance a purpose to so withdraw them in case a verdict was returned favorable to the party presenting them. In the absence of any showing or indication of prejudice to the appellants, we find nothing in this proceeding of which they can rightfully complain. *Railway Co. v. Moffatt*, 60 Kan. 113, 121, 55 Pac. 837.

[3] A master mechanic in charge of the shops of the company at Argentine, who had been a long time in railway service, and whose duties as master mechanic, among others, was to oversee or supervise the engine-men and to look after engines and repairs upon them, who had been a locomotive engineer and had also served as foreman of engines, in which latter capacity he had instructed engineers in their duties, was a witness for the appellee. After stating in detail the particulars of his service and experience in railroad business, the witness described the type of engine by which the train in question was drawn when the fire occur-

red and in particular the apparatus to prevent the escape of sparks. He was then asked: "I would like to ask you this question, Mr. Hamilton, knowing this balance compound engine of the 1800 type as you do, whether or not such an engine, running under steam, will throw sparks to a sufficient height to be carried, in a moderate wind, for 165 feet from the center of the track, and live long enough to start a fire in combustible matter." An objection was made that this was not a proper hypothetical question, and that the witness was not qualified inasmuch as he had stated that he had never run an engine of this type. The objection was overruled, and the witness answered, "It will not." The witness also testified that he knew Mr. Gallagher, the engineer on the train in question, and had examined him for promotion 15 or 16 years before and knew of his character in running and handling engines ever since. He was then asked the question, "I will ask you to state if you know whether or not he is a careful, competent, and skillful engineer," and answered, "I consider him a first-class engineer, both in the handling and operation and care of an engine." This question and answer was objected to on the ground that the testimony was incompetent, irrelevant, and immaterial, and that the witness was not qualified to answer. These rulings are complained of. Concerning the one first referred to, the testimony objected to is quite similar to that held competent in *Railroad Co. v. Blaker*, 68 Kan. 244, 75 Pac. 71 (syl. 5) 64 L. R. A. 81, although that part of the question relating to the distance that sparks might be carried by the wind and start a fire is somewhat speculative. Much would depend upon atmospheric conditions, and the degree of inflammability of the combustible matter referred to; but these considerations must have occurred to the jury in weighing the evidence. The witness was qualified to give testimony upon the substantial matters involved in the inquiry, and it cannot be held that the doubtful features of the question led the jury astray in considering the answer.

The other question concerning the engineer's skill and competency seems to be objectionable within the principles decided in *Coal Co. v. Dickson*, 55 Kan. 62, 39 Pac. 691, and *Erb v. Popritz*, 59 Kan. 264, 52 Pac. 871, 68 Am. St. Rep. 362. The petition alleged that the servants of the company in charge of the locomotive did "carelessly and negligently permit sparks and coals of fire to escape from said locomotive and fall upon plaintiffs' said property and ignite the same. \* \* \* The charge was, not that the engineer was incompetent and unskillful, but that he was negligent in this instance. It was said in *Erb v. Popritz*, supra, that "the matter of negligence is to be determined by the character of the specific act or omission, and not by the general character for care that the person may sustain." The appel-

lants do not, however, base their objection to the testimony upon this ground, but say in their brief that to meet the statutory presumption of negligence the burden was upon the railway company to show that the employees operating its engines were competent and skillful. Upon this interpretation of the issue no good reason appears why an expert may not testify directly to the fact. Wigmore says: "Testimony of the same sort to *carefulness* or *negligence* of disposition (when in issue or evidential as to an employee or a party) has also usually been received. Testimony to *professional skill*, concerning either party or witness, when furnished by professional persons qualified to know, is also generally regarded as receivable."

In *Coal Co. v. Dickson*, 55 Kan. 62, 39 Pac. 691, it was held incompetent to show by one expert miner that another miner was also expert. But in the opinion it was said: "Where a question as to the skill of an individual arises incidentally in the course of a trial, it is not uncommon for witnesses well acquainted with him and with his calling to testify directly as to his skill. \* \* \*

[4] Without deciding whether, under the issue and in the situation presented, the evidence was incompetent, we are constrained to hold that, if it was erroneously admitted, still the judgment should not be reversed because of such ruling. It cannot be supposed that, if the jury had found that the fire in this case was caused by the negligent operation of the railway, it would have relieved the company from liability because it believed that the engineer was generally competent and skillful. The Civil Code provides (section 581 [section 6176, Gen. St. 1909]): "The appellate court shall disregard all mere technical errors and irregularities which do not affirmatively appear to have prejudicially affected the substantial rights of the party complaining, where it appears upon the whole record that substantial justice has been done by the judgment or order of the trial court; and in any case pending before it the court shall render such final judgment as it deems that justice requires, or direct such judgment to be rendered by the court from which the appeal was taken, without regard to technical errors and irregularities in the proceedings of the trial court."

This section in the Code revision of 1909 perhaps means but little if anything more than was intended by a provision of the old Code continued in the revision which requires the court to disregard all errors and defects not materially affecting the substantial rights of a party, and providing that no judgment shall be reversed for such errors or defects. Civil Code, § 141 (Gen. St. 1909, § 5734). The new provision is, however, a later legislative declaration of a wholesome policy probably intended to make it more emphatic.

It does not authorize this court to substitute its own judgment for that of the jury. *Manufacturing Co. v. Bridge Co.*, 81 Kan. 616, 624, 106 Pac. 1034, 28 L. R. A. (N. S.) 156. But it does require the court to disregard immaterial errors and rulings that do not appear to have influenced the verdict or impaired substantial rights. The ruling must be prejudicial as well as erroneous, and prejudice must affirmatively appear, or the error will be disregarded. Prejudice may be said to appear when the proceedings show that the court or jury was misled by the error, and that the verdict or judgment was probably affected to the injury of the complaining party; and this may appear from a candid examination of the proceedings in the light of reason and common sense. The term "technical errors," used in section 581 of the Code, is an elastic one; but it doubtless was intended to mean the same as the expression "errors or defects which do not affect the substantial rights of the adverse party," found in section 141. Rules of procedure and of evidence alike are intended to promote the due administration of justice. Although they may not be disregarded, they must be so interpreted and applied as to facilitate, and not defeat, the purposes for which they were designed. *Hopkinson v. Conley*, 75 Kan. 65, 88 Pac. 549. It certainly does not affirmatively appear upon this record, nor does it seem probable, that the substantial rights of the complaining party were prejudicially affected by the answers given to either of the questions objected to.

If it should be conceded that the testimony objected to was erroneously received, as claimed, the error was of the nature referred to in these provisions of the Code, and should be disregarded.

The judgment is affirmed. All the Justices concurring.

#### CUNNINGHAM, State Auditor, v. NORTH-WESTERN IMPROVEMENT CO.

(Supreme Court of Montana. Nov. 21, 1911.)

#### 1. MASTER AND SERVANT (§ 11\*)—INDUSTRIAL INSURANCE—PUBLIC POLICY—POLICE POWER.

Laws 1909, c. 67, providing for state industrial insurance and workman's compensation for injuries, in case of employees engaged in coal mining within the state, is a proper exercise of police power.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 11.\*]

#### 2. CONSTITUTIONAL LAW (§ 81\*)—"POLICE POWER"—EXTENT.

In general "police power" extends to all the great public needs that may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and predominant opinion to be greatly and immediately necessary to the public welfare.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 148; Dec. Dig. § 81.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5424-5438; vol. 8, p. 7756.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

### 3. CONSTITUTIONAL LAW (§ 208\*)—EQUALITY—CLASSIFICATION—CLASS LEGISLATION.

Laws 1909, c. 67, creating a state insurance fund for disability of workmen engaged in coal mining, being equally applicable to all persons within the state engaged in the particularly hazardous business of mining coal, is not invalid as class legislation, as singling out a particularly hazardous employment, and subjecting it to burdens not placed on other extra-hazardous employments.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.\*]

### 4. CONSTITUTIONAL LAW (§ 208\*)—CLASSIFICATION—POWER.

Classification, for the purpose of tax legislation, or of regulation under the police power, is a legislative function, with which the courts have no right to interfere, unless it is so clearly arbitrary as to invade constitutional right.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208.\*]

### 5. MASTER AND SERVANT (§ 11\*)—STATUTES.

The right of the Legislature to pass laws regulating an extrahazardous business, such as coal mining, and to provide for benefits in case of injury or death, may be properly based on the intention to reduce economic waste, to obviate breaches and dissensions between employers and employes, raise the standard of citizenship, and lower the general burden of taxes or taxation, thereby promoting peace, order, and morals.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 11.\*]

### 6. TAXATION (§ 23\*)—TAXING POWER—EX-TENT.

The right of the state, in the exercise of police power, to regulate an extrahazardous business and to provide for the payment of benefits for employes injured or killed therein is supplemented by the taxing power, which is included in the police power, in order to enable the state to carry the scheme into effect.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 23.\*]

### 7. TAXATION (§ 23\*) — PURPOSE — "PUBLIC PURPOSE."

Tax levied to raise a fund to provide industrial insurance and benefits to injured employes engaged in the extrahazardous occupation of coal mining is for a "public purpose," notwithstanding the act operates to the direct benefit of the injured employe or his dependents, and not directly to the public generally.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 56; Dec. Dig. § 23.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5815-5817; vol. 8, p. 7773.]

### 8. JURY (§ 11\*)—TRIAL BY JURY—RIGHT.

Const. U. S. Amend. 7, providing that the right to trial by jury shall remain inviolate, does not guarantee a trial by jury in a civil action in a state court.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 19-24; Dec. Dig. § 11.\*]

### 9. JURY (§ 10\*)—TRIAL BY JURY—RIGHT.

State Const. art. 3, § 23, providing that the right of trial by jury shall be secured to all, and remain inviolate, applies only to cases where right of trial by jury existed at the adoption of the Constitution.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 10.\*]

### 10. JURY (§ 19\*)—TRIAL BY JURY—LIMITATION—CLAIMS.

State Const. art. 3, § 23, providing that the right of trial by jury shall remain inviolate,

and referring to civil cases, did not confer the right to trial by jury, in a special proceeding to obtain the benefits of Laws 1909, c. 67, providing a scheme for industrial insurance for persons engaged in coal mining within the state, and their dependents, in case of injury or death in the course of their occupation; and hence such act was not unconstitutional, as depriving those subject to its terms of their right to trial by jury.

[Ed. Note.—For other cases, see Jury, Dec. Dig. § 19.\*]

### 11. CONSTITUTIONAL LAW (§ 251\*)—"DUE PROCESS OF LAW."

The phrase "due process of law" does not necessarily mean trial or hearing by judicial proceeding.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 726, 727; Dec. Dig. § 251.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2227-2236.]

### 12. CONSTITUTIONAL LAW (§ 287\*)—DUE PROCESS OF LAW — OCCUPATION TAX — EMPLOYEES' BENEFIT.

Laws 1909, c. 67, provides a scheme of accident insurance and disability benefits for employes in coal mines, and requires the funds to be provided by a payment of 1 per cent. of the wages of such employes, and a tax on the employer of 1 cent for each ton of coal mined. *Held*, that such impost was in the nature of an occupation or license tax; and hence the scheme provided for its collection did not operate to deprive either the miners or their employers of their property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 287.\*]

### 13. MASTER AND SERVANT (§ 11\*)—INJURIES TO SERVANTS—COMPENSATION ACT—POLICE POWER.

Laws 1909, c. 67, providing for an indemnity to be paid to injured employes engaged in coal mining, was not invalid as a police regulation, because it provided for the payment to an injured employe of his compensation in a lump sum.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 11.\*]

### 14. MASTER AND SERVANT (§ 11\*)—INJURIES TO SERVANT—MINERS' COMPENSATION ACT—VALIDITY.

Laws 1909, c. 67, providing for indemnity and benefits to injured persons engaged in coal mining, to be paid from a fund collected from an assessment levied on both employer and employe is not unconstitutional, because it does not differentiate between a careful and a careless employer.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 11.\*]

### 15. CONSTITUTIONAL LAW (§ 80\*)—JUDICIAL POWER—WORKMEN'S COMPENSATION ACT—JUDICIAL DUTIES—ADMINISTRATIVE OFFICERS.

Miners' compensation act (Laws 1909, c. 67), providing indemnity for injured employes engaged in coal mining, from a fund to be collected from tax levied on the workmen and the coal operators in accordance with the amount of coal mined and the amount of wages paid, and providing a summary method for the disposition of claims filed under the law, is not unconstitutional, as conferring judicial power on the State Auditor having charge thereof.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 143-147; Dec. Dig. § 80.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**16. CONSTITUTIONAL LAW (§ 245\*)—MINERS' COMPENSATION ACT—EQUAL PROTECTION OF LAWS.**

Since the miners' compensation act (Laws 1909, c. 67), providing for compensation to injured employes engaged in mining, to be furnished out of a fund collected from mine operators in proportion to the amount of coal mined and sold and the amount of wages paid, does not protect the employer who furnishes compensation under the act from being sued for the injury and compelled to pay twice, the act is invalid, as depriving such an employer of the equal protection of laws.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 245.\*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Submission of controversy on agreed statement of facts of Harry R. Cunningham, as State Auditor of the State of Montana, against the Northwestern Improvement Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for appellant. Albert J. Galen, Atty. Gen., and J. A. Poore, Asst. Atty. Gen., for respondent.

SMITH, J. The Eleventh Legislative Assembly passed "an act to create a state accident insurance and total permanent disability fund, for coal miners and employes at coal washers in the state of Montana, and providing for the maintenance and management of the same; extending and defining the duties of the State Auditor, and fixing penalties for the violation of the provisions of this act." See chapter 67, p. 81, Laws of 1909. In order to understand the act in detail, it seems advisable to quote it in full. It reads as follows:

"Section 1. All workmen, laborers and employes employed in and around any coal mines, or in and around any coal washers in which coal is treated, except office employes, superintendents and general managers, shall be insured in accordance with the provisions of this act, against accidents occurring in the course of their occupations.

"Sec. 2. All corporations, partnerships, associations or persons engaged in the business of operating any coal mine or coal washers in the state of Montana shall pay to the Auditor of the State, within five days after the monthly wages at the particular mine shall have been paid, one cent per ton on the tonnage of coal mined and shipped, or sold locally, or having been mined is ready for shipment or sale during the month for which the wages were paid; and all persons mentioned in section 1 employed in and about coal mines shall allow to be deducted from their gross monthly earnings one per cent. thereof, the deduction to be made by the agent, manager, or foreman of any corporation, association, partnership,

person or persons engaged in the business of operating any coal mine or coal washer, and paid to the State Auditor within five days after such monthly wages have been paid.

"Sec. 3. The agent, manager, foreman or accountant of any corporation, partnership, association, person or persons engaged in mining coal in Montana, shall on or before the fifth day succeeding the pay day at his respective mine, make report under oath to the State Auditor as to the tonnage mined and subject to the payment of one per cent. per ton thereon; and stating the gross earnings subject to the one per cent. deduction as provided in this act, accompanied by a certified check in full for the amount of the tax provided in section 2 of this act. It shall be unlawful for any person, employer, employe, corporation, partnership, association or union to make any contract waiving, avoiding or affecting the full legal effect of this act.

"Sec. 4. It is hereby made the duty of the State Auditor to receive all moneys as provided for in this act, and to send the proper acknowledgment to the person making such remittance. The Auditor shall pay all moneys so received by him to the State Treasurer, who shall keep such sums in safe custody in a distinct fund to be known as the employers and employes co-operative insurance and total permanent disability fund. The State Treasurer must invest the surplus of this fund in safe and convertible state, county or city bonds, or bonds of the United States. All interest accruing from such investments shall be accredited to this insurance fund. The bond of the State Treasurer shall be liable for such funds, and it shall be his duty to keep accurate accounts of the receipts and disbursements of such money.

"Sec. 5. The Auditor of State shall keep full statistics of the operation of this function of his department in the event of death by accident of an employe insured under this act, who shall have come to his death in the course of his employment and by causes arising therein. The Auditor of State upon being satisfied by adequate evidence of such death shall issue a warrant upon the State Treasurer to persons dependent upon the deceased, these warrants to issue in the following order: (1) To surviving wife and child, or children, in equal shares, and if neither wife or child, or children be alive, then (2) to surviving parents who are dependent, or partially so, upon the deceased; if none, then (3) to such other relatives of the deceased as survive him and are dependent upon him, in the sum of three thousand (\$3,000.00) dollars.

"A workman receiving injuries which permanently incapacitate him from the performance of work shall receive a compensation monthly, not to exceed one dollar (\$1.00) a day for each working day. Compensation

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



for permanent injury shall not be allowed until after the expiration of twelve weeks from the time such injuries were sustained, provided that the medical practitioner examines and pronounces the injury as being permanent, compensation may then be allowed from commencement of disability. The Auditor of State, however, may, when in his judgment he deems it advisable, use so much of the funds as is necessary in the procuring of a medical practitioner, for the purpose of examination or treatment under this act, for such injuries as herein mentioned compensation shall continue during disability, or until settlement if effected as provided for in section 9 of this act. Total or permanent disability shall consist of the loss of both legs or both arms, the total loss of eyesight or paralysis, or other conditions incapacitating him from work, caused by accident, or injuries received during employment as specified by this act; provided, that if death, as a result of the injury, ensues at a period not longer than one year from date of accident the sum of three thousand dollars (\$3,000.00) shall be paid the deceased workman's dependents as hereinbefore provided. The representatives of a foreigner, except the widow or dependent children, who were not living within the country at the time of the accident, shall have no claim for the compensation provided for in this act. Such foreign person shall file their foreign address, if married, with the office of their employer with whom they are employed and duplicate thereof with the State Auditor, giving their wife's name and dependent children, and such other identification as may be required by the Auditor of State. Loss of any limb or eye, caused by accident to a workman while employed as provided for in this act, shall be compensated for in the sum of one thousand (\$1,000.00) dollars, provided, that in the event there shall be no funds available in the fund to pay the Auditor's warrant when drawn the same shall draw interest out of the fund at the rate of ten per cent. per annum until such warrant is called for payment by the Treasurer which shall be as soon as the fund is sufficient to pay the same with its interest when due.

"Sec. 6. Where a workman is entitled to monthly payments under this act, he shall file with the Auditor of State his application for such, together with a certificate from the county physician of the county wherein he resides, attested before a notary public.

"Sec. 7. If any person or persons, company or corporation who is then paying into this insurance fund shall believe that any person or persons are obtaining, or having made application to obtain benefits thereunder improperly or fraudulently, and shall file his written request that such person's claim be investigated, the State Auditor must, upon the receipt of such request request the Sec-

retary of the State Board of Health to make an examination for the purpose of this act and his certificate as to the condition of the person or persons with reference to their rights to benefit under this act shall be conclusive evidence as to his condition.

"Sec. 8. If the workman refuses to submit himself to such examination, or in any way obstructs the same, his right to compensation under this act shall be suspended until such examination takes place, and shall absolutely cease unless he submits himself for an examination within one month after being required to do so.

"Sec. 9. When any monthly payment has been made to a workman for any period whatever, the liability under this act may, on the application by, or on behalf of the workman, be redeemed by the payment of a lump sum, which in no instance shall be in excess of the amount specified as death indemnity and all monthly payments made prior shall be deducted from such settlement.

"Sec. 10. The Auditor of State shall report in January of each year to the Governor of the experience and business of this function of his department, and shall have plenary power to determine all disputed cases which may arise in its administration not herein provided for, and to recommend in his report the rates or premium necessary in order to preserve such fund, and shall order paid such indemnification as herein provided. He shall have power to define the insurance provisions of this act by regulations not inconsistent therewith and shall prescribe the character of the monthly or other reports required of the parties liable hereunder and the character of the proofs of deaths, or to total permanent disability, and shall have power to make all other orders and rules necessary to carry out the true intent of this act.

"Sec. 11. No money paid or payable in respect of insurance or monthly compensation under this act shall be capable of being assigned, charged, taken into execution, or attached, nor shall the same pass to any other person by operation of law; and the acceptance of pecuniary benefit under the provisions of this act shall operate to release the person or persons, corporation, partnerships, or associations causing such injuries or death for which benefits are so claimed, who shall have paid the assessment provided in section 2 of this act, and also the employer, officers and agents thereof from all liability and claim arising from such injuries or death. The commencement of a suit to recover for such injuries or death shall operate as a forfeiture of the right to benefit under this act.

"Sec. 12. A manager, agent, foreman, accountant, person or persons who represent any corporation, partnership, association, person or persons, engaged in the mining or management of any coal mines or coal washers in Montana, or person or persons liable for the payment herein provided for, who

shall violate the intent of this act by inaccurate reports of tonnage of coal produced by them, or the earnings of employes in their employ, or who in any manner hinders or obstructs the Auditor of State in ascertaining facts bearing upon any case provided for in this act or who may refuse correctly to make out such reports as are required by this act, or as requested by the Auditor of State, or submit to its provisions, when liable therefor, or who shall fraudulently obtain benefits hereunder shall be fined for each offense the sum of not less than one hundred (\$100.00) dollars nor more than five hundred (\$500.00) dollars and imprisonment in the county jail for a period of not less than one month nor more than six months, or by both such fine and imprisonment.

"The proceeds of all fines shall be forwarded to the State Treasurer and by him credited to the insurance fund.

"Sec. 13. This act to be in full force and effect from and after the first day of October, nineteen hundred and ten, benefits to commence four months thereafter."

On January 25, 1911, an agreed statement of facts was filed in the district court for Lewis and Clark county, as follows:

"Come now the plaintiff and defendant in the above-entitled action, and present and submit to the above-entitled court the following agreed case, containing the facts upon which this controversy depends, as follows, to wit:

"1. That plaintiff is now, and at all times herein mentioned has been, the duly elected, qualified, and acting State Auditor of the state of Montana.

"2. That defendant is, and was at all times herein mentioned, a corporation organized and existing under and by virtue of the laws of the state of New Jersey, and is, and was at all times herein mentioned, and particularly during the month of October, 1910, engaged in the business of operating coal mines and coal washers at or near Red Lodge, in the state of Montana.

"3. That on the 20th day of November, 1910, the monthly wages for the month of October, 1910, of all workmen, laborers, and employes of defendant were paid by defendant.

"4. That during the month of October, 1910, defendant mined from its mines at or near Red Lodge, Montana, and either shipped or sold locally fifty-nine thousand six hundred and fifty-one (59,651) tons of coal.

"5. That the gross monthly earnings of all workmen, laborers and employes employed in and around the coal mines of the defendant, and in and around its coal washers in which coal is treated, except its office employes, superintendents, and general managers, for the month of October, 1910, was the sum of \$79,000.47.

"6. That under the provisions of chapter 67 of the Eleventh Session Laws of the state

of Montana, entitled "An act to create a state accident insurance and total permanent disability fund, for coal miners and employes at coal washers in the state of Montana, and providing for the maintenance and management of the same; extending and defining the duties of the State Auditor; and fixing penalties for the violation of the provisions of this act"—plaintiff demanded of the defendant one cent per ton on the tonnage of coal mined and either shipped or sold locally by defendant during the month of October, 1910, to wit, the sum of \$596.51, and demanded of the defendant one (1%) per cent. of the gross monthly earnings of all workmen, laborers, and employes employed in and around the coal mines of the defendant, and in and around its coal washers in which coal is treated, except its office employes, superintendent, and general managers, for the month of October, 1910, amounting to \$790, making a total of \$1,386.51; and that defendant has failed and refused to pay said amount, or any part thereof.

"7. That some of the employes of the defendant have protested against the deduction by said defendant of one (1%) per cent, or any other amount, from their gross monthly earnings, as provided by said chapter 67; and some of the employes of the defendant have consented to the deduction of one (1%) per cent. from their gross monthly earnings, under the provisions of said chapter 67.

"8. That if plaintiff is entitled to recover upon this case he will be entitled to interest on the amount of recovery from the 25th day of November, 1910.

"This controversy is submitted upon the foregoing agreed case, under the provisions of sections 7254, 7255, and 7256, Revised Codes of the state of Montana, for the purpose of determining the constitutionality of chapter 67 of the Eleventh Session Laws of the state of Montana, under the agreed state of facts here presented."

The district court adjudged that the plaintiff, as auditor, have and recover of the defendant the sum of \$1,386.51, with interest thereon from the 25th day of November, 1910, together with costs. From that judgment, the defendant has appealed.

On the part of the appellant it is contended:

(1) The act does not amount to an exercise of the police power, so called, because not preventive in its nature, and because it does not serve any of the necessary ends of police legislation.

(2) If the subject were one which could be handled under the police power, so called, the act is class legislation.

(3) The act operates to deprive those subject to its terms of their right to trial by jury, guaranteed to them by the federal and state Constitutions.

(4) The act operates to take property without due process of law, and violates the pro-

visions of the federal Constitution, as well as article 3, § 27, of the Constitution of the state of Montana.

(5) In reserving to the employé his right to an action at law, the act denies to the mine operator the equal protection of the laws.

(6) The provision for payment to an injured employé of his compensation in a lump sum defeats the purpose of the act itself, viewed as a police regulation.

(7) The act does not differentiate between a careful and a careless employer.

(8) The act lodges judicial power in the State Auditor.

We shall not endeavor to consider the points raised in the foregoing order, because it will be noted that many of them comprehend, incidentally, questions of law involved in others.

At the outset, it may be stated that the act, viewed as a whole, presents certain fundamental propositions, novel in this jurisdiction, which, although they have lately been the subject of serious consideration by courts and students of present day conditions, involving, as they do, grave questions of constitutional law, as well as of economics, are yet so comparatively new in conception that their supposed basic principles have not been recognized as sound by some tribunals and law writers, and may be said not to have been accepted in their entirety by any court. It will not suffice to say that because the theory or design of the lawmaking power, as evidenced by the act, is one which is not only new in principle, but revolutionary of certain preconceived and deeply rooted notions of lawyers, therefore the act is unconstitutional. Nevertheless, it is the duty of courts to jealously guard the constitutional rights of the citizen.

It is matter of common knowledge, among lawyers and laymen alike, that our present system of compensation for injury or death of an employé, caused by the actual or imputed negligence of his employer, has given rise to conditions which seem to demand an abrogation of that system. This demand is so widespread and insistent that we shall do well to inquire into the reasons therefor.

In this state, the affirmative defenses of contributory negligence and assumption of risk, including in the latter the negligence of a fellow servant, are still generally available to the employer. The result is that in many cases the maimed employé, and, in case of his death, his dependents, are obliged to bear the whole burden of misfortune. He or they may suffer the humiliation of becoming public charges, with the consequent additional expense to the taxpayer. The injury or death may have been the result of inevitable accident in the course of the employment, in which event the workman is the sole victim. Whatever may be the reason therefor, actions for damages for personal injury and death have increased enor-

mously in number in the past few years. It is notorious that but a small proportion of the moneys forced from the employer in these cases finds its way into the pockets of the plaintiff. The remainder is frittered away in payment of counsel fees, witness fees, court costs, and other necessary expenses of litigation. The records of this court disclose that our best and most high-minded lawyers have, as was their duty, advocated the cause of the plaintiff in many of these cases; nevertheless, the fact remains that the solicitor of personal injury cases is a hateful reality, and much unnecessary and ill-advised litigation results from his activities. These cases are prolific of perjury and subornation of false swearing. They also add a great weight to the burden of the taxpayer. Some plaintiffs have lost meritorious causes, and many defendants, especially public service corporations, have been mulcted in heavy damages in actions where the great preponderance of the evidence was in their favor. Jurors in some communities are, unconsciously perhaps, prejudiced against corporations, as such. In practical application, our present system does not afford the equal protection of the laws to certain defendants. It is impossible not to recognize the fact that the defendant's ability to pay is often used as a basis for calculating the compensation due the plaintiff. Personal injury cases breed class hatred, as between capital and labor, in its most virulent form.

[1] 1. Can this statute be upheld as a proper exercise of the police power of the state? We shall first concern ourselves with the police power generally, as applied to the act. It is contended on the part of the appellant that the measure is not designed to prevent the evils growing out of and incident to the present system of actions for fault, because it does not abolish such actions. We shall discuss this question later, but here it may be suggested that if the act has a reasonable tendency to accomplish the desired result it ought to be upheld, so far as that point is concerned.

We think it cannot be doubted that many employés and dependents of employés who actually have a good cause of action under the common-law and statutory procedure now in force will voluntarily resort to the provisions of the act to save the expense and delay necessarily incident to litigation in the courts. Be that as it may, the members of the Legislature by whom the act was passed were evidently of opinion that such a result would or might ensue, and, as the question was one essentially for their determination, the courts ought not to declare otherwise, unless they are able to say that it has no such tendency.

Let us first disabuse our minds of the notion that a claim for indemnity under this act is either a suit, an action, or a cause of action. It is neither. The act, as distinctly

indicated by its title, provides for a state accident insurance and total permanent disability fund for coal miners. By its terms, a method of compensation is provided for injury or death of a coal miner, regardless of the manner in which the injury was inflicted or the death caused. It ignores, and was intended to ignore, any question of fault on the part of either employer or employé. It provides an insurance for persons who have no cause of action at law, and extends its benefits also to those who have a cause of action, if they so elect. But we may, for the moment, disregard the latter consideration, and treat the act as simply providing indemnity for those who could not successfully prosecute an action in the courts. So regarded, it is essentially extrajudicial in character.

[2] The police power of the state is not to be rigidly defined, or confined to set cases. Mr. Alfred Russell, in his work, *Police Powers of the State* (pages 25 and 26), says: "What the police power is, and what its extent and limitations are, can only be ascertained by the gradual processes of judicial inclusion and exclusion as the cases presented for decision require." Professor Ernst Freund says: "From the mass of decisions, in which the nature of the power has been discussed, and its application either conceded or denied, it is possible to evolve at least two main attributes or characteristics which differentiate the police power: It aims directly to secure and promote the public welfare, and it does so by restraint and compulsion." Freund, *Police Power*, § 3, p. 3. Mr. Justice Holmes, speaking for the Supreme Court of the United States, in *Noble State Bank v. Haskell*, 219 U. S. 104, 31 Sup. Ct. 186, 55 L. Ed. 112, 32 L. R. A. (N. S.) 1062, said: "If we have a case within the reasonable exercise of the police power, no more need be said. In a general way, the police power extends to all the great public needs. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and predominant opinion to be greatly and immediately necessary to the public welfare."

For the purposes of this case, let us turn from its humanitarian features, and suppose, for the moment, that the sole object of the act is to prevent persons injured in coal mines, and their dependents, from becoming public charges. Viewed in this light, the private benefits to be derived from the law may be disregarded, and its primary object held to be one of public concern solely. Moreover, it cannot be doubted, we think, that the general welfare of the state and its standing among its sister states, as well as among persons generally, necessarily including those who have money to invest, and those who seek new homes and new locations, depends in a great measure upon its industries and the class and welfare of its work-

ers. Any measure which tends to minimize indigency of necessity raises the general standard of the people; any statute which has a tendency to reduce the present enormous expense of operating our courts would seem to be, presumptively, a proper exercise of the police power. The Supreme Court of Washington, in *State of Washington ex rel. Davis-Smith Co. v. Clausen, State Auditor*, 117 Pac. 1101, while construing and sustaining a compulsory workman's compensation law (Laws 1911, c. 74), said: "The inquiry should be: Is there no reasonable ground to believe that the public safety, health, and general welfare is promoted thereby? It is unnecessary to discuss the origin, nature, or extent of the police power. It is sufficient to say that, by means of it, the Legislature exercises a supervision over matters affecting the common weal, and enforces the observance by each individual member of society of duties which he owes to others and the community at large. The possession and enjoyment of all rights are subject to this power. Under it the state 'may prescribe regulations promoting the health, peace, morals, education, and good order of the people, and legislate so as to increase the industries of the state, develop its resources, and add to its welfare and prosperity.' In fine, when reduced to its ultimate and final analysis, the police power is the power to govern." The court then cited many cases in which statutes creating liability without fault have been upheld. If we are correct in our conclusions, however, these cases have no great pertinency to this branch of the inquiry. They all relate to the protection of private rights. The statute of Washington in terms abolishes all civil actions and civil causes of action for personal injuries incurred in certain extrahazardous employments, and the jurisdiction of the courts therein, except as in the act provided. And, in so far as the case just cited holds that the act was a proper exercise of the police power, it is a direct authority in this case, and, we think, reaches a correct conclusion.

Mr. Robert J. Cary, of Chicago, in his brief on the Power of Congress in Respect of Industrial Insurance, at page 51 says: "The body of law involved in the law of torts and employer's liability statutes pertains entirely to the redress of private wrongs. In such instance, liability results in the payment of damages to the employé intended to be commensurate with, and to reimburse him for, the injury suffered. Such law has for its sole object and end the regulating of private rights. \* \* \* The obligations, on the other hand, of industrial insurance and workmen's compensation accrue from contingencies not dependent upon or within the control of the parties, and thus have no relation whatever to the conduct of the parties; hence these obligations are not based upon wrongs. It follows, then, that they must pertain to

the subject of government regulations, and are in the nature of economic provisions, taking the form of indirect taxation levied to regulate occupations, for on what other basis would the government be justified in writing into the labor contract, against the will of the parties, an insurance policy? Were this not so, industrial insurance or workmen's compensation would be, from the standpoint of both the employé and the employer, without basis of justice or equity; for the theory of such laws is that compensation is not to be commensurate with injury, but is to be based upon wages, thus substituting for the former obligations based upon tort, which offered damages commensurate with injury, a purely arbitrary sum. Such a scheme can have no relation to the adjustment of private wrongs. If it be justifiable, it must be on the sociological theory of the right of the state to levy a tax for the purpose of protecting, from an economic standpoint, the community as a whole."

The Supreme Court of the United States, in the case of *Lawton v. Steele*, 152 U. S. 133, 14 Sup. Ct. 499, 38 L. Ed. 385, used this language: "The extent and limits of what is known as the police power have been a fruitful source of discussion in the appellate courts of nearly every state in the Union. It is universally conceded to include everything essential to the public safety, health, and morals, and to justify the destruction or abatement by summary proceedings, of whatever may be regarded as a public nuisance. Under this power, it has been held that the state may order the destruction of a house falling to decay, or otherwise endangering the lives of passers-by; the demolition of such as are in the path of a conflagration; the slaughter of diseased cattle; the destruction of decayed or unwholesome food; the prohibition of wooden buildings in cities; the regulation of railways and other means of public conveyance, and of interments in burial grounds; the restriction of objectionable trades to certain localities; the compulsory vaccination of children; the confinement of the insane, or those affected with contagious diseases; the restraint of vagrants, beggars, and habitual drunkards; the suppression of obscene publications and houses of ill fame; and the prohibition of gambling houses and places where intoxicating liquors are sold. Beyond this, however, the state may interfere wherever the public interests demand it, and in this particular a large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." And, again, in *Holden v. Hardy*, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780, the court said: "This court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the states methods of procedure, which at the time the Constitution

was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while, upon the other hand, certain classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection. \* \* \* While the cardinal principles of justice are immutable, the methods by which justice is administered are subject to constant fluctuations, and the Constitution of the United States, which is necessarily and to a large extent inflexible and exceedingly difficult of amendment, should not be so construed as to deprive the states of the power to so amend their laws as to make them conform to the wishes of the citizens as they may deem best for the public welfare, without bringing them into conflict with the supreme law of the land."

In our judgment, the general scheme of this act is well within the police power of the state. If the people, represented by their Legislature, are of opinion that the public interests demand that industrial insurance ought to be substituted, in whole or in part, for actions for wrongs, this court certainly cannot say that they are in error.

[3, 4] 2. But it is contended that the act is an example of class legislation, and several reasons are urged in support of this contention. The first is that it singles out one particularly hazardous employment, and subjects it to burdens not placed upon other extrahazardous employments within the state. The Legislature has declared, in effect, that coal mining is a dangerous and extrahazardous business, and we think it is generally known to be so. The Court of Appeals of New York, in *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431, disposed of this question, correctly we think, as follows: "The appellant contends that the classification in this statute of a limited number of employments as dangerous is fanciful or arbitrary, and is therefore repugnant to that part of the fourteenth amendment to the federal Constitution which guarantees to all our citizens the equal protection of the laws. Classification, for purposes of taxation, or of regulation under the police power, is a legislative function, with which the courts have no right to interfere, unless it is so clearly arbitrary or unreasonable as to invade some constitutional right. A state may classify persons and objects for the purpose of legislation, provided the classification is based on proper and justifiable distinctions, and for a purpose within the legislative power. There can be no doubt, we think, that all of the occupations enumerated in the statute are more or less inherently dangerous to a degree which justifies such legislative regulation as is properly within the scope of the

police power. \* \* \* The mandate of the federal Constitution is complied with if all who are in a particular class are treated alike; and that, we think, is the effect of this classification." See, also, *Orient Insurance Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; *Magoun v. Illinois T. & S. Bank*, 170 U. S. 283, 18 Sup. Ct. 594, 42 L. Ed. 1037.

In the case of *Quong Wing v. Kirkendall*, 39 Mont. 64, 101 Pac. 250, this court said: "The Legislature is presumed to have exercised a reasonable discretion in making the classification, and the courts ought not to interfere with the action of this co-ordinate branch of the government, until the (party) upon whom rests the burden of proof clearly shows that he is denied the equal protection of the laws. Every intendment is in favor of the validity of the legislative action. In other words, the classification is presumed to be reasonable."

The fact that coal mining is alone selected from numerous other dangerous employments is not at all significant. Legislation of this nature is in its infancy, and if it be found adequate to correct the evils growing out of the present system it may gradually be extended to apply to all extrahazardous employments. So long as all persons operating coal mines are treated alike, no one of them has cause of complaint. The same may be said of coal miners. See *Soon Hing v. Crowley*, 113 U. S. 703, 5 Sup. Ct. 730, 28 L. Ed. 1145, and *Missouri Pac. Ry. Co. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107.

3. Before proceeding to discuss the other questions involved, it may be well to fix the status of the parties to whom the act applies, to wit, operators of and employes in coal mines, as indicated by the act itself. We hold to the following propositions:

[6] (1) That the right to exercise police authority as such over the operator arises, in part at least, from the fact that he is engaged in an extrahazardous business, which may, by reason of the liability of his employes to injury therein, resulting in death or partial or permanent disability, cause them to become public charges, thus lowering the standard of citizenship and increasing the general burden of taxation; and from the further fact that our present system of common-law and statutory actions greatly increases the expense of maintaining our courts, causes a vast economic waste, and tends to create breaches and dissensions between employer and employe which would otherwise not exist. *St. Louis Con. Coal Co. v. Illinois*, 185 U. S. 203, 22 Sup. Ct. 616, 46 L. Ed. 872. The latter consideration is one pertaining to the peace, order, and morals of the community, which are universally recognized as subject to control and regulation by the state. *State v. Penny*, 42 Mont. 118, 111 Pac. 727.

[6] (2) The exercise of the police power

is properly and necessarily supplemented by the taxing power of the commonwealth, in order to carry the general plan into practical effect. Or, perhaps, it is more accurate to say that the power to tax for the purposes of the act is necessarily included in the police power. It will readily be seen that, unless the power to impose taxes upon the extrahazardous industry can be invoked to create an insurance fund, the act is nugatory.

[7] Beyond doubt, there can be no lawful tax which is not laid for a public purpose. What is a public purpose? Having determined that the general design of the act may be upheld as a proper exercise of the police power—that is, as being a scheme which may result to the public welfare—we are justified, perhaps, in accepting as a corollary the conclusion that the tax imposed is for a public purpose. Again, if the act abolished actions and causes of action for personal injuries and death, the tax might be justified on the theory that the state had given a quid pro quo to the employer. But such is not the situation with which we have to deal. As a matter of fact, the tax is imposed for the purpose of creating a fund to indemnify certain individuals and classes of individuals, and actions at law are not abolished. It is imposed on an extrahazardous employment for the presumed reason that such employment is pregnant with possibility of injury to the employe. The business of coal mining is not unlawful or immoral; on the contrary, it is lawful and necessary. But it is extremely dangerous and therefore subject to regulation. The tax cannot be likened to a special assessment for local improvements, for the reason that such an assessment is primarily a lien upon the property benefited, and also because the supposed justification for such assessment rests in the idea that the owner receives a direct, substantial return for such tax in the enhanced value of his property. In our judgment, the better reasoning leads to the conclusion that this impost is an employment tax upon the occupations of operating and working coal mines. It is not at all necessary to justify the imposition of such a tax that the business itself should particularly require police supervision, although, as we have seen, extrahazardous enterprises may demand restraint and regulation. Such a tax may be imposed, either for regulation or revenue, or for both. Property and occupation are alike legitimate objects of taxation. See section 1, art. 12, of the state Constitution.

The Supreme Court of Wisconsin, in *Brodhead v. City of Milwaukee*, 19 Wis. 658, 88 Am. Dec. 711, held that a tax imposed for the payment of bounties to volunteers who might enlist in the service of the United States during the Civil War was for a public purpose. Mr. Chief Justice Dixon said: "The objects for which money is raised by

taxation must be public, and such as conserve the common interest and well-being of the community required to contribute. To justify the court in arresting the proceedings and declaring the tax void, the absence of all possible public interest in the purposes for which the funds are raised must be clear and palpable—so clear and palpable as to be perceptible to every mind at the first blush. In addition to these, I understand that it is not denied that claims founded in equity and justice in the largest sense of those terms, or in gratitude or charity, will support a tax. Such is the language of the authorities. I think the consideration of gratitude alone to the soldier for his services \* \* \* will sustain a tax for bounty money to be paid him or his family. \* \* \* It is a matter which ultimately concerns the public welfare, and that nation will live longest in fact, as well as in history, and be most prosperous, whose people are most sure and prompt in the reasonable and proper acknowledgment of such obligations."

The Supreme Court of Connecticut, speaking to the same subject, in *Booth v. Town of Woodbury*, 32 Conn. 118, said: "In the first place, if it be conceded that it is not competent for the legislative power to make a gift of the common property, or of a sum of money to be raised by taxation, where no possible public benefit, direct or indirect, can be derived therefrom, such exercise of the legislative power must be of an extraordinary character to justify the interference of the judiciary; and this is not that case. Second, if there be the least possibility that making the gift will be promotive in any degree of the public welfare, it becomes a question of policy, and not of natural justice, and the determination of the Legislature is conclusive. Such gifts to unfortunate classes of society, as the indigent blind, the deaf and dumb, or insane, or grants to particular colleges or schools, or grants of pensions, swords, or other mementos for past services, involving the general good indirectly and in slight degree, are frequently made and never questioned."

Judge Cooley, in his *Constitutional Limitations* (7th Ed. p. 698), says this: "Not only are certain expenditures absolutely essential to the continued existence of the government and the performance of its ordinary functions, but, as a matter of policy, it may sometimes be proper and wise to assume other burdens which rest entirely on considerations of honor, gratitude, or charity. There will therefore be necessary expenditures, and expenditures which rest upon considerations of policy only, and, in regard to the one as much as to the other, the decision of that department to which alone questions of state policy are addressed must be accepted as conclusive."

No one has ever thought to question the power of the Legislature to erect memorials

to certain distinguished citizens of Montana who have passed away. The erection of these memorials was actuated entirely by sentiment, but who shall deny that their contemplation has a tendency to raise, or at least to maintain, our general standard of citizenship?

The fact that the act operates to the direct benefit of the injured employé or his dependents does not of itself characterize the measure as one for private purposes only. We think the considerations to which we have heretofore adverted demonstrate that the provisions of the act disclose the fact that its enactment may have been so far a matter of public concern, involving the general good and welfare, that the Legislature, in carrying forward the policy of the state, directed by a clearly defined, dominant public opinion, was warranted in declaring, by implication, that the purpose for which the tax is imposed is a public one. This being so, the courts have no power to declare otherwise.

[8-10] 4. Is the right to trial by jury denied? Article 7 of the amendments to the Constitution of the United States does not guarantee a trial by jury in a civil action in a state court. *Walker v. Sauvinet*, 92 U. S. 90, 23 L. Ed. 678. Section 23 of article 3 of the state Constitution provides that the right of trial by jury shall be secured to all, and remain inviolate. This provision has been construed by this court as applying only to those cases wherein a right of trial by jury existed at the date of the adoption of the Constitution. *Montana Ore Pur. Co. v. Boston & Mont. Con. C. & S. Min. Co.*, 27 Mont. 288, 70 Pac. 1114. Section 23 of article 3 of the Constitution, supra, refers in terms to "civil cases" and "criminal cases." We shall not concern ourselves with the origin and growth of actions for fault. Suffice it to say that they were known to the common law, and are popularly referred to as common-law actions. It was a rule of the common law, speaking generally, that for the death of one person caused by the wrongful act of another, there was not any remedy by civil action. Because of the harshness of this rule, the English Parliament, in 1846, enacted a statute known as "Lord Campbell's Act," and this act is the model after which a like statute has been enacted in nearly every American state, including Montana. See *Dillon v. Great Northern Ry. Co.*, 38 Mont. 485, 100 Pac. 960. The Legislature of 1903 passed an act rendering railroad companies liable for injuries to employes caused by the negligence of certain other employes (see *Laws of 1903*, p. 157), and the Legislature of 1905 further enlarged the common-law liability of persons or corporations operating railroads (see section 5152, *Rev. Codes*). Many other instances might be cited from our own statutes. There can be no doubt of the power of the Legislature to abolish these provisions by re-

pealing the statutes. Indeed, all of our actions for wrongs may be regarded as in some degree statutory. The Court of Appeals of New York, in the *Ives Case*, supra, held that the Legislature had power to abolish the fellow servant rule and the law of contributory negligence, as applied to injuries to servants, and also to a limited extent to regulate the application of the doctrine of assumed risk. The Legislature may alter or repeal the common law. *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323. Many rules of the common law are abolished by our Code; and section 8060, Revised Codes, expressly declares that in this state there is no common law in any case where the law is declared by the Code or the statute. We find nothing in the Constitution to indicate that it is incumbent upon the Legislature to preserve the present system of actions for negligence so as to cover future happenings. And see *Martin v. P. & L. E. R. Co.*, 203 U. S. 214, 27 Sup. Ct. 100, 51 L. Ed. 184; *A. T. & S. F. Ry. Co. v. Sowers*, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695; *Sawyer v. E. P. & N. E. Ry. Co.*, 49 Tex. Civ. App. 106, 108 S. W. 718.

The right of trial by jury, which is secured and protected by the Constitution, refers to the trial of cases, actions, or suits at law (see *Koppikus v. Capitol Commissioners*, 16 Cal. 249), and has no reference to claims against an indemnity fund, such as are provided for by this act, or demands by the State Auditor for occupation taxes. There is not anything in the Constitution guaranteeing a right of trial by jury in case of demand for a license or occupation tax. The adjustment of claims under the act is an administrative function and not a judicial proceeding, and it is only in certain cases falling under the latter designation that trial by jury is guaranteed by the Constitution. "Due process of law" does not necessarily require a jury trial. *Montana Co. v. St. Louis Min. Co.*, 152 U. S. 160, 14 Sup. Ct. 506, 38 L. Ed. 398.

[11, 12] 5. This brings us to the question, Does the system and machinery provided in the act constitute due process of law? The phrase "due process of law" does not necessarily mean by a judicial proceeding. In the case of *Den v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L. Ed. 372, the Supreme Court of the United States decided that a sale of land by a marshal of the United States on a distress warrant was due process of law. That case contains a very interesting and instructive discussion of the subject. But we need go no further than to inquire whether the collection of an occupation tax in the summary manner provided by the act affords due process of law. This question is set at rest, as to taxes generally, by the case of *Kelly v. City of Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658, wherein the court said: "Taxes have not, as a general rule, in this country since its independ-

ence, nor in England before that time, been collected by regular judicial proceedings. The necessities of government, the nature of the duty to be performed, and the customary usages of the people have established a different procedure, which, in regard to that matter, is, and always has been, due process of law." See, also, *Palmer v. McMahon*, 133 U. S. 660, 10 Sup. Ct. 324, 33 L. Ed. 772.

The case of *McMillen v. Anderson*, 95 U. S. 37, 24 L. Ed. 835, was an action to enjoin the collection of a license tax. The court, in affirming a judgment of the Supreme Court of Louisiana, dissolving a preliminary injunction, said: "The mode of" assessing taxes in the states by the federal government, and by all governments, is necessarily summary, that it may be speedy and effectual. By summary is not meant arbitrary, or unequal, or illegal. It must, under our Constitution, be lawfully done. \* \* \* It seems to be supposed that it is essential to the validity of this tax that the party charged should have been present, or had an opportunity to be present, in some tribunal when he was assessed. But this is not, and never has been, considered necessary to the validity of a tax." The opinion then proceeds to show that under the laws of the state of Louisiana the person assessed has a remedy by application to the courts, if he be wrongfully taxed. Our statute (section 2741, Revised Codes), by necessary implication, provides a remedy by injunction in cases where the tax demanded is illegal or not authorized by law; and section 2742, Revised Codes, providing for payment of "taxes, licenses and other demands for public revenue" under protest, the amount to be later recovered in an action at law, is, we think, applicable to unauthorized demands by the State Auditor. In the case of *Chauvin v. Vallon*, 8 Mont. 459, 20 Pac. 658, 3 L. R. A. 194, this court, speaking through Chief Justice McConnell delivered a very exhaustive opinion concerning "due process of law." The views therein expressed accord with those of other courts on the subject, and seem determinative of the question we are considering. See, also, *McMillan v. City of Butte*, 30 Mont. 220, 76 Pac. 203.

[13] 6. The contention that the provision for payment to an injured employé of his compensation in a lump sum defeats the purpose of the act, viewed as a police regulation, is untenable. It may be that in some instances the employé will dissipate and waste the money so paid, and will thereby render himself indigent; but there is not any presumption that he will do so, and in many instances, we think, such will not be the case. Many employés will undoubtedly conserve the amount received, and use the same for future maintenance and support. We are aware that there is considerable criticism of proposed legislation containing provisions similar to the one we have in mind, but the



matter is not for judicial decision. The expediency of the measure in this regard was for legislative determination exclusively.

[14] 7. Again, it is argued the act does not differentiate between a careful and a careless employer. We think this argument is fully answered by the decision of the Supreme Court of the United States, in *Noble State Bank v. Haskell*, supra. Moreover, that case is authority for several of the conclusions reached in this case.

[15] 8. But, it is said, the act lodges judicial power in the State Auditor. What has heretofore been said applies in large measure to this contention. Indeed, many of the questions involved in the case are so interwoven that it is difficult to determine where one ends and another begins. Let it be noted, however, that the act is almost, if not completely, automatic in practical working. The amounts to be paid by the operator, based as they are upon the tonnage of coal mined and shipped, or sold locally, or mined and ready for shipment or sale, are easy of computation, as is also the amount to be deducted from the wages of the workmen, to wit, 1 per cent. thereof. The sum to be paid in case of death is fixed and certain, as are also the person or persons to whom it shall be paid. In case of injury, the amount of compensation is also fixed, dependent upon the character and extent of the injury. The Auditor has power to formulate rules and regulations, not inconsistent with the provisions of the act. In case of death of a workman, he may require satisfactory evidence of such death, and all applications for monthly payments under the act must be accompanied by a certificate from the county physician, and be attested before a notary public. We think these provisions insure, *prima facie*, protection to the fund in the hands of the Auditor. It is also provided that if any person, company, or corporation who is a contributor to the fund shall believe that an improper or fraudulent claim has been made thereon, the Secretary of the State Board of Health must investigate the matter, and his determination shall be conclusive.

It may be, considering the novel character of this legislation, that the Auditor will encounter some slight obstacles in performing his duties. The difficulties which he may thus meet, however, will relate more to the details of administration than to any fundamental defect in the act itself, and, we have no doubt, may be to a great extent minimized by the promulgation of reasonable rules and regulations for the conduct of his office, as well as for the guidance of contributors to and claimants against the fund. After all, such considerations are pre-eminently for the legislative branch of the government to deal with. Possibly time and experience will demonstrate that amendments to or changes in the act will be advisable; but, as was well said by the Supreme Court of Washing-

ton, in the *Clausen Case*, supra: "The courts cannot do otherwise than put it to the test of practice." If we are correct in our former conclusions that the act affords due process of law, and the right of trial by jury has not been violated, then it seems clear that any controversy which may arise concerning the mere administrative duty of collecting and distributing the fund may be decided in such summary manner as the state shall prescribe. To again quote from Mr. Cary's able brief (page 134): "The government may prescribe summary methods of adjudication through its administrative officers whose decisions shall be conclusive; or it may provide, as was suggested in *Den v. Hoboken Land & Improvement Co.*, that the controversy shall take a judicial form, and be determined by such remedial procedure as the government shall create for this purpose." Regarded as an act to provide a fund for the benefit of certain employes and their dependents, who would otherwise be remediless, we have no doubt that it is within the power of the Legislative Assembly to intrust the administration of the fund to such official as it may see fit.

The fact that one who has a cause of action at common law may elect to take under the act, and the suggestion that as to him the Auditor may be called upon to exercise judicial power, has no persuasive force when we consider that such election is altogether voluntary, and he may resort to the courts if he so desires. If the tax provided for in the act can legally be exacted from the employer, and, as is the case, the acceptance of its benefits by the claimant *ipso facto* operates to release the employer from liability, it is difficult to see how the latter has any further concern in the matter of distribution of the fund than to be assured, as the act provides he may be, that it is not paid out on improper or fraudulent claims. If the summary method of administration provided may not be resorted to, then one of the paramount reasons for this class of legislation must be entirely eliminated from consideration. It seems to us that the opinion of the Supreme Court of the United States, in *Den v. Hoboken Land & Improvement Co.*, supra, effectually disposes of this question, as well as of some others which we have considered. As this opinion is already too long, however, we shall content ourselves with a single quotation therefrom: "Though, generally, both public and private wrongs are redressed through judicial action, there are more summary extrajudicial remedies for both."

[16] 9. Contention No. 5, supra, has been reserved for final consideration, for the reason that, while the question raised thereby is by no means so fundamental in character as many of those already disposed of, it is nevertheless decisive of the case. It is therein contended that in reserving to the employe his right to an action at law

the act denies to the mine operator the equal protection of the laws. We have decided that the fact that actions at law are not abolished by the act is not, of itself, a sufficient reason for declaring the statute unconstitutional. We do not believe "that for the purpose of determining the validity of the tax it is necessary to find an immediate specific benefit to the individual taxed," as is maintained by some writers on the subject. We think we have already shown that if the act can be justified at all it must be upon a much broader principle than that above indicated. The duty to make payments as provided in section 2 is absolute and unconditional. It can be enforced by appropriate action. But, after full compliance with the terms of the act, the employer is not exonerated from liability. He may still be sued and compelled to pay damages in a proper case. No provision is made for reimbursement in whole or in part. The injured employes of one operator may all resort to the indemnity fund, while those of another may elect to appeal to the courts. The result is that the employer against whom an action is successfully prosecuted is compelled to pay twice. He has fully paid his assessments under the act, and is also obliged to pay damages. This fact is so palpable as to be needless of discussion. The act in this regard is not only inequitable and unjust, but clearly illegal and void, as not affording to such employer the equal protection of the laws. The Legislature of the state of Washington guarded against this contingency by abolishing all actions for negligence. Chapter 74, Session Laws, Washington, 1911. The General Assembly of Maryland, in an act somewhat similar to ours (see Pub. Loc. Laws of Maryland 1910, c. 153, § 10), provided: "If any suit or action be brought against any operator for or in respect of any injury or disability received by an employe while in the discharge of his duty or for death resulting therefrom \* \* \* and said operator shall appear and defend such suit or action and a judgment shall be rendered against him, he shall, after satisfying said judgment \* \* \* be entitled thereafter to deduct from the payments required to be made by him \* \* \* a sum equal to the amount of said judgment and costs."

The manner in which the equal protection of the laws shall be afforded to the operator is, of course, for the legislative body to determine; but some method must assuredly be provided to protect him from double payments. The act in its present form is, in this regard, so repugnant to all ideas of equity and equality that it must, we think, appeal to every right-thinking person, on the most cursory examination, as unjust. It was to guard against such legislation as this, as we apprehend, that the framers of all American

Constitutions guaranteed to the citizen the equal protection of the laws.

The judgment is reversed, and the cause is remanded, with directions to enter a judgment for the defendant.

Reversed and remanded.

BRANTLY, C. J., concurs.

HOLLOWAY, J. I concur in the result but prefer not to express an opinion at this time upon some of the questions discussed, as I do not deem a determination of them necessary to a decision of the case presented.

#### STATE v. ROBERTS.

(Supreme Court of Montana. Nov. 23, 1911.)

##### 1. HOMICIDE (§§ 7, 13\*)—MURDER—MOTIVE—MALICE.

It is not essential to a conviction of murder that a motive for the crime be shown. Malice might be inferred from want of considerable provocation or from circumstances showing an abandoned and malignant heart.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 12, 15, 16; Dec. Dig. §§ 7, 13.\*]

##### 2. WITNESSES (§ 268\*)—CROSS-EXAMINATION—SCOPE.

Where one accused of murder claimed that information was filed against his witness as an accessory not in good faith, but to induce witness to testify against accused, the state could show on cross-examination of a deputy county attorney that the information was filed because the deputy believed that witness was guilty.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 268.\*]

##### 3. CRIMINAL LAW (§ 1171\*)—MISCONDUCT OF PROSECUTING ATTORNEY—ARGUMENT TO JURY—REVERSIBLE ERROR.

It was not reversible error for the county attorney in his argument to refer to a reluctant witness for the state as one who was informed against as an accessory to hold him as a witness, and to see that he would not compound the felony, and to state that accused's counsel might lay stress on that fact, and might argue that the state was holding a club over witness' head, etc., in the absence of any showing that accused was prejudiced by the argument, and in the absence of a request for an instruction to disregard the remarks.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1171.\*]

Appeal from District Court, Silver Bow County; Michael Donlan, Judge.

W. A. Roberts was convicted of murder in the second degree, and he appeals from the judgment of conviction, and from an order denying a new trial. Affirmed.

Breen & Jones, for appellant. Albert J. Galen, Atty. Gen., and W. S. Towner, Asst. Atty. Gen., for the State.

SMITH, J. Defendant was convicted in Silver Bow county of the crime of murder in the second degree, his punishment was fixed by the jury, and judgment was entered

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on the verdict. He appeals from the judgment and also from an order denying his motion for a new trial.

Four principal contentions are urged upon the court:

[1] 1. That the evidence is insufficient to justify the verdict. We have carefully read the testimony and other evidence in the record. It was all circumstantial, but we are convinced was amply sufficient to warrant the jury in determining that the defendant was guilty of murder beyond a reasonable doubt. *State v. Byrd*, 41 Mont. 605, 111 Pac. 407. The evidence justifies the conclusion, we think, that Roberts shot and killed one Verholz, while he, Roberts, was on what is commonly called a "drunk" in Butte on the night of November 5-6, 1910. It was not indispensable to find a motive for the crime. *State v. Lucey*, 24 Mont. 295, 61 Pac. 994; *State v. Vanella*, 40 Mont. 326, 106 Pac. 364; *State v. Sultor*, 43 Mont. 31, 114 Pac. 112. Malice might be inferred from the fact that no considerable provocation appeared, or that the circumstances attending the killing showed an abandoned and malignant heart. See section 8291, Rev. Codes.

[2] 2. At the time of the shooting, Roberts was accompanied by one Scott. The latter was placed on the witness stand by the state, and the record of his testimony appears to disclose that he was an unwilling and most unsatisfactory witness. The information shows that, when it was prepared in the office of the county attorney, the names of both Roberts and Scott were included therein; but, before it was filed, the name of Scott had been stricken out. The record also discloses that, after the shooting, Scott was held in \$500 bail as a witness, which was furnished. An information was then filed against him charging him with being "an accessory after the fact of murder." He was again arrested and confined under this information, but was released in habeas corpus proceedings. Before he was called to testify, this information was dismissed. Upon demand of his personal counsel that he be assured of immunity from prosecution in case he testified, the county attorney informed him that, if he told the truth "and came through with the same story he told before," no further information would be filed against him. As near as we can gather from the record, the defendant assumed the position that the proceedings against Scott were not instituted in good faith or founded in a bona fide belief in his guilt, but rather to get him in a frame of mind to testify against Roberts, and that, when the latter object was attained, he was promised immunity in case he testified in a manner satisfactory to the county attorney. In furtherance of this notion the defendant called L. P. Donovan, Esq., chief deputy county attorney of Silver Bow county, and by him identified the information on which Roberts was being tried, the information charging

Scott with being an "accessory after the fact of murder," an application for a writ of habeas corpus, a writ of habeas corpus, and the return thereto. The latter information charged specifically that Roberts murdered Verholz. These documents were all admitted in evidence over the state's objection, and are all copied at length into the record to the great and entirely unjustifiable expense of Silver Bow county. The following proceedings then took place, viz.: "Donovan: I think I filed this information charging Scott with the crime of accessory after the fact to murder. Q. (by the county attorney): State why that information was filed." Over objection by the defendant, Donovan testified that he filed the information "because I received information that he was with Roberts on the night of the killing or shooting of Verholz. Later he was committed to the witness department, furnished bonds, and was released. About a day or two before the filing of the information charging him as an accessory, I received information to the effect that while in a saloon he stated he was a friend of Roberts, and was not going to see Roberts get the worst of it, and he would be outside of the state of Montana when the trial came up, and, believing that made him an accessory after the fact of murder—an attempt to conceal the crime of murder—I filed the information. I may say that I filed it for the double purpose, that he was in fact concealing a crime and I believed that he was in fact guilty of concealing a crime. I believed in good faith that he was guilty of the crime alleged in the information—trying to conceal a crime. I examined some of the witnesses in the case against Scott." It is contended that in allowing Donovan to express his belief that Scott was guilty of being an accessory to a murder the court committed error. In placing Donovan on the stand, the evident purpose was to draw from his narrative of the proceedings against Scott the inference that they were not taken in good faith. The state undoubtedly had a right to dispel this inference by showing, if it could, a well-founded ground for the proceedings. Defendant's counsel evidently recognized this when he, at one time, withdrew his objection to the question: "State why that information was filed." The county attorney could act upon the statements of witnesses; and we think he was justified in proceeding only when he had reasonable grounds for believing that a crime had been committed by Scott. When the defendant offered the information in evidence, he himself got before the jury the county attorney's sworn statement that he (Roberts) had murdered Verholz. We fail to see how he was prejudiced by Donovan's opinion that Scott was an accessory after the fact.

3. It is contended that the court erred in giving to the jury instructions relating to murder in the first and second degrees. This

contention is disposed of in the discussion of No. 1 above.

[3] 4. During the argument to the jury the county attorney made this statement: "You have the witness Ben Scott, the witness whom the state had so much difficulty in keeping here to testify, the witness who threatened to conceal testimony, and on that threat was informed against to hold him here and see that he would not compound a felony. Mr. Breen may lay considerable stress on this fact. He may argue that we were holding a club over his head." The statement, standing alone, shows no prejudicial error. We do not know what went before or came after it in argument. It is not entirely clear whether it is a statement of fact or simply a surmise as to what Mr. Breen might thereafter argue. At any rate, Scott was the state's witness, and the burden was on the defendant to show that he was prejudiced by the remark of the county attorney. This he has not done. There is testimony in the record tending to show that the county attorney had information that Scott had threatened to leave the state, and that proceedings were instituted against him in order to insure his presence at the trial, as well as to punish him for having participated in the crime. No request was made to the court to instruct the jury to disregard the remark. We do not think the ruling, even if regarded as erroneous, should work a new trial of a case otherwise properly and carefully tried. It was a small matter.

The judgment and order are affirmed.  
Affirmed.

BRANTLY, C. J., and HOLLOWAY, J.,  
concur.

# STEWART v. STONE & WEBSTER ENGINEERING CORPORATION et al.

(Supreme Court of Montana. Nov. 20, 1911.)

## 1. MASTER AND SERVANT (§ 270\*)—INJURY TO SERVANT—EVIDENCE—ADMISSIBILITY.

Where, in an action for injuries to a servant owing to negligence of the master in failing to provide a reasonably safe working place, evidence that the superintendent shortly before the accident had a conversation with another employé, in which he was informed that the place at which plaintiff was about to be put to work was dangerous, was admissible to show knowledge of the danger before plaintiff was put to work, though plaintiff was not present at such conversation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 923; Dec. Dig. § 270.\*]

## 2. MASTER AND SERVANT (§ 265\*)—INJURY TO SERVANT—EVIDENCE.

A servant suing for injuries sustained through the negligence of the master in failing to provide a reasonably safe place in which to work must show that the place of employment was dangerous and that the master knew of the

danger, or in the exercise of ordinary care ought to have known of it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 882, 888; Dec. Dig. § 265.\*]

## 3. MASTER AND SERVANT (§ 270\*)—INJURY TO SERVANT—EVIDENCE—ADMISSIBILITY.

In an action for injuries to a servant by a skip used in removing earth by means of a derrick from an excavation being lowered on him while at work, evidence of the manner in which the skip was used before and after it was unloaded was admissible to show that the general plan of operation pursued by the master was negligent, since a master is liable for a negligent system or a negligent mode of using machinery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 916, 917; Dec. Dig. § 270.\*]

## 4. TRIAL (§ 165\*)—NONSUIT—EVIDENCE.

The court on motion for nonsuit will deem every fact proved which the evidence tends to prove.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 373, 374; Dec. Dig. § 165.\*]

## 5. MASTER AND SERVANT (§ 163\*)—INJURY TO SERVANT—NEGLIGENCE.

A servant was directed by the master's superintendent to drill holes for blasting at about 15 feet from where a skip used by means of a derrick to remove earth from an excavation was unloaded. At the time of the injury, he was bending over, and the skip loaded with excavated material was lowered on him. Several hundred men were employed and busily at work about the derrick. The station of the engineer was such that he could not see the place of excavation, the place of unloading, and the men as they were at work. Earth and rock were likely to drop from the skip while it was moved from the excavation to the point of unloading, and unless the skip was kept a sufficient height above the ground it would strike the workmen. Held, that it was the duty of the master to provide a signalman to direct the engineer's movements, and the failure to do so, resulting in injury to a servant, was actionable negligence, and where the superintendent sent the signalman supplied by the master to another part of the work, and the engineer started the engine without a signal, causing injury to a servant, the master was liable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 328-330; Dec. Dig. § 163.\*]

## 6. MASTER AND SERVANT (§ 264\*)—INJURY TO SERVANT—COMPLAINT.

The complaint, in an action for injuries to a servant engaged in drilling for blasting caused by a skip by means of a derrick to remove earth from an excavation being lowered on him, which alleged that the master and the servant employed to signal the engineer negligently omitted to give proper signals, or any signals, authorized a recovery on proof that the superintendent had withdrawn the signalman from his place of duty and that the engineer proceeded without receiving any signal from any one.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 866; Dec. Dig. § 264.\*]

## 7. MASTER AND SERVANT (§ 201\*)—INJURY TO SERVANT—NEGLIGENCE.

Where a master failed to have a signalman present to guide the engineer operating a derrick moving a skip loaded with material from an excavation, and an injury to a servant would not have occurred if the proper signal had been given to the engineer, the master was liable,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rép'r Indexes.

under the rule that, where an injury to a servant is the result of the negligence of a fellow servant combined with the negligence of the master, the defense of the negligence of the fellow servant is unavailable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

**8. MASTER AND SERVANT (§ 264\*) — ISSUES, PROOF, AND VARIANCE.**

Under Rev. Codes, § 6585, providing that no variance between the allegations and proof is deemed material, unless it actually misleads a party to his prejudice, the variance between the complaint in an action for injuries to a servant drilling for blasting caused by a skip loaded with excavated material being lowered on him, which alleges negligence in failing to exercise care to provide a reasonably safe place in which to work in failing to have the skip hoisted to a height sufficient to avoid injury and in failing to warn the servant of the danger surrounding the place, and the proof showing negligence of the superintendent in withdrawing from his place of duty, a fellow servant employed to signal the engineer in operating the skip is not fatal, especially where the variance was not suggested to the trial court nor mentioned in appellant's brief.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 872, 873; Dec. Dig. § 264.\*]

**9. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.**

In an action for injuries to a servant while drilling for blasting caused by a skip loaded with excavated material being lowered on him, evidence held sufficient to authorize submission to the jury of the question of the master's negligence in the general method of carrying on the work of moving the skip.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1032, 1033; Dec. Dig. § 286.\*]

**10. MASTER AND SERVANT (§ 258\*)—INJURY TO SERVANT—NEGLIGENCE—COMPLAINT.**

A complaint, in an action for injuries to a servant while drilling for blasting caused by a skip loaded with excavated material being lowered on him, which charges negligence in the general plan of carrying out the work, and which alleges that such negligence with other negligent acts produced the injuries complained of, predicates negligence of the master in the general plan of carrying on the work of moving the skip and is sufficient, in the absence of a special demurrer or motion, to make more specific.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 833; Dec. Dig. § 258.\*]

**11. MASTER AND SERVANT (§ 264\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.**

A servant suing for a personal injury and alleging various acts of negligence may recover on proof of any one of the acts proximately causing the injury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 862; Dec. Dig. § 264.\*]

**12. MASTER AND SERVANT (§ 97\*)—INJURY TO SERVANT—NEGLIGENCE.**

Where an injury to a servant was likely to occur from the negligent method adopted by the master, the master was liable for injuries to a servant, though he could not anticipate the particular injury, for it is sufficient that he ought to have anticipated that some injury was likely to result as the natural consequence of the plan of operation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 163; Dec. Dig. § 97.\*]

**13. MASTER AND SERVANT (§ 285\*)—INJURY TO SERVANT — NEGLIGENCE — QUESTION FOR JURY.**

Whether a master guilty of negligence in adopting a method of doing the work ought to have anticipated injury to a servant held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1007; Dec. Dig. § 285.\*]

**14. MASTER AND SERVANT (§ 278\*)—INJURY TO SERVANT—FAILURE TO WARN—NEGLIGENCE.**

In an action for injuries to a servant engaged in drilling for blasting caused by a skip loaded with excavated material being lowered on him, evidence held to justify a finding of actionable negligence in failing to warn the servant of the movements of the skip.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 972; Dec. Dig. § 278.\*]

**15. TRIAL (§ 142\*) — WITHDRAWAL OF CASE FROM JURY.**

A case should not be withdrawn from the jury, unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery may be had on any view which may be reasonably drawn from the facts established by the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 337; Dec. Dig. § 142.\*]

**16. MASTER AND SERVANT (§ 330\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.**

In an action against a master and a fellow servant who was acting as signalman for injuries to a servant engaged in drilling for blasting caused by a skip loaded with excavated material being lowered on him, there was evidence that the engineer operating the skip acted without any signal from the signalman. The master through its superintendent had withdrawn the signalman from his place of duty and had sent him to another part of the work to perform other services. Held, that the signalman was, as a matter of law, not guilty of actionable negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.\*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by Patrick J. Stewart against the Stone & Webster Engineering Corporation and another. From a judgment for plaintiff, defendants appeal. Affirmed in part and reversed in part.

E. C. Day, for appellants. Purcell & Horsky, for respondent.

HOLLOWAY, J. The plaintiff was employed by the defendant corporation as a common laborer about its work constructing a dam across the Missouri river at Hauser Lake. Considerable excavation was being done and the earth and rock removed by means of a large skip or iron bucket. This skip when empty weighed 1,400 pounds, or thereabouts, and, when filled with material, from a ton and a half to two tons. The skip was moved by means of a derrick operated by an engine. A cable was attached to the skip, run through a pulley at the upper end of the boom of the derrick, then down to the base of the boom and around the drum at the engine. The boom operated on a pivot, and, when the skip was filled

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

with excavated material and raised to clear obstructions, the boom was swung to the left—the skip describing the arc of a circle—and the material deposited near the bank to be removed by a derrick on a scow anchored in the river. The situation of the engine operating the derrick, the place of excavation, and the location of the scow were such that, by reason of the unevenness of the ground, the engineer could not see the men filling the skip, the path over which the skip traveled, and the place at which the material was deposited, and to carry on the work it was necessary for the defendant corporation to employ a man to occupy a high and advantageous point of ground, from which all the operation could be seen, and direct the engineer by means of signals. On January 29, 1909, this plaintiff was taken from work upon which he had theretofore been employed, and directed by the defendant corporation's superintendent to assist another man in drilling holes in frozen ground, about 15 feet from the place where the skip was unloaded, for the purpose of blasting out an embankment. The place where plaintiff was put to work was directly in the path over which the skip swung. While plaintiff was bending over cleaning out a hole already drilled, the skip loaded with excavated material was lowered upon him, causing the injuries of which he complains. He brought this action to recover damages, and joined with the defendant corporation John Brown, who was foreman of the excavating gang and signalman.

The complaint is quite voluminous, and we content ourselves with the statement of its contents as we analyze it. It charges negligence on the part of the corporation in the following particulars: (1) In failing to exercise reasonable care to provide for plaintiff a reasonably safe place in which to work, and to maintain it in a reasonably safe condition; (2) in imposing upon the signalman an amount of work too great for him to discharge properly; (3) in rushing the work to such an extent that the men employed in its execution were greatly confused and unable properly to discharge their duties; (4) in failing to have the skip hoisted to a height sufficient to avoid striking plaintiff as it swung back and forth to and from the place of excavation; (5) in failing to warn plaintiff of the danger surrounding the place where he was put to work drilling, or to notify him of approaching danger; and (6) in the general plan or method of carrying on the work. It charges negligence on the part of both defendants in failing to give any signal to the engineer by which he could control the movements of the boom and skip at the time plaintiff was injured.

The defendant Brown answered denying any negligence on his part. The corporation answered separately, denying negligence on its part and pleading affirmatively that plaintiff's injuries were caused by his own neg-

ligence; that he assumed the risk of injury; and that his injuries were caused by the negligence of his fellow servants. These affirmative pleas were put in issue by reply. At the conclusion of plaintiff's testimony the defendants interposed a joint motion for nonsuit, and the defendant Brown made a separate motion. These motions were overruled, and defendants then declined to offer any testimony, and the case went to the jury upon the evidence introduced by the plaintiff. Before the cause was submitted, defendants moved the court to compel plaintiff to elect whether he proceeded upon the theory that defendant Brown was present giving a signal to the engineer, or did not give the signal. The motion was granted. The record recites: "Thereupon the plaintiff elected to stand upon the allegations of the complaint as amended, and as to that particular allegation that the defendant John Brown omitted to give proper signal for the movement of the skip after it was on its way to be dumped." The trial resulted in a judgment in favor of the plaintiff, and from that judgment and an order denying their motion for a new trial defendants have appealed. The specifications of error are treated under four heads: (1) The admissibility of evidence given by the witness Bartlett; (2) the admissibility of evidence given by the witnesses Hogan and Law; (3) the order of the court denying defendant Brown's separate motion for a nonsuit; and (4) the order denying the motion for a nonsuit made by both defendants.

[1] 1. Over objection of the defendants, Lloyd Bartlett, a witness for plaintiff, was permitted to testify to a conversation which he had with the general superintendent of the defendant company immediately before the plaintiff was injured. So far as material here, that conversation was as follows: "The superintendent came to me and asked me why I didn't have a man drilling in that bank down there. It was the same bank, the only bank there was there, the only bank. I told him it was too dangerous a place to put a man working at that place. It was a death trap. He said, 'Where is the man that is doing this work?' and I said, 'I don't know,' and he says, 'I will go and find him,' and he went away and found him, and this man [plaintiff] came back and went to work."

In the complaint negligence is predicated upon the failure of the defendant company to exercise reasonable care to provide a reasonably safe place for plaintiff to perform his work and maintain the place in a reasonably safe condition. Facts and circumstances were produced to show that the place of plaintiff's employment was dangerous, and this evidence elicited from the witness Bartlett tended to bring home to the defendant company, who was the master, knowledge or warning of the danger before plaintiff was put to work, and was properly

admitted for that purpose; and it was wholly immaterial that the plaintiff was not present or did not know of the conversation. *Colorado City v. Llafe*, 28 Colo. 468, 65 Pac. 680.

[2] It was incumbent upon the plaintiff to show that the place of his employment was dangerous and that the master knew of the danger, or, in the exercise of ordinary care, ought to have known of it. 26 Cyc. 1142.

[3] 2. The witnesses Hogan and Law testified to the manner in which the skip or iron bucket was used before and after it was unloaded. We think this evidence was properly admissible as tending to show that the general plan or method of operation pursued by the defendant company was negligent (26 Cyc. 1154); for a negligent system or place of work, or a negligent mode of using perfectly sound machinery, may make the master liable (*Thomas v. Cincinnati*, N. O. & T. P. Ry. Co. [C. C.] 97 Fed. 245; *Eeraert v. Eureka Lumber Co.*, 43 Mont. 517, 117 Pac. 1080; *Kelly v. City of Butte*, 119 Pac. 171).

3. The separate motion for nonsuit interposed by the defendant Brown should have been sustained. There is not any substantial evidence tending to show actionable negligence on his part, and this is practically conceded by counsel for respondent.

[4] 4. We are unable to determine upon what theory the motion to require plaintiff to elect was made or sustained. The complaint charges negligence on the part of both defendants in failing to give a signal to the engineer. Upon motion for nonsuit every fact will be deemed proved which the evidence tends to prove (*McCabe v. Montana Central Ry. Co.*, 30 Mont. 323, 76 Pac. 703; *Cain v. Gold Mt. Min. Co.*, 27 Mont. 529, 71 Pac. 1004), and in the further consideration of this case we will speak of the evidence in the light of this rule.

[5] A. It appears that, at the time plaintiff was put to work drilling, the derrick was idle; that it was the first skip moved there—after which injured him; that the general superintendent came upon the ground, spoke to plaintiff, who was then at work, and gave the signal to the engineer to start the skip; that he then sent Brown away to another part of the work and he himself gave his attention to the men about him. The engineer started his engine, raised the skip from the place where it was loaded, and swung it around. There is sufficient evidence—though negative in character—that there was not any signal given to the engineer to lower the skip, and, so far as this record discloses, the engineer in lowering the skip upon the plaintiff acted without a signal. That the circumstances surrounding the work were such that it was the duty of the master to furnish a signalman to direct the movements of the engineer in operating the derrick and skip, to the end that the place of employment for plaintiff and other workmen there should not

be rendered unnecessarily hazardous, cannot be questioned, and that the master failed to discharge this duty is equally apparent, for, though it provided a signalman in the person of Brown in the first instance, the evidence tends to show, and for the purposes of this appeal will be deemed to show, that immediately before plaintiff was injured, and at the very time when the services of the signalman were most greatly needed—that is, at the time the loaded skip was hoisted from the point of excavation and started swinging towards the place where plaintiff was at work and towards the point where it was to be lowered and unloaded—the defendant corporation, through its superintendent, Phee, withdrew Brown from his place of duty and sent him to another part of the work to perform other services. So that, so far as this case is concerned, it might with propriety have been charged that the defendant corporation failed to furnish a signalman, and the proof would have sustained the charge. Brown did not signal the engineer because he was withdrawn by the master just before the signal should have been given, and the evidence, though negative in character, tends to show that a signal was not given by any one.

[6] Counsel for appellant states in his brief that plaintiff elected to submit the case upon the theory that Brown was present at his post of duty as signalman at the time plaintiff was injured; but the record does not bear out this statement. The allegation of the amended complaint upon which plaintiff elected to rely is that the defendants (Brown and the corporation) "negligently omitted to give proper or any signals."

[7] It is suggested that, if this be the correct interpretation to be put upon the evidence, then the negligence which caused the injury was that of the engineer—a fellow servant of the plaintiff—and there cannot be a recovery. But this suggestion ignores the breach of duty on the part of the corporation in failing to have a signalman present to guide the engineer. The evidence is that, if a proper signal had been given, the accident would not have occurred. And the master in this instance cannot escape the imputation that its negligence, in preventing Brown giving the proper signal, by withdrawing him at the critical moment, combined with the negligence of the engineer to produce the injury to this plaintiff, and under these circumstances the plea that the engineer was plaintiff's fellow servant is unavailing. If the injury is the result of the negligence of a fellow servant, combined with the negligence of the master, the defense of fellow servant's negligence is not available. *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 212, 105 Pac. 724; *Meisner v. City of Dillon*, 29 Mont. 116, 74 Pac. 130.

[8] If it be suggested that this construction of the evidence results in a variance between the pleading and proof, it is sufficient answer

to say that the variance is not material, under section 6585, Revised Codes, and will not work a reversal, particularly in view of the fact that the variance was not suggested to the trial court at all and is not mentioned in appellants' brief.

That it was a primary duty of the master to furnish a signalman, at the time this plaintiff was injured, is declared by the authorities and is prompted by the dictates of reason and humanity. Four or five hundred men were employed, all busily at work about this derrick. The station of the engineer was such that he could not see the place of excavation, the place of unloading, and the men as they were at work. Pieces of earth or rock were likely to drop from the skip while it was in this swinging motion from the excavation to the point of unloading, and, unless the skip was kept a sufficient height above the ground, it was likely to strike the workmen. Under these circumstances, the duty of the master to provide a man to direct the engineer's movements was imperative, and its failure to discharge this duty, resulting in injury to a workman, was actionable negligence. *Aleckson v. Erie R. Co.*, 101 App. Div. 395, 91 N. Y. Supp. 1029.

Appellants' counsel devotes much of his brief to a consideration of the question: Was Brown, as signalman, the alter ego of the defendant corporation, or the fellow servant of the plaintiff? As we view the matter from this record, that inquiry is not of any moment here. The authorities upon the subject are in hopeless conflict, and whether we adopt the view that Brown was the fellow servant of plaintiff, as expressed in some of the leading cases (see note to *Lafayette Bridge Co. v. Olsen*, 108 Fed. 335, 47 C. C. A. 367, as reported in 54 L. R. A. at page 33), or the view that he was performing a nondelegable duty of the master and was for the time a vice principal, as held in other jurisdictions (*Anderson v. Pittsburgh Coal Co.*, 108 Minn. 455, 122 N. W. 794, 26 L. R. A. (N. S.) 624; *Sroufe v. Moran Bros. Co.*, 28 Wash. 381, 68 Pac. 896, 58 L. R. A. 313, 92 Am. St. Rep. 847), would not affect the result in this instance.

[9] B. We think the evidence sufficient to go to the jury, as tending to show negligence of the master in the general plan or method of carrying on the work of moving this skip. The evidence tends to show that instead of having the skip, when filled, hoisted to a reasonably safe height and swung at that distance from the ground to the point of unloading, and then lowered, that the skip was hoisted, and, as the boom turned, the skip was gradually lowered so that, by the time it reached a point over the place of plaintiff's work, it was dangerously near the ground, and, when the skip was emptied, the boom was started revolving back before the skip was hoisted to a safe distance above the ground; that this practice

was known to the master, or in the exercise of ordinary care ought to have been known to it.

[10, 11] It is insisted, however, that the complaint does not predicate plaintiff's injuries upon such negligence; but paragraph 10 of the complaint charges negligence in the general plan or method of carrying on the work, and alleges that such negligence, with other negligent acts, produced the injury of which plaintiff complains. It is true that the allegations are in very general terms; but, in the absence of a special demurrer or motion to make more specific, they are sufficient, and it is elementary that under such circumstances plaintiff need not prove every act of negligence charged, but it is sufficient if he proves any of the acts of negligence pleaded, which proximately caused the injury. *Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70.

[12, 13] C. The appellant corporation insists that it was not under obligation to warn the plaintiff of the movements of the skip over his place of work, for the reason that the skip was not emptied at that point, but 15 or 20 feet away, and in the abstract that contention is correct; but since there is evidence in this record tending to prove negligence in the general plan of moving the skip, by which plaintiff's place of employment was rendered extrahazardous—and unnecessarily so—the duty devolved upon the master to change its system of operation or warn plaintiff of the danger. The evidence is sufficient to justify a finding that injury to plaintiff was likely to occur from the negligent method of moving the skip back and forth over his place of work, without keeping it at a reasonably safe height above the ground. If it be suggested that the master could not anticipate that the engineer would drop the skip upon plaintiff, it is answered by saying that it is not necessary that the master should anticipate the particular injury which did result. It is sufficient that it ought to have anticipated that some injury was likely to result as the reasonable and natural consequences of the absence of a signalman to direct the engineer and the negligent plan of operation (*Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659), and whether the master ought to have anticipated injury to plaintiff was, under the circumstances of this case, a question for the jury (*Standard Oil Co. v. Brown*, 218 U. S. 78, 30 Sup. Ct. 669, 54 L. Ed. 939; *Jensen v. Commodore M. Co.*, 94 Minn. 53, 101 N. W. 944).

[14] The evidence discloses that plaintiff had been employed at work some distance from this derrick, and under such circumstances that he could not or did not see the derrick work; that he did not know that the skip would pass over his new place of employment; that the skip which struck him was making its first trip after he was directed to go to the embankment to drill; that



he was so situated there that he could not see the skip until it was over him, or nearly so; that he was engrossed in the discharge of the duties assigned him, and did not see the skip approaching; that the master knew of the danger surrounding this new place of employment and had ample opportunity to warn plaintiff after the skip was loaded and started; that it was the custom at this work to warn workmen of approaching dangers; and that the men relied upon receiving warning. In *Coleman v. Perry*, 28 Mont. 1, 72 Pac. 42, this court said: "The principle is that if an employer knows that the servant will be exposed to risks and dangers in any labor to which he assigns him, and is aware that the servant is from any cause disqualified to know, appreciate, and avoid such dangers, the dangers not being obvious, the master is guilty of a breach of duty, unless he gives such reasonable cautions and instructions as should reasonably enable the servant exercising due care to do the work with safety to himself."

The rule is well stated in *Baxter v. Roberts*, 44 Cal. 187, 13 Am. Rep. 160, as follows: "Nor is there any doubt that if the employer have knowledge or information showing that the particular employment is, from extraneous causes known to him, hazardous or dangerous to a degree beyond that which it fairly imports or is understood by the employé to be, he is bound to inform the latter of the fact or put him in possession of such information." The principle above has been approved by this court in *Berg v. Boston & Mont. C. C. & S. Min. Co.*, 12 Mont. 212, 29 Pac. 545, *Kelley v. Cable Co.*, 7 Mont. 70, 14 Pac. 633, and *Stephens v. Elliott*, 30 Mont. 92, 92 Pac. 45, and is peculiarly applicable to the facts of this case. The plaintiff went to the work assigned him in a place apparently perfectly safe and rendered unsafe only by reason of other work which the master was carrying on directly about him and of which he had no knowledge. Under such circumstances, the master owed him the duty to inform him of the danger (1 *Labatt on Master and Servant*, § 209; 20 Am. & Eng. Ency. of Law [2d Ed.] 97), and its failure to do so constituted negligence.

[15] So far as the defendant corporation is concerned, we think the evidence sufficient to go to the jury, and that the joint motion of the defendant for a nonsuit was properly denied. "No cause should ever be withdrawn from the jury unless the conclusion from the facts necessarily follows, as a matter of law, that no recovery could be had upon any view which could reasonably be drawn from the facts which the evidence tends to establish." *Cain v. Gold Mt. Min. Co.*, above.

[16] As to the defendant Brown, the judg-

ment and order are reversed, and the cause is remanded to the district court, with directions to enter judgment in his favor for his costs incurred in the trial court, and in this court, not to exceed, however, one-half the costs of preparing and presenting this appeal.

As to the defendant Stone & Webster Engineering Corporation, the judgment and order are affirmed.

BRANTLY, C. J., and SMITH, J., concur.

# VERLINDA v. STONE & WEBSTER ENGINEERING CORPORATION.

(Supreme Court of Montana. Nov. 22, 1911.)

## 1. MASTER AND SERVANT (§ 293\*)—INJURY TO SERVANT—INSTRUCTIONS—IGNORING ISSUES.

Where, in an action for injuries to a servant, the complaint alleged the negligent failure to have a hook on the fall tackle guarded so as to prevent a chain hanging from it from becoming detached by a sudden jar, in permitting the chain to be handled by one man when it was too heavy for him to handle it safely, in permitting the chain to be let down where employes were at work, without means by which it could be lowered with safety, in maintaining the derrick so far from the place of work as to make probable the happening of the accident complained of, and for failing to furnish the servant with a safe place to work, and the court properly adopted the theory that the master was negligent if it failed to exercise ordinary care to furnish the servant a reasonably safe place in which to work, reasonably competent fellow servants, numerous enough to accomplish the work, and reasonably safe appliances, and the injury was caused by breach of duty in any one of the particulars, though there was concurring negligence of the superintendent or a fellow servant, an instruction, assuming that the liability of the master must be determined solely on the evidence showing whether it performed its duty as to the place where the servant was put to work, and that the question whether the place was safe must turn exclusively on whether the chain became detached from the fall tackle, was properly refused as eliminating the questions whether the superintendent was negligent in permitting a fellow servant to handle the chain alone, without any means of preventing it from swinging out over the men below, and whether the method pursued had been selected with reasonable care, and whether, assuming that the appliance was defective, any negligence of the fellow servant increased the peril, and as requiring the servant to prove all the acts of negligence alleged.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 293.\*]

## 2. MASTER AND SERVANT (§ 201\*)—INJURY TO SERVANT—LIABILITY.

Where the safety of the place in which a servant worked depended in part on the safety of an appliance, which was unsafe because of the master's failure to exercise reasonable care in selecting it, the master was liable for an injury to the servant, though the master's superintendent negligently permitted a fellow servant to operate the appliance without assistance, with knowledge that one person could not properly handle it without peril to the servants, and though the fellow servant was guilty of negligence in handling the appliance as he did.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

### 3. MASTER AND SERVANT (§ 130\*)—INJURY TO SERVANT—NEGLIGENCE—LIABILITY.

A master must, as a reasonably prudent person, conduct the work so that the hazard from the character of the appliance or the place is not enlarged, and liability for injury to a servant may be predicated on a negligent system of doing the work or on a negligent method of using appliances free from defects.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 264, 266, 276; Dec. Dig. § 130.\*]

### 4. MASTER AND SERVANT (§ 190\*)—INJURY TO SERVANT—NEGLIGENCE.

Where a superintendent, empowered by the master to direct the work and control the men, permitted a servant, unaided, to lower a chain, knowing that by reason of its weight the servant could not hold it, the superintendent was guilty of negligence which must be imputed to the master, so as to make the master liable for injuries to a fellow servant in consequence thereof; the master being required to furnish a sufficient number of servants to perform the work in safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.\*]

### 5. MASTER AND SERVANT (§ 201\*)—INJURY TO SERVANT—NEGLIGENCE—NEGLIGENCE OF FELLOW SERVANT—LIABILITY.

A master who is guilty of negligence which concurs with the negligence of a servant in causing injury to a fellow servant is liable for the injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 515-534; Dec. Dig. § 201.\*]

### 6. MASTER AND SERVANT (§ 264\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

A servant, alleging in his complaint for personal injuries several acts of negligence, may offer evidence to prove all the acts of negligence, but is not bound to do so; proof of any one or more of them which proximately caused the injury being sufficient.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 862; Dec. Dig. § 264.\*]

### 7. TORTS (§ 22\*)—JOINT TORT-FEASORS—LIABILITY.

Where two or more persons, acting concurrently or independently, unite in causing injury to another, they are jointly and severally liable for the damages sustained, and the person injured may enforce the liability by action against them severally or all jointly or any number of them less than all, and it is no objection to the joinder of them all that one is liable on the principle of respondeat superior and the others are chargeable directly.

[Ed. Note.—For other cases, see Torts, Cent. Dig. §§ 29, 31; Dec. Dig. § 22.\*]

### 8. MASTER AND SERVANT (§ 254\*)—INJURY TO SERVANT—ACTIONS—PARTIES.

A servant sustaining a personal injury, who proceeds against the master, his superintendent, and a fellow servant, may have judgment against any one of them by whose sole act the injury complained of was caused, and may not be nonsuited because he has brought too many persons into court as defendants.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 254.\*]

### 9. MASTER AND SERVANT (§ 297\*)—INJURY TO SERVANT—NEGLIGENCE—VERDICT.

Where, in an action for injuries to a servant brought against the master and his superintendent, the evidence justified a finding against the master and the superintendent, the servant should not be denied a recovery against the master merely because the jury were un-

able to agree on a verdict against the superintendent, or arbitrarily disregarded the evidence of negligence on his part.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 297.\*]

### 10. MASTER AND SERVANT (§ 190\*)—INJURY TO SERVANT—LIABILITY.

The duty to furnish to a servant suitable appliances is primarily the duty of the master, and, where an appliance furnished is defective, the master is guilty of negligence, whether he imposed the duty on his superintendent to furnish it, or whether the master furnished it through another agency and imposed on the superintendent the duty of adopting the plan of its use.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474; Dec. Dig. § 190.\*]

### 11. MASTER AND SERVANT (§ 297\*)—INJURY TO SERVANT—EVIDENCE—VERDICT.

Where, in an action against a master and his superintendent for injuries to a servant, the evidence justified a finding that an appliance causing the injury was defective, and was silent on the point whether the master imposed the duty on the superintendent to furnish the appliance or whether the master furnished it through some other agency, and imposed on the superintendent the duty of adopting a plan for its use, a verdict against the master but silent as to the negligence of the superintendent could be sustained on the theory that the jury found that the master failed to furnish safe appliances.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 297.\*]

### 12. MASTER AND SERVANT (§ 297\*)—INJURY TO SERVANT—VERDICT.

A servant sustaining a personal injury, who sues the master and his superintendent, may elect to take judgment against the master alone on a verdict in his favor as against the master, but silent as to the liability of the superintendent, or he may insist on a verdict as to both defendants, and, where he elects to take judgment against the master alone, the case against the superintendent is, in effect, dismissed.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 297.\*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by Victor Verilinda against the Stone & Webster Engineering Corporation and others. From a judgment for plaintiff against defendant named only, it appeals. Affirmed.

E. C. Day, for appellant. Purcell & Horsky and H. G. & S. H. McIntire, for respondent.

BRANTLY, C. J. Action by plaintiff to recover damages for injuries sustained by him through the negligence of the defendant Stone & Webster Engineering Corporation (hereinafter referred to as the company) and defendants William Wallace and Samuel Turchin, two of its employes, during the course of his employment by the company as a common laborer.

As is usual in such cases, the evidence is in conflict as to the cause and particulars of the accident. From the testimony of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

witnesses and the exhibits introduced at the trial, we gather the following facts: On April 18, 1910, the company was engaged in the construction of a dam in the Missouri river at Hauser Lake, in Lewis and Clark county. The material used for the construction was concrete. It was put in in sections, being dumped into molds or forms built of heavy lumber by means of a skip operated by a derrick or from cars. When the concrete had hardened, the lumber forms were torn away and the material used for the construction of other forms as the work of construction progressed. These forms consisted of 12x12 upright timbers, lined on the inside with heavy planks. At the time of the accident a crew of carpenters and helpers, under the direction of Wallace, who had exclusive charge of this part of the work with power to hire and discharge men, were engaged in tearing away a form and setting the timbers in place for another. The timbers were lifted and moved by a derrick, the jib or mast of which was placed about 85 feet from the face of the completed section. The boom was 70 feet in length. Attached to the end of the boom was an iron chain 20 feet in length, the weight of which is estimated by the witnesses at from 170 to 300 pounds. It was connected with the boom by an oval link or ring at the end, slipped over the hook in the fall tackle attached to the boom. The hook was not moused or fitted with any device to prevent the chain from being accidentally unhooked. The section which had been completed, and from which the timbers were being removed, extended along the course of the river and ended at or near the lower side of the dam. The form in course of construction extended across the course of the river. At this point the main body of the work had been completed to the height of about 75 feet from the river bed. The newly completed section was 30 feet in height and formed a ledge along the transverse face of the higher structure. On this ledge were stationed several men whose business it was to assist in removing the timbers by means of the derrick. Among these was defendant Turchin. The derrick was operated by an engine placed beyond the mast or jib from the point of operation. Its movements were controlled by the engineer in obedience to signals given by Wallace. Wallace's position was upon a scow resting in the bed of the river immediately below the dam, and about 5 feet outside of the line of the new form. The form was some 30 feet in height. It rested upon a base of concrete near the level of the river bed, which had previously been put in. Several other men—carpenters and laborers, the plaintiff being among the latter—were below on the concrete base. Their business was to put in place the upright timbers and brace them so that they would be ready for the lining. Wallace's position on the scow was 12 or 15 feet above them. When it be-

came necessary to lift out one of the timbers, the chain was wrapped around it at the top and fastened by inserting a hook at the end of the chain in one of the links. Since the boom was not long enough to drop the chain at the place where it was desired to use it, it was hauled up by a rope by the men who were standing on the ledge, and was secured to a timber in the manner heretofore indicated. When in this position the line of its direction was at quite a wide angle from the perpendicular, so that if the end was released it would drop and swing as a pendulum. It had been secured to a timber, and the signal was about to be given to start the engine, when Wallace noticed a joint of heavy iron pipe lying on the concrete base below, which he thought might be broken during the handling of the timbers. He stopped the work in order that it might be removed, and directed the plaintiff to fit a chain around it so that it could be lifted out of the way with the derrick. The plaintiff was in a stooping position engaged in adjusting the chain. Wallace ordered the men on the ledge to throw off or let down the chain. Turchin, who was standing near by, without waiting for help by the men standing near and without using a rope to ease it down, loosed it, and, being unable to hold it because of its weight, let it swing. It first swung away and then back. As it came back the lower end of it struck a brace timber, with the result that the chain was jarred off the hook in the fall tackle, and the lower end of it as it fell on the swing struck the plaintiff on the face and head, destroying an eye and inflicting other serious injuries. There is a direct conflict in the statements of the witnesses as to whether the lower end of the chain was high enough from the base to swing clear of a man standing thereon. As a whole, however, the evidence furnishes ground for the conclusion that the chain would not have reached plaintiff, had it not jarred from the hook and fallen.

The pleadings are somewhat voluminous. The allegations of the complaint may be comprehensively summarized as follows: That the defendants were culpably negligent (1) in failing to have the hook in the fall tackle moused or guarded so as to prevent the boom chain from becoming detached by a sudden jar or jolt; (2) in permitting the chain to be handled by one man, it being apparent that it was too heavy for one man to handle it safely; (3) in permitting the chain to be let down where other employees were at work, without a rope or other means by which it could be lowered with safety; (4) in maintaining and operating the derrick so far away from the place of work as to make probable the happening of such an accident as that which resulted in the injury to plaintiff; and (5) in failing to furnish the plaintiff a safe place in which to work.

The defendant Turchin suffered judgment by default. The answer of Wallace was a

general denial. The company alleged that the derrick and other appliances were reasonably safe, were operated in a reasonably safe manner, and that, if the plaintiff was injured by the negligence of any one, it was that of his fellow servants. The trial resulted in a verdict in favor of plaintiff against the company. The jury made no finding with reference to Wallace. The court rendered judgment upon the verdict against the company and dismissed the action as to Wallace. The company has filed separate appeals from the judgment and an order denying its motion for a new trial. They will be considered together.

1. Counsel for plaintiff have presented a question of practice arising out of the proceedings on motion for new trial, which, if resolved in their favor, they insist, precludes a hearing of the appeal from the order denying the motion. We shall not notice it further than to say that we have examined it and have found it without substantial merit. The bill of exceptions was served and settled in time, in conformity with the requirements of the statute.

[1] 2. The first assignment of error is based upon the refusal of the court to submit to the jury defendant's requested instructions numbered 1 and 2. The instructions are too long to quote. In effect, the first one of them would have told the jury that the gist of the action was the negligence of the defendant company in failing to furnish the plaintiff a reasonably safe place in which to work; that the burden was upon him to establish each and every act constituting an element of the negligence of the company alleged; and that, if the jury believed from the evidence that the chain did not become detached from the hook in the fall tackle and that the injury was not proximately caused in this way, they should find for the company. The theory of the case adopted by the court, as indicated by the instructions submitted, was that the company was culpable if it appeared from the evidence that it had failed to exercise ordinary care to furnish the plaintiff a reasonably safe place in which to work, reasonably competent fellow servants, sufficient in number to accomplish the work, and reasonably safe appliances, and the injury was caused by its lapse of duty in any one of these particulars, although there might have been concurring negligence on the part of Wallace or plaintiff's fellow servant Turchin. No fault is found with the theory upon which the court proceeded. If it be accepted as correct—and we think it was—the instruction was properly refused. It assumed that the liability of the company was to be determined solely upon the evidence tending to show whether it did or did not meet the requirements of its duty with reference to the place in which plaintiff was put to work, and whether the place was safe was made to turn exclusively upon the question whether

the chain became detached from the fall tackle.

[2] The safety of the place depended in part upon the safety of the appliance in use. If the appliance was unsafe because of the failure of the company to exercise reasonable care in selecting it, the company was culpable, though Wallace negligently permitted Turchin to undertake to let the chain down without help and without the aid of a rope or similar device, knowing that one man could not prevent it from swinging, thus adding to the peril of the men below, and though Turchin was guilty of negligence in letting it swing as he did. The company was represented by Wallace. To him had been intrusted the direction of the work and the control of the men. He was therefore the alter ego of the company. *Allen v. Bell*, 32 Mont. 69, 79 Pac. 582; *Hill v. Nelson Coal Co.*, 40 Mont. 1, 104 Pac. 876; *Gregory v. Chicago, M. & St. P. Ry. Co.*, 42 Mont. 551, 113 Pac. 1123.

[3] Together with its other duties, it was also incumbent upon the company, as a reasonably prudent person, to conduct the work in such a manner that the hazard resulting from the character of the appliances or the place should not be enhanced. Liability may be predicated upon a negligent system or mode of doing work or upon a negligent method of using machinery or appliances which are entirely free from defects. *Stewart v. Stone & Webster E. Corp.*, 44 Mont. —, 119 Pac. 568, recently decided; *Keast v. Santa Ysabel G. M. Co.*, 136 Cal. 256, 68 Pac. 771; *McVay v. Mannheimer Bros.*, 113 Minn. 225, 129 N. W. 371; *Thomas v. Cincinnati, etc., Ry. Co.* (C. C.) 97 Fed. 245; *Kreigh v. Westinghouse, etc., Co.*, 214 U. S. 249, 29 Sup. Ct. 619, 53 L. Ed. 984. If, therefore, Wallace, the superintendent, was shown to have been negligent in the method pursued in handling the chain, assuming that the mode of attaching it to the fall tackle was reasonably safe, the increase of the hazard thereby wrought necessarily added to the peril of all the men at work on the concrete base below, and both he and the company were liable for any resulting injury. If, for illustration, he should have required the men at work on the ledge to lower the chain by means of a rope and failed to do so, this was culpable negligence. *Stewart v. Stone & Webster E. Co.*, supra; *Boden v. Demwolf* (D. C.) 56 Fed. 846.

[4] Again, if he permitted Turchin unaided to undertake to lower the chain, knowing that by reason of its weight Turchin could not hold it, he was guilty of negligence which must be imputed to the company; for it is also a duty of the master to provide a sufficient number of servants to perform the work with reasonable safety. 26 Cyc. 1292; 4 *Thompson on Negligence*, 4865; *Boden v. Demwolf*, supra; *Supple v. Agnew*, 191 Ill. 439, 61 N. E. 395.

[5] The master is not to be held blameless

if the negligence or inadvertence of a fellow servant concurs with his negligence in causing the injury. *O'Brien v. Corra-Rock Island Min. Co.*, 40 Mont. 220, 105 Pac. 724.

In effect, the instruction would have eliminated from the case the question of the culpability of the company touching any other duty than that to furnish a reasonably safe place. It would have excluded from consideration of the jury the question whether Wallace, and therefore the company, was negligent in permitting Turchin to handle the chain alone, without any means of preventing it from swinging out over the men below. It would have eliminated altogether the question whether the method pursued had been selected with reasonable care, and whether, assuming that the appliance was defective, any negligence on the part of Turchin increased the peril.

[6] It also required the plaintiff to prove all the acts of negligence alleged. Plaintiff may offer evidence to establish all the acts of negligence alleged, but he is not required to do so. Proof of any one or more of them which approximately caused the injury will sustain a recovery. *Mize v. Rocky Mt. Bell Tel. Co.*, 38 Mont. 521, 100 Pac. 971, 129 Am. St. Rep. 659; *Moyse v. Northern Pac. Ry. Co.*, 41 Mont. 272, 108 Pac. 1062; *Frederick v. Hale*, 42 Mont. 153, 112 Pac. 70.

A portion of the second instruction, modified so as to make it applicable to the facts appearing in the evidence, was submitted to the jury. The portion refused was open to the objection that it would have told the jury that if they found that the company had provided reasonably safe and suitable machinery with which to do the work, and competent persons to give directions, signals, and shouts of warning in and about the work, they should return a verdict for the defendants. In this respect it was open to the same objection as that we have pointed out with reference to instruction No. 1, in that it excluded from the case facts and circumstances which were properly to be submitted to the consideration of the jury.

3. When the verdict was returned, the defendant company submitted a motion for judgment in its favor, on the ground that the action being joint against the company and Wallace, and the jury having found that Wallace, the vice principal, was not guilty of any negligence, they thereby found that the company was without fault. It is argued that the motion should have been sustained. We do not think so. If it be assumed that it was the duty of Wallace, as the alter ego of the company, both to furnish the appliances and direct their use, the silence of the verdict as to him, even if it be regarded as a verdict in his favor, does not determine that the company was not negligent.

[7] It is the general rule that, where one has received an actionable injury at the

hands of two or more persons acting concurrently or independently of each other, if their acts unite in causing the injury, all of the wrongdoers are jointly and severally liable to him for the full amount of the damages suffered by him, and he may enforce the liability by an action against them severally, or all jointly, or any number of them less than all. *Cooley on Torts*, pp. 224, 252. It is no objection to the joinder of them all in the same action that one is liable upon the principle of the maxim respondeat superior, and the others are chargeable personally. This rule has been frequently recognized and applied by this court. *Golden v. Northern Pac. Ry. Co.*, 39 Mont. 435, 104 Pac. 549; *Rand v. Butte Electric Ry. Co.*, 40 Mont. 398, 107 Pac. 87; *Logan v. Billings & Northern Ry. Co.*, 40 Mont. 467, 107 Pac. 415; *Knuckey v. Butte Electric Ry. Co.*, 41 Mont. 314, 109 Pac. 979.

[8] The plaintiff having proceeded against all or some of the wrongdoers jointly, and there being no contribution between them, he may have judgment against some or all whose concurrent acts caused the injury, or against any one of them by whose sole act it was caused. He is not to be nonsuited because he has brought too many defendants into court.

There is a conflict of authority as to what is the legal effect of a verdict such as was returned in this case. The case of *Doremus v. Root*, 23 Wash. 710, 63 Pac. 572, 54 L. R. A. 649, is cited in support of the view that the failure of the jury to find the issues for or against the defendant Wallace made it a verdict in his favor, and since he, the agent through whom the company acted and through whom alone it could be held liable, was found without fault, the judgment upon the verdict against the company cannot be permitted to stand. In that case the injury was alleged to have been caused by the negligence of an engineer in charge of a train belonging to the Oregon Railroad & Navigation Company, one of the defendants. When the verdict was returned which found against the company and was silent as to the engineer, the trial court held that in so far as it affected the defendant engineer it was a verdict in his favor, and rendered judgment against the company and in favor of the engineer. The Supreme Court held that the judgment should have been in favor of the company also, upon the theory that the finding that the engineer was free from fault exonerated the company because the company was at the time acting through him.

In the case of *Illinois Central Ry. Co. v. Murphy*, 123 Ky. 798, 97 S. W. 732, 30 Ky. Law Rep. 98, 11 L. R. A. (N. S.) 356, in which the relations between the parties defendant were the same as in the Washington case, the court said: "It does not follow that the same verdict need have been rendered against the company and its engineer. We can think

of cases where possibly the engineer ought to be held to the stricter account, and vice versa; but, let that be as it may, if the plaintiff is entitled to his verdict against two tort-feasors, but the jury are able to agree only as to one of them, and gives a verdict accordingly, we know of no law that prevents the plaintiff from having at least what the jury has given him. If he failed to get the verdict against another also liable, the plaintiff may be aggrieved, but not the defendant."

In *Texas & Pac. Ry. Co. v. Huber* (Tex. Civ. App.) 95 S. W. 508, the jury returned a verdict against the railway company and in favor of the engineer. On appeal the defendant made the same contention as is made here. The court said: "We also overrule the tenth assignment, which contends that a motion in arrest of judgment ought to have been sustained because the verdict in favor of Oliphant [the engineer] was a finding that he was free from negligence, and, he being the agency through which the railway company committed the negligence, if any was committed, the verdict against this appellant was unfounded. The question was considered in *Railway Co. v. James*, 73 Tex. 12, 10 S. W. 744 [15 Am. St. Rep. 743], where it was held, in a case of similar character, that, although such a verdict has the appearance of being based on inconsistent and contradictory findings of the jury, this is not of itself enough to require the reversal of a judgment against the passive defendant; the reason being that the finding in favor of the defendant whose act constitutes the negligence complained of, and the finding against the other in the same case by the same jury, can be attributed to improper conduct of the jury in arbitrarily exonerating the former, and not necessarily to a finding that there was no negligence on his part. It has often been held that, where the servant or agent who was the real active wrongdoer has been sued, and a judgment has been rendered in his favor, it will be a bar to a judgment against the employer or principal. This rule is not deemed applicable where the verdict in favor of the agent or servant nevertheless bears intrinsic evidence that the jury found that the wrongful act complained of had been committed by the agent or servant."

The conclusions reached by jurors are sometimes inexplicable. Often they arbitrarily find against one party and in favor of another without any apparent reason; but, if the evidence justifies the verdict as to the party held, there is no reason why it should not be deemed good as to him, not-

withstanding there is no finding as to the other.

[8] It seems to us that the better rule is that, if the evidence is such that the jury might have found against both the master and the servant, the plaintiff should not be denied his recovery against the master because the jury were unable to agree upon a verdict against the servant, or arbitrarily disregarded the evidence tending to show negligence on the part of the servant.

[10, 11] In the instant case the charge of negligence is against both defendants. To furnish suitable appliances was primarily the duty of the company. The evidence justified the finding that the derrick hook was defective in that it was not moused or guarded. If the company failed to exercise ordinary care in selecting this, it was guilty of negligence whether it imposed the duty upon Wallace to select and furnish it, or whether it furnished it through some other agency and imposed upon Wallace the duty only to adopt the plan of its use. The evidence is silent on this point. This being so, a verdict in favor of Wallace is not conclusive as to the company. The action of the jury is therefore clear, if, as was probably the fact, it be assumed that the jury found that the company was negligent in the performance of its primary duty to furnish a reasonably safe appliance, and could not agree as to whether Wallace was negligent in the selection of the mode of its use. From this point of view, the principle underlying the decision in the *Washington* case does not apply; for the negligence charged there was not the failure to furnish a suitable appliance, but was negligence of the engineer in handling his train.

[12] The plaintiff might have dismissed the action as to Wallace and proceeded against the company alone, or he might have proceeded against the company alone in the first instance. He might have insisted upon a verdict as to both defendants. Having elected not to do so, but to take judgment against the company alone, his course amounted to a dismissal as to Wallace. *Rankin v. C. P. R. Co.*, 73 Cal. 93, 15 Pac. 57; *Fowden v. Pacific C. S. S. C. Co.*, 149 Cal. 157, 86 Pac. 178. The failure of the jury to find as to Wallace should be regarded as no finding upon the issues as to him at all.

The foregoing discussion incidentally disposes of two other contentions made by counsel for defendant, viz., that the verdict is against law, and contrary to the evidence.

The judgment and order are affirmed.  
Affirmed.

SMITH and HOLLOWAY, JJ., concur.

## WALLACE v. KOPENBRINK.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

## 1. PLEADING (§ 93\*)—INCONSISTENT DEFENSES—SLANDER.

In an action for slander, the defendant, by reason of sections 5634 and 5666, Comp. Laws 1909, may set up in his answer as his defense both a general denial, and that the defamatory language alleged to have been used by him is true.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 189; Dec. Dig. § 93;\* Libel and Slander, Cent. Dig. §§ 229, 230.]

## 2. LIBEL AND SLANDER (§ 104\*)—EVIDENCE.

Where the petition charges the defendant with having uttered slander upon his own authority, and counsel in his opening statement of defendant's case to the jury admits that defendant published the slander charged, but states that in doing so defendant made it as a statement of a third person, whom he named at the time, the testimony of defendant that he spoke the defamatory statement not as his own charge or accusation, but as a statement of a third person, whose name he gave at the time, was competent for the purpose of showing the absence of express or actual malice and to mitigate the damages.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 284-291; Dec. Dig. § 104.\*]

## 3. WITNESSES (§ 372\*)—CROSS-EXAMINATION—INTEREST.

An attorney who testifies as a witness for his client may be asked on cross-examination if he has an interest in the judgment that may be recovered as his fee for services rendered in the cause, and what part of the judgment he is to receive. Such evidence is competent to show his bias or interest in the suit, and that the jury may determine the credibility that should be given his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.\*]

Error from District Court, Noble County; W. M. Bowles, Judge.

Action by Henry Kopenbrink against W. P. Wallace. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

H. B. Martin, for plaintiff in error. L. C. McLean and Moss, Turner & McInnis, for defendant in error.

HAYES, J. Defendant in error, who will hereinafter be called "plaintiff," originally commenced this action in the district court of Noble county against plaintiff in error, who will hereinafter be called "defendant," to recover damages in the sum of \$10,000 for slander. The trial was to a jury and resulted in a verdict and judgment in favor of plaintiff in the sum of \$200. Plaintiff in his petition declares upon two counts. By the first count, he charges that on the 5th day of December, 1905, the defendant said of and concerning plaintiff: "Kopenbrink (meaning the plaintiff) is a thief. He had been caught stealing wheat. Lowery caught

Kopenbrink stealing wheat. They telephoned to Mr. Cook at Ponca City, and the officers came out, and next morning he fixed it up with the officers. Afterwards they found in a cornfield where he (Kopenbrink) had stacked the wheat which he had stolen." By the second count, he charges that on the 24th day of December, 1905, the defendant published a defamatory statement concerning him, which need not be set out here.

Defendant by his answer answered separately to the counts of plaintiff's petition. His answer to the first count consists of three paragraphs, the first of which constitutes a general denial. The second pleads a justification, by alleging that the defamatory words set out in said count of the petition are true. The third paragraph pleads matters in mitigation, by alleging that, at the time defendant is charged with having uttered the language in the first count, it was currently reported and believed in the community where plaintiff and defendant lived that plaintiff had stolen the wheat as charged in said language; that defendant then believed such fact to be true; and that plaintiff's good name was not injured or damaged by the charge. His answer to the second count consists of two paragraphs, the first of which is a general denial. The second paragraph pleads justification, by alleging the truth of the defamatory statements in said count, and contains an admission that defendant did, at the time alleged in the second count, use to the plaintiff certain defamatory language, which he sets out.

At the trial, counsel for defendant asked defendant, who testified in his own behalf, the following question: "What did you say on that occasion?" (referring to the occasion referred to in the first count of plaintiff's petition). Answer: "Well, we was talking there about Kopenbrink, you know, and I said that Henry Lowery had told me that he had caught Kopenbrink stealing wheat that belonged to George Cook, and he had notified George Cook of the same." At this point, witness was interrupted by counsel for plaintiff with a motion to strike out the answer of the witness, which was sustained. By other questions of defendant's counsel, it was sought to show that defendant did not himself charge plaintiff with stealing the wheat at the time alleged in the first count, but that on that occasion he said, in substance, that Henry Lowery had told him that plaintiff had stolen the wheat. Objections to all these questions were sustained by the trial court, upon the theory, it seems, that plaintiff, having pleaded in the second paragraph of his answer to the first count a justification, is now estopped from denying the publication of the alleged defamatory language. Such was the rule at common law, upon the ground that they are inconsistent defenses and cannot be joined; and the same

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

rule prevails in some of the states under the code practice.

[1] By section 5686, Comp. Laws 1909, it is provided that a defendant in an action for slander may allege and prove the truth of the matter charged and any mitigating circumstances to reduce the amount of damages, or he may prove either. Under this section and section 5634 of the Comp. Laws 1909, of this state, which provides, among other things, as follows: "The defendant may set forth in his answer as many grounds for defense, counterclaim, set-off and for relief as he may have, whether they be such as have been heretofore denominated legal or equitable or both"—it was held in *Cole v. Woodson*, 32 Kan. 272, 4 Pac. 321, that in actions for slander the defendant may set up that he did not use the language imputed to him, and, second, that the language was true. The rule announced in that case, decided before the adoption of the statute in this jurisdiction, is binding upon the court.

[2] Counsel for plaintiff, however, contended in the court below, and contends in this court, that no error was committed in rejecting said evidence, because of certain admissions made by counsel for defendant in his opening statement to the jury. The opening statements of counsel for both parties were preserved and have been made part of the record in this proceeding. Counsel for defendant, in his opening statement to the jury, admitted: "That he (plaintiff) did say that Lowery says that 'Kopenbrink stole Cook's wheat,' and you will learn, gentlemen, from this evidence that Mr. Wallace believed that it was true at the time that he said it." Substantially the same language was used in another part of his statement to the jury. Said statements of defendant's counsel, we think, constitute substantially an admission of the publication of the defamatory matter as charged in plaintiff's first count; the only difference being that in plaintiff's petition it is charged that defendant himself uttered upon his own authority slanderous statements, whereas the admission of his counsel is that he uttered them upon the authority of a third person, whom he named at the time. But the fact that he repeated a slander originated by a third person does not relieve him of liability, nor is it a defense that he at the time named the person from whom he heard the slander. *Newell on Slander & Libel*, p. 350. While under the admission made in the opening statement of defendant's case, the evidence rejected was not admissible for the purpose of disproving the grounds of plaintiff's liability, it was competent for the purpose of mitigating the damages. Under the statute, an injurious publication is presumed to be malicious, if no justifiable motive for making it is shown. Section 2342, Comp. Laws 1909. Plaintiff, however, seeks not only compensatory damages, but also exemplary damages; but, to be entitled to recover exemplary damages, it is

necessary to show that defendant in making the defamatory statement was actuated by actual or express malice. *Walker v. Wickens*, 49 Kan. 42, 30 Pac. 181; *Hess v. Sparks*, 44 Kan. 465, 24 Pac. 979, 21 Am. St. Rep. 300; 18 Am. & Eng. Encyc. of Law, 1093. We think it was competent for defendant to show, as bearing upon the question whether he was actuated by express malice in uttering the slanderous statement, that he repeated it as a statement of a third person giving at the time the name of the author; and that he then believed the statement to be true. In establishing or disproving actual or express malice, the rule that all the circumstances surrounding the making of the defamatory statement and of the language used by the person charged with committing the slander may be proven is a liberal and wise one; for whether there was actual malice is a question of fact for the jury, which can best be determined when it is in possession of all the facts and circumstances pertaining to the publication of the alleged slander. Under the statute, the smallest amount for which a verdict could have been returned is \$100. The verdict was for \$200, twice the minimum amount. We cannot therefore say that defendant was not prejudiced by the erroneous exclusion of this evidence.

[3] One McLean, of counsel for plaintiff, testified at the trial on behalf of plaintiff. He testified to the making of the defamatory statement by defendant as alleged in count 1 of plaintiff's petition, and also circumstances tending to show express malice on the part of defendant in making it. On cross-examination, this witness was asked if he has a contract with plaintiff to share in the judgment that he should recover in this action. An objection to this question was by the court sustained. Thereafter, however, other counsel for plaintiff admitted that the witness had an interest in the judgment to be recovered, but upon the witness being asked what amount of the judgment sought to be recovered in the action, if any was recovered, he would under his contract receive from plaintiff, the court sustained an objection thereto. In this, also, we think the court committed error.

Where an attorney testifies as a witness for his client in a case, communications between him and his client relative to the fee he received in the case is not privileged. *Moats v. Rymer*, 18 W. Va. 642, 41 Am. Rep. 703; *Smithwick et al. v. Evans*, 24 Ga. 461; *Eastman et al. v. Kelly et al.*, 1 N. Y. Supp. 866.<sup>1</sup> This rule is wise and just. To surround an attorney who takes the witness stand in behalf of the client he represents with a cloak of protection against cross-examination that will show his interest and possible bias in a cause would result in sub-

<sup>1</sup> Reported in full in the New York Supplement; reported as a memorandum decision without opinion in 49 Hun, 607.



jecting the adversary in the case to the dangerous effect of testimony clothed with the appearance of being unbiased and unprejudiced, when as a matter of fact it might be extremely to the contrary; and no good whatever could follow from such a rule. When an attorney goes upon the stand as a witness, he is not and should not be exempt from any of the rules applicable to other witnesses for testing his interest in the suit in order that the jury may competently judge whether he is biased and determine intelligently what weight and credibility is to be given to his evidence. It was not sufficient to admit that witness who was of counsel had a contingent interest in the result of the suit. It was equally important for the jury to know the extent of that interest. An inconsequential interest in a case might not be regarded as sufficient to bias a witness, whereas a large interest would lead the jury to believe his evidence unreliable.

*Ellis v. Whitehead*, 95 Mich. 105, 54 N. W. 752, the only case cited by defendant in error to support his contention that this evidence was inadmissible, is not in point.

For the errors suggested above, the judgment of the trial court is reversed, and the cause remanded.

TURNER, C. J., and KANE and DUNN, JJ., concur. WILLIAMS, J., not participating.

MISSOURI, O. & G. RY. CO. v. HAYDEN.  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

**TRIAL (§ 41\*)—EXCLUSION OF WITNESSES.**

The principal officer of a railway company who becomes a witness in a cause may be put under the rule and excluded from the courtroom as other witnesses.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 101-105; Dec. Dig. § 41.\*]

Error from District Court, Wagoner County; John H. King, Judge.

Action by Martha A. Hayden, Walter Hayden, special administrator, against the Missouri, Oklahoma & Gulf Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

E. R. Jones, for plaintiff in error. C. E. Castle and E. L. Moore, for defendant in error.

KANE, J. As the evidence is not all in the record, there is only one question for review presented by the plaintiff in error in its brief, and that is: "The court erred in refusing to allow W. P. Dewar, the vice president and general manager of plaintiff in error, to remain in the courtroom to aid and assist plaintiff in error in the trial of the cause." On this question counsel says:

"In this case the rule was invoked and all the witnesses, both of plaintiff and defendant, were excluded from the courtroom. The plaintiff, special administrator, Walter Hayden, the person primarily interested in the lawsuit from the plaintiff's standpoint, was permitted to remain in the courtroom and to give the attorneys the benefit of suggestions made to them from time to time during the course of the trial. W. P. Dewar, the vice president and general manager of the railway company, and, according to the testimony set out by this brief, the person having complete charge of the property of that company, was excluded from the courtroom and was not permitted to remain in the courtroom or permitted to give the defendant's attorneys the benefit of such suggestions as might occur to him during the trial of the case."

As this was a case commenced prior to statehood, the rule of practice applicable to like cases in the state of Arkansas is applicable. In that state it is held that even a party to a suit who becomes a witness may be put under the rule and excluded from the courtroom in the discretion of the court. This is also the rule at common law, and prevails generally in the courts of this country. *Randolph v. McCain*, 34 Ark. 696.

The judgment of the court below is affirmed. All the Justices concur, except DUNN, J., absent and not participating.

ST. LOUIS & S. F. RY. CO. v. BRYAN.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

**TRIAL (§ 359\*)—GENERAL VERDICT—SPECIAL FINDINGS—INCONSISTENCY.**

Where the general verdict of a jury and the special findings of fact on interrogatories can be harmonized and made to agree by taking into consideration the entire record and construing the same liberally for that purpose, it is the duty of the court to so harmonize them; and it is authorized to disturb the general verdict in those cases only where upon no reasonable hypothesis, under the pleadings and the evidence, they can be harmonized.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 857-860; Dec. Dig. § 359.\*]

Error from District Court, Kiowa County; G. A. Brown, Judge.

Action by T. F. Bryan against the St. Louis & San Francisco Railway Company, and defendant brings error. Affirmed.

W. F. Evans and R. A. Kleinschmidt, for plaintiff in error. P. K. Morrill and O. B. Reigel, for defendant in error.

DUNN, J. This case presents error from the district court of Kiowa county, and is an action brought by defendant in error as plaintiff against the plaintiff in error to recover damages for injuries sustained at a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

grade crossing of defendant's railroad where the same passed over one of the streets of the town of Snyder. Plaintiff's petition set forth the facts concerning the accident, which the defendant answered, denying its own negligence and averring contributory negligence on plaintiff's part. On the issues thus made, the case came on for trial before a jury, which on hearing the evidence returned a verdict in plaintiff's favor for \$300, on which judgment was rendered, to reverse which the cause has been filed in this court.

There is virtually no controversy over the facts in the case, which may be epitomized as follows: Plaintiff had resided in the vicinity of Snyder for three years, and had frequently passed over the crossing in question, and was perfectly familiar with the same. On the morning of October 10, 1906, he had driven in his wagon drawn by a team of mules to the Farmers' Gin which was located some distance north of the right of way and east of the street on which the accident occurred. The railroad passes through the town east and west, and is intersected at right angles by the street mentioned. The tracks are straight and on level ground, and consisted at this crossing of first a team track at the extreme north, then another track about 30 feet to the south thereof, and then the main track 10 feet south of that. On the day in question there was a line of box cars on the first side track north of the main track which extended from some distance in the street westward for a space of about 600 feet. Several gins in the immediate vicinity of the railroad were running and making the usual noise incident thereto, and also a freight engine on the side track near this crossing blowing off steam. The plaintiff driving an ordinary lumber wagon to which was hitched a team of young mules started from the Farmers' Gin on the north side of the track and drove south at a jog trot to the railroad crossing. All of the defendant's main line west was obstructed from plaintiff's view by the box cars. In driving south toward the crossing, plaintiff testified that the first track to which he came had a box car standing on the east of the road at which his mules shied and stopped. He says: "I looked and listened and went on. They bore to the west. I went on, started then south, and there was another car on the next track which extended up into the street too. Q. On which side of the street was that car? A. On the west side. Q. What kind of a car was it? A. A box car. Q. About how far did it extend into the street? A. Well, possibly the whole length. I don't know exactly; something like full length of the car into the street. Q. State what you did there. A. The mules shied at the car and I stopped. I had to bear east to get around those cars. I looked and I listened for the train, and I seen nothing nor heard nothing. Q. Then what did you do?

A. I started and went on south going on across."

It is conceded that the first point between the ginyard, where plaintiff started, and the main track, where the injuries occurred at which the plaintiff could see along the main track to the west, was about eight feet north of the main track, being at the point just after he cleared or passed the line of box cars. There is no claim made here that the defendant was not guilty of negligence. The sole contention is that the plaintiff was guilty of contributory negligence, and that the answers made by the jury to the special interrogatories propounded proved contributory negligence on the part of plaintiff so clearly that they should be held to control the general verdict which should be set aside, and judgment rendered for defendant. Section 5806, Comp. Laws Okl. 1906. The foregoing statement of facts will in our judgment clear the connection the interrogatories and answers bear to the subject under discussion without setting them all out at length. Those which are pertinent, and upon which counsel for defendant rely, are as follows: "When the plaintiff cleared the line of box cars driving toward the crossing, how far away from the crossing was the engine of defendant? A. About 25 feet. When plaintiff's team of mules reached the north rail of the main track, how far away was defendant's engine visible to plaintiff? A. About 25 feet. At what point between the ginyard and the main track could the plaintiff first see down the main track without obstruction? A. About 8 feet north of the main track. Did the plaintiff stop at that point and look for approaching trains? A. No. How far from the main track was the plaintiff's wagon when it was first seen by the fireman or engineer of said train from the crossing at that time? A. About 8 feet. How far was the engine of said train from the crossing at that time? A. About 15 feet. Could the defendant's train then have been stopped in time to avoid a collision with the plaintiff? A. No, sir. At what rate was the defendant's train traveling? A. Fifteen to 18 miles per hour."

Now the question is, Are the facts here disclosed sufficient to show contributory negligence on plaintiff's part? The reason and rule governing the force and effect to be given to special findings made in answer to interrogatories is stated at pages 45 and 46 of Clementson on Special Verdicts, and is as follows: "The submission of interrogatories under the statute is a sort of 'explanatory opening' into the abdominal cavity of the general verdict (if I may be pardoned a surgical metaphor), by which the court determines whether the organs are sound and in place and the proper treatment to be pursued. The general verdict and special findings are considered together, and anything necessary to the right to judgment of

the party in whose favor the general verdict is rendered, which is not found in the answers, is presumed to be considered in the general verdict. There is therefore no necessity that the answers should cover all the issues, nor does the statute contemplate that they should. The general verdict is controlled by the special findings only when the two are irreconcilable. The latter furnishes a basis for judgment only where it is apparent that upon no conceivable hypothesis under the pleadings and evidence admissible thereunder can the findings be true and the party in whose favor the general verdict is rendered have ground left to stand upon." The doctrine there announced has received general recognition. *Solomon Railroad Co. v. Jones*, 34 Kan. 443, 8 Pac. 730; *Bevens v. Smith*, 42 Kan. 250, 21 Pac. 1064; *Drinkwater et al. v. Sauble*, 46 Kan. 170, 26 Pac. 433; *Moesser et al. v. Lewis*, 68 Kan. 485, 75 Pac. 512.

The court instructed the jury fully upon the proposition that negligence on the part of plaintiff contributing to his own injury would defeat recovery on his part, and the general verdict returned included within it a finding that plaintiff was free from contributory negligence. The question here presented, therefore, is Do the answers to the special interrogatories above set out present such an irreconcilable conflict between the conclusion of the jury on this proposition that this court can say as a matter of law that plaintiff was guilty of contributory negligence and that the jury was in error when it found him free therefrom? In the determination of this question, it is our duty, if possible, to harmonize the general verdict with the special findings of fact if they can be made to agree by taking into consideration the entire record of the case and construing the same liberally for that purpose. *Bevens v. Smith*, supra. It is to be noted that, on account of defendant's obstructing a view of the main line over which the train inflicting the injuries passed, plaintiff was unable to see the approaching train, and that the first point at which he was able to see it by reason of this obstruction was after he had passed the box cars on his road across the track. The jury finds that, when he passed these cars, he did not stop nor look for approaching trains, and counsel for defendant contends that by reason of this fact he was guilty of contributory negligence, insisting that it was his duty after having passed the string of box cars and could look to the west, that he should have stopped his team and backed off the track rather than have gone forward as he did. Even a casual consideration of the facts as they presented themselves to plaintiff at that fraction of a second of time is sufficient in our judgment to demonstrate the futility of the contention.

Plaintiff, in his wagon, driving, was certainly not less than from 12 to 15 feet back of the heads of his mules. When he was in a position to see the train which was approaching, the facts found demonstrate that his mules were then absolutely upon the track with a train but 25 feet away bearing down upon them at a rate of from 15 to 18 miles an hour, and it would be virtually impossible in our judgment for plaintiff to have taken any action as the situation presented itself to him which would be held on his part to be contributory negligence. The fact that he or his team escaped at all under the facts found by the jury is little less than miraculous.

Finding as we do that there is no conflict between the verdict and the answers to the special interrogatories, the judgment of the trial court is affirmed.

TURNER, C. J., and KANE, J., concur. WILLIAMS and HAYES, JJ., absent and not participating.

#### PHOENIX INS. CO. v. CEAPHUS.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

#### INSURANCE (§ 383\*)—CONDITIONS OF POLICY—WAIVER—PAROL WAIVER.

Where the fire insurance policy sued on provides, "This entire policy unless otherwise provided by agreement indorsed hereon or added hereto shall be void, \* \* \* if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple," etc., and it was admitted on the trial that the building insured was not on ground so owned at the time the policy was executed and delivered, but on ground owned and patented to the wife of the insured, if parol evidence to establish a waiver of said condition is admissible to prove that the agent of the insurer had notice or knowledge of that fact at that time, the same is insufficient to establish such waiver, where the policy also provides: "No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto and as to such provision and conditions no officer, agent or representative shall have such power or be deemed or held to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1018; Dec. Dig. § 383.\*]

Error from District Court, Bryan County; Robt. Crockett, Judge.

Action by Ben Ceaphus against the Phoenix Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Burwell, Crockett & Johnson, for plaintiff in error. Hatchett & Ferguson, for defendant in error.

TURNER, C. J. This is an action brought by Ben Ceaphus, defendant in error, hereafter called "plaintiff," against the Phoenix Insurance Company of Brooklyn, N. Y., hereafter called "defendant," in the district court of Bryan county, upon a fire insurance policy executed by defendant on February 15, 1907, by which defendant undertook to insure plaintiff's one-story frame building with shingle roof, situated on the S. E.  $\frac{1}{4}$  of section 8, township 6 S., range 11 E., then in the Indian Territory, in the sum of \$750. A copy of the policy is filed as an exhibit to his petition and contains: "In witness whereof this company have executed and attested these presents. This policy shall not be valid until countersigned by the duly authorized agent at Tishomingo, I. T. Chas. A. Shaw, President, Joseph McCord, Sec. Countersigned at Tishomingo, I. T." During the life of the policy, on December 14, 1907, the house was totally destroyed by fire. For answer defendant pleaded a general denial and, as a second defense, that plaintiff was not at the time the policy was issued and delivered, nor at any time prior to the alleged destruction of said building, the owner in fee simple of the real estate on which it was located, and that the insured was not during any of that time the sole and unconditional owner of said land, and for that reason said policy is void because of that part thereof which reads: "This entire policy unless otherwise provided by agreement indorsed hereon and added hereto shall be void if the insured now has or shall hereafter make or procure any other contract of insurance whether valid or not on property covered in whole or in part by this policy; \* \* \* or if the interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple," etc. For a third defense defendant pleaded failure on the part of the insured to comply with the terms of the policy and that none of the conditions or terms thereof were ever waived by any of its officers or agents. For reply thereto plaintiff, after a general denial, pleaded that defendant was estopped from relying for a forfeiture upon said part of the contract of insurance for the reason that the agent, who executed the policy and accepted payment of the premium which had not been returned or offered, knew all the facts concerning the title of said real estate upon which said building was located and issued said policy with full knowledge thereof. There was trial to a jury, during which a return of the premium was tendered and refused and judgment rendered and entered for plaintiff, and defendant brings the case here.

In maintaining the issues on his part after

admitting that the house described in the policy was not located on land owned by him at any time prior to the destruction, plaintiff, after introducing said policy in evidence, to prove the waiver pleaded, was permitted to testify over objection to a conversation between plaintiff and the agent, in effect that he had informed the agent at the time he came to inspect the risk that the land belonged to his wife, and showed him her patent therefor, whereupon the agent replied that such did not matter and copied the description of the land therefrom to set forth in the policy. The admission of this testimony is assigned for error, and such it seems to be. Said policy provides: "No officer, agent or other representative of this company shall have power to waive any provision or condition of this policy except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto and as to such provisions and conditions no officer, agent or representative shall have such power or be deemed to have waived such provisions or conditions unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

In *Liverpool, etc., Ins. Co. v. Richardson Lumber Co.*, 11 Okl. 585, 69 Pac. 938, as here, plaintiff made no written application for the policy. For the purpose of determining whether the policy should issue, the local agent and the state agent or adjuster for the state of Kansas went to Red Oak, Ind. T., and examined the situation and condition of the insured property. It consisted of a stock of lumber situated in the yards and sheds of the plaintiff. The state agent informed the agent of plaintiff that he was satisfied with the risk and authorized the local agent to write a "liberal policy." The policy was afterwards written by the local agent and delivered and the premium received. As here, it provided as last quoted, no waiver of any kind appeared upon the policy, and no issue was tendered or evidence offered that the policy was void on the ground of fraud or mistake of the parties. The policy, among other things, contained the following stipulations: "Warranted by the assured that a clear space of 200 feet, tramway excepted, shall always be maintained between the lumber hereby insured and any mill or other manufacturing establishment, or else this policy shall be void." The company claimed a forfeiture under this clause, and it appeared in the agreed statement of facts that no such space existed between the lumber in the sheds and the mill at the time the risk was inspected by said agents and the policy delivered. Knowledge of this fact at that time thus established by parol was relied on by the insured to prove a waiver of said stipulation, and such, in effect, it was held to be by the trial court. On appeal this

was held error, and that such testimony was inadmissible to contradict or vary the terms of the policy. The court said: "The policy sued on in this case is plain and explicit and free from all doubt or ambiguity. There is no allegation in the petition of fraud or mistake, and none is claimed or shown. And hence parol testimony was inadmissible and incompetent to vary or change the terms or conditions of the policy, and all previous negotiations and statements between the insured and assured were merged in the policy."

In that case the court followed *Northern Assurance Co. v. Grand View*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, which it declared to be controlling. But that case goes further and holds, in effect, that such evidence, if admissible, was insufficient in legal effect to establish a waiver of said conditions of the policy or estop the company from insisting upon such forfeiture as a defense to a suit thereon. Those cases involved policies containing identical stipulations and conditions. In the case followed the policy contained a stipulation rendering it void and of no effect in case other insurance had been or should be made upon the property unless by agreement indorsed thereon or attached thereto. At the time the policy was delivered, other insurance had been placed on the property by the insured in another company. Reversing the judgment of the Circuit Court of Appeals decided in 101 Fed. 77, 41 C. C. A. 207, the Supreme Court held that parol testimony to establish a waiver of said condition was not only inadmissible to prove that the agent of the company issuing the policy had notice or knowledge of that fact at that time, but that such condition could not be waived by any agent of the company, except in the manner stated in the policy, and that the knowledge of the agent of the existence of the forfeiture at the time of its inception did not constitute a waiver of the conditions of the policy. As the law as it existed at the time and place of the making of this contract is a part thereof, and what constitutes a waiver, the facts being undisputed, is a question of law, and as the waiver here contended for occurred, if at all, at the inception of the policy and by the happening of no subsequent event; so that case, deciding, as it does, that the evidence offered, if admissible, was insufficient in legal effect to establish a waiver, is and was the law entering into that contract construing it and fixing the rights of the parties thereto.

For that reason, and the further reason that the parties to said contract being chargeable with knowledge of the law as it then existed and presumed to have contracted with knowledge that the acts complained of and then transpiring did not constitute a waiver of said stipulation, that case is controlling here. The controlling effect of that decision was recognized by this court in *Sullivan v. Mercantile, etc., Co.*, 20 Okl. 460, 94 Pac. 676, 129 Am. St. Rep. 761. That was an action on

a fire insurance policy dated November 2, 1903, wherein defendant undertook to insure the plaintiff's one-story shed house for storing his one J. I. Case threshing machine and his one Advance threshing machine, all in several amounts, which said property during the life of the policy was totally destroyed by fire. One of the conditions of the policy provided: "This entire policy and each and every part thereof, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void. \* \* \* If the subject of insurance be personal property and be or become incumbered by chattel mortgage." It also contained a provision identical to that last quoted from the policy in question. One of the errors assigned by plaintiff in error, plaintiff below, was that the court erred in refusing to allow him to answer the question as to whether or not the agent who wrote the policy knew at the time said policy was written and delivered that said J. I. Case threshing machine was under mortgage. But this court, following the rule in the *Northern Assurance Co. Case*, supra, held that such was not error. Speaking of that case, the court said: "The court in that case held that such condition in the policy could not be waived by any officer or agent of the company except in the manner provided in the policy, and that knowledge of the existence of the forfeiture of said policy by reason of the violation of any condition thereof on the part of the agent of the insurance company at the time he delivered the policy and received the premium did not operate as a waiver of the conditions of said policy, or estop the company from setting up such forfeiture as a defense against an action upon the policy; and further held that oral testimony was not admissible to show knowledge of the agent of the company of such facts existing in violation of the conditions of said policy at the time of the execution and delivery of the same. This rule laid down by the Supreme Court of the United States in *Northern Assurance Co. v. Grand View Building Association*, supra, was a controlling decision upon the trial court in the case at bar; and, while we do not wish to be understood as saying it is our opinion that the doctrine announced in that case is in harmony with the weight of authorities upon this question, or that it is supported by the better reasoning, yet, on account of the fact that the rule announced in said case was the law controlling the courts in the Indian Territory at the time of the trial of the case at bar, we are constrained to follow in this case the rule announced herein, and hold that the trial court did not err in refusing to permit the introduction of oral testimony to show the knowledge of the agent of the company of the existence of said mortgage at the time of the execution and delivery of the policy, and that said court did not err in holding that the forfeiture of said policy, if any had occurred, was not waived, and that the defendant com-

pany was not estopped from pleading the same as a defense by reason of the fact that the agent of the company who countersigned and delivered said policy had knowledge at the time of the existence of said mortgage. In applying the rule of law adopted by the Supreme Court of the United States in said case to the case at bar, and in following the same, we do not wish to be understood as laying down a rule by which this court shall be governed in the future in passing upon the same question arising in cases originating since the admission of the state of Oklahoma into the Union."

The vital question here being the legal sufficiency of the evidence, if admissible, to establish a waiver of the stipulation relied upon to claim a forfeiture of the policy, and not whether the company by its agent could waive said stipulation owing to the other stipulation in the policy, *supra* (identical in all cases cited, *supra*), we will not consider the latter proposition. *Deming Investment Co. v. Shawnee, etc., Investment Co.*, 16 Okl. 1, 83 Pac. 918, 4 L. R. A. (N. S.) 607.

We are therefore of opinion, following the rule laid down in those cases, that, the same being legally insufficient to establish the waiver, the court erred in admitting the testimony complained of, and for that reason the cause is reversed and remanded for a new trial. All the Justices concur, except WILLIAMS, J., who dissents.

#### AMERICAN WELL & PROSPECTING CO. v. SPEAR.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(*Syllabus by the Court.*)

#### APPEAL AND ERROR (§ 1001\*)—REVIEW—SUFFICIENCY OF EVIDENCE.

Where there is evidence reasonably tending to sustain the verdict of a jury, a judgment entered thereon will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. § 3928; Dec. Dig. § 1001.\*]

Error from District Court, Marshall County; D. A. Richardson, Judge.

Action by D. A. Spear against the American Well & Prospecting Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Cornelius Hardy, Veasey & Rowland, and Kenneth H. Davenport, for plaintiff in error. Summers Hardy and William M. Franklin, for defendant in error.

KANE, J. This was an action, commenced by the defendant in error, plaintiff below, against the Fall River Oil & Gas Company, wherein certain personal property was attached as belonging to the gas company. There was judgment by default against the gas company for the amount claimed, but the question of the attachment was tried

out between the plaintiff in error here, who intervened, and the plaintiff in the original action, so that the controversy is now between the intervener, who lost below, and the defendant in error, plaintiff below.

The interpleader contends that the judgment of the court below ought to be reversed upon the following grounds: (1) The court erred in overruling the interpleader's motion to direct a verdict. (2) The court erred in overruling the interpleader's motion for a new trial. (3) The court erred in excluding from the consideration of the jury the interpleader's Exhibits B and C.

We do not believe that any of these grounds are well taken. The interpleader alleges, in substance, that it delivered the property involved to one Douglass under a written contract with him, by the terms of which it was to retain title until the same was fully paid for; that the property was never paid for; and that therefore it was entitled to its possession, as owner thereof. By way of answer, the plaintiff alleged, in substance, that Douglass was a stockholder in the gas company; that, in consideration of the issuance of said stock to him, with the full knowledge and consent of the interpleader, he sold and transferred the attached property to said gas company; that afterwards Douglass transferred said stock to the intervener, who thereupon ratified and confirmed the sale of the attached property by Douglass to the gas company. There was evidence tending to sustain the allegations of the plaintiff's answer, and that, under a long line of decisions by this and other courts, precludes us from interfering with the verdict of the jury in his favor.

We think the court below succinctly stated the issues joined by the pleadings in its instructions, as follows: "The defendant having made no defense, the issue to be determined by the jury is one purely between the plaintiff and interpleader, and the issue to be determined is the ownership of the property. Now the court would instruct you that, if you should find that the interpleader accepted this stock in payment for the debt which Douglass owed it, then, in that event, the interpleader did not have title at the time it interpleaded, and you should find for the plaintiff. If you believe that Douglass turned over his stock, but as security, then, in that event, the court would instruct you that it would be your duty to find for the interpleader." That seems to us to be all there is to the case, and, as the question of the ownership of the property was settled by the verdict of the jury, this court will not disturb it.

The remaining assignments deal with alleged defects in the pleadings and proceedings, which do not seem to affect the substantial rights of the adverse party. The statute provides that: "No judgment shall be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

reversed or affected by reason of such error or defect." Section 5680, Compiled Laws of Oklahoma 1909.

The judgment of the court below is affirmed. All the Justices concur.

**FIRST NAT. BANK OF SALLISAW v. HOUSTON.**

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

**APPEAL AND ERROR (§ 1001\*)—REVIEW—SUFFICIENCY OF EVIDENCE.**

Where the case turns upon a question of fact, and the issue joined is fairly presented to a jury, a judgment entered upon their verdict will not be reversed, when there was evidence adduced reasonably tending to support it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3928; Dec. Dig. § 1001.\*]

Error from District Court, Sequoyah County; John H. Pirchford, Judge.

Action by the First National Bank of Sallisaw against John Houston. Judgment for defendant, and plaintiff brings error. Affirmed.

Wm. L. Curtis and J. W. Watts, for plaintiff in error. T. F. Shackelford, for defendant in error.

**KANE, J.** This was an action commenced by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, to recover certain moneys, which were alleged to be due the plaintiff from the defendant, in substance as follows: Said plaintiff held a mortgage against one Harvey Houston upon certain growing crops and live stock which debt was evidenced by a promissory note payable to plaintiff; that said defendant, John Houston, agreed to pay said indebtedness in consideration of the plaintiff surrendering to him the said mortgaged property. After the issues were joined, there was a trial by jury which returned a verdict in favor of the defendant, upon which judgment was duly entered, to reverse which this proceeding in error was commenced.

The defendant denied that he agreed to pay the debt of his brother Harvey Houston upon the mortgaged property being turned over to him, and testified that the agreement between himself and the bank was, in substance, as follows: The defendant agreed to take charge of the crop, gather it, and pay it over to plaintiff, who agreed to pay him 75 cents per hundred for picking the cotton and \$1 per load for hauling the cotton and corn. That under this agreement plaintiff received the sum of \$41.40, after paying for picking, hauling, rents, etc. That the plaintiff offered to sell the property to the defendant for \$135, the amount of Harvey Houston's indebtedness to it, which proposal was

rejected by him, and he afterwards stated that he would sell the cows for \$45 and make certain other arrangements about the balance of the mortgaged property, and pay the balance, if any, which proposition was rejected by the plaintiff. The jury returned a verdict in accordance with the defendant's theory of the case, and, as there was evidence reasonably tending to support it, we are not at liberty to disturb it.

We have examined all the assignments of error, and we are of opinion that none of them warrant a reversal. The case turns principally upon a question of fact, and as the issue joined was fairly presented to the jury, and they decided it in favor of the defendant on the merits of the case, we are required by section 5680, Compiled Laws of Oklahoma, 1909, to disregard any error or defect in the pleadings or proceedings, which does not affect the substantial rights of the adverse party.

The judgment of the court below is affirmed. All the Justices concur, except WILLIAMS, J., absent, and not participating.

**MALOY et ux. v. WM. CAMERON & CO.**

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

**1. HOMESTEAD (§§ 1, 118\*)—NATURE OF ESTATE—ALIENATION—RIGHTS OF HUSBAND.**

Homesteads, being unknown at common law, exist only by statutory or constitutional provisions.

(a) In the absence of some statutory provision limiting the right of the husband to alienate or encumber the homestead, he may sell or encumber the same without the joinder or consent of his spouse, and such alienation or encumbrance, made without her consent, is valid and binding.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 1, 203, 209, 216, 217; Dec. Dig. §§ 1, 118.\*]

**2. HOMESTEAD (§ 118\*) — ENCUMBRANCE — RIGHTS OF HUSBAND—FORECLOSURE.**

Under the laws existing in Oklahoma Territory on June 13, 1901, the title to the homestead being in the husband, he having mortgaged the same without being joined by his wife, his rights in such homestead were concluded thereby.

(a) Foreclosure proceedings having been instituted by the mortgagee, to which the wife was made a party, by answering and setting up her right therein, such mortgage could thereby be avoided as to such rights, and foreclosure decreed only against the rights of the husband and subject to all homestead rights of the wife as long as they should exist.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. §§ 203-209, 216, 217; Dec. Dig. § 118.\*]

Error from District Court, Greer County; J. R. Tolbert, Judge.

Action by William Cameron & Co. against H. M. Maloy and wife. Judgment for plaintiff, and defendants bring error. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

A. M. Stewart, for plaintiffs in error.  
Charles M. Thacker, J. Percy Powers, and  
J. A. Powers, for defendant in error.

**WILLIAMS, J.** The trial court without the intervention of a jury found: That plaintiff (defendant in error) "has a valid, subsisting, and unsatisfied lien, by virtue of said mortgage, upon the aforesaid real estate, which he is entitled to foreclose, as to all the right, title, and interest of defendant therein, but subject to the aforesaid homestead rights of the said intervener (the wife), so that the purchaser at the foreclosure sale of the same shall take the legal title and all the reversionary rights of the defendant in and to the same, but, so long as the same shall remain such homestead, the lawful homestead rights of the intervener (the wife) in and to the same as such homestead shall remain unimpaired and in full force and effect as if said note and mortgage had never existed. That the said mortgage is not valid as to the homestead rights of the intervener (the wife) in respect to said real estate, and she has avoided the same herein, so that she can be deprived of none of her said rights to occupy and use the same as a homestead so long as her said homestead rights in respect to the same may continue to exist; but, upon her death, voluntary abandonment of her said husband and said homestead for a period of one year, abandonment of said homestead and taking up of her residence out of this state, or other act working a forfeiture or surrender of her said homestead rights, the right of occupancy and use of said real estate will be united with the legal title in the purchaser in said foreclosure proceedings or his successor, as said reversionary interest, so that the said purchaser or his successor in right shall thenceforth have both the title and the sole right of possession, occupancy, and use of the same."

[1] Homesteads, being unknown at common law, exist wholly by statutory or constitutional provision. *McGuire v. Van Pelt*, 55 Ala. 344; *Cook v. Higley*, 10 Utah, 228, 37 Pac. 336. In the absence of some constitutional or statutory provision limiting the right of the husband to alienate or incumber the homestead, he may sell or incumber the property without the joinder or consent of his wife, and such alienation or incumbrance, made by the husband alone, is valid and binding. *Lindsay v. Norrill*, 38 Ark. 545; *Klenk v. Noble*, 37 Ark. 298; *Drake v. Root*, 2 Colo. 685; *Wright v. Whittick*, 18 Colo. 54, 31 Pac. 490; *Gullett v. Arnett*, 44 S. W. 957, 19 Ky. Law Rep. 1892; *Brame v. Craig*, 12 Bush (Ky.) 404; *Pribble v. Hall*, 13 Bush (Ky.) 61; *Schleids v. Horbach*, 49 Neb. 262, 68 N. W. 524; *Gunnison v. Twitchel*, 38 N. H. 62; *Kennedy v. Stacey*, 1 Baxt. (Tenn.) 220; *Bilbrey v. Poston*, 4 Baxt. (Tenn.) 232; *Nichol v. Davidson County*, 8 Lea (Tenn.)

389; *Kincaid v. Burem*, 9 Lea (Tenn.) 553; *Cook v. Higley*, 10 Utah, 228, 37 Pac. 336; *Moran v. Clark*, 30 W. Va. 358, 4 S. E. 303, 8 Am. St. Rep. 66; *Platto v. Cady*, 12 Wis. 461, 78 Am. Dec. 752. The law creating homestead exemptions having no provision as to selling or conveying the same, conveyances of such homestead are governed by the general law regulating conveyances of real estate. *Drake v. Root*, 2 Colo. 685. See, also, note to *McDonald et al. v. Sanford*, 9 Am. & Eng. Ann. Cas., beginning at page 3.

[2] The following statutory provisions were in force in Oklahoma Territory, and governed at the time the mortgage in question was executed: "No deed, or mortgage or other conveyance relating to real estate or any interest therein, other than for a lease for a period not to exceed one year, shall be valid unless reduced in writing and subscribed by the grantors; and no deed, mortgage or contract relating to the homestead exempt by law, except a lease for a period not exceeding one year, shall be valid unless in writing and subscribed by both husband and wife, where both are living and not divorced, except to the extent hereinafter provided." Section 880, *Wilson's Revised and Annotated Statutes of 1903*. "Where the title to the homestead is in the husband, and the wife voluntarily abandons him for a period of one year, or from any cause takes up her residence out of the territory, he may convey, mortgage, or make any contract relating thereto without being joined therein by her; and where the title to the homestead is in the wife, and the husband voluntarily abandons her, or from any cause takes up his residence out of the territory for a period of one year, she may convey, mortgage or make any contract relating thereto without being joined therein by him." Section 882, *Wilson's Revised and Annotated Statutes of 1903*. "If the husband shall make any deed, mortgage or conveyance relating to the homestead, without being joined therein by his wife he shall be concluded thereby, and the same can only be avoided by the wife; and if the wife shall make any deed, mortgage or contract relating to the homestead without being joined therein by the husband, she shall be concluded thereby, and the same can only be avoided by the husband; and in either case, the husband or wife entitled to avoid any such deed, mortgage or contract shall be concluded by a failure after due notice of any suit in a court of competent jurisdiction, to set forth his or her right, title or interest therein." Section 883, *Wilson's Revised and Annotated Statutes of 1903*.

"In most jurisdictions it is held that laws which merely exempt homestead property from sale under legal process do not prevent judgments from becoming liens upon it; but that the lien attaches subject to the homestead use, retains its priority over subse-



quent liens, and may be enforced when that use has terminated by a sale or other abandonment." 15 Am. & Eng. Ency. of Law (2d Ed.) p. 621 (b). Arkansas, Louisiana, Minnesota, Nebraska, New York, North Carolina, and Wisconsin support this rule. Colorado, Illinois, Iowa, and Kansas, however, support the contrary doctrine. Under the laws existing at the time this mortgage was executed, the homestead right was created with the statutory limitations hereinbefore set out. Under these provisions, when the husband executes a deed, mortgage, or contract relating to his homestead, without being joined by his wife, he is "concluded thereby." The language that "the same can only be avoided by the wife" obviously means that the wife might intervene and protect such homestead rights as she might have under the law, that after notice, if she failed to appear and set up such claim, she would be concluded thereby; that, when she set up such rights and showed that she was entitled to a homestead as a wife therein, that would avoid the deed, mortgage, or contract, so far as it affected her homestead rights, but not as to her husband. This statute was evidently not intended to make the wife the guardian of the husband as to his rights, but to fix it so that he could not convey, mortgage, or contract away her homestead rights.

It seems that the trial court in rendering the decree followed the literal construction of this statute. However, since this transaction took place on June 13, 1901, the state has been erected, and section 883, *supra*, seems not to have been extended in force in the state. Sections 1, 2, 3, art. 12, Const.

The judgment of the lower court is affirmed. All the Justices concur, except HAYES, J., who is absent, and not participating.

#### REVARD v. HUNT.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

##### (Syllabus by the Court.)

#### 1. DEDICATION (§ 19\*)—SALES OF LOTS—STREETS AND ALLEYS.

When lots are sold with reference to a recorded plat, a dedication of the streets and alleys as laid out in such plat is deemed perfect without any affirmative official or other action on the part of the municipality or public.

[Ed. Note.—For other cases, see Dedication, Cent. Dig. §§ 35, 37-47; Dec. Dig. § 19.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 671\*)—OBSTRUCTION OF STREET—PUBLIC NUISANCE—ACTION TO ABATE.

Plaintiff is the owner and occupant of certain lots on a public street and alley which are the only means of communication with the outside world. Defendant by a fence and gates inclosed said lots along with all the streets and alleys leading thereto, completely obstructing plaintiff's free access to the outside world. *Held*, that the said obstructions constitute a public nuisance, but plaintiff is entitled to

maintain an action to abate them on the ground that they are specially injurious to her.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1448; Dec. Dig. § 671.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 671\*)—OBSTRUCTION OF STREET—PUBLIC NUISANCE—ACTION TO ABATE—LACHES.

Where a party is specially injured by a public nuisance, and brings an action to abate the same, no lapse of time will either legalize the same, nor estop the injured party from bringing an action to effect its abatement.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 671.\*]

Error from District Court, Kay County; W. M. Bowles, Judge.

Action by Margaret M. Hunt against Susan Revard. Judgment for plaintiff, and defendant brings error. Affirmed.

A. W. Comstock and L. A. Maria, for plaintiff in error. James Q. Louthan, for defendant in error.

DUNN, J. This case presents error from the district court of Kay county. January 14, 1909, the defendant in error, as plaintiff, filed her petition, wherein she alleged that the defendant was obstructing certain streets and alleys in the town site of Bluffdale, in that county, and that she owned two lots within the town site, and praying for a judgment enjoining defendant from keeping and maintaining the same. The petition, with plat attached, showed that the town site was regularly laid out with streets and alleys, and that on the 1st day of August, 1898, plaintiff purchased her said lots with reference thereto. It was then averred that the defendant, unmindful of the rights of plaintiff, maintained and kept a fence around a certain number of lots and blocks of this said town site which entirely closed the streets and alleys, and entirely surrounded the lots of plaintiff upon which was located her residence, and shut her and her household off from communication with the outside world, and the outside world from communication with her. This petition defendant answered by admitting title and ownership of the real estate described in plaintiff's petition, but alleged that she had placed gates in the said fence which had at all times been used by the plaintiff and her relatives and friends and other persons in traveling between plaintiff's place of residence and the outside world, and that these gates were sufficient to permit persons to go to and from said premises, and that, by reason thereof, plaintiff's ingress and egress had not been curtailed. Defendant further answered that the fence referred to had been constructed for more than 10 years, and that it was then and had been in substantially the same condition as at the time of its construction, and that, if plaintiff had a cause of action, the same was barred by the statute of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

limitations and additional lapse of time. Both parties moved for judgment on the pleadings, and the court, after hearing the argument of counsel thereon, found that the motion of counsel for plaintiff should be sustained, and adjudged that the defendant should be required to remove all fences and gates obstructing the street running north and south in front of plaintiff's property, and enjoined her from the maintenance of her gates and fence. To reverse this judgment the cause has been lodged in this court.

Counsel for plaintiff in error argue substantially three propositions in their brief which may be stated as follows: First, that the streets and alleys mentioned in plaintiff's petition are not public highways or streets, for the reason that no dedication to the public is pleaded, and that there is no allegation of any acceptance by the public of the said streets and alleys; second, that, if the fence referred to constitutes any nuisance whatsoever, it is a public nuisance, and that it is not pleaded that the obstruction occurs at a point where plaintiff's property abuts on the street, and hence plaintiff suffers no special damage, and cannot maintain this action to abate the same; and, third, that defendant, having maintained the fence for more than five years, has obtained the right by prescription of maintaining the same, and that plaintiff's cause of action, if she ever had any, is barred by her laches and long delay in bringing this action, as well as by the statute of limitations.

On the first proposition it is sufficient to say that the petition avers that one Broadhead caused the land within the town site of Bluffdale to be surveyed and platted into a town site, and that the plat which was attached to the petition and made a part thereof was regularly filed for record in the office of the register of deeds in that county on the 11th day of August, 1894, and duly transcribed into Plat Book 1, at page 12 of the official public records of said office, and the petition then sets out a long chain of conveyances of the lots claimed by plaintiff, which shows title in her, and that they were located in the town site of Bluffdale, according to the said plat.

Section 578, Wilson's Rev. & Ann. St. Okl. 1903 (section 913, Comp. Laws Okl. 1909), provides, in substance, that, when a plat or map is made out, certified, acknowledged, and recorded, every donation or grant to the public or any individual shall be considered to all intents and purposes a general warranty against the donor or donors or their grantees, and that the land intended to be used for streets, alleys, or other public uses shall be held in the corporate name of the city or town in trust for the uses and purposes set forth or intended. Section 589, Wilson's Rev. & Ann. St. 1903 (section 924, Comp. Laws Okl. 1903), provides, in substance, that, should any part of the plat be vacated, this will not abridge or destroy any

of the rights or privileges of proprietors therein, nor authorize the closing or obstructing of any public highway laid out according to law.

[1] From this it is apparent that, the town site having been once platted, it could not be vacated to the prejudice of the plaintiff, and the rule seems to be that the dedication of the streets and alleys is accepted by the public so far as the same is necessary, when any of its members purchase lots in the plat so executed and recorded. *Roberts v. Mathews*, 187 Ala. 523, 34 South. 624, 97 Am. St. Rep. 56; *Weiss et al. v. Taylor et al.*, 144 Ala. 440, 39 South. 519; *Williams v. Poole* (Ky.) 103 S. W. 336; *Boise City v. Hon*, 14 Idaho, 272, 94 Pac. 167. In the case of *Boise City v. Hon*, supra, the court in its discussion thereof said: "It was held in *Weiss v. Taylor*, 144 Ala. 440, 39 South. 519, that, 'when lots are sold with reference to a recorded plat, a dedication of the streets and alleys as laid out in such plat is perfected.' No official affirmative action on the part of the city was necessary, as the right vested in the public by some of its members purchasing lots in accordance with the plat. Upon this question, see *Garvey v. Harbinson-Walker Refractory Co.*, 213 Pa. 177, 62 Atl. 778; In re *Southwestern State Normal School*, 213 Pa. 244, 62 Atl. 908; *Lins v. Seefeld* [128 Wis. 610], 105 N. W. 917; *City of Mobile v. Fowler*, 147 Ala. 403, 41 South. 468; *Thorp v. Clanton* [10 Ariz. 94] 85 Pac. 1061; *Rhodes v. Town of Brightwood*, 145 Ind. 21, 43 N. E. 942." And in the case of *Williams v. Poole*, supra, the court approvingly quoted from the case of *Rowan's Ex'rs v. Town of Portland*, 8 B. Mon. (Ky.) 282, as follows: "The mere laying out of a town upon a man's land and by his own private act, and the making and the recording of a plan of the town, may not, and, as we suppose, do not, of themselves, conclude him to any extent. The land, notwithstanding these acts, is still his own, and neither any other nor the public have any right to interfere with such use of it as any man may lawfully make of his own. Though he has laid out a town upon the land and upon paper, he is not bound to sell the lots or to make or to authorize the making of a town in fact. If he never disposes of a lot or lots as part of the town, no one has any interest in the town as such, or any right growing out of his acts in relation to it. But in selling to another the lots laid off as parts of the town he creates in them an interest in the town and its plan, which place both beyond his future control. \* \* \* The right which, as we suppose, passes to the purchaser of lots as appurtenant thereto, is not the mere right or privilege that each purchaser may use the street and other public places according to their appropriate purposes; but the right acquired by each purchaser that all persons whatever as their occasions may require or

invite may so use them, or, in other words, we suppose the sale and conveyance of lots in the town, and according to its plan, imply a grant or covenant to the purchaser that the streets and other public places indicated as such upon the plan shall be forever open to the use of the public, free from claim or interference of the proprietor inconsistent with that use."

The next contention is that the fence, if a nuisance at all, constitutes a public nuisance, for which plaintiff cannot sue because her property does not abut upon the street at the point of the obstruction, and that she therefore suffers no special damage.

[2] Section 4752, Comp. Laws Okl. 1909, provides that "a public nuisance is one which affects at the same time an entire community or neighborhood," etc., and section 4760, Id., provides that "a private person may maintain an action for a public nuisance if it is specially injurious to himself but not otherwise." Under the conceded facts in this case, plaintiff's place of residence is surrounded by the fence of which complaint is made, and it is necessary for her to pass this fence and remove the obstruction occasioned thereby through gates in order to pass to and from her home. That the maintenance of an obstruction of this character in a public highway is a public nuisance is not denied, and the authorities are virtually unanimous holding that a person situated as plaintiff shows herself to be has such an interest and suffers such special injury as entitles him to maintain this action. 2 Elliott on Roads and Streets (3d Ed.) § 850; 2 Wood on Nuisances (3d Ed.) § 733; Joyce on Nuisances, §§ 218, 424; 37 Cyc. 253; McKay v. City of Enid et al., 26 Okl. 275, 109 Pac. 520, 30 L. R. A. (N. S.) 1021; Birmingham Ry., Light & Power Co. v. Moran et al., 151 Ala. 187, 44 South. 152, 125 Am. St. Rep. 21; Stricker v. Hillis et al., 15 Idaho, 709, 99 Pac. 831; Roberts v. Mathews, supra; Miller v. Schenck, 78 Iowa, 372, 43 N. W. 225; Helm v. McClure et ux., 107 Cal. 199, 40 Pac. 437; Fisher v. Zumbalt, 128 Cal. 493, 61 Pac. 82; Hayden v. Stewart, 71 Kan. 11, 80 Pac. 43; Brown v. Watson, 47 Me. 161, 74 Am. Dec. 482.

The Oklahoma case—McKay v. City of Enid, supra—while not decisive of the proposition involved, discusses it. In that case it appeared that McKay was the owner of a quarter section of land which laid northwest and outside of the limits of the city of Enid. Between his property and the city was the intersection of two public highways. Several city streets began at the said intersection, and led from the property of plaintiff to the city. They were obstructed by the construction of a railroad over and across them under and by virtue of an ordinance of the said city. Plaintiff alleged that the railroad and the switch tracks made access to his land more difficult, and because of which the value of his property

had greatly depreciated; that the company had negligently constructed its tracks upon a different grade than the streets, creating embankments and ditches, and permitting cars to stand upon the tracks, and thereby obstructing the public travel. A demurrer filed to the petition by the city was sustained. In the consideration of the proposition presented on appeal, this court in an opinion by Justice Hayes, after quoting the general rule that a private party to recover for damages inflicted by a public nuisance must sustain damages of a different character, special and apart from that which the public in general suffers, said: "The statement of the rule is easier than the application of it. It is often difficult to determine whether the injury to an individual from a public nuisance is or is not a kind that gives him a right of private action to recover damages therefor. The authorities generally hold that the injury resulting from an obstruction in a street or public highway in front of an abutting owner's property which interferes with his ingress and egress to and from his property is a special injury to him, and many authorities hold that, although the obstruction be not in front of the abutting property, if it be in such proximity to it upon the street or highway upon which the property abuts that the abutting owner's use and enjoyment of the property is destroyed or greatly interfered with, and its value depreciated, this injury is special and peculiar to him. And it has been held that injury to property, the access to which has been interfered with by an obstruction, although the property be not adjoining the highway or street upon which the obstruction exists, if such street or highway is the owner's only means of access to the property, is a special injury, and the owner may recover therefor. Bembe v. Commissioners of Anne Arundel County, 94 Md. 321, 51 Atl. 179, 57 L. R. A. 279. But the facts in the case at bar do not bring it within any of these classes. Plaintiff's property does not abut upon any of the streets obstructed. It abuts only upon public highways into which said streets lead. He has no private easement in the streets obstructed, such as an abutting property owner has. His right therein, of violation of which he complains, is one common to all the public. Plaintiff owns property in the vicinity of these highways, and the value of his right to travel over these may be greater to him than the value of the same rights to others who have no property in the same vicinity; but this is a difference only in degree, and not in kind. He does not allege that the streets obstructed constitute the only means of access to the property, or that the obstruction complained of cuts off his communication with the city." In the case at bar the specific averment indicated as essential in the foregoing opinion and contained in the last sentence was averred, and

it is conceded exists, for, as above stated, plaintiff's residence was entirely surrounded by the fence of which the complaint is made, and it is impossible for her to reach the outside world except by the removal of the obstruction occasioned thereby.

In the case of *Stricker v. Hillis et al.*, supra, it appears that section 3665 of the Revised Codes of Idaho is identical with section 4760 of the Compiled Laws of Oklahoma of 1909. A demurrer to the complaint which was filed in that case was sustained, and the court in the consideration thereof reversed the action of the trial court for the reason that "the allegation that the road is the only one which plaintiff can use in getting out and into the place where he lives states a special injury different from that sustained by the general public. The allegation that the plaintiff's buildings are so located that there is no other way for the use and enjoyment of the same, and carrying on his business of farming without constantly using said highway, is another allegation of special injury different from that sustained by the general public." The case of *Sloss-Sheffield Steel & Iron Co. v. Johnson*, 147 Ala. 384, 41 South. 907, 8 L. B. A. (N. S.) 226, 119 Am. St. Rep. 89, which deals with this question, is extensively annotated in 11 Am. & Eng. Ann. Cas. p. 285, wherein the various phases of this question are considered. The cases there cited, and from which quotations are made, leave no doubt of the correctness of the rule here stated, and of the right in plaintiff to maintain this action.

There remains but the further question, which is presented by the claim that the delay on the part of plaintiff in bringing her action until more than five years had elapsed and until ten years had expired gave defendant by prescription as to plaintiff the right to maintain the fence, or, if not, that the claim was too stale to be subject to equitable cognizance.

[3] The question here presented is of greater difficulty than the other two, and text-writers and courts seem to have manifested more uncertainty in its determination. The nuisance which plaintiff here seeks to abate is one that is public in its nature, in that it infringes a public right, and plaintiff is given a standing to proceed against it because it infringes her private right in such a way as to specially injure her, different from the manner in which it affects the public generally. The question therefore arises whether, in so far as she is given the right to proceed, the nuisance is considered private, and hence controlled by the principles applicable to the abatement of a private nuisance, or whether she will enjoy the exalted plane occupied by the state or municipalities in their action in such cases. Section 4757, Comp. Laws Okl. 1909, provides that "no lapse of time can legalize a public nuisance amounting to an actual obstruction of public right." From this statute, as well as the common law, it

is clear no lapse of time can either legalize a public nuisance, nor can any right or title be acquired by prescription to permit or continue the same, and, after much research and full consideration, we have come to the conclusion that the same doctrine applies to a suit brought by a private person who has sustained special injuries from a public nuisance as to a suit brought by the public authorities, for the reason that a public nuisance cannot be unlawful as to the whole public and lawful as to its constituents; that it is absolutely and wholly unlawful. Authorities which directly or in principle sustain this conclusion may be noted as follows: *Joyce on Nuisances*, § 50; 2 *Wood on Nuisances* (3d Ed.) § 727; 29 *Cyc.* 1237; *Town of Cloverdale v. Smith et al.*, 128 Cal. 230, 60 Pac. 851; *Weiss et al. v. Taylor et al.*, supra; *Woodruff v. North Bloomfield Gravel Mining Co. et al.* (C. C.) 18 Fed. 753.

In the case of *Woodruff v. North Bloomfield Gravel Mining Co. et al.*, supra, the court in discussing this question said: "At common law no right could be acquired by prescription to commit, or continue, a public nuisance. In the words of Mr. Wood: 'The law is that no length of time can prescribe for a public nuisance of any description.' *Wood, Nuis.* 81, 30, 790-792. Or, as stated in *Cooley, Torts*, 618: 'It is a familiar principle that no lapse of time can confer the right to maintain a nuisance as against the state.' The authorities to this effect are numerous and uniform. But, even if it were not so, the express provisions of section 3490 of our Civil Code, 'no lapse of time can legalize a public nuisance amounting to an actual obstruction of public right,' establishes the same rule, so that it is not open to question in this state. In this connection, after stating that a right can be acquired by prescription when a nuisance is purely private, and concerns only the one person, or the few who are injured, Judge Cooley observes: 'There still remains the case of a public nuisance not complained of by the state, but by those to whom it works a peculiar injury; and whether the right to maintain it, as against such persons, can be gained by a lapse of time, may possibly be open to some question.' But, after considering the point, he announces his conclusions as follows: 'On the whole, the better doctrine would seem to be that the acquisition of rights by prescription can have nothing to do with the case of public nuisances, either where the state or where individuals complain of them,' citing a large number of cases wherein the doctrine is recognized and stated, if the point was not necessarily involved or decided. *Id.* 613, 614. And 'a uniform consensus of such judicial expressions of opinion,' even though not absolutely necessary to the decision of the case, 'especially where accepted by able and approved text-writers, and not contradicted by a single direct decision, is as high evidence of a doctrine or rule of law as can be found.'

*Santa Clara County v. Southern Pac. R. Co.* [C. C.] 18 Fed. 423, and 9 Sawy. 165. Wood also states this to be the rule, citing the authorities, pages 791, 792. In *Mills v. Hall*, 9 Wend. [N. Y.] 315 [24 Am. Dec. 160], Sutherland, J., said: 'Admitting that defendant's dam has been erected and maintained more than 20 years, and that during the whole of that period it has rendered the adjacent country unhealthy, such a length of time can be no defense to a proceeding on the part of the public to abate it or to an action by any individual for the special injury which he may have suffered from it. [*Lansing v. Smith*] 8 Cow. [N. Y.] 152, 153; [Id.] 4 Wend. [N. Y.] 925.' Among other cases, Wood cites *Reg. v. Brewster*, U. C. 8 C. B. 208, where a large tract of country and a public highway had been flooded and noxious gases issuing from it were producing disease. A prescriptive right to maintain the dam having been set up, the Chief Justice in deciding the case said: 'It was urged at the trial that the dam had been erected for more than 20 years. For the purpose of establishing an easement affecting private rights of others, this would be sufficient, generally speaking, but it is not so when the consequences of this act are a public nuisance.' And *Rhodes v. Whitehead*, 27 Tex. 304 [84 Am. Dec. 631], in which it was held that no prescriptive right could be acquired to maintain a public nuisance, and, if a private party should sustain special injury by such public nuisance, it is a private nuisance also, and the party injured could maintain the action. 'The reason is that, being a public offense, it is unlawful in its inception and in its continuance, and, being unlawful to the public in its aggregate capacity, it can never become lawful by any length of exercise against the individual members of the public.' He then adds: 'The doctrine of these cases (the last two cases cited), although reached without any very elaborate process of reasoning, and without any particular thought as to the result, nevertheless embodies the law as recognized in the courts of this country, and is supported by principle and authority.' Wood, Nuls. 792. We have no doubt that the rule thus stated is correct, and we so hold. In the case of a mere private nuisance of the kind in question, by continuing it under the proper conditions recognized by the law for the prescribed period, a right becomes vested by prescription, and thenceforth it is in itself lawful. But in the case of a public nuisance it never becomes in itself lawful. It is not unlawful as to the whole public, and lawful as to its constituents, or a part of its constituents. It is absolutely and wholly unlawful. The act being unlawful, a private party sustaining

special damages from the nuisance—from the unlawful act—gains a status which enables him to maintain a private action for such injury. When a private person thus obtains a standing in court, by reason of his having suffered special damages, although he can only maintain his suit for an injunction on that ground, yet the court grants relief, not solely because the nuisance is private so far as he is concerned, but because it is public, and the relief will benefit the public. Such appears to be the doctrine of the Supreme Court as declared in *M. & M. R. Co. v. Ward*, 2 Black, 492 [17 L. Ed. 311]. Says the court: 'A bill in equity to abate a public nuisance filed by one who has sustained special damages has succeeded to the former mode in England of an information in chancery prosecuted on behalf of the crown to abate or enjoin the nuisance as a preventive remedy. The private party sues rather as a public prosecutor than on his own account; and unless he shows that he has sustained, and is still sustaining, individual damage, he cannot be heard. He seeks redress of a continuing trespass and wrong against himself, and acts in behalf of all others who are or may be injured.'

In the case of *Weiss et al. v. Taylor et al.*, supra, the public way to a burial lot had been for more than 20 years obstructed by defendant by placing a wall across it. It was insisted and confessed in that case that the complainants were barred both by limitations and laches, unless they were in a position to invoke the doctrine that time nor estoppels run against the state, and that, where an individual becomes the actor and attempts to assert the rights of the state or the public, he could invoke the right of the state in being exempted from the operation of the statute of limitations and laches. The Supreme Court said on this subject: "The statute of limitations is no defense to a bill filed for the abatement of a public nuisance. *Wright v. Moore*, 38 Ala. 593 [82 Am. Dec. 731]; *Olive v. State*, 86 Ala. 88, 5 South. 653, 4 L. R. A. 33; *Reed v. Birmingham*, 92 Ala. 339, 9 South. 161; 2 *Dillon on Munic. Corp.* 675; *Elliott on Roads & Streets*, p. 490."

According to the view expressed in the foregoing authorities, we therefore conclude that plaintiff was neither estopped, barred by laches, nor limitations from the assertion of the claim which she made in her petition, and that the judgment of the trial court under the facts found and the theory of counsel on the trial thereof and in this court must be affirmed.

TURNER, C. J., and WILLIAMS, KANE, and HAYES, JJ., concur.

# MENDENHALL v. UNITED STATES.

(Criminal Court of Appeals of Oklahoma.

Dec. 13, 1911.)

(*Syllabus by the Court.*)

## 1. CRIMINAL LAW (§ 108\*)—JURISDICTION—DISTRICT COURTS.

Under the provisions of the enabling act and the Constitution of Oklahoma, the district court of Le Flore county has jurisdiction to try an indictment for the crime of assault with intent to kill, returned by a grand jury of the Central District of the Indian Territory at Poteau, and pending in said court on the admission of Oklahoma as a state, wherein it is charged that said offense had been committed within said district, and the proof is that the offense was committed within what is now Le Flore county.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 108.\*]

## 2. STATES (§ 9\*)—CRIMES IN INDIAN TERRITORY—ADMISSION OF TERRITORY—PROSECUTION IN STATE—RIGHTS OF ACCUSED.

While a defendant, charged with the commission of a crime in the Indian Territory before statehood, whose case was pending on the admission of Oklahoma as a state, is entitled, under the enabling act and the Constitution of Oklahoma, to a trial under the laws in force in the Indian Territory, he has no vested right of being prosecuted in accordance with the method of procedure that was in force in that jurisdiction beyond those substantial protections which the law then in force gives to him. The substantial right guaranteed by article 6 of the amendments to the Constitution of the United States, which secures a public trial by an impartial jury of the state and district wherein the crime charged has been committed, is a right to a trial by an impartial jury of 12 men from within such district, or any part thereof.

[Ed. Note.—For other cases, see States, Dec. Dig. § 9.\*]

## 3. CRIMINAL LAW (§ 662\*)—EVIDENCE AT COMMITTING EXAMINATION.

The testimony of a witness before a committing court, taken, written, and subscribed to in the presence of the defendant and his counsel upon proper preliminary proof, including the fact that the witness has since died, may be admitted as evidence against the defendant upon his trial, and the admission of such testimony does not disparage or infringe the constitutional right of the defendant to be confronted with the witnesses against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1538-1548; Dec. Dig. § 662.\*]

Appeal from District Court, Le Flore County; Malcolm E. Rosser, Judge.

Marion Mendenhall was convicted of assault with intent to kill, and appeals. Affirmed.

R. P. White and Tom W. Neal, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

DOYLE, J. The plaintiff in error was convicted in the district court of Le Flore county of the crime of assault with intent to kill, and on November 5, 1909, in accordance with the verdict of the jury, was sentenced to serve a term of one year and one day in the state

penitentiary, and he appeals from the judgment of conviction and order denying a new trial.

The record in this case shows that this conviction was had on an indictment returned by a grand jury in the United States Court in the Indian Territory for the Central District of said territory at the April term, 1907, at Poteau; and that the case was pending in said court at the time of the admission of Oklahoma as a state.

The proof on the part of the prosecution tended to show that Pete Wise, city marshal of Howe, and the defendant had a dispute over the collection of a license tax, and the defendant shot at Wise, which shot was followed by a fusillade; seven or eight shots being fired by both parties. The marshal was uninjured, and the defendant was wounded in the hand. The defense was that Wise was the aggressor, and that the defendant shot in self-defense.

[1] The first assignment of error is: "That the court erred in overruling the demurrer of the defendant to the jurisdiction of the court to try said cause." The defendant's counsel contend that he had the right, under the Constitution of the United States, having been indicted by the courts of the United States, to a trial by the courts of that sovereignty. This question has been decided contrary to this contention by the Supreme Court and this court. *Higgins v. Brown*, 1 Okl. Cr. 33, 94 Pac. 703; *Ex parte Ellis*, 1 Okl. Cr. 125, 94 Pac. 556; *Ex parte Curlee*, 1 Okl. Cr. 145, 95 Pac. 414.

[2] The second assignment is: "That the court erred in overruling the challenge to the panel of jurors summoned to try said cause." The record shows that after the jury was impaneled the following challenge was interposed: "The defendant objects to the entire panel of jurors, because they were drawn, chosen, and selected from the body of Le Flore county, and not from the body of the Central Judicial District of the Indian Territory." This objection was properly overruled.

While a defendant, charged with the commission of a crime in the Indian Territory before statehood, whose case was pending at the time Oklahoma was admitted as a state, is entitled, under the provisions of the enabling act and the Constitution of Oklahoma (Enabling Act June 16, 1906, c. 3335, § 20, 34 Stat. 267, as amended Act March 4, 1907, c. 2911, § 3, 34 Stat. 1287, Schedule, Const.), to be tried by the laws in force in the Indian Territory, he has no vested rights of being prosecuted in accordance with the method of procedure that was in force in that jurisdiction beyond those substantial protections which the law then in force gives to him. The right guaranteed to the defendant is based upon article 6 of the amendments of the Constitution of the United States, which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

prescribes that: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime charged has been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him."

The substantial right guaranteed to the defendant was a right to a trial by an impartial jury of 12 men from within such district, or any part thereof. Le Flore county is wholly within what was formerly the Central district of the Indian Territory. It does not appear that any difficulty was experienced in securing an impartial jury, as the record does not disclose that the defendant used any of his peremptory challenges. It is evident that the situation of the defendant was not altered to his disadvantage.

For the reasons herein stated, the case of *Sharp v. State*, 3 Okl. Cr. 24, 104 Pac. 71, is hereby modified to conform herewith.

[3] The third assignment is: "That the court erred in permitting the statements of John Slusher, taken before the United States Commissioner, to be read in evidence." The record shows that on the preliminary examination John Slusher was a witness, and his testimony was reduced to writing and signed by him. Proof was offered, and it was conceded that this witness was dead. There was no error in admitting this testimony.

The provisions of the federal Constitution apply to criminal prosecutions in the territories. The Supreme Court of the United States passed directly upon this question in the case of *Mattox v. United States*, 156 U. S. 237, 15 Sup. Ct. 337, 39 L. Ed. 409. Mr. Justice Brown delivering the opinion of the court after fully reviewing the authorities, used the following language:

"The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner, in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury, in order that they may look at him, and judge, by his demeanor upon the stand and the manner in which he gives his testimony, whether he is worthy of belief. There is doubtless reason for saying that the accused should never lose the benefit of any of these safeguards, even by the death of the witness; and that, if notes of his testimony are permitted to be read, he is deprived of the advantage of that personal presence of the witness before the jury which the law has designed for his protection. But general rules of law of this kind, however beneficial in their operation and valuable to the accused, must occasionally give way to

considerations of public policy and the necessities of the case. To say that a criminal, after having once been convicted by the testimony of a certain witness, should go scot-free, simply because death has closed the mouth of that witness, would be carrying his constitutional protection to an unwarrantable extent. The law in its wisdom declares that the rights of the public shall not be wholly sacrificed, in order that an incidental benefit may be preserved to the accused.

"We are bound to interpret the Constitution in the light of the law as it existed at the time it was adopted, not as reaching out for new guaranties of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors have inherited and defended since the days of Magna Charta. Many of its provisions in the nature of a bill of rights are subject to exceptions, recognized long before the adoption of the Constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected. A technical adherence to the letter of a constitutional provision may occasionally be carried further than is necessary to the just protection of the accused, and further than the safety of the public will warrant. For instance, there could be nothing more directly contrary to the letter of the provision in question than the admission of dying declarations. They are rarely made in the presence of the accused; they are made without any opportunity for examination or cross-examination; nor is the witness brought face to face with the jury; yet from time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility. They are admitted, not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice. As was said by the Chief Justice when this case was here upon the first writ of error (146 U. S. 140, 152 [13 Sup. Ct. 50, 36 L. Ed. 917], the sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of an oath. If such declarations are admitted, because made by a person then dead, under circumstances which give his statement the same weight as if made under oath, there is equal, if not greater, reason for admitting testimony of his statements which were made under oath.

"The substance of the constitutional protection is preserved to the prisoner in the advantage he has once had of seeing the witness face to face, and of subjecting him to the ordeal of a cross-examination. This, the law says, he shall under no circumstances be deprived of, and many of the very cases which hold testimony such as this to be admissible also hold that, not the substance of

his testimony, only, but the very words of the witness, shall be proven. We do not wish to be understood as expressing an opinion upon this point, but all the authorities hold that a copy of the stenographic report of his entire former testimony, supported by the oath of the stenographer that it is a correct transcript of his notes and of the testimony of the deceased witness, such as was produced in this case, is competent evidence of what he said."

We are of opinion that the admission of the testimony of the deceased witness did not disparage or infringe the defendant's constitutional right to be confronted with the witness against him. See, also, *Hawkins v. U. S.*, 3 Okl. Cr. 651, 108 Pac. 561, and *Warren v. State*, 6 Okl. Cr. —, 115 Pac. 812.

In conclusion, it is complained that the record does not show that the defendant was present in court at the time the motions for new trial and in arrest of judgment were ruled upon. We are of the opinion that this contention is not well founded. The record recites that the defendant appeared and filed his motion for a new trial on the same day that the motion in arrest of judgment was filed, and that the defendant excepted to the orders of the court, overruling said motions. The record further recites that immediately upon the overruling of the motion for a new trial the court pronounced judgment and sentence upon the defendant, and that the defendant excepted thereto. Thus the record sufficiently shows the presence of the defendant.

Upon a careful consideration of the case, we discern no error prejudicial to the substantial rights of the defendant. Wherefore the judgment of the district court of Le Flore county is affirmed.

FURMAN, P. J., and ARMSTRONG, J., concur.

#### Ex parte WILSON.

(Criminal Court of Appeals of Oklahoma. Dec. 18, 1911.)

#### (Syllabus by the Court.)

INTOXICATING LIQUORS (§ 17\*)—CONSTITUTIONALITY OF STATUTE—POLICE POWER.

Section 4, c. 70, Session Laws 1911, which provides that it shall be unlawful for any person to have or keep in excess of one quart of spirituous, vinous, fermented or malt liquors, or any imitation thereof, or substitute therefor, or in any manner permit any other person to have or keep any such liquors, etc., was not enacted within the reasonable exercise of the police power, and is therefore unconstitutional and void.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 21-23; Dec. Dig. § 17.\*]

Application by W. J. Wilson for writ of habeas corpus. Writ allowed, and petitioner discharged.

Johnson & McGill and Chas. E. McPherrin, for petitioner. Smith C. Matson and E. G. Spilman, Asst. Atty. Gen. (Andrew Wood, of counsel), for respondent.

ARMSTRONG, J. This is an application for a writ of habeas corpus brought by petitioner to secure his discharge from the custody of the sheriff of Carter county, held on a charge of having violated section 4, c. 70, Session Laws of 1911, by having in his possession three quarts of alcohol at his place of business in Ardmore.

The agreed statement of facts is as follows: "First, that the defendant is now and has been for a long time engaged in the livery business on South Washington street in the city of Ardmore, Okla., and that in the office of said livery stable defendant had in his possession on the day and dates alleged in the information 3 quarts of alcohol shipped to him from Ft. Worth, Tex., which he claimed was for his own use. Second, that the affiant, Dew Brazier, is and was at the time a policeman of the city of Ardmore, and found this liquor in the possession of the defendant, Wilson, as stated above, and that the defendant stated to him at the time that he had the same for his own use, and not for any unlawful purpose. Third, that the above and foregoing is all the evidence the state has in said cause. Fourth, that the arrest of the defendant and his commitment to jail in default of bond was because he had violated section 4 of chapter 70 of the Session Laws of the State of Oklahoma, enacted and approved March 11, 1911."

The particular section of the prohibitory law under which this prosecution was instituted is as follows: "Sec. 4. It shall be unlawful for any person to have or keep in excess of one quart of spirituous, vinous, fermented or malt liquors, or any imitation thereof, or substitute therefor; or in any manner permit any other person to have or keep, any spirituous, vinous, fermented or malt liquors, or any imitation thereof, or substitute therefor; or any liquors or compounds of any kind or description whatsoever, whether medicated or not which contains as much as one-half of one per centum of alcohol, measured by volume, and which is capable of being used as a beverage, except preparations compounded by any licensed pharmacist, the sale of which would not subject him to the payment of the special tax required by the laws of the United States; upon, in, or about his place of business, or any place of amusement or recreation, or any public resort, or any club room, whether such liquors be intended for personal use of the person so having and keeping the same or not; provided, however, that the foregoing provision of this section shall not apply to bonded apothecaries, druggists or pharma-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



cists as to alcohol purchased by them pursuant to the rules and regulations promulgated by the Governor in accordance with the provisions of this act. Provided, further, that this section shall not be construed in any way to legalize the keeping of such liquors for an unlawful purpose. A violation of any provision of this section shall be a misdemeanor, and shall be punished by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) and by imprisonment for not less than thirty days nor more than six months."

The propositions raised by petition in this case have been exhaustively briefed by both sides. Counsel for petitioner contend that the provisions of section 4, c. 70, of the Session Laws of Oklahoma, 1911, quoted in full supra, contravene the fourteenth amendment of the Constitution of the United States and section 7 of article 2 of the Constitution of the state of Oklahoma; and, secondly, that the said provision is not a reasonable exercise of the police power of the state, and is for that reason void; and, thirdly, that said provision is in contravention of section 8, art. 1, of the Constitution of the United States as an interference with and attempt to regulate foreign commerce.

Section 1 of article 14 of the Constitution of the United States is as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States, and of the states wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Section 7 of article 2 of the Constitution of the state of Oklahoma is as follows: "No person shall be deprived of life, liberty or property without due process of law."

That portion of section 8, art. 1, of the Constitution of the United States relative to interstate commerce, is as follows: "The Congress shall have power—to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

It is an old and well-settled rule, and one which has been followed since the establishment of appellate courts in this country, that a court will not declare a law to be unconstitutional unless the conflict between the Constitution and the law be clear and plain. The rule is stated by Chief Justice Marshall in the case of *Fletcher v. Peck* as far back as 1810, reported in 6 Cranch, 87, 3 L. Ed. 102, in the following language: "The question whether a law be void for its repugnancy to the Constitution is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a

doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other."

The rule is declared by this court in an opinion by Doyle, Judge, in the case of *McCord v. State*, 2 Okl. Cr. 231, 101 Pac. 286, as follows: "It is a fundamental rule that legislative acts shall not be declared void by the courts if by any reasonable construction thereof such result can be avoided. If, by limitation upon its general terms, the same can be fairly construed, and so applied as to bring the statute within the Constitution and thus save it from being in conflict therewith, such limitation and construction should be adopted."

The question here raised, while new in this jurisdiction, is not a new one to the courts. Identical questions and questions involving the identical principle have been determined in many states, and by the Supreme Court of the United States.

The Supreme Court of West Virginia in 1889, in the case of *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847, had under consideration a statute which made it an offense to keep intoxicating liquors in possession for another. We quote the following from the opinion:

"This indictment is framed under the provisions of section 1, c. 32, Code 1887, and is in the precise language of the statute. It is in legal form, and, as no extrinsic facts were shown to invalidate the finding of it, I think the motion to quash was properly overruled.

"The said statute was amended by chapter 29, Acts of 1887, and then, for the first time, the words '*or solicit or receive orders for, or keep in his possession for another,*' were made a part of the statute. From the facts proved, it is apparent the conviction in this case must be sustained, if it is done at all, under that provision which I have italicized, '*keep in his possession for another.*' It will be observed that this provision has no reference to the intent or purpose for which the liquor is kept in possession, but it denounces as a crime the simple fact that the liquor is kept in possession for another, however innocent the act or commendable the purpose. Has the Legislature of this state the constitutional power to make such an act a crime?

"The fourteenth amendment to the Constitution of the United States declares: 'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' And the same amendment makes all persons born or natur-

alized in the United States citizens thereof. It is conceded that the 'privileges and immunities' here protected are such only as are in their nature fundamental; such as belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states of the Union, from the time of their becoming free, independent, and sovereign. What these fundamental rights are, it is not easy to enumerate; the courts preferring not to describe and define them in a general classification, but to decide each case as it may arise. The following, however, have been held to be embraced among them: 'Protection by the government; the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety, subject to such restraints as the government may justly prescribe for the general good of the whole.' Washington, J., in *Corfield v. Coryell*, 4 Wash. C. C. 380, Fed. Cas. No. 3,230; *Conner v. Elliott*, 18 How. 591 [15 L. Ed. 497]; *In re Parrott (C. C.)* 6 Sawy. 349, 1 Fed. 481, 6 Myer, Fed. Dec. § 1000; *Landing Co. v. Slaughter House Co.*, 111 U. S. 746, 4 Sup. Ct. 652 [28 L. Ed. 585]. These are inalienable and indefeasible rights, which no man, or set of men, by even the largest majority, can take from the citizen. They are absolute and inherent in the people, and all free governments must recognize and respect them. Therefore it is incumbent upon the courts to give to the constitutional provisions which guarantee them a liberal construction, and to hold inoperative and void all statutes which attempt to destroy or interfere with them. *Cooley, Const. Lim.* (35) 44. It can hardly be questioned that the right to possess property is one of these rights, and that that right embraces the privilege of a citizen to keep in his possession property for another. It is not denied that the keeping of property which is injurious to the lives, health, or comfort of all persons may be prohibited under the police power.

"The maxim, '*Sic utere tuo ut alienum non lædas*,' being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others. But it does not follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exercise of the police power of the state; and much less is such the case when the statute is merely claimed by its defenders to be intended for that purpose. The United States Supreme Court, in its opinion in *Mugler v. Kansas*, says: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute pur-

porting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.' 123 U. S. 661, 8 Sup. Ct. 273 [31 L. Ed. 205].

"The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public; and therefore the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void."

The same principle is discussed in the case of *Commonwealth v. Campbell*, by the Kentucky Court of Appeals, reported in 133 Ky. 50, 117 S. W. 383, 24 L. R. A. (N. S.) 172, 19 Am. & Eng. Ann. Cas. 159. In this latter case the court was construing a regulation prohibiting the introduction of intoxicating liquor for one's own use. The principle being identical, the case is strongly in point. The authorities are reviewed, and the question is exhaustively discussed. We quote with approval the following from the opinion:

"It will be observed that the warrant issued against the defendant charges him with bringing into the town of Nicholasville spirituous, vinous, or malt liquors, upon his person or as his personal baggage, exceeding a quart in quantity. So far as the warrant is concerned, therefore, there is nothing to negative the idea but what the defendant had the liquor for his own use, and for no other purpose. We presume it will not be controverted that, if the council of Nicholasville could limit the quantity of liquor which a person might have in his possession for his own use to a quart, it could prohibit his having in his possession any quantity whatever. We are confronted therefore with the proposition as to whether or not, in this state, it is competent under the police power for any legislative body to prohibit the possession or use of liquor by one for his own necessity and comfort. Broadly stated, the question before us is whether or not it is competent for the Legislature to prohibit a citizen from having in his own possession spirituous liquor for his own use. It will not require any elucidation to show that, if the citizen may be prohibited from having liquor in his possession, he can be prohibited from drinking it, because, of necessity, no one can drink that which he has not in his possession. So that if it is competent for the legislative body of any given city or district, or even the Legislature of the state, to prohibit the citizen from having liquor in his own possession, then a new and more complete way has been discovered for the establishment of total

prohibition, not only in any precinct, town, or county, but throughout the state, because, if it is competent to prohibit the citizen from having liquor in his possession, it necessarily follows that he can neither sell nor use it, as it is a physical impossibility to do either without first having had the possession of the interdicted liquor.

"When the constitutional convention was in session, it was confronted with the question of how the use of spirituous liquor should be regulated. There were two forces brought strongly to bear upon the convention: First, there were the Prohibitionists, who desired to facilitate and advance in every way the means of banishing liquor from the state; and, on the other hand, there were those who were engaged in the business of manufacturing and selling liquor, who strongly advocated the utmost freedom of the citizen with reference to its use. The convention gave patient and full hearing to both parties to this controversy, and, as a result, formulated a system by which the sale of vinous, spirituous, or malt liquors throughout the state was to be regulated by general laws. By subsection 27 of section 59 of the Constitution, it is provided that the General Assembly shall not pass local or special acts to provide a means of taking the sense of the people of any city, town, district, precinct, or county, whether they wish to authorize, regulate, or prohibit therein the sale of vinous, spirituous, or malt liquors or alter the liquor laws. And by section 61 it is provided that the General Assembly shall, 'by general law, provide a means whereby the sense of the people of any county, city, town, district, or precinct may be taken, as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or the sale thereof regulated. But nothing herein shall be construed to interfere with or to repeal any law in force relating to the sale or gift of such liquors. All elections on this question may be held on a day other than the regular election days.' Section 154 is as follows: 'The General Assembly shall prescribe such laws as may be necessary for the restriction or prohibition of the sale or gift of spirituous, vinous or malt liquors on election day.' It will thus be seen that the Constitution prescribes fully the power of the Legislature with reference to the regulation of liquor, the General Assembly is given ample power by general laws to submit to the people the question whether or not any given district shall have prohibition, and by section 154 they are authorized to prohibit the sale or gift of liquor on election days.

"Now, can it be contended with any show of reason that the framers of the Constitution intended to leave the question of the retailing of liquor in a given district to a vote of the majority of the qualified voters in the district, and yet leave it in the power

of the Legislature upon its own motion to prohibit the possession of liquor by the citizen? Before the present Constitution, it was competent for the Legislature to prohibit the sale of liquor, by retail in any county, town, or district, without any vote being taken by the citizens or without giving them any voice in the matter; but no one doubts that, under the present Constitution, it is not competent for the Legislature, without a vote of the citizens, to declare the retailing of liquor in any part of the state unlawful. How vain it would be, then, for the framers of the Constitution, to thus take from the Legislature the power to regulate the retailing of liquor and place that question within the competency of the qualified voters, and yet leave within the competency of the Legislature the greatest power of prohibiting the citizen either from possessing liquor or using it for his own benefit or comfort. It is self-evident that, if the Legislature may pass a general law prohibiting any citizen from possessing or using liquor in any quantity, this would in itself be the most perfect prohibition law possible, because no man could retail without first having possession of it. We cannot believe that the framers of the Constitution intended to thus carefully take from the Legislature the power to regulate the sale of liquor, and at the same time leave with that department of the state government the greater power of prohibiting the possession or ownership of liquor. \* \* \*

"The history of our state from its beginning shows that there was never even the claim of a right on the part of the Legislature to interfere with the citizen using liquor for his own comfort, provided that in so doing he committed no offense against public decency by being intoxicated; and we are of opinion that it never has been within the competency of the Legislature to so restrict the liberty of the citizen, and certainly not since the adoption of the present Constitution. The Bill of Rights, which declares that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness, and that the absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority, would be but an empty sound if the Legislature could prohibit the citizen the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public. Man in his natural state has a right to do whatever he chooses and has the power to do. When he becomes a member of organized society, under governmental regulations, he surrenders, of necessity, all of his natural right the exercise of which is, or may be, injurious to his fellow citizens. This is the price that he pays for governmental protection, but it is not within the

competency of a free government to invade the sanctity of the absolute right of the citizen any further than the direct protection of society requires. Therefore the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society.

"The difference between the absolute and relative rights of man, and the power of the government with reference thereto, is thus set forth by Blackstone in his Commentaries on the Laws of England: 'The rights of persons considered in their natural capacities are also of two sorts, absolute and relative: Absolute, which are such as appertain and belong to particular men, merely as individuals or single persons; relative, which are incident to them as members of society, and standing in various relations to each other. The first—that is, absolute rights—will be the subject of the present chapter. By absolute rights of individuals, we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute duties which man is bound to perform, considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society, and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself (as drunkenness, or the like), they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstances of publication is what alters the nature of the case. Public society is a relative duty, and therefore enjoined by our laws; private sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never enforce it by any civil sanction.' Book 1, pp. 123, 124.

"Cooley, in his work on Constitutional Limitations, thus states the rule with reference to sumptuary laws, and the right of the Legis-

lature to enact them: 'In former times sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government. But the ideas which suggested such laws are now exploded utterly, and no one would seriously attempt to justify them in the present age. The rights of every man to do what he will with his own, not interfering with the reciprocal rights of others, is accepted among the fundamentals of our laws.' Pages 549, 550.

"John Stuart Mill, in his great work on Liberty, says: 'The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their numbers is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil, in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.' Pages 22, 23. And again: 'Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.' Page 28.

"In discussing the limits of the authority of society over the individual, our author says: 'Though society is not founded on a contract, and though no good purpose is answered by inventing a contract in order to deduce social obligations from it, every one who receives the protection of society owes a return for the benefit, and the fact of living in society renders it indispensable that each should be bound to observe a certain

line of conduct towards the rest. This conduct consists: First, in not injuring the interests of one another, or rather certain interest, which, either by express legal provision or by tacit understanding, ought to be considered as rights; and, secondly, in each person's bearing his share (to be fixed on some equitable principle) of the labors and sacrifices incurred for defending the society or its members from injury and molestation. These conditions society is justified in enforcing, at all costs to those who endeavor to withhold fulfillment. Nor is this all that society may do. The acts of an individual may not be hurtful to others, or wanting in due consideration for their welfare, without going the length of violating any of their constituted rights. The offender may then be justly punished by opinion, though not by law. As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all persons concerned being of full age, and the ordinary amount of understanding). In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences.' Pages 144, 145, and 146. Again: 'In like manner when a person disables himself, by conduct purely self-regarding, from the performance of some definite duty incumbent on him to the public, he is guilty of a social offense. No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty. Whenever, in short, there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law.' Pages 157, 158.

"Black, in his work on Intoxicating Liquors (page 50, par. 38), says: 'But it is justly held that a provision in such a law that no person, without a state license, shall "keep in his possession, for another, spirituous liquors," is unconstitutional and void. "The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals, or safety of the public, and therefore the statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void."'

"In the case of *State v. Gilman*, 33 W. Va. 146, 10 S. E. 283, 6 L. R. A. 847, the Supreme

Court of West Virginia held that a statute prohibiting the citizen to keep in his possession, for another, spirituous liquors, is unconstitutional and void. It is from the opinion in this case that Black adopted the quotation given above. The principle is rested upon the broad proposition that every person has a right to keep or use liquor for his own benefit, or to keep it for another, provided in so doing he does not attempt to sell it or otherwise use it so as to injure the public.

"In the case of *State v. Williams*, 146 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. S.) 299, it was held by the Supreme Court of North Carolina that a statute forbidding one under penalty to carry into a county, where the sale of intoxicating liquors is prohibited, more than a half gallon of such liquor on any day, deprives him of his constitutional property right in case he has no intent to sell it. In the opinion in this case the question is most learnedly discussed in all of its phases, and the principle which we have announced is upheld after a review of all the authorities.

"In discussing the question before us we have assumed that the general council of the city of Nicholasville has been clothed with all the authority to enforce what is called the police power which the General Assembly possesses, and also that the city of Nicholasville has by regular proceedings prohibited the sale of liquor within its boundary; but with these presumptions we have not been able to uphold the warrant in this case. It will be observed that the defendant is not charged with having the liquor in his possession for the purpose of selling it, or even giving it to another. The sole charge against him is that he had it in his possession, and therefore we must presume that he had it there for a lawful purpose if he could so hold it. Nothing that we have said herein is in derogation of the power of the state under the Constitution to regulate the sale of liquor, or any other use of it which in itself is inimical to the public health, morals, or safety; but, as spirituous liquor is a legitimate subject of property, its ownership and possession cannot be denied when that ownership and possession is not in itself injurious to the public. The right to use liquor for one's own comfort, if the use is without direct injury to the public, is one of the citizen's natural and inalienable rights, guaranteed to him by the Constitution, and cannot be abridged as long as the absolute power of a majority is limited by our present Constitution. The theory of our government is to allow the largest liberty to the individual commensurate with the public safety, or, as has been otherwise expressed, that government is best which governs the least. Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in mat-

ters in themselves indifferent and to make them conform to a standard not of their own choosing, but the choosing of the lawgiver; that inquisitorial and protective spirit which seeks to prescribe what a man shall eat and wear, or drink or think, thus crushing out individuality and insuring Chinese inertia by the enforcement of the use of the Chinese shoe in the matter of the private conduct of mankind. We hold that the police power—vague and wide and undefined as it is—has limits, and in matters such as that we have in hand its utmost frontier is marked by the maxim: 'Sic utere tuo ut alienum non ledas.'

The Supreme Court of Maine, in discussing a similar proposition, in the case of *Preston et al. v. Drew*, 33 Me. 559, 54 Am. Dec. 641, decided in 1852, uses the following language:

"While the act provides for the seizure and forfeiture of the liquors designed for sale in violation of its provisions, no positive enactment is found that no person shall acquire any property in them. Nor is there any language capable of receiving such a construction as would forbid it. The prohibition to sell them cannot prevent any person from acquiring and possessing them for his own use, without any intention to sell them. Nor can it prevent their transportation from one town or city to another, or through the state, when there is no intention to make sale of them. There is nothing found in the act indicative of an intention to prevent their being property, when thus possessed or used. On the contrary, the act authorizes them to be legally sold and used for certain purposes, and therefore to be the subject of property for such purposes. If they cannot be the subject of property, the town or city agents can have no property in them, nor can they or the town or cities, by any action, obtain redress for their lawless and wanton destruction.

"It is, however, insisted in argument that a person, by the common law, can no more acquire property in spirituous and intoxicating liquors, than he can in obscene publications and prints. There is a clear and marked distinction between them. Such liquors may be applied to useful purposes. This is admitted in the act, by its authorizing their sale for medicinal or mechanical purposes. It is their misuse or abuse alone which occasions the mischief. Obscene publications and prints are in their very nature corrupting, and productive of evil. They are incapable of any use which is not corrupting and injurious to the moral sense.

"Such liquors are also alleged to be a common nuisance, and as such liable to destruction. There is nothing which can be regarded as a nuisance, when considered by itself alone, and separate from its use. It is the improper use or employment of a thing

which causes it to become a nuisance. It would be not a little absurd to declare that to be a nuisance, and as such liable to be abated and destroyed, which the act allows to be sold and purchased as an article useful for medicinal and mechanical purposes."

The Supreme Court of Illinois, in the case of *Sullivan v. City of Onelda*, reported in 61 Ill. 242, had under consideration an ordinance similar in purpose and involving the principle here under discussion, and held such provision invalid. Among other things, the court says: "A frequent recurrence to certain fundamental principles is essential to the preservation of good government, and to the security of the liberty and personal rights of the citizen. Every man has the right to acquire and protect his property; to be secure against unreasonable searches and seizures; to a fair trial according to the course of the common law, before he can be deprived of life, liberty, or property; and in all criminal prosecutions the right to be heard, to demand the nature and cause of the accusation against him, and to meet the witnesses face to face."

And again: "Spirituous liquors, ale and beer, are property, as much so as money or lands. They are chattels; are articles of consumption and of commerce. The ordinance recognizes them as property and directs their sale on execution, and permits druggists to keep them. Their abuse may be restrained, and punishment inflicted upon those who sell them to the injury of others. They may, as well as other chattels, come under the designation of nuisance, and, to a certain extent, lose their quality as property; but they cannot, per se, lose their quality as property."

And again: "The Legislature may change the law and increase the presumptions of guilt. It may, to a certain extent, make acts evidence of an unlawful intent which had before been innocent. It may declare the possession of certain articles of property, on account of their highly dangerous character, unlawful. But such laws must always have proper safeguards for the security of private rights."

And again: "There can be no justification for the search which is authorized by the charter. Possession is declared to be evidence of unlawful intent; hence the possession is unlawful. Unlawful possession justifies the search and seizure; therefore mere possession justifies the search. Without actual sale—without the overt act, without even intent, in fact to violate the law—the sanctity of the domestic circle is violated by an odious search. For cause so trivial the privacy of the citizen cannot be invaded and his house ransacked from cellar to garret. If this can be done, the rampart which the Constitution has built up to secure the hearthstone from rude intrusion is an effect-

tual defense no longer. The search provided for is odious and unreasonable, and in conflict with the Declaration of Rights."

While the question before this court does not directly involve the search and seizure provisions of the prohibitory statute, yet the provision under consideration, if valid, would subject our citizens to the search of their offices, places of business, or homes, and subject their property to seizure in the same manner as was done in the Illinois case. No reasonable theory can be advanced to sustain any such high-handed action.

An examination of the prohibitory statutes of this state in connection with that of the state of North Carolina discloses the fact that the North Carolina statutes is the fountain from which our statute flows; and no one can fairly contend that the Supreme Court of North Carolina has not gone as far as any state in the American Union in upholding the strictest prohibitory statutes.

In the case of *State v. Williams*, 148 N. C. 618, 61 S. E. 61, 17 L. R. A. (N. S.) 299, that court construes what appears to be the original of the statute here under consideration. It says: "That the Constitution is the 'law of the land,' in the sense that no act of either department of the government, which violates its provisions or exceeds its powers, can be enforced to deprive the citizen of his life, liberty, or property, is a fundamental truth. To deny it is to assert that constitutional government is a failure, and liberty regulated by law has no abiding place in our political system. The Constitution is, of necessity as well as the declared will of the people, the supreme law; and in no proper legal sense can any act of either department of the government, which violates its provisions or exceeds the powers delegated, be the law. To state the same proposition affirmatively: An act of the Legislature which finds no support in the Constitution, or is not an exercise of the power conferred therein, imposes no duty, deprives the citizen of no right, and subjects him to no penalty. This is a 'first principle, the recognition of which is essential to the preservation of liberty.' 'If the Constitution prescribes one rule and the law another and different rule, it is the duty of courts to declare that the Constitution, and not the law, governs the case before them for judgment.' *Scott v. Sanford*, 19 How. 628 [15 L. Ed. 691]. 'An unconstitutional law is void, and is as no law. An offense created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment.' *Ex parte Siebold*, 100 U. S. 376 [25 L. Ed. 717]. 'The limitations imposed by our constitutional law upon the action of the governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions.' *Hurtado v. Cal.*,

110 U. S. 536 [4 Sup. Ct. 111, 292, 28 L. Ed. 232]."

In discussing the rights of a citizen situated as the petitioner in the case at bar, the court, continuing, says: "It is the right of the citizen, when called to the bar of the court, to appeal to the Constitution, and demand that the court declare whether the statute which he is charged with violating be 'the law of the land.' To make this right of any value or protection to the citizen, it must be the duty of the court to declare its judgment thereon. To deny this is to keep the promise to the ear and break it to the heart—to make of noneffect the declaration that 'ours is a government of law, and not of men.' 'It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence. No higher duty rests upon this court than to exert its full authority to prevent all violations of the principles of the Constitution.' *Harlan, J., in Downes v. Bidwell*, 182 U. S. 382, 21 Sup. Ct. 823 [45 L. Ed. 1088]."

In connection with this discussion of the sacred duty of a court to act absolutely without regard to fear or favor, we deem it proper to quote the language of *Furman*, Presiding Judge, in *Titsworth v. State*, 2 Okl. Cr. 271, 101 Pac. 289, as follows: "Whatever the personal views of the members of this court may be upon this question, it must be remembered that it is our sworn duty to decide this, as well as all other questions, according to the law as it is, whether we like it or not. The judge who would attempt to defeat or misconstrue the law of the land, simply because he did not personally approve it, or who, Pontius Pilate like, would attempt to keep his fingers upon the public pulse and allow public clamor to cause him to swerve one iota from a correct declaration of the law, is utterly unworthy of the confidence and respect of rightly thinking people, and establishes precedents which will result in the subversion of our institutions and the ultimate defeat and destruction of justice itself. The true judge maintains the integrity of his character, and enforces the law as it is, without regard to his personal feelings or any consequences which may ensue to himself, let his conduct please or displease whosoever it may. If he does not do this, he is a coward and perjurer, and a traitor, and a disgrace to the position which he occupies, a curse to the people among whom he lives, and should receive the contempt of all honest people."

*Furman*, Presiding Judge, in the case supra, draws attention to the fact that the "law of the land" not only means the law of our own state, but also the Constitution of our state (which is violated by the act under discussion as well as the Constitution of the United States), and, above all, the Constitution of the United States, in the fol-

lowing language: "The state of Oklahoma is an inseparable part of the federal Union, and the Constitution of the United States is the supreme law of the land. Constitution, art. 1, § 1 (Bunn's Ed. § 2). Article 6 of the Constitution of the United States contains the following: 'This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the Constitution or laws of any state to the contrary notwithstanding.'"

Touching the reluctance with which the courts declare an act of the Legislature to be unconstitutional, the Supreme Court of North Carolina, in the above-quoted case of *State v. Williams*, uses the following language: "However much we may desire to sustain the acts of the Legislature as a co-ordinate department of the government, we may not, without being recreant to the duty imposed upon us and the rights of the citizen, refuse to declare firmly and fearlessly the issue which he makes with the government."

That the Supreme Court of the state of North Carolina has traveled as far, if not farther, than any other judicial tribunal in the United States to sustain prohibitory legislation, is evidenced by the following from the case supra:

"The Legislature, in the exercise of the police power, may, by appropriate enactment, regulate, and, if they deem it conducive to the public health, morals, peace, or safety, entirely prohibit the manufacture and sale of intoxicating liquors. For the purpose of making effective such legislation, they may make it criminal for any person to have such liquors in his possession within the territory wherein the sale or gift is prohibited, with intent to sell or give away. They may prescribe or change the rules of evidence by making such possession prima facie evidence of a guilty intent. This court has universally sustained legislation of this character.

"In *State v. Dowdy*, 145 N. C. 432 [58 S. E. 1002], we held that a certified copy of the record kept by the collector of internal revenue was competent, not only as evidence but sufficient to sustain a conviction for selling liquor in violation of the statute. (It is evident that North Carolina furnished the pattern for our, on the whole, excellent prohibition laws.) We have endeavored to give full force and effect to the legislation enacted in this state for the suppression of the liquor traffic, resolving, as was our duty, every reasonable doubt regarding its validity in favor of the enactment. This legislation finds its support in the police power vested in the state government. It is exercised primarily by the Legislature, which may adopt any measure within the extent of the power, appropriate and needful, for the pro-

tection of the public morals, the public health, or the public safety."

The court calls attention to the fact that there is a limit to the police power, which the courts must, when called upon in a judicial proceeding, ascertain and declare, and quotes Justice Harlan in *Mugler v. Kansas*, as follows: "It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exercise of the police power of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. \* \* \* If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of the rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. *State v. Redmon* [134 Wis. 89, 114 N. W. 137] 14 L. R. A. (N. S.) 229 [126 Am. St. Rep. 1003]."

Relative to the proper limitations upon the police power, the court says: "Recognizing the difficulty of fixing any definite limitation upon the police power, the courts have refrained from doing more, in cases which have arisen, than inquire whether the real purpose of the statute under consideration has a reasonable connection with the public health, welfare, or safety." *People v. Havnor*, 149 N. Y. 195 [43 N. E. 541, 31 L. R. A. 689, 52 Am. St. Rep. 707]; *People v. Lochner*, 177 N. Y. 145 [69 N. E. 373, 101 Am. St. Rep. 773]. The result of the decisions has been well stated in 22 Am. & Eng. Enc. 938: "In order that a statute or an ordinance may be sustained as an exercise of the police power, the courts must be able to see that the enactment has for its object the prevention of some offense or manifest evil, or the preservation of the public health, safety, morals, or general welfare, and that there is some clear, real, and substantial connection between the assumed purpose of the enactment and the actual provisions thereof, and that the latter do, in some plain, appreciable, and appropriate manner, tend toward the accomplishment of the object for which the power is exercised."

The Legislature of North Carolina appears to be the first legislative body to enact a statute as broad and sweeping as the one now under discussion (the statute so enacted was held to be unconstitutional); Oklahoma's Legislature is the second and last to do so. In view of the provisions of our state Constitution, the Constitution of the United States, and the long, unbroken line of adverse decisions in states having constitutional provisions similar to ours, where a similar statute has been enacted, we cannot bring ourselves to believe that the Legislature of this state expected this court to be recreant to its duty to declare the law without fear or favor.



In calling attention to the fact that the enactment of a statute similar to the one under consideration in the case at bar was without precedent, the Supreme Court of North Carolina in this case used the following language: "Beginning with the Maine liquor law, the statutes and Codes of every state in the Union abound with every conceivable variety of legislation having for its objects the regulation, restriction, or prohibition of the liquor traffic. The courts, both state and federal, have been called upon to construe, interpret, and pass upon the validity of many of these statutes. They have with remarkable uniformity sustained them, and, when of doubtful meaning, given them such interpretation as would suppress the evil and advance the remedy. An unusually careful and diligent examination by the Assistant Attorney General and ourselves fails to discover any statute, either in terms or scope, similar to the one under discussion. While the Legislatures have resorted to many expedients to control, regulate, restrict, and prohibit the manufacture and sale, either in entire states, or counties, towns, cities, or districts, we do not anywhere find any suggestion that the possession of intoxicating liquor, without any unlawful purpose, or carrying it into the territory wherein its sale is prohibited, with no unlawful purpose, is made indictable. While by no means decisive of the power to do so, the fact that no such attempt has been made is worthy of note in seeking the basis of the asserted power."

The court, in the above case, approves the holding of the Supreme Court of Vermont in the case of *Lincoln v. Smith*, 27 Vt. 328, where, in a well-considered opinion, it was held that the Legislature had the power to prohibit the traffic in intoxicating liquor and subject it to seizure, forfeiture, and destruction when kept for that purpose, quoting with approval the following language: "Though there is a prohibition not to sell them, yet we cannot prevent a man from having property in them for his own use without any intention to sell them; and they may be transported through the state where there is no intention to violate the law."

In *Austin v. Tenn.*, 179 U. S. 343, 21 Sup. Ct. 132, 45 L. Ed. 224, it is stated: "Whatever produce has from time immemorial been recognized by custom or law as a fit subject for barter or sale, particularly if its manufacture has been made the subject of federal regulation and taxation, must, we think, be recognized as a legitimate article of commerce, although it may, to a certain extent, be within the police power of the state."

In the *License Cases*, 5 How. 504, 12 L. Ed. 256, Taney, Chief Justice, used the following language: "But spirits and distilled liquor are universally admitted to be subjects of ownership and property."

Our own Supreme Court, in the case of

*Gulf, C. & S. F. Ry. Co. et al. v. State ex rel. Caldwell*, 116 Pac. 176 (not yet reported in the official volumes of the state), determines the property right in intoxicating liquors in a well-reasoned and well-supported opinion by Justice Williams.

The Supreme Court of North Carolina, in the case of *State v. Williams*, supra, cites and quotes with approval *State v. Gilman*, supra, and discusses *Ex parte Mon Luck*, 29 Or. 421, 44 Pac. 693, 32 L. R. A. 738, 54 Am. St. Rep. 804, which is one of the two cases relied upon by the Attorney General in the case at bar. In this case, Bean, Chief Justice, says: "Opium is an active poison and has no legitimate use except for medical purposes; but it is frequently used to produce a kind of intoxication by smoking or eating."

The writer of the opinion in this Oregon case, in considering the case of *State v. Gilman*, supra, and, no doubt, many other cases supporting the doctrine of *State v. Gilman*, took pains to differentiate the *Mon Luck* Case, which he was considering, from the long, unbroken line of cases dealing with intoxicating liquors, by using the following language: "But the principles of these cases has no application here (that is, to the opium cases). It is a matter of common knowledge that intoxicating liquors are produced principally for sale and consumption as a beverage; and so common has been their manufacture and use for this purpose that they are regarded by some courts (Chief Justice Bean should have said by all the courts from the Supreme Court of the United States down) as legitimate articles of property, the possession of which neither produces nor threatens any harm to the public. But the use of opium for any purpose than as permitted in this act has no place in the common experience or habits of the people of this country."

The Supreme Court of Alabama, in the case of *Eldge v. City of Bessemer*, reported in 164 Ala. 599, 51 South. 246, 26 L. R. A. (N. S.) 394, determines this identical question. We quote from the opinion as follows:

"We indulge one further quotation from high authority, as succinctly stating the limitation upon the Legislature in the exercise of the police power: 'It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exercise of the police power of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. \* \* \* If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to these objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273,

31 L. Ed. 205. Such are the limitations upon the Legislature in the exercise of the police power which must be observed in the consideration of this case. There is no attack here upon any statutory enactment of the Legislature. But the principles to be gathered from the cases considered applies with equal force, of course, to municipal ordinances, which must be enacted in pursuance of a delegated legislative authority.

"Municipal corporations in this state have power to adopt ordinances, not inconsistent with the laws of the state, to provide for the safety, preserve the health, promote the prosperity, and improve morals, order, comfort, and convenience of the inhabitants. Code 1907, § 1251. It must be conceded that they may pass ordinances in accord with the general prohibition law of the state, ordinances to prevent evasions thereof by trick, artifice, or subterfuge, and ordinances making it an offense to keep intoxicating liquors and beverages in any place, public or private, with intent to sell or dispose of them in violation of law; all such being in consonance with the law and policy of the state, and fairly implied in the broad grant of powers enumerated. The ordinance in question does not make an offense against the municipality of those acts which are denounced by the law of the state; that is to say, it does not prohibit the sale of intoxicating liquors, nor does it create the separate and distinct offense of having or keeping liquors and intoxicating beverages with the unlawful intent. It can be justified only, if at all, on the ground that it sustains some reasonable relation to the prohibition law in the way of preventing evasions of that law by trick, artifice, or subterfuge under guise of which that law is violated. But it has no such relation. It undertakes to prohibit the keeping in any quantity and for any purpose, however innocent, of intoxicating liquors and beverages in places which are innocent in themselves. Under the ordinance a keeping with innocent purpose is as much an offense as a keeping with purpose to violate the law. The ordinance is no more to be sustained than if it had said: 'No man shall keep for his own use intoxicating liquors or beverages in any place where any drinks or beverages, though entirely free of alcohol, are sold or kept for sale.' Certainly if the keeping for one's own use, and with no purpose to violate the law, may be prohibited in such places, the prohibition against keeping without lawful purpose may as well be extended to keeping at any place where men are, many or few, with result that vinous, spirituous, and malt liquors must in-

deed be classified with burglar's tools (the keeping of which with innocent purpose, we remark, has never been prohibited), lottery tickets, infected clothing, and diseased animals, and the constitutional and legislative recognition of property rights and personal liberty held for naught."

See, also, *French v. City of Birmingham*, 165 Ala. 669, 51 South. 254; *Dorman v. State*, 34 Ala. 216; *Ex parte Mayor of Florence*, 78 Ala. 419.

In the case of *Vance v. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100, the Supreme Court of the United States, in passing on a similar proposition, held certain provisions of the liquor law of South Carolina unconstitutional. The court says: "It is settled by previous adjudications of this court that the respective states have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the lawmaking power of the states; provided, always, they do not transcend the limits of state authority by invading rights which are secured by the Constitution of the United States, and provided further that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other states of the Union."

There are many other authorities bearing on this question; but we feel this opinion has covered sufficient ground to make the position of the court clear. Our research has not disclosed a single case in conflict with the doctrine of the authorities quoted and cited, and none has been called to our attention, although the question has been extensively briefed and presented by the Attorney General's office. The only conclusion that we can legitimately arrive at is that the act in question is not within a reasonable exercise of the police powers of the state—is unconstitutional and void. We may observe, however, that although the law cannot prevent one from having intoxicating liquors in his possession for his own use, yet this court has always held that the possession of an unusual quantity of intoxicating liquors is a circumstance which, together with other competent proof, is admissible against the defendant in the trial of cases involving violations of the prohibitory statute. But such possession alone is insufficient to sustain a conviction.

The writ is allowed, and the petitioner discharged.

FURMAN, P. J., and DOYLE, J., concur.

## STATE v. COPELAND.

(Supreme Court of Washington. Dec. 16, 1911.)

## 1. CRIMINAL LAW (§ 683\*)—APPEAL—DISCRETION OF TRIAL COURT.

Whether evidence is admissible in rebuttal, rather than in chief, is in the discretion of the court, which will not be disturbed in absence of abuse.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1615-1617; Dec. Dig. § 683.\*]

## 2. INDICTMENT AND INFORMATION (§ 189\*)—INCLUDED OFFENSES.

Rem. & Bal. Code, § 2413, makes every person guilty of assault in the first degree who, with intent to kill, assaults another with any deadly weapon or means likely to produce death. Section 2414 makes one guilty of assault in the second degree who, under circumstances not amounting to an assault in the first degree, shall willfully assault another with an instrument likely to produce bodily harm. Section 2168 provides that accused can be found guilty of an offense, the commission of which is included within that with which he is charged in the indictment. *Held*, that one charged with assault in the first degree, by having made an assault with a loaded shotgun, and shot with intent to willfully kill, could be convicted of assault in the second degree; the only difference in the offenses being the absence of intent to kill.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 582-595; Dec. Dig. § 189.\*]

## 3. CRIMINAL LAW (§ 814\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where the evidence conclusively showed that accused was either guilty of assault in the first or second degree, or not guilty, it was not error to refuse to submit the question of assault and battery.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1979; Dec. Dig. § 814.\*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

William A. Copeland was convicted of assault in the second degree, and he appeals. Affirmed.

James J. McCafferty and M. J. Costello, for appellant. John F. Murphy, Hugh M. Caldwell, and H. B. Butler, for the State.

PARKER, J. The defendant was charged by information, filed in the superior court for King county, with the crime of assault in the first degree, as follows: "He, said William A. Copeland, in the county of King, state of Washington, on the 12th day of September, A. D. 1910, did willfully, unlawfully, and feloniously make an assault upon one Walter C. Knapp with a firearm, to wit, with a shotgun, then and there loaded with shot, which he, said William A. Copeland, then and there had and held, and did then and there willfully, unlawfully, and feloniously, with said shotgun, shoot at, toward, and into the body of said Walter C. Knapp, with intent then and there willfully, unlawfully, and feloniously to kill said Water C. Knapp."

The trial resulted in a verdict and judgment against the defendant, convicting him of assault in the second degree from which he has appealed to this court.

It is first contended that the trial court should have directed a verdict of acquittal in appellant's behalf. This seems to be rested upon the theory that it can be determined, as a matter of law, from the evidence that the assault made by appellant upon Knapp was justifiable upon the ground of self-defense. A careful reading of the evidence convinces us that this was clearly a question for the jury. There is abundant evidence in the record to support the view that the assault was without legal justification. This contention only involves the credibility of witnesses, even assuming that appellant made out a prima facie case of self-defense, which we regard as somewhat doubtful.

[1] It is next contended that the trial court erred in admitting certain testimony offered by the prosecuting attorney in rebuttal. The argument seems to be that it was erroneously admitted, because it should have been offered in chief. An examination of this testimony shows that it went but little, if any, beyond being in direct contradiction of the testimony offered in appellant's behalf, upon which his theory of self-defense was rested. This testimony was admissible, in so far as it contradicted that testimony; and, so far as it went beyond that, it was at most only cumulative of the state's evidence in chief. This would, in any event, present only a question of the trial court's discretion, which was clearly not abused. *State v. Klein*, 19 Wash. 368, 53 Pac. 364; 12 Cyc. 557.

[2] It is next contended that the judgment is erroneous, in that a conviction of assault in the second degree cannot lawfully be had under this information. This presents the inquiry, Is the crime of assault in the second degree necessarily included in the crime of assault in the first degree, as charged in this information? An affirmative answer to this question will necessarily sustain the conviction under section 2168, Rem. & Bal. Code. The acts constituting assault in the first degree, in so far as we need notice such acts here, are defined by section 2413, Rem. & Bal. Code, as follows: "Every person who, with intent to kill a human being, \* \* \* (1) shall assault another with a firearm or any deadly weapon or by any force or means likely to produce death, \* \* \* shall be guilty of assault in the first degree." The information charges this crime against the appellant, charging both the assault with a firearm and the intent to kill. The acts constituting assault in the second degree, in so far as we need notice such acts here, are defined by section 2414, Rem. & Bal. Code, as follows: "Every person who, under circumstances not amounting to an assault

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in the first degree, \* \* \* (4) shall willfully assault another with a weapon or other instrument or thing likely to produce bodily harm, \* \* \* shall be guilty of assault in the second degree." It will be noticed that assault in the second degree does not involve any particular intent, as does assault in the first degree, and therefore, of course, does not require the charge of any particular intent in the information, as is necessary in charging assault in the first degree. It seems plain then that if we ignore the allegation of this information of the particular intent to kill we have a complete and perfect charge of assault in the second degree, because there is still left in the information a charge of facts constituting assault in the second degree, under the provisions of section 2414, above quoted. This view is supported by the following authorities: *Clark v. Territory*, 1 Wash. T. 68; *White v. Territory*, 3 Wash. T. 397, 19 Pac. 37; *State v. Klein*, 19 Wash. 368, 53 Pac. 364.

Counsel for appellant rely upon *State v. Ackles*, 8 Wash. 462, 36 Pac. 597, where this court held, under an information charging assault with intention to commit murder, that the accused could not be convicted of an assault with a deadly weapon with intent to do bodily harm. The reason of that decision, however, is found in the fact that the supposed lesser crime which the jury assumed to find the defendant guilty of was by statutory definition found to include elements which were not covered by the information; nor were they necessarily included in the crime of assault with intent to commit murder. As stated by the court in that opinion, at page 465 of 8 Wash., at page 598 of 36 Pac.: "Under our statute, an assault with a deadly weapon, with intent to inflict upon the person of another a bodily injury, is made a felony only upon the express condition that the assault is without considerable provoca-

tion, or where the circumstances of the assault show a willful, malignant, and abandoned heart. Penal Code, § 23. And where an act is punishable in a particular manner, under certain conditions, these conditions must be set forth, so as to show that the act is punishable. 1 Whart. Crim. Law, § 192." These elements the court concluded were not covered by the information, and were not necessarily included in the higher crime charged. In the present case, the lesser crime is not distinguishable from the higher by having, as an element thereof, a different particular intent, or any other different element, as in the *Ackles* Case; but it is distinguishable from the higher crime charged only by the absence of a particular intent, and by the use of a weapon "likely to produce bodily harm," instead of one "likely to produce death." Of course, a weapon likely to produce death is also one likely to produce bodily harm. The case of *State v. Snider*, 32 Wash. 299, 73 Pac. 355, while adhering to the views expressed in *State v. Ackles*, also shows how the lesser offense of assault and battery is included in the charge of assault with intent to kill, made in that case. There the court, by eliminating the element of intent, held that the information contained a complete charge of assault and battery. This theory, we are of the opinion, will support this conviction.

[3] It is finally contended that the trial court erred in the declining to charge that the defendant might be found guilty of assault and battery. This was not error, because the evidence conclusively shows that the defendant was guilty of assault in the first or second degree, or was not guilty of any crime.

The judgment is affirmed.

DUNBAR, C. J., and MOUNT, FULLERTON, and GOSE, JJ., concur.

## STATE v. O'BRIEN.

(Supreme Court of Washington. Dec. 9, 1911.)

## 1. CRIMINAL LAW (§ 598\*)—CONTINUANCE—ABSENT WITNESSES—DILIGENCE—NECESSITY.

To entitle accused to a continuance on the ground of absence of witnesses, diligence to procure their attendance must be shown.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1335-1341; Dec. Dig. § 598.\*]

## 2. CRIMINAL LAW (§ 594\*)—CONTINUANCE—ABSENT WITNESSES—JUDICIAL DISCRETION.

There was no abuse of discretion in refusing accused a continuance on the ground of absence of a witness, where the case had been once continued upon a like showing, and no subpoena had been issued or served, though the witness was present when the case was originally set for trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1321, 1322, 1332; Dec. Dig. § 594.\*]

## 3. ASSAULT AND BATTERY (§ 90\*)—EVIDENCE—ADMISSIBILITY.

In an assault and battery prosecution, it was proper to exclude evidence as to the character of the wound inflicted and as to the actual cause of the assaulted person's death, though the state's attorney in opening told the jury that the person assaulted had died, where the court instructed that the remark should be considered only as accounting for decedent's absence as a witness.

[Ed. Note.—For other cases, see Assault and Battery, Cent. Dig. § 135; Dec. Dig. § 90.\*]

## 4. CRIMINAL LAW (§ 448\*)—EVIDENCE—OPINIONS.

Since one's character is best evidenced by general reputation, it was not error, in an assault and battery trial, to exclude a question whether the person assaulted was peaceable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1043; Dec. Dig. § 448.\*]

## 5. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

It was not reversible error to give instructions requested by the state, though copies thereof were not filed with the clerk, nor served upon defendant's counsel, as required by a local rule of the court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3157; Dec. Dig. § 1172.\*]

## 6. CRIMINAL LAW (§ 1173\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

Any error in refusing to give instructions requested by defendant, on the ground that the requests were made too late, was harmless, where it is not claimed that the instructions given did not state the law of the case.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3164-3168; Dec. Dig. § 1173.\*]

## 7. CRIMINAL LAW (§ 1159\*)—APPEAL—VERDICT—CONCLUSIVENESS.

The weight of the evidence is for the jury in the trial court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

## 8. CRIMINAL LAW (§ 1156\*)—APPEAL—DISCRETION OF TRIAL COURT—MOTIONS FOR NEW TRIAL.

Appellate courts will rarely control the discretion of a trial court in granting or deny-

ing a new trial on the ground of newly discovered evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3067-3071; Dec. Dig. § 1156.\*]

## 9. CRIMINAL LAW (§ 939\*)—NEW TRIAL—NEWLY DISCOVERED EVIDENCE—DILIGENCE.

Application for a new trial on the ground of newly discovered evidence should show diligence to procure it at the former trial; a statement of applicant's conclusion that diligence was had being insufficient.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2318-2323; Dec. Dig. § 939.\*]

Department 2. Appeal from Superior Court, King County; John F. Main, Judge.

William P. O'Brien was convicted of assault, and he appeals. Affirmed.

James B. Metcalfe, for appellant. John F. Murphy and Alfred H. Lundin, for the State.

CHADWICK, J. Defendant was convicted of the crime of assault in the second degree. Error is predicated upon several assignments, which we will discuss in the order in which they are presented.

[1, 2] 1. It is urged that the court erred in refusing to grant a continuance of the trial from February 23d until March 2d, a period of nine days, in order to procure the attendance of a witness. It seems that one Christiansen was a witness to a part of the affray; that he was present on December 20th, when the case was set for trial, but was put over on account of the congested condition of the docket. It was expected that Christiansen would be present on February 23d, and it is likely that he would have been, but for the wreck of the steamer Cottage City, on which he was engaged as quartermaster. The wreck occurred in the northern waters, and Christiansen was transferred to another ship that could not be expected to arrive in port before March 2d. This court is committed to the rule that in all such cases there must be a show of diligence. The case had been once continued upon a like showing. No subpoena had been issued or served; nor is it made certain that Christiansen would have been willing to voluntarily follow the fortunes of the case. Therefore, in such cases this and other courts have held that a show of diligence is best evidenced by putting, or attempting to put, a prospective witness under those restraints which have been provided by statute. To say that, if a prospective witness were present he would testify in a given way, or that he promised to be present and so testify, may not be enough to satisfy the law. It must be made to appear reasonably certain that he will be present, and appellate courts have been loath to interfere with the discretion of trial judges in denying continuances, when after lapse of time there is no showing that the aid of the court has been sought by the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 119 P.—39

party. We find no abuse of discretion in this order of the court. *State v. Brooks*, 4 Wash. 328, 30 Pac. 147.

[3] 2. It is urged that the court erred in excluding testimony showing the character of the wound inflicted. The vice of this ruling is alleged to lie in the fact that the state's attorney had, in making his opening statement, told the jury that the party assaulted had since died, thus conveying to the minds of the jury that he had died of the wound which defendant had inflicted. It is argued that this remark and the ruling of the court is enough to destroy the presumption of innocence and invite a verdict of guilty, because the victim of the assault was dead. We find it impossible to follow counsel in this argument. The court in words twice told the jury that the remark objected to should not be considered, further than to account for the absence of the party as a witness. This, coupled with the fact that under the charge the manner of death was an immaterial question, makes it reasonably certain that the jury was not misled to the prejudice of the defendant. Aside from this, we find that the attending physician described the wound so that defendant's contention in this behalf was probably covered in any event.

3. The refusal of the court to hear evidence as to the actual cause of the death of the assaulted one was not error. This assignment is controlled by our discussion of assignment 2.

[4] 4. The following question was put to a witness: "What sort of a man was Mr. Smith—a peaceable man?" Answer: "No." This was objected to, and the objection was sustained; but the answer was not stricken by the court. But, assuming that it was so understood by the jury, it is said that the court erred in excluding evidence of the quarrelsome and insulting character of the party "who made the first assault." We assume that counsel directs this contention to the exclusion of the testimony just quoted, for several witnesses testified to the peaceable character of the defendant. But it will be seen that the grounds upon which counsel bases his contention are not tenable. "Who made the first assault" was a question for the jury under the evidence. But upon principle the exclusion of the testimony was not error. The opinion of the witness would not be competent evidence. The true fact might be entirely different, and the law, except in certain excepted instances, not now necessary to be considered, has been settled upon the premise that the fact of character is best evidenced by proof of general reputation. The case of *People v. Kenyon*, 93 Mich. 19, 52 N. W. 1033, is relied on to sustain appellant's position. It was there held to be error to exclude evidence of the quarrelsome disposition of the prosecuting witness after the state had gone into the character and disposition of the defendant. But reference

to that case will show that the inquiry was directed to the prosecuting witness himself, when under cross-examination. It has ever been the law that one who offers himself as a witness is bound to disclose his motive and disposition. But the rule which allows this inquiry on cross-examination is not inconsistent with, but is in harmony with, the rule that, if others speak of the general character of a person, it must be by way of reputation. To hold otherwise would be to substitute the judgment of a witness for that of the jury.

[5] 5. It is complained that the court erred in giving the *entire* instructions requested by the state. Three copies of the requested instructions were not filed with the clerk, nor a copy thereof served upon defendant's counsel, as required by rule 12 of the special rules adopted by the several judges sitting in King county for the guidance of their court. It is unnecessary to quote the rule, in order to show the impossibility of giving it literal application; for we have heretofore held that cases will not be reversed because of non-observance of some rule of court. In *Sylvester v. Olson*, 115 Pac. 175, we said: "How far local rules of procedure are to be held binding is a question which has been variously decided by the courts of this country. 18 Ency. Pl. & Pr. p. 1269. But, generally speaking, it may be said that the observance of such rules lies within the discretion of the trial judge. We now recall but one case in our own reports where this question was considered. It was held, in *Washington Bank v. Horn*, 24 Wash. 299, 64 Pac. 534, that a rule might, 'for good reason,' be suspended, implying that the reasons might rest in *gremio judicis*."

[6] 6. The court refused to give any of the instructions requested by defendant, because, as the court held, under rule 12 they came too late. The reason assigned may not be tenable; for it would seem that a request for a proper instruction would be timely, if made at any time before the court instructed the jury. But it is not contended that the instructions as given do not state the law of the case, and, unless the law is overlooked or misapplied to the disadvantage of the party, there can be no legal prejudice.

[7-9] 7. This assignment goes to the refusal of the court to grant a new trial for errors in law occurring at the trial; that the verdict is contrary to the law and evidence; and newly discovered evidence. The first ground is covered by our former discussions, and the second by the rule that the weight of the evidence was for the jury. Defendant discovered, a day or two after the trial, that one Myers might have known something of the crime charged. Myers was then at Janesville, Wis. Counsel for defendant sent the following telegram: "In case state against Captain O'Brien understand you can testify as follows: Saw shooting. Two men came out of the house about the same time. The shots were fired while the larger man was

prostrate. If you can testify in substance as stated wire fully at once. Answer paid." He received the following reply: "To Gen. Jas. B. Metcalfe, Pacific Bldg., Seattle, Wash. Can swear substantially as asked but must send expense money also. I have business here for at least a week." Defendant says: "No diligence on affiant's part could have secured said evidence." Aside from the fact that appellate courts will rarely overrule the discretion of the trial court in granting or denying a motion for a new trial, made on the grounds of newly discovered evidence, for the showing in support of such motions must be measured by reference to the evidence alleged to be newly discovered, the evidence as disclosed on the trial, and the probable consequences of a new trial, we think no showing of diligence is disclosed by the supporting affidavits. It is not enough to show that there was diligence. Diligence is a fact and not a conclusion, and to show it circumstances must be so set forth that the court, rather than the party, can say that there was diligence. In this case, it is not even shown how or from whom the information was obtained, so that an inference of diligence might be drawn.

Finding no error, the judgment is affirmed.

DUNBAR, C. J., and MORRIS, CROW,  
and ELLIS, JJ., concur.

### BARKER v. SARTORI et al.

(Supreme Court of Washington. Dec. 16, 1911.)

#### 1. BILLS AND NOTES (§ 327\*)—BONA FIDE HOLDERS.

Persons acquiring a negotiable note before maturity, without notice of any defect or want of consideration as between the makers and payee, are holders in due course.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 792; Dec. Dig. § 327.\*]

#### 2. BILLS AND NOTES (§ 370\*)—NEGOTIABLE INSTRUMENTS TO BONA FIDE HOLDERS.

While a note, declared void by statute, is void in the hands of even a bona fide holder, a note merely adjudged by the court to be invalid for failure of consideration, etc., is void only in the hands of the original parties, or persons charged with notice of the lack of consideration, and not in the hands of a bona fide purchaser for value.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 963; Dec. Dig. § 370.\*]

#### 3. BILLS AND NOTES (§ 157\*)—NEGOTIABLE INSTRUMENTS.

A note, reciting that two years after date, without grace, for value received, the signers promised to pay to the order of a person named \$1,000, with 9 per cent. interest from date until paid, interest to be paid semiannually, and, if not so paid, to bear interest after delinquency until date at the rate of 9 per cent., was a negotiable instrument; Rem. & Bal. Code, § 3392, requiring a negotiable instrument to contain an unconditional promise or order to pay a sum certain in money; and section 3393 providing that the sum payable is a sum certain within

the act, though it be paid with interest, or by stated installments, with a provision that upon default in payment of any installment, or interest, the whole shall become due.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 399-400; Dec. Dig. § 157.\*]

#### 4. BILLS AND NOTES (§ 167\*)—CONSTRUCTION OF MORTGAGES.

Notes were secured by mortgages, executed on the same date, which stipulate that the maker should pay, in addition to the principal debt and interest, such sums as mortgagee might be required to incur for insurance, taxes, assessments, and charges on the land, etc. Held, that the provisions in the mortgages were not imported into the notes secured thereby, so as to make the notes nonnegotiable.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 418, 419; Dec. Dig. § 167.\*]

#### 5. CONTRACTS (§ 164\*)—CONSTRUCTION—SEPARATE WRITINGS.

The rule as to construing instruments together merely means that if the provisions of one instrument limit, explain, or affect the provisions of another such limitations will be given effect, as between the parties and persons having notice thereof, in order to carry out the intent of the original parties; and it should not be applied to import the provisions of one instrument into another, contrary to the intention of the parties.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 746-748; Dec. Dig. § 164.\*]

#### 6. BILLS AND NOTES (§ 342\*)—BONA FIDE PURCHASERS.

The purchasers of a negotiable note were only bound to inquire into the regularity of the indorsement thereon, if the only irregularity on the face of the note was that it was not indorsed by the payee.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 830-841; Dec. Dig. § 342.\*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Patrick Barker against R. Sartori and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Howard O. Durk and A. R. Rutherford, for appellant. Chas. F. Munday and Bausman & Kelleher, for respondents.

MOUNT, J. In the year 1910 the city of Seattle began proceedings to condemn certain lots for park purposes. Among these were lots 6 and 7, block 1, Columbia Terrace addition, and lot 7, block 24, of Squire's Lakeside addition. These lots were owned by Patrick Barker, who was made a party to the condemnation proceeding. Upon a trial of the condemnation case, Mr. Barker was awarded \$2,200 for the lots in Columbia Terrace addition, and \$1,013 for the lots in Squire's Lakeside addition. After these awards were made and the money paid into court, R. Sartori, who claimed to hold a mortgage lien on lot 7, block 4, above stated, for \$1,000 and interest, and the Seattle National Bank, which claimed to hold a mortgage on

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the other two lots for \$2,200 and interest, were brought into the case upon petition of the city. These parties thereupon set up their mortgages, claiming to be purchasers of the notes secured thereby, before maturity, for value, and in good faith, and petitioned the court for the application of the funds to the payment of their respective mortgage liens. Patrick Barker answered these petitions, denying execution of the instruments, and alleging affirmatively that both were void for want of consideration. Upon issues thus made, the trial court was of the opinion that Barker executed the notes and mortgages which were liens upon the premises covered by the respective mortgages, and that the petitioners were holders in good faith, before maturity, and therefore entered orders, directing the application of the funds remaining after certain prior liens were paid to the satisfaction of the petitioners' claims. Mr. Barker has appealed from these orders. Both cases depend upon the same state of facts, and were tried as one.

[1, 2] Appellant argues that the notes and mortgages given for their security are void, because they were executed without consideration passing to Mr. Barker. It may be true that no consideration passed, but the court found, and the evidence is clearly sufficient to show, that Mr. Barker executed the notes and mortgages. It was not disputed that Mr. Sartori and the Seattle National Bank acquired the paper, for value, before maturity, without notice of any defect or want of consideration between the makers and the original payee. It is clear, therefore, that these respondents are holders in due course, provided the paper is negotiable. *Gray v. Boyle*, 55 Wash. 578, 104 Pac. 828, 133 Am. St. Rep. 1042. In that case the court quoted the rule in such cases from *Vallett v. Parker*, 6 Wend. (N. Y.) 615, as follows: "Wherever the statutes declare notes void, they are, and must be so, in the hands of every holder; but, where they are adjudged by the court to be so for failure, or the illegality, of the consideration, they are void only in the hands of the original parties, or those who are chargeable with or have had notice of the consideration." This is decisive of that question.

[3, 4] It is next argued that the paper was not negotiable. The notes contain similar provisions. One of them recites: "Two years after date, without grace, for value received, I promise to pay to the order of H. P. Wolcott the sum of \$1,000, with interest at the rate of 9 per cent. per annum from date until paid. Interest to be paid semi-annually, and if not so paid to bear interest after delinquency until paid at the rate of 9 per cent. per annum." The notes were secured by mortgages, which contain stipulations requiring the maker to pay, in addition to the principal debt and interest, such sums as the mortgagee may be required to incur for in-

surance, taxes, assessments, and charges on the land, etc. It is argued (1) that the provision in the notes renders them uncertain as to the amount to be paid at maturity, because if the interest is not paid at certain fixed periods such past-due interest bears interest; and (2) that the mortgages bearing the same date as the notes are assumed to have been made at the same time as the notes, and the two instruments must be construed as one contract, and therefore are entirely uncertain as to the amounts to be paid at maturity. Our statute, at section 3392, Rem. & Bal. Code, defines a negotiable instrument, and declares that it "must contain an unconditional promise or order to pay a sum certain in money." The next section provides: "§ 3393. The sum payable is a sum certain within the meaning of this act, although it is to be paid (1) with interest; or (2) by stated installments; or (3) by stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; or \* \* \* (5) with costs of collection or an attorney's fee, in case payment shall not be made at maturity." It is apparent that the notes in this case were negotiable instruments within this rule, because they were in writing, signed by the maker, and contain an unconditional promise to pay a sum certain in money. The fact that the interest was payable in installments does not render the notes uncertain, for the statute expressly provides that payments may be made by installments. This applies as well to interest as to the principal. The argument made by counsel, that an installment may not be paid when due, and therefore the instrument would not show upon its face what amount would be due at maturity, would apply equally to the principal, where payable by installments. There are cases which hold that notes like these are uncertain, and therefore not negotiable, as, for example, *Cornish v. Woolverton*, 32 Mont. 453, 81 Pac. 4, 108 Am. St. Rep. 598, and *Davis v. Brady*, 17 S. D. 511, 97 N. W. 719; but those were cases which were based upon statutory provisions unlike ours. We are satisfied that the provisions of the mortgages were not imported into the notes, so as to render them nonnegotiable.

[5] The rule is well stated in *Thorpe v. Minedman*, 123 Wis. 149, 101 N. W. 417, 68 L. R. A. 146, 107 Am. St. Rep. 1003, as follows: "The rule that instruments are to be construed together does not lead to this result. Construing together simply means that, if there be any provisions in one instrument limiting, explaining, or otherwise affecting the provision of another, they will be given effect, as between the parties themselves and all persons charged with notice, so that the intent of the parties may be carried out, and the whole agreement actually made may be effectuated. This does not mean that the provisions of one instrument are imported



bodily into another, contrary to the intent of the parties. They may be intended to be separate instruments, and to provide for entirely different things, as in the very case before us. The note is given as evidence of the debt, and to fix the terms and time of payment. It is usually complete in itself—a single, absolute obligation. The purpose of the mortgage is simply to pledge certain property as security for the payment of the note. The agreements which it contains ordinarily have no bearing on the absolute engagements of the note, but simply relate to the preservation of the security given by its terms, such as the payment of taxes, the insurance of the houses, and the like. While the two instruments will be construed together wherever the question as to the nature of the actual transaction becomes material, this does not mean that the mortgage becomes incorporated into the note, nor that the collateral agreements to pay the taxes, or to insure the property, or that the mortgagee might insure in case of default by the mortgagor and have an additional lien therefor, become parts of the note. These agreements pertain to another subject, namely, the preservation intact of the mortgaged property. The promise to pay is one distinct agreement, and, if couched in proper terms, is negotiable. The pledge of real estate to secure that promise is another distinct agreement, which, ordinarily, is not intended to affect in the least the promise to pay, but only to give a remedy for failure to carry out the promise to pay. The holder of the note may disregard the mortgage entirely, and sue and recover on his note; and the fact that a mortgage had been given with the note, containing all manner of agreements relating simply to the preserva-

tion of the security, will cut no figure." See, also, *Farmers' Bank v. McCall*, 25 Okl. 600, 106 Pac. 868, 26 L. R. A. (N. S.) 217; *American Savings Bank & Trust Co. v. Helgesen*, 116 Pac. 837.

[8] It is next argued that the circumstances under which the respondents acquired the paper were sufficient to put them upon notice of the invalidity of the notes, (1) because the property mortgaged was not worth the face of the notes at the time the mortgages were given; and (2) that the notes were not indorsed by the payee, but were indorsed: "H. P. Walcott, H. W. Fisher, Trustee." The evidence shows that Mr. Sartori looked at the location of the lot covered by his mortgage at the time he purchased the note, and was satisfied that the property was good for the amount of the note at that time. There is no evidence that the bank made any examination of the property, but the officers of the bank knew the payee and her trustee, and relied upon the indorsement. The evidence also shows that H. W. Fisher was a trustee for the payee, and was authorized to make the indorsements as they were made. The only duty which devolved upon the purchasers was to inquire into the regularity of the indorsement, for this was the only thing upon the face of the notes which did not appear to be regular. The notes in all other respects were regular, and the purchasers were authorized to rely upon the face of the papers, unless they had notice of some irregularity. There is nothing in the evidence to show any such notice.

The judgment must therefore be affirmed.

DUNBAR, O. J., and PARKER and GOSE, JJ., concur.

**SCHWAB v. ANDERSON STEAMBOAT CO.**  
(Supreme Court of Washington. Dec. 16, 1911.)

**THEATERS AND SHOWS (§ 6\*)—AMUSEMENT PARKS—PERSONAL INJURY—LIABILITY.**

Where one, suing a company which operated an amusement park for injury in a defective swing, relied on the swing being within the park, he was not entitled to recover on it appearing that the swing was outside the ground controlled by the company.

[Ed. Note.—For other cases, see Theaters and Shows, Dec. Dig. § 6.\*]

Chadwick, J., dissenting.

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by W. A. Schwab, by M. A. Schwab, his guardian ad litem, against the Anderson Steamboat Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions.

Byers & Byers, for appellant. Peterson & Macbride, for respondent.

**MORRIS, J.** Respondent, a minor 20 years of age, was injured, July 4, 1910, by falling from a swing which, it is alleged, was in Fortuna Park, on Mercer Island.

The park was alleged as under the ownership and control of appellant, and the swing as one maintained by it within the park. The tree from which hung the rope respondent was using as a swing was shown by all the evidence, both that given by appellant and respondent, to be outside the park. In fact, there was no contention that it was within the park, or nearer to it than 75 feet; respondent's theory on the trial seemingly being that, there being no dividing line between the park proper and the outside territory in which the swing was, the public might regard all the ground as within the park, and subject to the control of appellant. It might be that a case could be predicated upon such a theory. But this one is not. It depends for its success upon proof that appellant owned or controlled the place where the injury happened, and maintained the swing. The court took this view of it in the charge to the jury, to the effect that, if the place where the respondent fell was outside of the ground controlled by appellant, there could be no recovery. When, however, he was asked to take the case from the jury, because of the failure to show the place of the injury under the control of appellant, he thought the question, as one of fact, should be submitted to the jury, because there was testimony that the place of the accident was Fortuna Park. While it is true the respondent testified the accident happened at Fortuna Park, he at the same time describes the tree to which the rope was attached; and this tree is shown by all the testimony to be outside of the

park, and not within the control of appellant. There was no dispute as to this fact in the evidence, and the court should have so held on appellant's motion.

There being no proof of the fact upon which respondent relied to establish a liability against appellant, the case should have been dismissed on appellant's motion.

Judgment reversed and the cause remanded, with instructions to dismiss.

**DUNBAR, C. J., and CROW and ELLIS, JJ., concur.**

**CHADWICK, J.** I am unable to agree with the opinion of the majority. The appellant operated a certain park, situated on Mercer Island, in Lake Washington, as an adjunct to its business of steamboating. This park was given over to the use of the public, and to lodges and societies of like nature, for picnic purposes. It was so used on the Fourth of July by the Ancient Order of United Workmen. Respondent was an attendant at the picnic, and while there was injured by falling from a swing that, as it now transpires, was a short distance beyond the line of the park proper, although it appears from the testimony that there were tables and other paraphernalia incident to picnic grounds even beyond the swing, so that the swing was an invitation to any one inclined to take that sort of exercise or recreation. I confess that I am unable to find any case directly in point that would sustain my theory that the appellant is liable, but in reason it would seem that it should be so. I can see no difference in principle between this case and that of *Neel v. King County*, 53 Wash. 493, 102 Pac. 396, where a judgment was sustained, although the defect in the highway was beyond the limit of the county's property. The court there said that the doctrine upon which a recovery was allowed was that of simple justice and fair play, and estoppel to deny responsibility, where the county had in effect issued an invitation to the public to use the property adjacent to the highway as a part of the road; there being no defined boundary between the road and the place where the public was invited to go. In my judgment, respondent was warranted in the assumption that the swing was a part of the park playground, and to hold that he is bound by an arbitrary, unmarked line is to put a premium upon the negligence of those whose duty it is to safeguard all who come to their place for amusement and recreation. Appellant knew its boundary lines, and it was within its power to define them. The court's decision puts the injured party to the burden of knowing them at his peril.

For these reasons, I dissent from the majority opinion.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

## GRINDEMAN v. WOODLAND SHINGLE CO.

(Supreme Court of Washington. Dec. 16, 1911.)

## MASTER AND SERVANT (§ 41\*)—WRONGFUL DISCHARGE—DAMAGE.

Where an employe under contract to work a year, but not to receive wages when disabled, was ill most of the year, so that he would not have received during the year more than he actually received elsewhere, had he not been wrongfully discharged, the jury were justified in finding that he was not damaged by his discharge before the end of the term.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 50-53; Dec. Dig. § 41.\*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by W. F. Grindeman against the Woodland Shingle Company. From a judgment for defendant, plaintiff appeals. Affirmed.

E. H. Gule, for appellant. J. P. Wall, for respondent.

PARKER, J. The plaintiff seeks to recover a balance, alleged to be due him for work, and also damages, alleged to have resulted to him from his discharge by the defendant from employment under the following contract: "Labor Contract. W. F. Grindeman as first party, agrees with the Woodland Shingle Company, a corporation, as second party, as follows: Second party agrees to employ first party as sawyer in shingle mill of second party in Seattle, Washington, and agrees to pay first party for his labor as follows: Five and one-half (\$0.05½) cents per thousand for each thousand shingles cut per day in said mill by the said first party and guarantees that said first party shall receive a minimum payment each labor day in said mill of seven (\$7.00) dollars per day. First party agrees to work for second party for said wages and further agrees to work every day that said mill is in operation during the year ending December 30th, 1909, and devote his time and energy to his labor in a diligent and faithful manner. It is agreed that in the event that the straight shingle mills of Ballard shall shut down that the period of shut down shall not be taken as earning anything in favor of first party but in the event that any one of the straight shingle mills of Ballard shall run then it is agreed that said minimum sum of seven dollars shall become due and payable to first party for each working day during said time. First party herewith deposits with the second party his promissory note payable on demand for fifty (\$50.00) dollars without interest as security for faithful performance of this contract and further agrees that in the event that the same shall be violated in the party of the first part that all moneys due or owing to first party from second party at

the time of violation of said contract shall be forfeited together with said note as liquidated damages. And it is further agreed that in the event that first party is sick or disabled in any manner that he shall receive no profits under this contract. Witness the hands of the parties hereto this the 23rd day of February, 1909. [Signed] W. F. Grindeman, Woodland Shingle Co., by L. J. Hamel, Pt."

The substance of the plaintiff's claim is that he was discharged without cause by the defendant on August 28, 1909, at which time there was due him for work under the contract \$110.48, and that, had he been permitted to remain in the defendant's employ until the end of the year under the contract, he would have earned \$885.50 additional, during which time he was able to earn elsewhere only \$154.75. The difference he claims to be the measure of his damages resulting from his discharge. The substance of the defendant's defense is that the plaintiff breached the contract by quitting his work under the contract without cause, and thereby forfeited the balance due him at that time, and also thereby entitling the defendant to judgment against him upon the note for \$50 delivered with the contract as security for its performance. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff for \$110.48, which, it will be noticed, is the exact sum claimed to be due him at the time he ceased to work. The plaintiff has appealed from this judgment.

It is contended by counsel for appellant that, since the jury found in his favor for this balance, it follows that respondent breached the contract, and therefore became liable to appellant for \$7 per day for the entire unexpired term of the contract, less the amount he earned elsewhere during that time. He asks us to direct judgment to enter accordingly, or grant him a new trial. The evidence tends strongly to show that at the time appellant ceased to work he was sick and unable to work, and that he so continued for a large part of the remaining portion of the year. This evidence was ample to warrant the jury in believing that appellant would not have been entitled to compensation for a considerable portion of the unexpired time of the contract, in view of its concluding provision that he was not to receive compensation when sick or disabled. The evidence does not show that appellant would have earned during the unexpired term any more than the \$154.75 he earned elsewhere, even had he worked for respondent under this contract during the whole time he was not sick or disabled. Therefore the jury were fully warranted in concluding that appellant was not damaged, even conceding that he was discharged without cause.

A careful reading of the evidence also

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

convinces us that it supports the conclusion that at the time appellant ceased to work for respondent he did so by mutual consent of himself and respondent, and that thereafter neither made any demands upon the other looking to a continuance of their contract obligations, except as appellant demanded compensation for the unexpired time by bringing this action. This theory of mutual termination of the contract was not urged by respondent upon the trial, as it was claiming a breach of the contract by appellant; but we think, nevertheless, that the jury might legitimately arrive at their conclusion upon this theory. Either of these theories will support the verdict and judgment.

The judgment is affirmed.

DUNBAR, C. J., and MOUNT, FULLERTON, and GOSE, JJ., concur.

### CONE v. ELDRIDGE et al.

(Supreme Court of Colorado. Dec. 4, 1911.)

#### 1. APPEAL AND ERROR (§ 1170\*)—HARMLESS ERROR.

Plaintiffs filed individual claims against the estate of the maker of notes to recover for amounts paid by them as guarantors thereon, and they also filed a joint claim for the amount of such notes, alleging that they were transferred to them jointly after payment; and the executor made a motion to strike the joint claim, on the ground that it was inconsistent with the individual claims, and also filed a demurrer, based on practically the same ground, both of which were overruled. The judgment for claimants on the joint claim was less than the aggregate of the individual claims; they being disallowed. The validity of the notes and the payment by claimants was undisputed. *Held* that any error in overruling the motion and demurrer was not prejudicial to the estate, and hence not reversible, under Mills' Ann. Code, § 78, providing that no judgment shall be reversed because of any error not affecting the substantial rights of the parties.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4540-4545; Dec. Dig. § 1170.\*]

#### 2. GUARANTY (§ 47\*)—NATURE OF OBLIGATION—ACCRUAL OF LIABILITY.

While a surety is primarily liable for the debt, being bound with his principal on the same contract, a guarantor is only secondarily liable; his contract being to pay or perform if his principal does not do so.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. § 58; Dec. Dig. § 47.\*]

#### 3. SUBROGATION (§ 7\*)—PAYMENT BY GUARANTORS—EFFECT.

Since the guarantor is only secondarily liable, upon payment of a note by him, he is entitled to possession thereof with the right to maintain an action thereon, both under the general rule and under the negotiable instruments act (Rev. St. 1908, § 4584), providing that an instrument, paid by a party secondarily liable thereon, is not discharged, but the party paying is remitted to his former rights as regards prior parties, so that the discharge of the guaranty contract by several guarantors on a note, by paying the note, did not extinguish it, but the

guarantors, if joint owners, could maintain a joint action thereon against the makers.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. §§ 17-29; Dec. Dig. § 7.\*]

#### 4. SUBROGATION (§ 41\*)—ACTION AGAINST PRINCIPAL—JOINT ACTION.

If guarantors on notes by agreement with the holders thereof became the joint owner of the notes by transfer after their discharge, they could bring a joint action thereon against the maker, whether the funds with which they discharged the notes were individual funds of the several guarantors, or owned jointly by them.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 113; Dec. Dig. § 41.\*]

#### 5. EXECUTORS AND ADMINISTRATORS (§ 227\*)—CLAIMS AGAINST ESTATE—FILING.

Though the guaranteed notes were secured by mortgage, and judgment was rendered against the guarantors in the action to foreclose, and the notes were transferred to the guarantors after payment by them, their claim against the estate of the maker for the amount so paid was founded upon the notes, and not upon the judgment of foreclosure, so that it was not necessary to file the exemplification of the judgment with the claim against the estate.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 811-818; Dec. Dig. § 227.\*]

#### 6. EXECUTORS AND ADMINISTRATORS (§ 256\*)—CLAIMS—REVIEW—PRESENTATION BELOW.

An objection in proceedings to enforce a claim against an estate that the claim was not legally verified will not be considered on appeal, if not made below.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 852; Dec. Dig. § 256.\*]

#### 7. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Whether a witness was interested in the result of an action against an executrix, so as to disqualify him under Mills' Ann. St. § 4818, is immaterial, if his testimony was not prejudicial to the estate.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.\*]

#### 8. SUBROGATION (§ 41\*)—ACTIONS BY GUARANTORS—PRESUMPTIONS.

Where the original notes were indorsed and delivered to the guarantors upon payment by them of the debt guaranteed, it must be presumed, in absence of a contrary showing, in an action by the guarantors against the maker, that they are the owners of the notes, though additional securities were given by the maker to secure the contract of guaranty.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 115; Dec. Dig. § 41.\*]

#### 9. SUBROGATION (§ 41\*)—ACTION ON NOTE—PAYMENT—SUFFICIENCY OF EVIDENCE.

Evidence, in an action by guarantors on notes transferred to them, after payment by them, *held* not to show that one of the notes was paid, so as to preclude an assertion of the right of subrogation.

[Ed. Note.—For other cases, see Subrogation, Cent. Dig. § 115; Dec. Dig. § 41.\*]

Error to Fremont County Court; J. L. Cooper, Judge.

Action by E. B. Eldridge and others against Annie E. Cone, as executrix of the will of James J. Cone, deceased. From a judgment for plaintiffs, defendant appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Taylor & Sayre and Hardy Sayre, for appellant. Charles E. Waldo, Clyde C. Dawson, and James A. Stump, for appellees.

GABBERT, J. W. H. McClure and James J. Cone executed eight promissory notes to the Deseret Savings Bank of Salt Lake City, aggregating \$38,000. Seven of them were for \$5,000 each, and one for \$3,000. These notes were secured by a mortgage on real estate, executed by Cone. The payment of the \$3,000 note and four of the \$5,000 notes was guaranteed by John Sharp, Elias A. Smith, E. R. Eldridge, and James Sharp; the remaining \$5,000 notes being guaranteed by Smith and Eldridge. When the notes matured, the mortgage securing them was foreclosed. In this action judgment was also rendered against the guarantors. The mortgaged property was sold, with the result that a large part of the indebtedness evidenced by the notes was unsatisfied. Afterwards the guarantors severally paid sums to discharge the unsatisfied balance of the judgment. Cone died, and John Sharp, Smith, and Eldridge filed their respective claims against his estate, by which each claimed individually the amount he had paid as guarantor of the notes in question. James Sharp had also died, and his executors filed a claim against Cone's estate for the amount which he had paid on account of his liability as a guarantor. In addition to these individual claims, the several claimants filed a joint claim against the Cone estate, in which it was stated that the McClure and Cone notes had been assigned, transferred, and indorsed to claimants, on which there was due them the sum of \$28,616.92. The issue of the indebtedness represented by these several claims was tried to the court, and judgment rendered on the joint claim in the sum of \$33,911.02; the individual claims being disallowed. From this judgment, the executrix has appealed.

In advance of the hearing, the executrix moved the court to require claimants to elect between their individual claims and joint claim, and after such election to strike the other claim or claims, on the ground that all the claims arose out of the same notes and transactions, and that the individual claims and joint claim were inconsistent. This motion was held for consideration until the evidence was all in. The executrix next moved the court to strike the joint claim, for the reason that the several claims disclosed that all arose out of and were based on the same notes and transactions (this was admitted by counsel for claimants); and also showed that the only relief to which claimants were entitled was to be reimbursed in such sums as each had paid separately as guarantor. This motion was overruled tentatively. The executrix then demurred to each of the claims, upon the following grounds: (1) That as to each individual

claim there is another action pending, to wit, the joint claim. (2) That as to the joint claim other actions are pending, to wit, the individual claims. (3) That as to the joint claim there is a misjoinder of claimants. (4) That, as to all the claims there is an improper joinder of causes of action. (5) As to each claim, want of facts. This demurrer was overruled. When the testimony was completed, the executrix renewed her motions, to which reference has been made. They were then overruled.

[1] The first point urged upon our attention by counsel for appellant is that the court erred in overruling the motions and demurrer. In support of this contention, it is said that the claims are inconsistent; that claimants could not have both an individual and joint claim growing out of the same transaction; and that they were bound to know in advance which statement regarding their claims was true. If the Civil Code governs proceedings of the character under consideration (upon which we express no opinion), a serious question would be presented, were it not for the fact that the record affirmatively discloses that the executrix was not prejudiced by overruling the motions and demurrer. There is no claim that the notes were not executed by Cone and McClure. There was no claim of a failure of consideration. It stands undisputed that severally the claimants paid sums which, in the aggregate, discharged the amount due on the notes, after deducting the amount realized from a sale of the mortgaged premises. Their individual claims were disallowed. It is not claimed that claimants were ever reimbursed in any sum whatever for the amount which they paid to discharge their obligation as guarantors, and the judgment which was rendered was only for the amount which they paid for this purpose. In fact, it appears that the judgment on the joint claim is for a less sum than the individual claims aggregated, for the reason that in the former there was only claimed and allowed the amount paid necessary to take up the notes, while in the individual claims the several amounts claimed included costs, which the respective parties paid to satisfy the judgment rendered in the foreclosure proceedings and interest at a higher rate upon the several amounts thus paid than provided for in the notes. So that it clearly appears the executrix was not prejudiced by the rulings complained of. Our Civil Code (section 78, Mills') expressly provides: "The court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties, and no judgment shall be reversed or affected by reason of such error or defect. \* \* \*"

The material and important question is whether the testimony established a joint claim upon the notes. It is urged that it

does not, because it appears the money paid by each claimant was paid out of his individual funds, and not out of any joint funds belonging to them; and hence, it is contended, the claim of each was individual. In other words, it is contended that there being no joint right, no joint recovery could be had. It is also claimed that, as under their contract of guaranty the claimants were each responsible for the entire sum which their contract covered, the discharge of their contract by payment was a payment of the notes to the holder, and not a purchase of them from it. Neither of these propositions is tenable. We will consider the latter first.

[2] There is a marked distinction between a contract of guaranty and one of suretyship. A surety is primarily liable on his contract; that is to say, he is bound with the principal on the identical contract under which the liability of the principal accrues, while the guarantor is only bound for the performance of a prior or collateral contract, by which the principal is alone obligated; that is, the contract of the guarantor is separate and distinct from that of his principal, so that the liability of a guarantor does not attach until default by his principal. In other words, the obligation of a surety is primary, and that of a guarantor secondary. 20 Cyc. 1400; 2 Daniel on Negotiable Instruments, § 1733.

[3] Because of this distinction, the discharge of the contract of guaranty by the guarantor does not extinguish or satisfy the obligation to which the contract of guaranty relates; consequently it is universally held that upon payment of a note by a guarantor, when only secondarily liable, he becomes entitled to the possession of such note, and may maintain an action upon it against the maker. 2 Daniel on Negotiable Instruments, § 1758; Teberg v. Swenson, 32 Kan. 224, 4 Pac. 83; Anthony Investment Co. v. Law, 62 Kan. 193, 61 Pac. 745; Jennings v. Pratt, 19 Utah, 129, 56 Pac. 951; Jacobs v. Pierce, 132 Ill. App. 547. Such, in effect, as applied to the facts of this case, is the provision of our negotiable instruments act (section 4584, Rev. Stats. 1908). We therefore conclude that the discharge of the contract of guaranty did not extinguish the notes, and that claimants, if they were the joint owners, could maintain a joint claim thereon against the makers, or either of them.

[4] The testimony disclosed that the sum or sums which each paid was out of his individual funds, but after these payments the notes to which their contract of guaranty related were assigned and delivered to them jointly. Whether the funds, by reason of which this arrangement was effected, were joint or individual is immaterial, if, by an agreement between themselves with the holder of the notes, they became the joint owners thereof. In such circumstances,

the amount to which each of the joint owners would be entitled of the sum recovered from their principal would, doubtless, be in proportion to what each had paid, but that is not a matter in which the maker is concerned, so that from the testimony it not only appears that claimants were the joint owners of the notes in question, by a special arrangement between themselves and the holder, but that they also became such owners of the notes which they jointly guaranteed by operation of law. Perhaps the latter would not, of itself, entitle them to maintain a joint claim on all the notes, but the arrangement between the holder and themselves, to which we have referred, did.

[5] The executrix objected to the introduction of any testimony to support the joint claim, upon the ground that it had not been properly exhibited. This objection was based upon the assumption that the claim was founded upon a judgment, and that for this reason the exemplification of the judgment should have been filed. This assumption is not warranted. The claim was based upon the notes which claimants had guaranteed and paid. These notes were attached to and filed with the claim.

[6] It developed at the trial that the claim was verified by one of the claimants before Hiram S. Young, a notary, and also one of the claimants as executor. For this reason, it is urged that the claim was not properly verified. No such objection was made below, and will not be considered here. *Jakway v. Rivers*, 48 Colo. 49, 108 Pac. 999; *Rice v. Cassells*, 48 Colo. 73, 108 Pac. 1001.

[7] W. H. McClure was called as a witness on behalf of claimants. Counsel for the executrix objected to his being permitted to testify, upon the ground that he was disqualified by virtue of the provisions of section 4816, 2 M. A. S., which provides, in substance, that a person interested in the result of an action to which an executrix is a party shall not be permitted to testify as a witness for the adverse party to such action, except in certain cases, and that the witness did not come within the exceptions. It is unnecessary to determine whether or not the witness was disqualified by virtue of the provisions of this section. His testimony was of a character that it could not possibly have been prejudicial to the interests of the executrix or the estate which she represents.

The judgment rendered in Utah was satisfied, and for this reason it is urged that, as such satisfaction released McClure, the Cone estate could only be held for one-half of the amount of the joint claim of claimants. The satisfaction was the result of the guarantors, who are claimants, complying with their contract. Had McClure paid the judgment, claimants would not have been required to pay anything, but, as he did not, they were compelled to pay the sum represented by their joint

claim, which imposed upon their principals a joint and several obligation to reimburse them for the money expended to discharge their contract of guaranty. This is the obligation which they sought to enforce by their joint claim. In the circumstance above noted, the fact that the judgment had been satisfied which operated to release McClure from further liability thereon to the original judgment creditor is immaterial.

[8] To further secure the notes executed by Cone and McClure, James Sharp and wife, and John Sharp and wife, and one Emily C. Smith mortgaged other lands. It appears that these securities were applied upon the notes in question. For this reason, it is urged that to the extent such securities were credited upon the notes, by accepting or subjecting property belonging to others, claimants are not entitled to recover. In other words, it is urged that we must assume that one-half of the property mortgaged by James Sharp and wife belonged to the latter; that a similar condition existed with respect to the property mortgaged by John Sharp and wife; and that Emily C. Smith was the owner of the property which she mortgaged; and that therefore property, other than that of the claimants, was taken or accepted upon the notes, and to this extent they have no claim against the Cone estate; but that whatever claim exists on this account belongs to the parties, not guarantors, whose property was applied upon the notes. We do not think there is any merit in this contention. These additional securities were unquestionably given to secure the contract of guaranty. The original notes were indorsed and delivered to the claimants by the payee, and we must assume that they paid the whole consideration to the bank for the use of those entitled thereto necessary to obtain such assignment, and are the owners thereof, there being nothing from which to infer the contrary; otherwise the notes would not have been indorsed and delivered to them. *Gumaer v. Sowers*, 31 Colo. 164, 71 Pac. 1103.

[9] It is claimed that in no event can claimants recover upon the \$5,000 note, designated as "Exhibit No. 6." This claim is based upon the ground that in the complaint filed in the Utah court to foreclose the mortgage securing the Cone and McClure notes it is alleged that this note had been paid. It is true that this complaint does allege the payment of the note, designated therein "Number 6," but that wholly fails to establish that what is designated in the record before us "Ex. 6" is the same note referred to in the complaint

as "Number 6." According to the exhibit and serial numbers, when arranged in their order, the exhibits are numbered from 1 to 7, inclusive. The serial numbers are from 1,459 to 1,466, inclusive, with No. 1,464 omitted. By whom these numbers were placed on the notes does not appear. They are not so numbered and designated in the complaint, and we cannot assume that "Number 6" therein is the same note in the record here designated "Ex. 6"—No. 1,465. But if we adopt the contention of counsel for appellant to the effect that the serial numbers were the registry numbers of the payee bank, and that the notations "Ex. 1," etc., were evidently used by the parties and adopted by the court in which the action to foreclose the mortgage securing the notes was pending for the purpose of identifying the several notes, then it is evident that what is designated in the complaint as "Number 6" is not "Ex. 6," with the additional identification "No. 1,465," for the very obvious reason that the note alleged to have been paid would not have been presented to the court, and must have been the note bearing the serial number "1,464," which is not one of the notes exhibited on behalf of the claimants.

It is also urged on behalf of the appellant that much irrelevant and immaterial testimony was introduced by claimants, and that the court failed to consider all the testimony introduced when determining the validity of the joint claim. We do not deem it necessary to go into consideration of these matters in detail. As previously intimated, the validity of the joint claim was established by uncontroverted testimony, regarding the competency of which there can be no question, and the court was clearly right in rendering the judgment it did. Had it failed to do so, it certainly would have erred to the prejudice of the claimants. There was no dispute regarding the facts upon which their claim is based. It is true that the judgment rendered is a large one, but claimants are entitled to it, because of the obligation which their compliance with their contract of guaranty imposed upon their principal.

Other errors are assigned which it is not necessary to specifically notice, because the disposition of other questions to which we have given attention demonstrates that they are without merit.

The judgment of the county court is affirmed.

Judgment affirmed.

MUSSER and HILL, JJ., concur.

## WILEY v. PEOPLE.

(Supreme Court of Colorado. Dec. 4, 1911.)

## 1. HOMICIDE (§ 300\*)—INSTRUCTIONS—DEFENSES.

Accused testified that he was assailed by decedent while in a weakened physical condition and heavily dressed, and, to resist the attack and put himself on an equality with decedent, he struck the latter with a pitchfork handle without any intention of seriously injuring him, though decedent died as a result of the blow. *Held*, that it was error to instruct that accused relied upon the plea of self-defense; his contention being, in effect, that the homicide was accidental.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 614-632; Dec. Dig. § 300.\*]

## 2. HOMICIDE (§ 309\*)—INSTRUCTIONS—ISSUES—INVOLUNTARY MANSLAUGHTER.

It was also error to instruct that the issue of involuntary manslaughter was not in the case.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 649-656; Dec. Dig. § 309.\*]

## 3. HOMICIDE (§ 340\*)—APPEAL—HARMLESS ERROR.

Where accused claimed that the killing was accidental, in that he merely struck decedent with a pitchfork handle because he was otherwise incapable from illness to meet decedent's attack upon equal physical terms without using a weapon, a charge that accused testified that he was in actual fear of losing his life or receiving great bodily harm when he struck decedent, when accused did not so testify, was prejudicial error.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.\*]

Error to District Court, Weld County; Hubert L. Shattuck, Judge.

E. Wiley was convicted of second-degree murder, and brings error. Reversed.

William H. Trindle, for plaintiff in error. Benjamin Griffith, Atty. Gen., Charles O'Connor, First Asst. Atty. Gen. (George A. Carlson, Dist. Atty., of counsel), for the People.

WHITE, J. E. Wiley was charged with the murder of Swan Hager. Upon trial he was convicted of murder in the second degree, and sentenced to the penitentiary for a term of not less than 10 or more than 11 years.

The defendant and Hager, in company with several other men, were at the Shamrock coal mine in Weld county, where they had congregated with their wagons and teams for the purpose of purchasing coal and hauling the same to their respective homes. Wiley and deceased were not acquainted, though they had seen each other a few times, and there was no unfriendly feeling between them. There was some evidence tending to show that deceased during the afternoon became somewhat intoxicated. At the mine was a barn which had been provided by the management of the coal company for the purpose of accommodating those who were detained overnight. Under

the rules governing the use of the barn, those desiring stalls therein could reserve the same, as against other claimants, by tying their halters in the stalls, or placing feed in the feed boxes. Wiley, in accordance with such rules, appropriated stalls for his own team and that of two teams driven to the mines by his sons earlier in the day. About 5 o'clock deceased, and other members of his party, drove to the barn and unhitched their horses, and deceased inquired of Wiley if there were any vacant stalls, and was informed that all stalls on that particular side of the barn had been appropriated, as evidenced by the halters and feed. Wiley's wagon was standing about 10 feet east and a little south of the southeast corner of the barn, with the tongue pointing to the southwest. There was a door on the south side, and also another on the north side of the barn. Just before the conversation detailed above, Wiley had been engaged in gathering up hay or straw, with a short handled, three-tined pitchfork, at a point about 20 feet east, and a little south of the northeast corner of the barn, and carrying it into the stalls for bedding purposes. Immediately after the conversation, Wiley resumed this work, and, observing Hager in the act of tying his team to the rear of Wiley's wagon, requested him not to do so, as the team would destroy his grain. Hager thereupon used some profanity, and several times wanted to know of Wiley if he was afraid the team would eat the wood on the wagon. To this Wiley made no answer, but continued at his work raking up hay or straw. Hager untied his team, and, holding the halters thereof in his left hand, said to Wiley, "To hell with you and your halters," and shortly afterwards started walking rather rapidly toward Wiley, leading his team with his left hand, as claimed by Wiley and his witnesses, and extending or holding his right hand in a threatening attitude as if to strike. Wiley told Hager to stop, that he wanted no trouble with him, and repeated the request two or three times, to which deceased paid no attention. Deceased advanced on Wiley, the latter retreating two or three steps, until, as he testified, he was almost against a wire fence, when, as he and his witnesses claim, deceased was about to strike or jump upon him, he reversed the pitchfork, and struck Hager with the handle, the blow falling on the left side of the head, inflicting a scalp wound two inches in length. Wiley made no attempt to strike a second blow, but, as he claims, waited to see whether Hager would press the attack further. The latter was felled by the blow, but immediately got up, and led his team away. Thereupon Wiley resumed his work. The latter had on a heavy coat, a pair of mittens and overshoes, and testified

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



that he had been sick for some time, very lame in the back, and unable to do any work, and that he had no other intent in striking deceased than simply to keep him off, and "did not pick out his head or any other particular place to strike."

Some of the witnesses for the people testified that they did not observe any threatening attitude on the part of Hager as he advanced towards Wiley, and thought that Hager's right hand was not uplifted at all. The theory advanced by counsel for the people was that while Hager with his left hand was leading his horses along the east side of the barn, towards the north door thereof, with intent to put them in the barn, he was without provocation viciously and unlawfully assaulted by Wiley.

Within two or three hours after the difficulty, a physician dressed the wound inflicted on the deceased, and thereafter, from day to day, the deceased visited physicians for the purpose of having the wound treated. About February 22d his physician, concluding that Hager was in a dangerous condition, sent him to the hospital at Greeley, where the skull under the wound was trepanned. That night, or the next morning, Hager died. The physicians attending deceased and making the autopsy testified that there was no fracture of the skull, or any injury to the brain or its tissues, arising directly from the blow, and that the immediate cause of death was septic inflammation of the brain, caused by the emissary veins carrying from the external wound to the brain, poison arising from the infection of the wound in the scalp.

[1, 2] The court in its instructions told the jury that Wiley relied upon the plea of self-defense, and gave the usual instructions upon that theory; and, contrary to the facts in evidence, specifically instructed that "the defendant has testified in this case that he was in actual fear of losing his life, or of receiving great bodily harm, at the time he struck deceased with the pitchfork." The court also, after defining the two grades of manslaughter instructed the jury that involuntary manslaughter "is eliminated from your consideration in this case, because there is no evidence whatever to sustain it." The court evidently misconceived the nature of the defense on which Wiley relied. It was not that he struck the blow to save his own life, or to prevent the infliction of great bodily harm, but that he was assailed by Hager, and in resisting the attack, and be-

cause of his manner of dress and weakened condition, and in order to put himself upon an equality with Hager, he struck the latter with an instrument, not necessarily a deadly weapon, or which, from the use made of it, could be presumed to be a deadly weapon, and that in so doing, but without any such intention, he unfortunately struck the blow which probably eventually resulted in Hager's death, and that the homicide was entirely accidental, or the result of misadventure, and therefore excusable, or, at most could be no greater crime than involuntary manslaughter. The prejudice to plaintiff in error consisted, not only in failing to state the true character of the defense, but, as stated in *Nilan v. People*, 27 Colo. 206, 211, 60 Pac. 485, 486, " \* \* \* especially in submitting to the jury a defense that was not made, and in support of which there was not a particle of evidence. There being no such defense as that submitted, consequently there being no evidence to sustain it, the jury, if they obeyed the instructions, must necessarily find defendant guilty. We go further, and say, if defendant had asked instructions on the law of 'self-defense,' they should have been refused, because there was no evidence on which to predicate them. But the question here is not whether the defense of excusable homicide was made out. There was evidence in support of it, and the court should have instructed upon the law applicable to it." Where one resisting an assault uses force not greatly disproportionate to the character of the assault, or uses a weapon from the use of which death would not ordinarily or naturally result, and through accident, or without due caution or circumspection, kills his assailant, he is not guilty of murder. Furthermore, the instruction given upon voluntary manslaughter did not properly define that offense.

[3] Counsel for the people concede that the defendant did not testify, in substance, or to the effect, as stated by the court to the jury, and that the instruction of the court in that regard was purely an assumption upon its part. The instruction, when considered in connection with the defense relied upon by Wiley, was extremely prejudicial.

We can discern no distinguishing features in principle between this case and that of *Nilan v. People*, supra. The judgment is therefore reversed, and the cause remanded. Judgment reversed.

MUSSER and HILL, JJ., concur.

## GREENE v. CITY OF LOVELAND.

(Supreme Court of Colorado. Dec. 4, 1911.)

## 1. LICENSES (§ 40\*)—OFFENSES—MUNICIPAL WATERWORKS—PLUMBER'S LICENSE—ORDINANCES.

An ordinance, prohibiting any one doing any plumbing work "to connect with, or in connection with, any of the pipes of the department of water" till he obtains from the city authorities a plumber's license, is not limited in its application to work done in connection with the city mains, but applies to plumbing on appliances on private property, intended to utilize water from the waterworks system, and directly connected therewith.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 40.\*]

## 2. LICENSES (§ 5½\*)—MUNICIPAL WORKS—PROTECTION—IMPLIED POWER OF COUNCIL.

A city council, empowered by Rev. St. 1908, § 6525, subd. 67, to construct, maintain, and operate waterworks, has implied power to make reasonable regulations for protection of waterworks owned by the city, as by an ordinance requiring persons performing work on appliances connected with the water mains, and intended to utilize water therefrom, to first obtain a license from the city authorities.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 5½.\*]

## 3. LICENSES (§ 40\*)—MUNICIPAL WORKS—CONNECTIONS—PLUMBER'S LICENSE—ORDINANCE.

An ordinance, prohibiting any one doing any plumbing work to connect with, or in connection with, any of the pipes of the department of waterworks till he obtains from the city's authorities a plumber's license, is violated by one working without such a license in the capacity of helper to a plumber, where the plumber under whose direction he is working has not obtained a license from the city, and he is not working for such plumber, though under his directions, but is employed and paid by the owners of the premises on which the plumbing work is performed.

[Ed. Note.—For other cases, see Licenses, Dec. Dig. § 40.\*]

Error to Larimer County Court; Fred W. Stover, Judge.

W. W. Greene was found guilty of violating an ordinance of the City of Loveland, and brings error. Affirmed.

E. S. Allen and I. J. Doke, for plaintiff in error. Ab. H. Romans, for defendant in error.

GABBERT, J. Plaintiff in error was found guilty of violating an ordinance of the city of Loveland, relating to plumbing. The ordinance in question is as follows: "No person or persons shall be allowed to do any plumbing work to connect with, or in connection with, any of the pipes of the department of waterworks until such person or persons shall obtain a license from the board of trustees, which license shall be issued by the recorder, to operate and carry on the trade of a plumber, and the board of trustees may

grant such a license to any person when it shall appear to them that the person applying is a proper person, and qualified and competent to perform the duties of the plumbers' trade, and may revoke said license at any time by giving notice to such person of such revocation, and he shall then cease to do any work to connect with, or in connection with the waterworks; and any person or persons licensed or to be licensed as aforesaid, as a plumber, shall, before receiving such license, or doing any work as such plumber, pay to the recorder for the town of Loveland the sum of twenty-five dollars for a license for one year, and no such license shall be transferable."

[1, 2] The evidence establishes that plaintiff in error performed work in the way of plumbing on appliances on private property, which were intended to utilize water from the waterworks system, and were directly connected therewith. On his behalf, the contention is made that the ordinance only applies when work is done in connection with the city mains. No such construction can be given the ordinance without doing violence to its plain meaning, and the language employed to express that meaning. Its purpose was to require persons performing work on appliances connected with the water mains, and intending to utilize water therefrom, to first obtain a license from the city authorities. The waterworks system belongs to the city. Subdivision 67 of section 6525, Rev. Stats. 1908, provides that the city council of cities and boards of trustees of towns shall have power to construct waterworks, and maintain and operate them. The ordinance in question does not attempt to impose a license on the occupation of a plumber, but is intended to protect the waterworks system owned by the city from damages and injuries, which would necessarily result if unskilled persons, or persons without any limitations whatever, might perform work on appliances connected with the system. As the city owns the waterworks system, it impliedly possesses the power to make reasonable regulations for the protection of the system.

[3] The testimony discloses that plaintiff in error worked as the helper, or at least he claims to have worked in that capacity, to a plumber. For this reason, it is urged that the ordinance does not apply to his case. What might be the rule if the plumber under whose direction he worked had obtained a license from the city of Loveland, it is not necessary to determine, because such is not this case. If he had any license, it was from some other city or authority. It further appears that plaintiff in error was not working for him, even though under his direction. He was employed and paid by the owners of the premises upon which the plumbing work was performed. In these cir-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

cumstances, we think plaintiff in error violated the ordinance.

The judgment of the county court is affirmed.

Judgment affirmed.

MUSSER and HILL, JJ., concur.

# NEWSOM v. JACOBS.

(Supreme Court of Colorado. Dec. 4, 1911.)

## 1. EJECTMENT (§ 95\*)—RIGHT OF POSSESSION—EVIDENCE.

Defendant's possession of the entire lot sued for in ejectment was prima facie evidence of his right to possession, as against plaintiff, of that part of the lot to which plaintiff did not establish title.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 280-286; Dec. Dig. § 95.\*]

## 2. TAXATION (§ 663\*)—TAX DEED—RECITALS.

A tax deed recited a sale by the county treasurer, on a certain date, at an adjourned sale, without reciting the date of the first attempted sale, if any. Held, that the tax sale was void.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 663.\*]

## 3. TAXATION (§ 810\*)—ACTIONS—ADMISSION OF EVIDENCE.

Where the tax deed on which defendant in ejectment relied was void on its face, he was not entitled to the benefit of the five-year statute of limitations by showing by extrinsic evidence that he would have been entitled to a valid deed.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1605-1608; Dec. Dig. § 810.\*]

Error to District Court, Washington County; E. E. Armour, Judge.

Action by Agnes D. Newsom against Wilhelm Jacobs. Judgment for defendant, and plaintiff brings error. Reversed and remanded, with leave to amend.

John F. Mail, for plaintiff in error. August Muntzing and Egbert More, for defendant in error.

HILL, J. This is an action in ejectment. The plaintiff alleged ownership, etc., of lot 12, in block 6, original town of Akron, Washington county, Colo. The defendant, by answer, first denied such ownership; second, alleged he was the owner of the lot and in possession; third, alleged he was the owner by virtue of a tax deed issued and recorded over five years prior to the bringing of the action. Judgment was for the defendant, holding the tax deed good. The plaintiff brings the case here for review upon error.

[1] The evidence discloses that the lot in controversy was 25 feet wide and 140 feet deep. The plaintiff deraigned title to about four-fifths of this lot (subject to any title transferred by the tax deed); she makes no

attempt to establish her title to the remainder of it. The defendant being in possession of the entire lot, this was prima facie evidence of his right to possession, as against the plaintiff, to that portion of the lot to which she failed to establish her title. *Moon v. Rollins*, 36 Cal. 333, 95 Am. Dec. 181.

[2] The defendant, over objections, offered in evidence a tax deed for this lot; the portion material to this controversy reads as follows: " \* \* \* Whereas, the treasurer of said county did, on the twenty-first day of October, A. D. 1895, by virtue of the authority vested in him by law, at (an adjourned sale) the sale begun and publicly held on the twenty-first day of October, A. D. 1895, expose to public sale at the office of the treasurer in the county aforesaid, in substantial conformity with the requirements of the statute in such case made and provided, the real property above described, for the payment of taxes, interest and costs then due, and remaining unpaid on said property; and whereas, at the time and place aforesaid, W. S. Stratton, Co. Treas. (for Washington Co.) of the county of Washington, and state of Colorado, having offered to pay the sum of six dollars and eighty cents, being the whole amount of taxes, interest and costs then due, and remaining unpaid on said property, for the above described property which was the least quantity bid for, and payment of said sum having been made by him to the said treasurer, the said property was stricken off to him at that price." This was followed by the allegations of the sale of the certificate by the county, its assignment to the defendant, his payment of subsequent taxes, and the other matters, including the execution of the deed to him, etc. Under the ruling of this court in the case of *Bryant v. Miller*, 48 Colo. 192, 109 Pac. 959, this deed recites facts, if true, which make void the sale upon which it is based.

[3] After the admission in evidence of this deed, the defendant, over objections, was allowed to introduce evidence to show that this tax sale was in fact commenced on the 7th of October of that year, and continued until October 21st, and also other matters in connection therewith. In the case of *Page v. Gillett*, 47 Colo. 289, 107 Pac. 290, we held that, where a tax deed was void upon its face, outside testimony was not competent to show that the requirements of the statute, wherein the deed was defective in so stating, had in fact been complied with; that in such case the proof might tend to establish valid sales, but that it would not mend void deeds; that it might be one step in the proof that the grantee was entitled to a good deed when he got a bad one, but that, where that question was not in issue, viz., where the defendant had not pleaded or counted upon the fact that each step necessary to effect

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

a valid sale for taxes was taken, except as the deed itself shows, that he must be limited in proof to the issues tendered. These principles are applicable here. The defendant pleaded title by virtue of a tax deed, which he alleged was not subject to attack, having been issued and recorded for over five years prior to the institution of this action. Having relied upon his deed and the five-year statute of limitation, the deed being void upon its face for the reasons stated, he was not entitled to the benefit of this statute by showing aliunde that he would have been entitled to a valid deed. For which reasons, as the issues were made up, we are of opinion that the court erred in the admission of the deed, as well as the other evidence, in support of the regularity of the proceedings leading up to its execution.

The defendant makes the further contention that, if the plaintiff was entitled to recover at all, she left the court below, and is leaving this court, in the dark as to just how much land she should recover. It is urged that the burden to show this was on the plaintiff; that the case made in this respect was not sufficient to put the defendant to proof of his defense, and for these reasons plaintiff should have been nonsuited. An examination of the record fails to disclose any motion for a nonsuit. At the close of the plaintiff's case, the defendant proceeded with his evidence. The trial court erroneously held that the defendant's tax deed vested the title to the entire lot in him. This necessitates a reversal of the judgment. Upon a new trial the issues may be materially changed. We do not think it incumbent upon us at this time to pass upon questions which it may not be necessary to consider upon a second trial.

For the reasons stated, the judgment is reversed, and the cause remanded, with leave

to the parties to amend their pleadings as they may be advised.

Reversed.

MUSSER and GABBERT, JJ., concur.

### MOSSIE v. CYRUS.

(Supreme Court of Oregon. Feb. 6, 1912.)

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

On motion for rehearing. Denied.

For former opinion, see 119 Pac. 485.

Wm. P. Lord and W. C. Winslow, for appellant. A. O. Condit and Geo. G. Bingham, for respondent.

EAKIN, C. J. Appellant urges that the court is in error in holding that a seal affixed to a writing is only prima facie evidence of a consideration.

We find it necessary to refer to this matter, as there is an error in the citation of the authority upon which we based the statement: "The seal affixed to the signature is only prima facie evidence of consideration." The citation should have been *Olston v. Oregon Water Power & Ry. Co.*, 52 Or. 343, at page 349, 96 Pac. 1095, 97 Pac. 538, 20 L. R. A. (N. S.) 915, instead of *Catlin v. Jones*, 52 Or. 337, 97 Pac. 546, where that question is fully discussed and to which we adhere, and that decision in no way conflicts with *Johnston v. Wadsworth*, 24 Or. 502, 34 Pac. 13.

It fully appears from the record that there was no other consideration than the \$45, mentioned in the agreement, which was not consideration for the agreement, but part of the price of the land, of which only \$10 was paid.

The motion is denied.

**CROSS v. CITY OF LAWTON et al.**  
(Supreme Court of Oklahoma. Dec. 5, 1911.)

(*Syllabus by the Court.*)

**INJUNCTION (§ 12\*)—INJURY ALREADY COMMITTED.**

Where, in an action for an injunction to prevent a city council from entering into a contract, it is made to appear that prior to the issuance and service of the writ and without notice thereof the contract had been duly executed, the judgment of the trial court denying the injunction will not be disturbed on appeal.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 12; Dec. Dig. § 12.\*]

Error from District Court, Comanche County; J. T. Johnson, Judge.

Action by S. M. Cross against the City of Lawton and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Hudson & Whalin, for plaintiff in error. Charles C. Black, for defendant in error City of Lawton. Key & Michelson, for defendant in error Shaw.

**DUNN, J.** This case presents error from the district court of Comanche county, and was brought in that court to secure an injunction against the city of Lawton, the mayor, and the city council thereof, preventing them and each of them from entering into a contract with Charles H. Shaw for the paving, curbing, and guttering of any of the streets or avenues of the said city. The evidence discloses that the contract, the execution of which it was sought to restrain, was entered into on the 17th day of April, 1911, at 5:45 p. m. before the writ of injunction or any restraining order was issued and without any knowledge of the same, and that the restraining order issued was not served until after the contract had been executed and entered into and at 8 o'clock p. m. of the same day. On the trial of the cause the court refused the injunction, and the plaintiff, after denial of the motion for a new trial, has duly lodged the cause in this court for review.

It is insisted by counsel for defendants in error that, as the only relief prayed for was an injunction restraining the execution of the contract, and as the same had been entered into and executed prior to notice or service of any writ of injunction, the judgment of the trial court should be sustained. Section 5755, Comp. Laws Okl. 1909, provides: "The injunction provided by this Code is a command to refrain from a particular act." The statute is identical with the Kansas statute, and the question presented in this case was considered by the Supreme Court of that state in the case of *City of Alma v. Loehr*, 42 Kan. 368, 22 Pac. 424. That case was an action brought to restrain the officers of the city of Alma from executing, issuing, and delivering certain bonds for

certain improvements voted at an election which it was alleged was held without authority of law, and was fraudulent and void. A restraining order and a temporary injunction were both issued and served. The officers answered, with other defenses alleged that before the restraining order or the temporary injunction was served upon them, or any one of them, and before they had any notice of the issuance of the same, the bonds had been executed, issued, sold, and delivered. The court in the consideration of this defense said: "The function of a writ of injunction is to afford preventive relief. It is powerless to correct wrongs or injuries already committed. This is alphabetical law. The injunction provided by our Code of Civil Procedure 'is a command to refrain from a particular act.' Sections 237, 238. Equity will not entertain a bill for an injunction to restrain the issuing of municipal bonds in aid of a subscription to a railway when the bonds have been actually issued and delivered to the company." This case was later followed by the Court of Appeals of the state of Kansas in the case of *McCurdy et al. v. City of Lawrence et al.*, 57 Pac. 1057.<sup>1</sup> And the same doctrine was announced by the Supreme Court of Illinois in a similar case (*Menard et al. v. Hood et al.*, 68 Ill. 121). See, also, 1 Joyce on Injunctions, §§ 41, 41a; 2 Joyce on Injunctions, § 1282.

The judgment of the trial court is accordingly affirmed.

**TURNER, C. J., and KANE and HAYES, JJ., concur; WILLIAMS, J., not participating.**

**ST. LOUIS & S. F. R. CO. v. NELSON.**

(Supreme Court of Oklahoma. Sept. 12, 1911.)

(*Syllabus by the Court.*)

**APPEAL AND ERROR (§ 334\*)—DISMISSAL—DEATH OF DEFENDANT IN ERROR.**

A person obtained a judgment in the district court, and, after her death, a petition in error, making her the sole party defendant, was filed in this court, and her attorney of record in the district court accepted service of summons in error. Held, that the petition in error was a nullity for want of a party defendant in error; and that the appellate court acquired no jurisdiction by the acceptance of service of summons in error by the deceased party's attorneys of record; and that the cause should be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1851-1863; Dec. Dig. § 334.\*]

Error from District Court, Jackson County; J. T. Johnson, Judge.

Action by Gertrude Nelson against the St.

<sup>1</sup> Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 9 Kan. App. 833.

Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Dismissed.

W. F. Evans and R. A. Kleinschmidt, for plaintiff in error. Guy P. Horton, for defendant in error.

HAYES, J. It has been brought to the attention of this court by a motion to dismiss and the affidavit of Fay Nelson, daughter and only heir of defendant in error, that defendant, subsequent to the rendition in the trial court of the judgment attempted to be appealed from in this proceeding and before the filing of the petition in error, died. Neither the motion nor the affidavit have been controverted by plaintiff in error, and it therefore must be accepted as true that defendant in error died before this action was attempted to be commenced. A proceeding in error is a new action in this court, and is begun by the filing of the petition in error herein and causing to be issued a summons in error. There has been no revivor of the action in the trial court in the name of the legal representative of deceased, and the only person attempted to be made party defendant in this proceeding is Gertrude Nelson, deceased before the action was begun. It follows, therefore, that there has never been any defendant in error to this proceeding, and that the petition in error filed herein is a nullity. *Kuhnert v. Conde*, 39 Kan. 265, 18 Pac. 193; *Bridge v. Main St. Hotel Co. et al.*, 61 Pac. 754;<sup>1</sup> *Doble v. Brown et al.*, 20 Ind. App. 12, 50 N. E. 88. Under the statute the summons in error may be served upon the attorney of record in the original case (Comp. Laws 1909, § 6069), and service of summons may be waived in writing, either by defendant in error or his attorney (section 6070, Id.). Counsel of record for Gertrude Nelson in the trial court accepted service of summons in error; but this act on their part cannot have the effect to cure the defect of there being no party defendant in error in this proceeding. The statute contemplates that where a proceeding in error is brought in this court, which may be accomplished by the filing of a petition in error and having summons issued, counsel of record for defendant in error in the trial court may be served, or may waive service of summons; but such action must be begun in this court, and that action cannot be begun without some person as defendant in error. An attorney cannot, by the acceptance of service or waiver thereof, enter the voluntary appearance of a person who was dead before the attempt to begin the action was made. *Ritchey et al. v. Seeley*, 68 Neb. 120, 94 N. W. 972. The statutory period within which a proceeding in error must have

been filed in order for this court to review the judgment of the trial court has now expired.

The appeal is dismissed. *Skilern et al. v. Jameson et al.*, 116 Pac. 193, recently decided by this court, but not yet officially reported.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

#### PRICE et al. v. COVINGTON.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 564\*)—CASE-MADE—SETTLEMENT AND SERVICE.

A joint judgment being rendered against P. and G. for the possession of a certain tract of land and the costs of the trial, G. was allowed 90 days in which to prepare and serve a case-made, 10 days for the suggesting of amendments, same to be settled upon 5 days notice by either party. There was no extension of the time asked or granted to the co-defendant, P. After the expiration of 3 days from the time of entering of the judgment and denial of motion for a new trial, the case-made was served on defendant in error, and presented for settlement, and signed and settled without any service or notice upon or to P. There was no waiver by the said P., either of service of the case-made, or of notice of the time and place of signing and settling the same, nor the suggestion of amendments. *Held*, that this court is without jurisdiction to review any alleged errors sought to be presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. § 564.\*]

Error from District Court, Murray County; R. McMillan, Judge.

Action by W. D. Covington against S. P. Price and Josiah Gibson. Judgment for plaintiff, and defendants bring error. Dismissed.

Emanuel & Broadbent and Wm. A. Baker, for plaintiffs in error. Walter E. Latimer and J. H. Casteel, for defendant in error.

DUNN, J. This case presents error from the district court of Murray county. On April 8, 1910, the court rendered a joint judgment against S. P. Price and Josiah Gibson. On April 9, 1910, motion for new trial was filed by Josiah Gibson, which, on August 20, 1910, was overruled, and the defendant Gibson given 90 days within which to make and serve a case-made, plaintiff 10 days within which to make and suggest amendments, the same to be signed and settled on 5 days notice. The joint judgment debtor, S. P. Price, filed no motion for a new trial, made no case-made within 3 days from the date of any judgment or order, and was given no extension of time, but on the filing of the petition in error and case-made, duly prepared, served, and settled by Josiah Gibson, the said S. P. Price is made a party

<sup>1</sup> Reported in full in the Pacific Reporter; reported as a memorandum decision without opinion in 63 Kan. 266.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaintiff in error. A motion to dismiss the appeal, for the reason that the said Price, being a joint judgment debtor, is a necessary party to the same, and that, not having prepared any case-made within three days, filed a motion for a new trial, nor secured extension of time within which to make and serve a case, nor waived any of the statutory requirements, and there being no claim that the case is here on transcript of the record, the petition in error must be dismissed.

The question here presented was passed on by this court at this term, in the case of Thompson et al. v. Fulton, 119 Pac. 244, in an opinion prepared by Justice Williams. In that case there was a joint judgment against Thompson and Mathis, and the court said: "The record recites that 'thereupon the defendant Rachel Thompson excepted to said judgment, and asked that she be given 90 days in which to prepare and serve case-made, and that 10 days be given the plaintiff, J. S. Fulton, in which to suggest amendments, and that said case, when so made, be settled upon five days notice by either party, which time is by the court granted.' This is the only order granting an extension of time to any one in said action for the settling and signing of the case-made. The case-made, when made, was served upon the plaintiff's attorney, but no service was had upon the codefendant, Ed Mathis. Neither were any amendments suggested nor the right to suggest same waived by the said Mathis, or any one for him. It follows that the case-made is invalid. Whilst the questions sought to be raised could be brought up by transcript, yet the record is not certified by the clerk, and therefore cannot be considered as a transcript."

It therefore follows that under this authority the petition in error is dismissed.

TURNER, O. J., and WILLIAMS, KANE, and HAYES, JJ., concur.

J. K. COBB & CO. et al. v. HANCOCK.  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 568\*)—DISMISSAL—NOTICE OF SETTLEMENT OF CASE-MADE.

The syllabus in First National Bank, etc., v. Daniels, 23 Okl. 383, 108 Pac. 748, is made the syllabus of this case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2523-2529; Dec. Dig. § 568.\*]

Error from District Court, Bryan County; D. A. Richardson, Judge.

Action by J. K. Cobb & Co. and others against C. A. Hancock. Judgment for defendant, and plaintiffs bring error. Dismissed.

J. M. Crock, for plaintiffs in error. Utterback, Hayes & McDonald and McPharren & Abbott, for defendant in error.

TURNER, C. J. It failing to appear from the record or otherwise that defendant was present, either in person or by counsel, at the settlement of the case-made filed herein, or that notice of the time thereof was served or waived, the motion to dismiss this proceeding in error is sustained, and it is so ordered. First National Bank, etc., v. Daniels, 26 Okl. 383, 108 Pac. 748. All the Justices concur.

SMITH, Constable, v. ROADS.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

1. EXEMPTIONS (§ 45\*)—TOOLS OF TRADE—TURNING LATHE.

A turning lathe weighing 600 pounds, being a machine operated both by foot and engine power, belonging to, used, and necessary in conducting the business of a machinist in his repair shop, he being the head of a family and residing in the state, is exempt, under subdivision 5 of section 3346, Compiled Laws of Oklahoma 1909, providing that there "shall be reserved to every family residing in the state exempt from attachment or execution and every other species of forced sale for the payment of debts: \* \* \* Fifth, all tools, apparatus and books belonging to and used in any trade or profession."

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. §§ 56-61; Dec. Dig. § 45.\*]

2. APPEAL AND ERROR (§ 1071\*)—HARMLESS ERROR—FINDINGS OF FACTS.

Where the evidence is undisputed and merely a question of law is presented thereby, refusal of the trial court on request to state in writing its conclusion of fact found separately from its conclusions of law, if erroneous, is without injury, and a judgment rendered thereon will not be reversed on account of such refusal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.\*]

Error from District Court, Caddo County; G. A. Brown, Judge.

Action by Orange Roads against Bert R. Smith, Constable. Judgment for plaintiff in the Justice's Court was affirmed in the District Court, and defendant brings error. Affirmed.

C. H. Carswell, for plaintiff in error. Randall U. Livesay, for defendant in error.

DUNN, J. This case presents error from the district court of Caddo county. The defendant in error, as plaintiff, began a replevin action in a justice court against the plaintiff in error, who was a constable. In his bill of particulars plaintiff claimed that he was a machinist and the owner of a certain turning lathe on which an execution

had been levied and which he claimed was not subject thereto, being exempt. After trial in the justice court, the case was appealed to the district court, where judgment was rendered in favor of the plaintiff, and the defendant has brought the action to this court for review.

Counsel for defendant states in his brief that the only question involved in the trial of the case was whether the machine was exempt to plaintiff as a tool. Plaintiff testified that he was a machinist and could not successfully conduct his business without the use of this lathe; that when he first used it he operated it by foot power, but he afterwards rigged up a countershaft with his wife's washing machine and ran both with a gasoline engine of about one-half horse power; that the lathe weighed about 600 pounds. The evidence disclosed that Roads was a machinist by trade and conducted a repair shop and had occasion to use the lathe practically every day and was without any other tool or apparatus that would take its place. Another witness, Linzee, was called by defendant in error, and testified that he had followed the trade of a machinist for 22 years; that he was acquainted with the use of turning lathes; that they were common, ordinary, and essential tools to a machinist in a repair shop; that he was acquainted with the approximate value of this lathe, which was about \$100. Witness Pierson testified that he had followed the trade of machinist for 30 years, was acquainted with the use of turning lathes, and that a turning lathe was one of the essential and indispensable tools of a machinist to be used in a repair shop.

[1] All of this evidence appears to have been undisputed, and in our judgment brought the lathe in question within the protection of the fifth subdivision of section 3346, Compiled Laws of Oklahoma 1909, reserving to every family residing in the state "all tools, apparatus and books belonging to and used in any trade or profession." The question raised is virtually determined in this state by the case of *Brummage v. Kenworthy*, 27 Okl. 431, 112 Pac. 984. In that case this court held that a paper cutter weighing 685 pounds, which was operated by hand, and which belonged to and was used and necessary in conducting the business of a printer, was exempt. The plaintiff in this case established that in his trade as a machinist and running a repair shop the tool or apparatus in question was one of the ordinary and essential tools to him, and that he used it every working day. The fact that he may have found it more convenient to attach the same to the engine which oper-

ated his wife's washing machine in our judgment will not deprive him of the protection which this statute affords. Other authorities supporting this conclusion may be noted in the cases cited in 18 Cyc. 1418, 1419. See, also, *Waples on Homestead & Exemption* (1893) p. 801; *Wood v. Bresnahan*, 63 Mich. 614, 30 N. W. 208.

Counsel contends that the court erred in its failure or refusal to state in writing its conclusions of fact separately from the conclusions of law to which it arrived. The statute upon which counsel rely is section 279 of article 15, c. 66 (section 4477), *Wilson's Revised & Annotated Statutes of Oklahoma 1903* (section 5809, *Compiled Laws of Oklahoma 1909*), which reads as follows: "Upon the trial of questions of fact by the court it shall not be necessary for the court to state its findings, except generally, for the plaintiff or defendant, unless one of the parties request it, with the view of excepting to the decision of the court upon the questions of law involved in the trial; in which case the court shall state in writing, the conclusions of fact found, separately from the conclusions of law."

As we have heretofore stated, the evidence in this case was undisputed. After both parties had submitted their testimony, there was no difference between them on the material facts involved, and while it is held (*Rogers et al. v. Bonnett et al.*, 2 Okl. 553, 37 Pac. 1078) that the refusal of a court to state in writing its findings of fact and conclusions of law upon them, when requested to do so by either party before judgment, is reversible error, this rule does not apply in cases where the facts are admitted in the pleadings, stipulated by the parties, or where a case is submitted on an agreed statement of facts. 8 *Ency. Pleading & Practice*, 936, 937; *Frush v. City of East Portland*, 6 Ore. 281; *McMenomy v. White et al.*, 115 Cal. 339, 47 Pac. 109.

[2] Hence in the case at bar, where the evidence offered is without dispute, the failure or refusal of the court to state its conclusions of fact found separately from its conclusions of law, if technically error, in our judgment was without injury. There is, as stated by counsel for defendant, virtually but one question in this case, which is determined by the conclusion to which we have come on the matter of the exemption of the turning lathe.

The other propositions mooted by counsel are without merit, and the judgment of the trial court is, accordingly, affirmed.

TURNER, C. J., and WILLIAMS, KANE, and HAYES, JJ., concur.



## TERRY v. PARNELL.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

## 1. NEW TRIAL (§ 157\*)—OVERRULING OF MOTION FOR NEW TRIAL.

The overruling of a motion for a new trial pro forma by a trial court is not in itself error sufficient to require a reversal of the cause.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 317; Dec. Dig. § 157.\*]

## 2. GARNISHMENT (§ 218\*)—CLAIMS BY THIRD PARTY—BURDEN OF PROOF.

Where the fund in the hand of the garnishee is claimed by a third party, the burden of establishing his superior right thereto is upon such claimant.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 411-413; Dec. Dig. § 218.\*]

## 3. GARNISHMENT (§ 218\*)—EVIDENCE—ASSIGNMENT OF FUND.

It is error to sustain an objection to the introduction in evidence of an assignment duly executed, unimpeached, and in all particulars regular upon its face, under which a third party claims title to a fund in the hands of a garnishee.

[Ed. Note.—For other cases, see Garnishment, Cent. Dig. §§ 411-413; Dec. Dig. § 218.\*]

Error from District Court, McClain County; R. McMillan, Judge.

Garnishment proceedings by J. M. Parnell against W. J. Terry. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

A. D. Brown, for plaintiff in error. Renle, Hocker & Moore, for defendant in error.

DUNN, J. This case presents error from the district court of McClain county. March 18, 1909, J. M. Parnell filed his complaint against E. J. O'Shea and John McManus to recover for goods furnished them, in the amount of \$139.63. Judgment was allowed to go by default. The plaintiff then, in order to impound moneys in the hands of the Canadian Valley Construction Company due from it to the defendants, had a garnishee summons issued and served upon it, which in due time answered that it had in its possession the sum of \$619.35, but that, prior to the service upon it of the said writ of garnishment, there was served upon it an assignment thereof, signed by the defendants O'Shea and McManus, whereby they, for the consideration of \$2,208.99, assigned to W. J. Terry, of Lehigh, all claims and demands which it then held or which thereafter might accrue in its hands to them prior to May 15, 1907. The garnishee thereupon prayed that said J. W. Terry, who was claiming the said fund by virtue of the said assignment, be made a party defendant to the garnishment proceeding, and required to set up such claim as he had to the fund. The assignment referred to was executed on December 17, 1906, and recited that for a valuable con-

sideration there was transferred, assigned, and set over to the said Terry all or any claims and demands which the said O'Shea and McManus had, or which might accrue to them between that date and May 15, 1907, by reason of any contract then existing, or which might thereafter be entered into, between them. Thereupon the said Terry was made a party, and on January 8, 1908, he filed an answer, claiming the money impounded, and praying for an order requiring the said Canadian Valley Construction Company to pay the same into court, and that it be discharged as a further party to the cause. The said Terry further answered that the answer of the garnishee theretofore made was correct, and that the money in the hands of the Canadian Valley Construction Company was not subject to garnishment, for the reason that it had been previously assigned to him, and had been so assigned long prior to the filing of the suit, and that the money claimed under the assignment was earned by the defendants between the 17th day of December, 1906, and the 15th day of May, 1907, and was a part of the funds covered by the said assignment, and prayed for judgment. Whereupon plaintiff filed his reply, in which he denied that the assignment was made by the defendants O'Shea and McManus, and also averred that it was made and entered into between the defendants and the said Terry with fraudulent intent to cheat, hinder, and defraud plaintiff, and that the said interpleader, Terry, had solicited plaintiff to continue furnishing the defendants with supplies, especially recommending defendants to plaintiff for credit. Thereafter the said Terry, by counsel, filed a pleading, which he entitled a "rejoinder," in which he denied the allegations contained in the reply.

On March 18, 1908, on the issues thus made, the cause came on for trial before a jury, and the court, on motion and over objection, ruled that the burden of proof to establish the validity of his assignment and his right to the fund was upon W. J. Terry, to which exceptions were saved. Whereupon, to sustain the cause on his part, counsel for Terry offered in evidence the assignment above referred to, to the reception of which as evidence counsel for plaintiff objected on two grounds: First, that if it was relied upon as a mortgage it had not been recorded; and, second, if intended as an assignment, it was void, for the reason that it attempted to convey something that did not exist at the time of its making and execution. This objection was by the court sustained, to which the defendant Terry excepted. The assignment being the only evidence offered in the case, the jury were instructed to find for the plaintiff and against the interpleader, Terry, on the issues be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tween them, which was accordingly done, and judgment rendered thereon for the amount of plaintiff's judgment, to reverse which counsel for intervener, Terry, has duly lodged the case in this court for review.

[1] The complaint is first made that the judgment should be reversed and a new trial ordered, because the court on the consideration of the motion for a new trial overruled the same pro forma. It has been held in a number of cases that this ground in itself is not sufficient to require reversal. *Pinson and Sunday v. Prentise*, 8 Okl. 143, 56 Pac. 1049; *Lewis v. Hall*, 11 Okl. 684, 69 Pac. 890; *Linson v. Spaulding*, 23 Okl. 254, 108 Pac. 747; *Oklahoma Portland Cement Co. v. Anderson et al.*, 28 Okl. 650, 115 Pac. 767.

It is next contended that the court erred in its rule, placing the burden of proof upon plaintiff in error. Section 5723, Compiled Laws of Oklahoma 1909, provides, in substance, that when the answer of the garnishee discloses that another person than the defendant claims the indebtedness that service upon such party shall be made, whereupon such claimant "shall be deemed a defendant to the garnishee action," and that, "in case of default, judgment may be rendered, which shall conclude any claim upon the part of such defendant." When the garnishee summons was served, it caught in the hands of the construction company sufficient funds to have paid plaintiff's judgment. This fund plaintiff was entitled, under his garnishment, to have applied to the liquidation of his judgment, unless some other person had a superior claim thereto. When the construction company answered by showing that Terry claimed it, this had the effect of suspending plaintiff's claim until Terry could be given an opportunity to assent and establish his right to the fund. If he failed to avail himself thereof, then plaintiff was entitled to the fund, and judgment would have run in his favor against the construction company for the amount thereof.

[2] Plaintiff's claim was *prima facie* superior to Terry's, or any one else's, and if Terry secured the fund it was necessary to do so upon the strength of his own title, which would necessarily place upon him the burden of establishing his right to the money, and of showing that it was superior to the right of plaintiff. This conclusion on our part finds support in the following texts and the authorities cited in support thereof: *Bailey on Onus Probandi and Preparation for Trial*, p. 27; 2 *Wade on Attachment*, §§ 375, 435; 2 *Shinn on Attachment and Garnishment*, § 676; *Rood on Garnishment*, §§ 342, 343, and 348.

In section 348 of *Rood on Garnishment*, *supra*, the author says: "The claimant is made a party merely for the purpose of determining whether he has such an interest in the property that the plaintiff cannot have

a judgment condemning it to the satisfaction of his claim against the principal defendant. Therefore the only matter in which he is concerned is to show his superior title. He must rely upon the strength of his own claim."

[3] The argument of counsel upon the question of the admissibility of the assignment as evidence is purely hypothetical, and based on grounds which do not appear within the assignment, the reception of which was rejected; nor are they made to appear in any other way by the record. The assignment appears in every particular to be regular; it was for a valuable consideration with a presumably proper subject-matter, and completely conveyed title to the same. It was necessary, in order to sustain the objections urged against it, to assume matters, not shown either by the pleadings, the paper, or any other proof, and under these circumstances, in our judgment, the document was admissible.

The judgment of the trial court is therefore reversed and the action remanded, with instructions to set aside the judgment heretofore entered and grant plaintiff in error a new trial.

TURNER, C. J., and WILLIAMS, KANE, and HAYES, JJ., concur.

CHICAGO CRAYON CO. v. ROGERS et al.  
(Supreme Court of Oklahoma. Nov. 18, 1911.)

(Syllabus by the Court.)

1. COMMERCE (§ 46\*)—SUBJECTS OF REGULATION—STATUTORY PROVISION.

Plaintiff, an Illinois corporation, sent agents into the Indian Territory and Arkansas to take orders for enlarging pictures. The orders, when taken, were sent to it at its home office in Chicago, where the pictures were enlarged, and the pictures with frames were shipped by it to agents, different from those who took orders, who delivered them to the patrons and collected the money, which they remitted to plaintiff. *Held*, that this was interstate commerce, and that a failure by plaintiff to designate a resident agent in the Indian Territory upon whom service might be had, under the provisions of sections 4 and 5, 31 Stat. L. 796, requiring foreign corporations to designate an agent in the Indian Territory before beginning to carry on business, did not render void a bond, executed by one of its delivering agents in the Indian Territory, conditioned for the faithful performance of his duty as such where-ever the plaintiff sent him.

[Ed. Note.—For other cases, see *Commerce*, Cent. Dig. §§ 113, 126; Dec. Dig. § 46.\*]

2. COMMERCE (§ 46\*)—SUBJECTS OF REGULATION—STATUTORY PROVISION.

After the bond was executed, the agent was sent to Arkansas, where the breach of the bond, if any, occurred. *Held*, that a failure by plaintiff to designate a resident agent in Arkansas, upon whom service might be had, as provided by sections 825 and 829a of Kirby's Digest of the Arkansas Statute, did not con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

stitute a defense in favor of the sureties on the bond.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 113, 126; Dec. Dig. § 46.\*]

3. COMMERCE (§ 46\*)—SUBJECTS OF REGULATION—BUSINESS OF FOREIGN CORPORATION.

A state cannot require a foreign corporation to designate a resident agent, upon whom service may be had, as a condition precedent to its engaging in interstate commerce with residents of the state.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 113, 126; Dec. Dig. § 46.\*]

4. PRINCIPAL AND SURETY (§ 139\*)—REMEDIES OF OBLIGEE—NOTICE TO SURETIES.

Where an agent for the delivery of pictures and collection of the price makes reports as required by the contract of agency, in which reports his shortage appears, and where his conduct is not inconsistent with honesty, his employer is not required to notify the sureties upon his bond to the employer, conditioned to account for pictures and frames shipped to him for delivery, of his default, as a condition precedent to its recovery upon the bond for either the first reported shortage, or shortage subsequent to the first.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 388; Dec. Dig. § 139.\*]

Commissioners' Opinion, Division No. 2. Error from Pittsburg County Court; R. W. Higgins, Judge.

Action by the Chicago Crayon Company against Henderson G. Rogers and others. Judgment for defendants, and plaintiff brings error. Reversed and remanded for new trial.

A. C. Markley, for plaintiff in error. Lester & Hammond, for defendants in error.

ROSSER, C. This was an action by the Chicago Crayon Company against Henderson G. Rogers, J. J. Brewen, A. F. Holladay, and Philip H. Howe upon a certain bond given by Henderson G. Rogers as agent of the plaintiff company. There was a judgment for the defendants, and plaintiff brings error.

The bond is as follows:

"Know all men by these presents, that we, Henderson G. Rogers, of the city of Krebs, county of Central District, state of Ind. Ter., as principal, and J. J. Brewen, county of Central District, state of Ind. Ter., and A. F. Holladay, county of Central District, state of Ind. Ter., as sureties are held and firmly bound to the Chicago Crayon Company, an Illinois corporation, of Chicago, Cook county, Illinois, in the penal sum of five hundred dollars (\$500.00) to be paid the said obligee or their legal representative, to the true payment thereof we bind ourselves, our heirs, executors and administrators jointly and severally, firmly by these presents.

"The condition of this obligation is: That whereas, the said bonded Henderson G. Rogers, principal has been appointed and has agreed to act as agent (known as deliveryman and collector) for and on behalf of the said Chicago Crayon Company in accordance

with the terms and provisions of a certain contract (marked "A," hereunto attached). Now, therefore, if the said bonded principal shall and does perform all the duties and obligations required of him in said contract, according to the spirit and letter thereof, then this obligation shall become null and void, otherwise to remain in full force and effect.

"It is further agreed that in case of default in any of the conditions by said bonded principal the measure of damages of said party of the first part shall be the amount of goods entrusted to said bonded principal, as shown by the sheets and bills, less amount of cash remitted and goods accounted for by party of the second part to said party of the first part mentioned in said contract.

"It is further understood and agreed to by the sureties that the transferring of the principal from one portion of the country to another and resulting in his necessarily being under the management of a different legal representative of said obligee, known as district manager, does not release said sureties from the obligation of this bond.

"In witness whereof, we have hereunto set our hands and seals this 9th day of November, A. D. 1905."

The contract, marked "Exhibit A," to the bond is as follows:

"Memorandum of agreement, made and entered into this day and date, between the Chicago Crayon Company, a corporation of Chicago, county of Cook, state of Illinois, party of the first part, and Henderson G. Rogers of town of Krebs, state of I. T., party of the second part.

"Party of the second part, known as collector and deliveryman, agrees to deliver portraits, frames and other merchandise, and to receive as compensation therefor the difference in the list price of the frames (Exhibit B, page 3) plus any excess freight, and the amount the frames are sold for.

"Party of the second part agrees to pay all his personal expenses, including livery hire to deliver the portraits and frames, and also to pay all drayage and transfer charges on portraits and frames account of transferring the goods from the depot to which they have been consigned. Party of the first part agrees to pay the freight charges on all portraits and frames from Chicago to points of consignment, except where the freight amounts to more than twenty-five cents (25¢) per frame, in which case the party of the second part agrees to pay all charges in excess of that amount.

"He further agrees to forward the lists for each shipment, with money to balance, as the delivery has been made and before lifting the next shipment. Further agrees that in case he is delivering a small shipment where collections will not amount to fifty dollars, to remit the same as soon as delivery is com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

pleted. Further agrees that on lifting a shipment to immediately notify the party of the first part of the same, by forwarding a lifting card (form A95) (Exhibit C) on that shipment, and further agrees to make out in detail Friday report (form A34) and forward every Friday to party of the first part and a copy to road manager. (Exhibit D.)

"Party of the second part further agrees not to deliver any portrait for less than the regular list price (Exhibit B) and to account for all portraits shipped by a remittance in full, or by returning the eyes of said portraits with a report as voucher for their nondelivery. Party of the second part agrees to account for all frames shipped by a remittance in full at prices per (Exhibit B).

"Party of the second part agrees to remit all collections daily (and report daily if idle) to the main office of the party of the first part at Chicago, Illinois. Party of the second part agrees to truly remit and account for all monies collected upon portraits, frames or other merchandise received and retained by him as agent and custodian aforesaid, and to properly account for and surrender the residue of such portraits, frames and other merchandise aforesaid to and at such time or times as may be requested or demanded by said party of the first part or their legal representative.

"It is also agreed that party of the first part shall not be held responsible for any expense of party of the second part due to the delays in the shipment of or the nonarrival of the aforesaid portraits, frames or other merchandise.

"Party of the second part agrees to exercise due caution in the care and protection of all portraits, frames and other merchandise (loss or damage by fire or storm excepted) received and retained by him as agent and custodian aforesaid.

"Either party may at any time they deem the business unsafe or unprofitable, terminate this contract by giving notice, either verbal or written, and the party of the second part agrees in event of such notice to turn over to the party of the first part, or its legal representative all supplies, printed matter, and the residue of such portraits, frames and other merchandise not otherwise accounted for.

"Witness our hands and seals this fourth day of November, 1905."

The proof shows that the plaintiff sent out agents into Indian Territory and Arkansas, and took orders for the enlargement of pictures, and for frames, and the orders were sent to the company, at Chicago, where the pictures were enlarged and the frames manufactured; and that the completed pictures were then shipped to other agents of the company, different from those who took the orders, whose business it was to deliver the pictures and collect. Rogers was employed to deliver and collect, and it appears that he delivered for plaintiff, both in the Indian

Territory and Arkansas. It also shows that the shortage, if any, arose out of the shipments to him in Arkansas.

The defendant denied liability, upon the ground that at the time the bond and contract were executed plaintiff had no designated agent, either in the state of Arkansas or Indian Territory; and that it was doing business within the state of Arkansas and Indian Territory in violation of the statute requiring foreign corporations to maintain a known place of business, and to have an authorized agent, or agents, upon whom process could be served, within the state and territory, respectively. Defendants also deny that Henderson G. Rogers owed plaintiff anything under his contract. They further answer that the plaintiff had released the defendant Henderson G. Rogers from any liability by reason of the fact that after he had delivered a number of pictures and frames in the state of Arkansas he asked permission from the plaintiff to go back to that state and collect for the pictures and frames, the price of which had not been collected, and the plaintiff, through its manager, directed him to go to the state of Missouri and work for the company there, and agreed that if he would go to the state of Missouri and work for them that they would release him from all claims for shortage in the state of Arkansas. The sureties also claim that they were released, because the company did not give them notice that Rogers was short in his accounts when it first discovered that fact, and, after it had ascertained that he was short, that it continued to ship him goods and extend to him credit, without giving them notice.

The plaintiff assigns as error the giving by the court of instructions numbered 4, 5, 6, 7, 9, and 11, and also the refusal of the court to give instructions 4 and 5 requested by plaintiff. Instructions numbered 4, 5, 6, 7, 9, and 11, given by the court, are as follows:

"(4) The court will instruct you, gentlemen, that where one man is employed by another, and bond is made, sureties bind themselves for the payment of the contract. When it becomes known to the principal that default is being made, it is his duty then to notify the sureties. Such duty of disclosure rests upon the theory that the creditor who receives advancements from the principal on the credit of the guarantor, or continues the principal in his service for whose honesty another has become surety, with knowledge that the principal has violated his agreement or is unworthy of trust, actively conspires to assist the principal in committing default; and that such conduct contains the same element of fraud as the concealment of similar facts at the time of the execution of the contract.

"(5) In other words, gentlemen, if the Chicago Crayon Company had become aware of the fact that the defendant Henderson G.

Rogers was in default in his work, then it was their duty to notify the sureties, because that is knowledge that was only known by two parties—Mr. Rogers and the Chicago Crayon Company—in other words, it would not be good faith on the part of the Chicago Crayon Company to continue a man in their employ, if they knew he was in default in his obligations to them, and then look to the sureties.

"(6) The law of suretyship gives to the promisor a right of notice, even though he does not make a stipulation in his contract, whenever such notice is necessary for his protection, as in the case of a commercial guaranty, where the facts upon which his liability rests are not within his knowledge, or depend upon the creditor's option.

"(7) However, it is not an insignificant breach of a contract that the Chicago Crayon Company was compelled to give notice of. It is only these that were absolutely material to the sureties, Mr. Brewen, Mr. Holladay, and Mr. Howe. Ordinarily it requires fraud or dishonesty of some kind to be shown on the part of Mr. Rogers that would justify or require notice to be given to sureties.

"(8) If the actions of Mr. Rogers at the time he was working for the Chicago Crayon Company was such that would cause a reasonable man to believe he was dishonest, or was perpetrating fraud on the Chicago Crayon Company, then it would be the duty of the Chicago Crayon Company to notify the sureties.

"(9) I will instruct the jury this: A notice must be given. It is immaterial whether it is written or verbal, but notice must be given where it becomes known to the Chicago Crayon Company that its agents were dishonest; then the company should notify the sureties."

"(11) The court will instruct you, gentlemen, that, if you find from the evidence that there was fraud or dishonesty on the part of the principal, Mr. Rogers, against the Chicago Crayon Company, it was their duty to notify the sureties, but the sureties were responsible for all debts up to the time the notice should have been given, if any notice was necessary."

Instructions numbered 4 and 5, requested by the plaintiff, and refused by the court, are as follows:

"(4) You are instructed that the law is that the signing and executing the contract and bond in the Indian Territory, covering business to be, and afterwards, done in the state of Arkansas, was not 'doing business' in violation of the laws of the Indian Territory, or of the state of Arkansas, as then existing in November, 1905, requiring an agent for service to be designated by a foreign corporation before doing business within its territory. Further, the agreed statement of facts is that no such agent had then been designated by the plaintiff, and that the

business done under said contract and bond was the shipment by plaintiff from its place of business in the state of Illinois certain goods, ordered by residents of the the state of Arkansas, to its agent, H. G. Rogers, in the state of Arkansas for delivery and the collection of the price, and remittance to be made to the company at Chicago. Such acts and business were interstate transactions, and these, together with the making of the contract and the institution of the suit for the collection of the money due under the contract, are all controlled by the laws of interstate commerce, and are not affected by the local laws of any state or territory. And you are instructed not to consider the defenses alleged in the first and second paragraphs of defendants' answer.

"(5) In another part of their answer, the defendants plead that no timely notice of the default of H. G. Rogers was given to the sureties upon this bond by the plaintiff. But defendants do not plead that they suffered any loss by reason of not getting notice of the default. You are instructed that you need not consider the evidence as to whether any notice of the default was given. Whether this bond sued upon be properly called a surety bond or a guaranty bond, it guaranteed the faithful performance of the contract and the punctual payments to be made by H. G. Rogers. And the signers of such a bond are liable to the guarantee immediately upon the default of the principal, and without demand or notice."

[1, 2] It is proper to notice, first, the refusal of the court to instruct the jury, as requested by plaintiff, that the business of plaintiff was not such as to require it to designate an agent in the Indian Territory. The fact that it had no such agent was pleaded as a defense in the answer and admitted by the plaintiff in the agreed statement of facts. If the fact that plaintiff had failed to designate an agent was not sufficient to render the bond void, then the jury should have been so instructed, and a failure to so instruct upon request of the plaintiff was reversible error. If the failure to designate an agent rendered the contract void, then, the fact that plaintiff had designated no agent being admitted, the court should have instructed the jury to find for the defendant, and it would not be necessary to consider other alleged errors.

The statute requiring the designation of an agent in the Indian Territory (31 Stat. L. 795) is as follows:

"Sec. 4. That before any foreign corporation shall begin to carry on business in the Indian Territory it shall, by its certificate, under the hand of the president and seal of such company, filed in the office of the clerk of the United States Court of Appeals for the Indian Territory, designate an agent, who shall reside where the United States Court of Appeals for the Indian Territory is

held, upon whom service of summons and other process may be made. Such certificate shall also state the principal place of business of such corporation in the Indian Territory. Service upon such agent shall be sufficient to give jurisdiction over such corporation to any of the United States courts for the Indian Territory. If any such agent shall be removed, resign, die or remove from the Indian Territory or otherwise become incapable of acting as such agent, it shall be the duty of such corporation to appoint immediately, another agent in his place as hereinbefore provided.

"Sec. 5. That if any foreign corporation shall fail to comply with the provisions of the foregoing sections, all its contracts with citizens and residents of the Indian Territory shall be void as to the corporation, and no United States court in the Indian Territory shall enforce the same in favor of the corporation."

Section 825 of Kirby's Digest of the Statute of Arkansas upon the same subject is as follows: "Every corporation formed in any other state, territory or country, before it shall be authorized or permitted to transact business in this state, or to continue business therein if already established, shall, by its certificate, under the hand of the president and seal of such company or corporation, filed in the office of the Secretary of State of this state, designate an agent who shall be a citizen of this state, upon whom service of summons and other process may be made. Such certificate shall also state the principal place of business of such corporation in this state. Any corporation so filing such certificate in the office of the Secretary of State shall pay therefor a fee of one dollar for such filing, and a like fee for each subsequent appointment of an agent so filed."

Section 829a of Kirby's Digest of the Statute of Arkansas is as follows: "If any such foreign corporation shall fail to comply with the provisions of section 825, all its contracts with citizens of this state shall be void as to the corporation, and no court of this state shall enforce the same in favor of the corporation."

It will be observed that the resemblance between the act of Congress, requiring the designation of an agent in the Indian Territory, and the statute of Arkansas on the same subject is very close. The act of the Arkansas Legislature of 1887 (Laws 1887, p. 234), which was the first statute passed in Arkansas requiring a nonresident corporation to designate an agent in the state, was as follows: "Before any foreign corporation shall begin to carry on business in the state, it shall by its certificate," etc. The act of Congress with reference to the Indian Territory appears to have been modeled after the Arkansas act of 1887.

The first question that arises is whether the various transactions engaged in by plain-

tiff amounted to carrying on business, within the meaning of the act of Congress, or to transacting business, within the meaning of the Arkansas statute in force at the time the defendant Rogers was employed by plaintiff as deliveryman. It appears that plaintiff sent agents into the Indian Territory and Arkansas, who took orders for enlarging pictures, and for frames for the enlarged pictures, and sent them to plaintiff in Chicago. The work of enlarging the pictures and of manufacturing the frames was done in Chicago, and then the enlarged pictures and frames were shipped to other agents of plaintiff, known as deliverymen, of whom defendant Rogers was one, at certain points, and the deliveryman then delivered to the customers and collected the price, which was by the deliveryman remitted to plaintiff in Chicago. It would be improper in this opinion to conjecture why the persons taking the orders were not permitted to deliver and collect. It seems that the various acts performed by plaintiff's agents, from the time they first called on persons with intent to persuade them of the advantages of having the likenesses of relatives and friends preserved in large size until other agents delivered the enlarged pictures, collected therefor, and remitted to plaintiff, was carrying on and transacting business.

The case of *International Text-Book Co. v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, was a suit, brought in the courts of the state of Kansas, by the International Text-Book Company, of Scranton, Pa., against Aaron L. Pigg, a citizen of Kansas, to recover a sum of money due from Pigg upon a contract of subscription for a scholarship or course of instruction in one of plaintiff's correspondence schools. The facts in that case were as follows: The International Text-Book Company was a Pennsylvania corporation and the proprietor of the International Correspondence Schools at Scranton, Pa. These schools have numerous courses in various branches of learning. Its officers and instructors reside in Scranton, Pa., and perform their respective duties there. Its business is conducted by preparing and publishing instruction papers, text-books, and apparatus for courses of study. It employs local or traveling agents to procure and forward to the company, at Scranton, applications for scholarships in its correspondence schools, and also to collect deferred payments on scholarships. It has correspondence with these agents about its business, and it sends its instruction papers, text-books, and illustrative apparatus directly to its pupils in each state, and instruction is given by means of correspondence through the mails. One of its solicitors maintained an office in Kansas at his own expense, received a fixed salary, and sent in daily reports of his business. At the time of the suit, a number of persons were taking its

courses of instruction by mail, and the contracts for the courses had been procured by the solicitor assigned to duty in the state of Kansas, and payment for the courses were collected and remitted by him to plaintiff in Scranton. The defendant, Pigg, had signed a written contract, showing that he had subscribed for a scholarship covering a course of instruction by correspondence in commercial law, and had agreed to pay therefor \$84 in installments. When the suit was brought, there remained unpaid on the principal of that subscription the sum of \$79.60. The court held that under this state of facts the company was doing business in the state of Kansas. The court, speaking by Mr. Justice Harlan, said:

"1. In view of the nature and extent of the business of the International Text-Book Company in Kansas, the first inquiry is whether the statutory prohibition against the maintaining of an action in a Kansas court by 'any corporation *doing business in this* [that] *state*' embraces the plaintiff corporation. It must be held, as the state court held, that it does; for it is conceded that the text-book company did not, before bringing this suit, make, deliver, and file with the Secretary of State, either the statement or certificate required by section 1283 [Gen. St. 1901]; and upon any reasonable interpretation of the statute that company, both at the date of the contract sued on and when this action was brought, must be held as '*doing business*' in Kansas. It had an agent in the state, who was employed to secure scholars for the schools conducted by correspondence from Scranton, and to receive and forward any money obtained from such scholars. Its transactions in Kansas, by means of which it secured applications from numerous persons for scholarships, were not single or casual transactions, such as might be deemed incidental to its general business as a foreign corporation, but were parts of its regular business continuously conducted in many states for the benefit of its correspondence schools."

It is difficult to see why the acts of the Chicago Crayon Company, in this case, were not as much in the nature of doing, or carrying on, or transacting, business as were the acts of the International Text-Book Company in that case.

Finding that plaintiff was carrying on or transacting business in the Indian Territory and Arkansas at the time defendant was employed, the next question to be decided is whether its business was of such a character as to render its contracts void under the statutes quoted.

It is settled that a single or isolated transaction of a corporation will not be void because of the failure by the corporation to designate an agent in the state. This question is settled by the decisions of both Arkansas (Railway Co. v. Fire Association, 55 Ark. 163, 18 S. W. 43; Florsheim Bros. D.

G. Co. v. Lester, 60 Ark. 120, 29 S. W. 34, 27 L. R. A. 505, 46 Am. St. Rep. 162) and of the appellate courts having jurisdiction of appeals from the Indian Territory prior to statehood (Ammons v. Brunswick-Balke-Clender Co., 141 Fed. 570, 72 C. C. A. 614; same case in Indian Territory Court of Appeals, 5 Ind. T. 636, 82 S. W. 937), as well as by the Supreme Court of the United States. Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137. But the transactions of plaintiff in this case were more than isolated transactions, and it cannot escape the inhibition of the statute, upon the ground that this was an isolated contract. It was connected with other continuous acts and conduct which amounted to carrying on business.

[3] Then was the business of the character which the statute was intended to prevent, and was it of a kind that the state of Arkansas could prevent, when the corporation had failed to comply with the statute by appointing an agent? It is well settled that a state cannot prevent a corporation, any more than an individual, from making contracts within the state with reference to or in furtherance of interstate commerce. Gunn v. White Sewing Machine Co., 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223; Kindel v. Beck & Pauli Lith. Co., 19 Colo. 310, 35 Pac. 538, 24 L. R. A. 311; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 5 Sup. Ct. 739, 28 L. Ed. 1137; Crutcher v. Kentucky, 141 U. S. 47, 11 Sup. Ct. 851, 35 L. Ed. 649. In the last case cited, Mr. Justice Bradley said:

"If a partnership firm of individuals should undertake to carry on the business of interstate commerce between Kentucky and other states, it would not be within the province of the state Legislature to exact conditions on which they should carry on their business, nor to require them to take out a license therefor. To carry on interstate commerce is not a franchise or a privilege granted by the state; it is a right which every citizen of the United States is entitled to exercise under the Constitution and laws of the United States; and the accession of mere corporate facilities, as a matter of convenience in carrying on their business, cannot have the effect of depriving them of such right, unless Congress should see fit to interpose some contrary regulation on the subject.

"It has frequently been laid down by this court that the power of Congress over interstate commerce is as absolute as it is over foreign commerce. Would any one pretend that a state legislature could prohibit a foreign corporation—an English or French transportation company, for example—from coming into its borders and landing goods and passengers at its wharves, and soliciting goods and passengers for a return voyage, without first obtaining from some state officer, and filing a sworn statement as to the

amount of its capital stock paid in? And why not? Evidently because the matter is not within the province of state legislation, but within that of national legislation. *Inman Steamship Co. v. Tinker*, 94 U. S. 238, 24 L. Ed. 118. The prerogative, the responsibility, and the duty of providing for the security of the citizens and the people of the United States in relation to foreign corporate bodies, or foreign individuals with whom they may have relations of foreign commerce, belong to the government of the United States, and not to the government of the several states; and confidence in that regard may be reposed in the national Legislature, without any anxiety or apprehension arising from the fact that the subject-matter is not within the province or jurisdiction of the state Legislatures. And the same thing is exactly true with regard to interstate commerce as it is with regard to foreign commerce. No difference is perceivable between the two. *Western U. Tel. Co. v. Texas*, 105 U. S. 460, 26 L. Ed. 1067; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 205, 211 [5 Sup. Ct. 826] 29 L. Ed. 158, 162, 164; *Philadelphia & S. S. Co. v. Pennsylvania*, 122 U. S. 326, 342 [7 Sup. Ct. 1118] 30 L. Ed. 1200, 1203; *Norfolk & W. R. Co. v. Pennsylvania*, 136 U. S. 114, 118 [10 Sup. Ct. 958] 34 L. Ed. 394, 396. As was said by Mr. Justice Lamar, in the case last cited: 'It is well settled by numerous decisions of this court that a state cannot, under the guise of a license tax, exclude from its jurisdiction a foreign corporation engaged in interstate commerce, or impose any burdens upon such commerce within its limits.'

Further in the same opinion he says: "The case is entirely different from that of foreign corporations seeking to do a business which does not belong to the regulating power of Congress. The insurance business, for example, cannot be carried on in a state by a foreign corporation without complying with all the conditions imposed by the legislation of that state. So with regard to manufacturing corporations, and all other corporations whose business is of a local and domestic nature, which would include express companies whose business is confined to points and places wholly within the state. The cases to this effect are numerous. *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 568, 19 L. Ed. 1029; *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727 [5 Sup. Ct. 739] 28 L. Ed. 1127; *Philadelphia F. Ass'n v. New York*, 119 U. S. 110 [7 Sup. Ct. 108] 30 L. Ed. 342." See, also, *Watson on the Constitution*, 542; *Willoughby on the Constitution*, § 324, and the following sections.

If, then, the business in which plaintiff was engaged was interstate, it follows that the bond sued on was not void because no agent had been designated by plaintiff.

The case of *Caldwell v. North Carolina*,

187 U. S. 622, 23 Sup. Ct. 229, 47 L. Ed. 336, arose out of a prosecution of an agent of the Chicago Portrait Company for the violation of an ordinance of the city of Greensboro, N. C., which provides: "That every person engaged in the business of selling, or delivering picture frames, pictures, photographs, or likenesses of the human face in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of \$10.00 for each year." The agent of the Chicago Portrait Company received the pictures and frames from the freight office of the railroad company, took them to his rooms in Greensboro, broke the bulk, placing the pictures in their proper frames, and from this point delivered the pictures, one at a time, to the purchasers in the city of Greensboro. He was convicted in the lower court, and his conviction affirmed by the Supreme Court of the state of North Carolina. On appeal to the Supreme Court of the United States, the case was reversed; the Supreme Court holding that the defendant was engaged in interstate commerce, and that the ordinance of the city of Greensboro was void as an attempt to regulate interstate commerce. In the course of the opinion, Mr. Justice Shiras said: "Nor does the fact that these articles [referring to the pictures and frames] were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor, at Greensboro, who delivered them to the purchaser, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that if the vendor had sent the articles by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to state taxation. The same could be said if the vendor himself, or by a personal agent, had carried and delivered the goods to the purchasers. That the articles were sent as freight by rail, and were received at the railroad station by the agent, who delivered them to the respective purchasers, in no wise changes the character of the commerce as interstate." It will be observed that the facts in the case of *Caldwell v. North Carolina*, with reference to the character of the business, are identical with the facts in this case. In *Rearick v. Pennsylvania*, 203 U. S. 507, 27 Sup. Ct. 159, 51 L. Ed. 295, the facts are very similar, and the holding the same. See, also, *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719; *Stockard v. Morgan*, 185 U. S. 27, 22 Sup. Ct. 576, 46 L. Ed. 785; *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128.

In *Gunn v. White Sewing Machine Company*, 57 Ark. 24, 20 S. W. 591, 18 L. R. A.



206, 38 Am. St. Rep. 223, which was a suit on a bond executed by A. I. Julian, as principal, and Gunn, as surety, conditioned that Julian should pay any indebtedness to the White Sewing Machine Company which might thereafter arise out of the purchase and sale of sewing machines, or otherwise, under a contract of the same date, wherein the company agreed to sell their machines to Julian at a stipulated price, and Julian agreed to canvass Faulkner county, or have it canvassed, for the White Sewing Machine Company, the evidence showed that the White Sewing Machine Company sold or shipped to Julian its machines, charging them to him at a stipulated price. On or about the 12th of each month, the company mailed Julian a statement of his indebtedness. The contract provided that he should give a promissory note for the amount stated within 30 days, payable 6 months from the date of the statement, with an option to him to pay the amount of the statement within 30 days, less discount of 5 per cent. Julian agreed to canvass Faulkner county for the sale of the White Sewing Machine, exclusive of any other make or makers. The contract and bond were executed on behalf of the White Sewing Machine Company by S. B. Kirby, who was the agent for the White Sewing Machine Company in Arkansas for making and forwarding contracts. It was his duty to secure the services of agents in the state of Arkansas. The company, at the time the contract was ordered, had agents in 30 or 40 counties in the state, and the White Sewing Machine Company had that many contracts with its agents. Under these facts, the court held that the business of the White Sewing Machine Company in Arkansas was of the character of interstate commerce, and that the fact that the company had no designated agent in Arkansas, upon whom service could be had, was no defense in favor of the surety to the action on the bond. After reviewing the authorities bearing upon the proposition, the court, speaking by Mr. Justice Battle, said:

"In this case the contract between the corporation and Julian and the bond sued on were executed in this state, and were business transacted in Arkansas. But no sales or indebtedness were created by them. The contract was only an agreement to sell, and the bond was a condition upon which the corporation agreed to sell and a means adopted to secure the indebtedness to be contracted by sales, and both constituted a contract. They were made a foundation of a future trade between a corporation of one state and a citizen of another, and were a direct method devised to increase the business of the former, and, as to them, served as a basis of interstate commerce. Relying on them, the corporation sold the machines and other property, and shipped them from the state of Ohio, its place of manufacture and business, to Julian, in Arkansas; the place of

sales being in Ohio. Until they ceased, according to their terms or by agreement of the parties, to be of any force, they were an inducement to, and entered into, every sale, and formed a part of it. According to the principles firmly established by numerous decisions of the Supreme Court of the United States, they [the bond and contract], the sales and shipment of the machinery and other property, were a part of the interstate commerce of the United States, which Congress has the exclusive right to regulate, and were not and could not be affected by the act of April 4, 1887." This case is directly in point, and is authoritative, at least as indicating that the courts of Arkansas would hold the bond sued on to be a contract exempted from the provisions of the statute of Arkansas, requiring corporations to designate an agent in the state.

A fair interpretation of these authorities leads to the conclusion that the business in which plaintiff in this case was engaged was in its nature interstate, and the state of Arkansas had no right to require the corporation to appoint any agent as a condition upon which it could engage in interstate business in the state. The bond given by defendant Rogers was in furtherance of the interstate business, and entered into and formed a part of it. The case of *International Text-Book Company v. Pigg*, 217 U. S. 91, 30 Sup. Ct. 481, 54 L. Ed. 678, 24 L. R. A. (N. S.) 493, requires scrutiny in this connection. A careful examination of that case shows that it is in harmony with this view, although the first part of the opinion, quoted at length in this opinion, would not leave that impression, unless carefully compared with the latter portion.

In that case the statute of Kansas required all corporations doing business in that state, except banking, insurance, and railroad corporations, to file a statement with the Secretary of State annually, on or before the 1st day of August, and required that the statement should set forth the authorized capital stock, paid-up capital stock, par value and market value of each share of said stock, a complete statement of the assets and liabilities of the corporation, a full and complete list of the stockholders, with the post office address of each, and number of shares held and paid for by each, the name and post office address of the officers, trustees, and directors, and the manager elected for the ensuing year, etc., and provided that the failure of any corporation to file the statement provided within 90 days from the time provided for filing same should work a forfeiture of the charter of any corporation organized under the laws of the state, and that such failure by any corporation doing business in the state, and not organized under the laws of the state, should work a forfeiture of its right or authority to do business in this state. It provided further that no action should be

maintained or recovery had in any of the courts of Kansas by any corporation doing business in the state without first obtaining the certificate of the Secretary of State that the statement provided for in this section had been properly made. The court, as above stated, held that the International Text-Book Company was doing business in the state, within the meaning of the statute, and quoted with approval the holding of the Kansas Supreme Court that it "was the intention of the Legislature that the statute should reach every continuous exercise of a foreign franchise," and that it should apply, even where the business of the foreign corporation was purely interstate commerce, citing *Deere v. Wyland*, 69 Kan. 255, 76 Pac. 863, *State v. Book Company*, 65 Kan. 847, 69 Pac. 563, *Commission Company v. Haston*, 68 Kan. 749, 75 Pac. 1028, and said that, in the judgment of the court, the rulings in those cases as to the scope of the statute were correct. But further in the opinion it was decided that the business of the text-book company was interstate commerce, and it was held that it was not competent for the state to prescribe, as a condition of the right of the text-book company to do interstate business in Kansas, that it should prepare, deliver, and file with the Secretary of State the statement as above set forth. In the course of the opinion, the court says:

"It is true that the statute does not, in terms, require the corporation of another state engaged in interstate commerce to take out what is technically 'a license' to transact business in Kansas. But it denies all authority to do business in Kansas, unless the corporation makes, delivers, and files a statement of the kind mentioned in section 1283. The effect of such requirement is practically the same as if a formal license was required, as a condition precedent to the right to do such business. In either case, it imposes a *condition* upon a corporation of another state seeking to do business in Kansas, which, in the case of interstate business, is a regulation of interstate commerce, and directly burdens such commerce. The state cannot thus burden interstate commerce."

Further in its opinion the court questions the right of the state to forbid its courts from taking jurisdiction of a suit, brought by a corporation of another state, and engaged in interstate business, upon a valid contract arising out of such business, and made with it by a citizen of Kansas, but it does not expressly decide the point.

But the Arkansas courts, under the ruling in *Gunn v. White Sewing Machine Company*, 57 Ark. 24, 20 S. W. 591, 18 L. R. A. 206, 38 Am. St. Rep. 223, would undoubtedly enforce a contract valid as an interstate contract, and the United States courts in the Indian Territory would do so for the

same reason. It may well be doubted if any court can or will decline to enforce a contract made in pursuance of law.

It has been suggested, though not in the briefs of counsel in this case, that, as Congress had plenary power over the Indian Territory prior to statehood, and full power to prohibit all commerce, not only by corporations, but by individuals, in the Indian country, foreign corporations were prohibited by the act from engaging in any business in the Indian Territory until they complied with the act, and that the question of whether or not the business was interstate was immaterial. Congress undoubtedly had the right to prohibit any sort of commerce in the Indian Territory, but they did not intend by the act quoted to exercise that right as against foreign corporations. The requirement of the act that the certificate to be filed with the clerk of the United States Court of Appeals should state where the principal place of business of the corporation was located seems to imply that purely interstate commerce was not prohibited. It was the intention of Congress in enacting the statute to extend to the people of the Indian Territory the same protection against "wild-cat" corporations that was enjoyed by the people of the states having similar statutes, and the act of Congress must be construed in the same manner as a similar statute of a state.

In arriving at these conclusions, the case of *Chattanooga Nat'l Bldg. & L. Ass'n v. Denson*, 189 U. S. 408, 23 Sup. Ct. 630, 47 L. Ed. 870, has not passed unnoticed, but that case is not controlling of the questions involved in this. In that case the loan association lent money to a resident of Alabama, and took a mortgage on certain real property in Alabama to secure the payment. In a suit to foreclose the mortgage, the mortgagor made the defense that the loan company had not designated an agent before the mortgage was taken. The statute made it unlawful for the company to transact any business in the state before designating an agent and a place of business in the state. The court held that the mortgage could not be enforced, and held that the fact that the note for the borrowed money was drawn in Tennessee and payable in Tennessee did not prevent the transaction from coming within the terms of the statute. It appears that the mortgage was executed in Alabama, and that the note was signed there. Emphasis was laid upon the term "any business" in the Alabama statute. The question whether the business was interstate was not discussed, but it seems clear that the taking of a mortgage which is to affect title to the lands of a state cannot be interstate business. To enforce it, the courts within the state must be resorted to, and it is every way different to commerce in the ordinary sense, controversies arising out

of which give rise to transitory actions cognizable anywhere that service may be had.

As the business in which plaintiff was engaged was interstate, and the bond sued on was in furtherance of the interstate business, it was not essential to its validity, in either the Indian Territory or Arkansas, that plaintiff should have designated an agent, upon whom service of process might be had. The fact that plaintiff had not designated such an agent was pleaded as a defense to the action, and was admitted by the agreed statement of facts. It was thus before the jury, and the court should have instructed the jury with reference to the legal effect of the failure to designate such agent, when requested by the plaintiff. It is the duty of a court of record to instruct as to the law with reference to all matters within the issues, when requested. *Bales v. Northwestern Consol. Milling Co.*, 21 Okl. 421, 96 Pac. 599; *Dunlap & Taylor v. Flowers*, 21 Okl. 600, 96 Pac. 643; *Brickwood's Sackett's Instructions to Juries*, § 170.

[4] The other error assigned by plaintiff was the giving of instructions 4, 5, 6, 7, 8, 9, and 11, and the refusal to give instruction No. 5, requested by plaintiff. This assignment involves the question as to what duty the plaintiff owed the sureties to give them notice of the principal's default. The court in effect told the jury in his instructions 4, 5, and 6 that it was the duty of the plaintiff to notify the sureties as soon as it knew of Roger's default in remitting, and that by continuing him in its employment and failing to notify the sureties plaintiff was committing a fraud upon the sureties. This was stating the rule too broadly, and the error is not cured by the subsequent instructions. It is true the seventh, eighth, and eleventh instructions limit the others to some extent. In the seventh, eighth, and eleventh instructions, the jury was told that it must appear that Rogers had been guilty of fraud or dishonesty of some kind, before the sureties would be discharged for the failure to give notice. But they seemed at least to imply that he had been guilty of conduct requiring the sureties to be notified. Instruction 9 especially tended to impress the jury that, in the opinion of the court, a notice to the sureties was necessary. The bond sued on in this case was an absolute undertaking that Rogers would perform all the duties and obligations arising out of his employment as agent, as set out in the written contract of employment, and the rule is that sureties upon absolute undertakings are not entitled to notice of the default of their principal. 32 Cyc. 107, and cases cited.

The bond sued on was executed prior to statehood, and all transactions out of which this controversy arose took place in the Indian Territory and Arkansas, and were completed before statehood. A decision of the Arkansas Supreme Court must therefore be, if not controlling, at least very persuasive. In the case of *Wilkerson v. Crescent Insurance Company*, 64 Ark. 80, 40 S. W. 465, 62 Am. St. Rep. 152, the insurance company brought a suit against Wilkerson as surety on a bond given by Ingalls for the performance of his duty as agent of the company. The proof showed that Ingalls was in default in his settlements, with the knowledge of the company, for about three years, during which he continued work for the company, and that the company did not notify the surety. The surety was held liable; the court in its opinion citing with approval *Watertown Ins. Co. v. Simmons*, 131 Mass. 85, 41 Am. Rep. 196; *Atlantic & Pac. Tel. Co. v. Barnes*, 64 N. Y. 385, 21 Am. Rep. 621; *McKecknie v. Ward*, 58 N. Y. 541, 17 Am. Rep. 281. The surety signing a bond, such as the one sued on in this case, undertakes that the principal will perform his contract. A failure to perform renders him liable without notice. It is only where there is moral turpitude upon the part of the principal, as distinguished from a mere failure to perform his contract, that the duty is imposed on the obligee to notify the surety. There is no evidence in this case showing that Rogers had been guilty of moral turpitude. He made correct statements of his accounts. He did not conceal his alleged shortage. He continued working, apparently intending to satisfy his employer, and there was no evidence in the case tending to show that he was guilty of any criminal misconduct. See *Home Insurance Co. v. Holway*, 55 Iowa, 571, 8 N. W. 457, 39 Am. Rep. 179; *Richmond P. R. Co. v. Kasey*, 30 Grat. (Va.) 218.

By signing the bond, the sureties promised to make good the shortage of the principal. The obligee had the right to rely on the bond, and to continue to ship its agent pictures and frames for delivery. The bond was given to secure it for shipments so made, and until something occurred which would justify the obligee in saying to the sureties that the principal was a dishonest rascal it was under no duty to say anything. Nothing in the proof in this case would have justified such a charge. The fifth instruction requested by the plaintiff should have been given.

The judgment should therefore be reversed, and the cause remanded for a new trial.

PER CURIAM. Adopted in whole.

RUDOLPH v. JURGENSEN et al.  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

1. COURTS (§ 160\*)—COUNTY COURTS—JURISDICTION.

Section 2, art. 1, of an act of the Legislature of 1907-08, entitled "An act to define the jurisdiction and duties of the county court," etc. (Sess. Laws 1907-08, p. 284; section 1978, Comp. Laws 1909), has no application to an action instituted and pending in a county court before the passage and approval of said act.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 405; Dec. Dig. § 160.\*]

2. TRIAL (§ 323\*)—VERDICT—SUFFICIENCY.

Where, in an action in a county court, the parties agree to a trial by a jury of five jurors, instead of six, and a unanimous verdict is returned by said jurors, the verdict is not void, because not signed by all members of the jury concurring.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 759; Dec. Dig. § 323.\*]

Error from Cimarron County Court; M. W. Pugh Judge.

Action by Dave Jurgensen against C. P. Rudolph and John F. Carter. Judgment for plaintiff, and defendant Rudolph brings error. Affirmed.

Virgil M. Hobbs, for plaintiff in error. W. T. Cleeton, for defendant in error.

HAYES, J. Defendant in error Dave Jurgensen commenced this action, on April 15, 1908, in the county court of Cimarron county against plaintiff in error and defendant in error John F. Carter to recover upon a promissory note for \$100, with interest at the rate of 10 per cent. per annum from July 15, 1907, and attorney's fees. Defendant in error Carter confessed judgment. Plaintiff in error filed his separate answer, denying all the allegations of the petition. Upon the issues thus joined, there was a trial to a jury, which resulted in a verdict and judgment against plaintiff in error for the sum of \$125. The trial occurred on the 12th day of October, 1908.

[1] The first assignment of error urged by plaintiff in error in his brief challenges the jurisdiction of the county court to try this cause, because the amount in controversy is less than \$200. To sustain his contention, he relies upon section 2, art. 1, of an act of the Legislature of 1907-08 (Sess. Laws, 1907-08, p. 284), which in part reads as follows: "The county court, coextensive with the county, shall have original jurisdiction in all probate matters, shall have concurrent jurisdiction with the district court in civil cases in any amount over five hundred dollars and not exceeding one thousand dollars, exclusive of interest, and exclusive original jurisdiction in all sums in excess of two hundred dollars and not exceeding five hundred dollars. \* \* \*

It is his contention that this statute repeals that portion of section 12, art. 7, of the Constitution which confers, until otherwise provided by law, upon the county courts, concurrent with the district court, jurisdiction of civil cases in any amount not exceeding \$1,000, exclusive of interest, and that it substitutes therefor the foregoing provision of the legislative act, and that county courts no longer have original jurisdiction in civil cases, when the amount in controversy is less than \$200. But, whatever may be the effect of the legislative act as to future cases, it can have no operation in the instant case; for it did not become a law until subsequent to the institution of this action in the court below. The act carried the emergency clause, and became effective upon its approval, but it was not approved until June 4, 1908, and this suit was commenced in the preceding April.

Section 54, art. 5, of the Constitution, provides: "The repeal of a statute shall not revive a statute previously repealed by such statute, nor shall such repeal affect any accrued right, or penalty incurred, or proceedings begun by virtue of such repealed statute."

If the legislative act of 1908 had the effect to repeal the provision of the Constitution that gave to the county court jurisdiction in civil cases involving less than \$200, the foregoing provision of the Constitution prohibits said act from affecting this proceeding, which had been begun before the enactment of the statute. State ex rel. West, Atty. Gen., et al. v. McCafferty, 25 Okl. 2, 105 Pac. 992.

Whether the act of 1908 takes away from county courts jurisdiction in civil cases involving less than \$200 is involved in other cases pending in this court, in which a decision will be necessary to dispose of those cases, and we shall reserve our decision thereon until those cases are reached.

[2] The parties agreed that the case should be tried by a jury of five jurors, instead of six, as provided by the Constitution. Plaintiff in error concedes in his brief that his act relative thereto in the lower court constitutes a waiver of his constitutional right to a trial by a jury composed of six jurors. There was a unanimous verdict returned into court, signed only by the foreman. Plaintiff in error contends that said verdict is void, because not signed by all the jurors concurring therein, as required by section 19, art. 2, of the Constitution. That section in part provides: "In civil cases and in criminal cases less than felonies, three-fourths of the whole number of jurors concurring shall have power to render a verdict. In all other cases the entire number of jurors must concur to render a verdict. In case a verdict is rendered by less than the whole number of jurors, the verdict

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

shall be in writing and signed by each juror concurring therein."

This provision of the Constitution effected an important change in the jury system, as it had theretofore existed in this jurisdiction. Before the admission of the state, the unanimous concurrence of the jurors was required, in order to render a verdict in any case. By this provision of the Constitution, in all cases, except felonies, less than the whole number of jurors may render a verdict, to wit, three-fourths thereof. But, when less than all the jurors concur in a verdict, it must be in writing and signed by those jurors concurring therein. The verdict in the instant case was agreed upon and rendered by the whole number of jurors constituting the jury. It is true that it was not returned by six jurors, but it was not tried by a jury of six jurors. The right to a jury of six was waived. There was no division in the jury as to what the verdict should be.

The constitutional requirement that the verdict shall be signed by the jurors concurring therein was intended to apply only when there is division among the jurors as to what the verdict shall be. Its purpose is to lay solemnly and heavily the responsibility of the act upon the minds of those jurors of any jury who are willing to render against the conclusion and judgment of some of their brother jurors a verdict in a case. There is less probability of error in a verdict in which the minds of all the jurors reach the same conclusion than in one upon which the minds of the jury differ. Where not all the jurors concur, those concurring, if sufficient in number to render a verdict, should be made to feel fully the responsibility of their act, and to consider carefully the correctness of the conclusion they have reached. This the framers of the Constitution intended to accomplish by requiring the verdicts in such cases to be written and signed by those jurors concurring therein. Their acts are thereby made a public record, and the responsibility therefor not only impressed fully upon the conscience of the jurors, but such knowledge is afforded the public that it may know who renders the verdict. Where a unanimous verdict is rendered, the public knows and each juror knows that the public must know that such verdict is the judgment and act of each juror; but, where the verdict is rendered by less than all the jurors, and it is not reduced to writing and signed by the jurors concurring, it cannot be known by the litigants or by the public who is responsible for the verdict, except as the deliberations in the jury room are disclosed by the jurors.

But, it is no more necessary for a unanimous verdict of a jury of five to be signed by each juror, in order that it may be known who has concurred therein, than it

is necessary for a unanimous verdict of six or twelve to be signed. The verdict is the personal judgment of each juror, or it could not be a unanimous verdict. Parties by their agreement have said that they would accept the verdict of five, as if it were the verdict of six, and the whole number of jurors have concurred. The verdict, we think, falls neither within the letter nor the intentment of the constitutional requirement that certain verdicts shall be signed by the jurors concurring. It is not contended that there is any statutory provision or rule of common law requiring such verdicts to be signed.

Complaint is made of alleged errors in admission of evidence. These alleged errors are not presented in plaintiff in error's brief with sufficient compliance with the rules of the court to entitle them to consideration; but we have examined them, and find that no prejudicial error has been committed.

The judgment of the trial court is affirmed.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur. DUNN, J., not participating.

#### MULLEN v. RENZLEMAN.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

##### (Syllabus by the Court.)

#### 1. COURTS (§ 160\*)—JURISDICTION OF COUNTY COURT—STATUTORY PROVISIONS—RETROACTIVE OPERATION.

The provisions of section 1978, Comp. Laws 1909, conferring upon county courts exclusive original jurisdiction of civil actions, wherein the amount in controversy is in excess of \$200, but does not exceed \$500, does not affect an action pending in the district court at the time of the passage and approval of said statute.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 405; Dec. Dig. § 160.\*]

#### 2. FENCES (§ 25\*)—INJURIES TO ANIMALS—LIABILITY.

One who constructed a barbed-wire fence around his land in the Indian Territory in a careless and negligent manner, and on account of such negligent construction stock running at large were, before the admission of the state, cut, bruised, and otherwise injured on the fence, is liable to the owner of the stock for the damages sustained by him.

[Ed. Note.—For other cases, see Fences, Cent. Dig. §§ 50, 51; Dec. Dig. § 25.\*]

#### 3. FENCES (§ 25\*)—INJURIES TO ANIMALS—ACTIONS—QUESTION FOR JURY.

There was evidence tending to establish that the fence consisted of posts 80 to 120 feet apart, set loosely in shallow holes, so that they did not stand erect or stationary; that there were 2 wires hung loosely upon the posts, the first of which was hung about 2 feet above the ground, but sagged between the posts to within 1 foot of the ground; that the second or top wire hung and sagged in a similar manner about 2 feet above the first; that the fence extended in part through timber, through which no fence

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

row had been cut, and the wire was hung in a similarly negligent manner upon trees and bushes, wherever the same was accessible; and that in places the wire could not be easily seen by stock on account of the bushes and timber. *Held*, that whether there was negligence in the construction and maintenance of said fence was properly a question for the jury.

[Ed. Note.—For other cases, see *Fences*, Dec. Dig. § 25.\*]

Error from District Court, Carter County; S. H. Russell, Judge.

Action by F. Renzleman against J. S. Mullen. Judgment for plaintiff, and defendant brings error. Affirmed.

H. A. Ledbetter, for plaintiff in error. Mathers & Matson, for defendant in error.

HAYES, J. Defendant in error originally instituted this action by filing in the United States Court for the Southern District of the Indian Territory, at Ardmore, his petition to recover from plaintiff in error damages in the sum of \$365, for alleged injuries received by his stock from a fence constructed by plaintiff in error. Upon the admission of the state, the cause was transferred, under the provisions of the enabling act and the schedule to the Constitution, to the district court of Carter county, where a trial to a jury was had, and judgment rendered in favor of defendant in error for his damages, which the jury found to be \$162.50. The trial in the court below occurred on May 10, 1909.

[1] Plaintiff in error contends, first, that the district court was without jurisdiction to try the cause, because of the provision of section 1978, Comp. Laws 1909, which confers upon the county courts exclusive original jurisdiction in civil cases, where the amount in controversy is in excess of \$200, but does not exceed \$500. But this statute has no application to causes pending at the time of its passage and approval. *Rudolph v. Jurgensen et al.*, 119 Pac. 640, decided at this term, but not yet officially reported; *Adair v. McFarlin et al.*, 28 Okl. 633, 115 Pac. 787.

Defendant in error alleges in his amended petition below that plaintiff in error, in the year 1906, unlawfully, wrongfully, tortiously, and carelessly erected around a certain body of land a fence; that the fence consisted of a single barbed wire, supported by posts 60 or 70 feet apart; that the wire, being about 4 feet from the ground, sagged between the posts so close to the ground that it was not likely to be seen by the live stock; that the holes were dug at the shallow depth of from 8 to 10 inches; that the posts were placed in the holes without the dirt being packed or pressed around them, so as to make them upright and stationary; that they were left loose, so they could sag from 1 to 3 feet; that the wire was not securely or permanently tacked or nailed to the posts; that the fence as thus constructed was left in an unsafe and dangerous condition, so

that it constituted a trap for passing live stock. He then alleges that on account of such negligent construction of the fence several of his domestic animals, describing them, became entangled in the barbed wire of the fence, and were cut and bruised, and some were killed, all to his damage, as itemized in his petition. There was a demurrer by plaintiff in error to defendant in error's petition, and to the evidence, the overruling of which has been made the grounds of the second and sixth assignments of error, which may be considered together.

[2] Under the general rule of the common law of England, the owner of the land was under no duty to fence his land against the cattle of his neighbor, and the owner of such stock was bound to keep them within his own inclosure; but this rule of the common law was not in force in the Indian Territory, and the owner of stock in that jurisdiction had the right to let them run at large. *Perry v. Cobb*, 4 Ind. T. 717, 78 S. W. 289; *Eddy et al. v. Evans*, 58 Fed. 151, 7 C. C. A. 129. It is earnestly contended by counsel for plaintiff in error that the construction of the barbed-wire fence by plaintiff in error does not constitute negligence per se. No fault can be found with this contention, when, as in this case, there is no law prohibiting the construction of such fence; for the contention is supported by many authorities. *Robertson v. Wooley*, 5 Tex. Civ. App. 237, 23 S. W. 828; *Worthington v. Wade et al.*, 82 Tex. 26, 17 S. W. 520; *Galveston Land & Imp. Co. v. Levy et al.*, 10 Tex. Civ. App. 104, 30 S. W. 504; vol. 1, *Thompson on Negligence*, c. 961. But it does not follow that if such a fence be constructed in a negligent manner, and in consequence of the negligent construction injury results to a person or his animals, without negligence on his part, the owner of the fence will not be liable for damages. The only negligence with which defendant in error is charged is permitting his stock to run at large where they might come in contact with plaintiff in error's fence; but in states where the owner of stock may, under the law, permit them to run at large upon uninclosed lands the landowners have no right to erect barbed-wire fences thereon in such a manner as to become in the nature of a trap for the destruction of straying animals. *Thompson on Neg.* vol. 1, c. 958. A leading case upon this question is *Hurd v. Lacy*, 93 Ala. 427, 9 South. 378, 30 Am. St. Rep. 61, in which Walker, J., speaking for the court, said:

"Upon this subject, the rule prevailing here is very different from the old common-law rule. The result is to work a corresponding change in the liability of the landowner. It follows, therefore, that where the general law of this state prevails a person's right to the use of his land is, in a measure, affected by the recognized right of others to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

allow their stock to run at large. This latter right would be practically destroyed if upon the lands, not inclosed by a lawful fence, erections or excavations could with impunity be so made that animals straying thereon would be exposed to injury or destruction. It seems plain, under our law, that the landowner has no right to expose straying stock to such perils. He may be under no duty to guard them from the dangers to which they may be exposed in consequence of the natural features of the land, such as ditches, holes, decayed trees liable to fall, etc. Nor would he be liable for an injury to an animal, caused by a fence built in the usual way. If, however, a fence or other erection is so negligently maintained on the land as to be in effect a trap to passing animals, if the injury to animals is the natural or probable consequence of the act, and such as any prudent man must have foreseen, then, in the event of such injury, the landowner is liable to damages therefor."

Other cases in point are *Slak v. Crump*, 112 Ind. 504, 14 N. E. 381, 2 Am. St. Rep. 213; *McFarland v. Swihart*, 11 Ind. App. 175, 38 N. E. 483, 54 Am. St. Rep. 499; *Lowe v. Guard et al.*, 11 Ind. App. 472, 39 N. E. 428, 54 Am. St. Rep. 511; *Brown v. Cooper*, 10 Tex. Civ. App. 512, 31 S. W. 316; *Rowland v. Baird*, 18 Abb. N. C. (N. Y.) 256; *Loveland v. Gardner*, 79 Cal. 317, 21 Pac. 768, 4 L. R. A. 395. This question involves the application of the maxim that the owner of property shall so use it as not to injure the property of another. It is not so applied, however, that the owner of land is deprived of its ordinary use, but, where in the use of it he so negligently constructs a fence that injury to stock of another, who had the right to permit them to run upon the commons, results therefrom, and the injury is such that a man of ordinary prudence, under the circumstances, would have foreseen it, the injury is an actionable wrong.

In the Alabama case, a single barbed wire, 4 feet from the ground was loosely hung from the posts 20 or 40 feet apart, and sagged between the posts from 8 to 12 inches, and the fence was around a vacant lot in town. Appellee's mule, while running at large, came in contact with the wire, and was injured. The appellate court sustained the finding of the trial court that the fence was not constructed as an ordinarily prudent husbandman constructs such a fence; and that it was constructed carelessly and negligently and dangerously, without regard to the rights of stock owners and the public.

In the California case, *supra*, the posts

were 36 feet apart, with 3 strands of wire upon them, the first of which was 24 inches above the ground; the second 13 inches above the first; the third 15 inches above the second. The wires were not properly stretched, but left hanging loose between the posts. It was held that whether there was negligence was properly a question for the jury.

[3] There is evidence in the instant case tending to show that the posts were from 90 to 120 feet apart; that there were 2 wires; that the bottom wire was hung on the posts 2 feet above the ground, and sagged between the posts to within 1 foot of the ground. The second and top wire was about 2 feet above the first. The fence extended partly over prairie land and partly through timber. In the timber no fence row was cut, and no posts set up, but the wire was attached to bushes and trees, wherever they were accessible. In some places the wire could not be easily seen for the brush or timber, and was loosely hung all around the tract of land inclosed. From this evidence the jury might easily conclude that the fence was so constructed as to constitute a warning to stock; and that the dangerous wire hanging so loosely upon the posts and so near to the ground, while not sufficient to warn stock that an obstruction was before them over which they could not pass in safety, constituted a trap in which stock, trying to pass over it, would easily be caught and injured; and we think no error was committed in sending the case to the jury upon the question whether the fence was negligently constructed.

By the third and fifth assignments, complaint is made of the admission of testimony, and by the fourth assignment of the rejection of testimony offered by plaintiff in error. But counsel has failed to set out in his brief in full the substance of the testimony admitted and rejected, of which he complains, as required by rule 25 (20 Okl. xii, 95 Pac. viii), and these assignments therefore will not be considered. For failure to comply with the same rule, by setting out in his brief instructions requested and refused, assignments 8 and 9 cannot be considered. All other assignments made have either been covered in the assignments hereinbefore considered, or are so clearly without merit as not to require discussion.

The judgment of the trial court is affirmed.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

**HUFFMAN v. STATE.**

(Criminal Court of Appeals of Oklahoma. Dec. 18, 1911.)

(Syllabus by the Court.)

**CRIMINAL LAW (§ 753\*)—ABSENCE OF EVIDENCE—INSTRUCTION TO ACQUIT.**

Where there is a total absence of direct or presumptive evidence to sustain the charge, it is the duty of the trial court to instruct the jury to acquit the defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1727; Dec. Dig. § 753.\*]

Appeal from Kay County Court; Claude Duval, Judge.

Carl Huffman was convicted of misdemeanor, and brings error. Reversed.

Herman S. Gurley, for plaintiff in error. Chas. West, Atty. Gen., Smith C. Matson, Asst. Atty. Gen., and E. G. Spilman, Asst. Atty. Gen., for the State.

DOYLE, J. The plaintiff in error was tried and convicted upon two indictments, duly transferred from the district court to the county court of Kay county. Each indictment charged the unlawful possession of one cask of beer with the intention of violating the provisions of the prohibition law.

The state introduced but one witness, the station agent of the Santa Fé Railroad Company at Ponca City, who produced a freight delivery receipt for one cask of beer from the railroad company to the Ponca Restaurant Company, signed by K. S. Van Vorhees, and identified the signature thereto. He also produced an order from the Ponca Restaurant Company, the consignee, to deliver this package to K. S. Van Vorhees, drayman, and testified that the signature thereto was written by one McCarthy, and that he believed that Carl Huffman was connected with the Ponca Restaurant Company. Cross-examination: "You stated to the jury that you don't know who did constitute the Ponca Restaurant Company of your own personal knowledge? A. No, sir." Redirect: "Mr. Caldwell: You do not know, on your own personal knowledge, who the king of Slam is, do you?"

This question was as relevant and material to the issue in the case as the testimony offered in support of the charge. We cannot conceive upon what theory the court admitted the freight delivery receipt and the order for the delivery to be admitted and read in evidence. There was no evidence connecting the defendant with the Ponca Restaurant Company, or the order of delivery to the drayman. A witness is required to state knowledge, recollection, or memory of facts in respect to the issue involved, and not his impressions, suppositions, or thoughts. Even if there was evidence tending to connect the defendant with the orders and re-

ceipts, this alone would not be sufficient to prove possession as charged. *Cook v. State*, 7 Okl. Cr. —, 120 Pac. 1038.

There was no reason given why the drayman, Van Vorhees, was not produced as a witness. To establish the offense charged, there must be proof of the defendant's possession of a barrel of beer. There is a total absence of such proof, either by direct or presumptive evidence. For this reason, it was the duty of the trial court to direct a verdict of not guilty.

The judgments appealed from are therefore reversed.

FURMAN, P. J., and ARMSTRONG, J., concur.

**MAYNES v. STATE.**

(Criminal Court of Appeals of Oklahoma. Jan. 3, 1912.)

(Syllabus by the Court.)

**1. INTOXICATING LIQUORS (§ 210\*)—UNLAWFULLY CONVEYING WHISKY—INDICTMENT**

It is not necessary for an information or indictment, charging the unlawful conveyance of whisky from one place to another in this state, to contain an allegation that the whisky is being conveyed for an unlawful purpose, nor for the proof to so show.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 210.\*]

**2. INTOXICATING LIQUORS (§ 138\*)—UNLAWFUL PURCHASE—CONVEYANCE.**

Whisky purchased at an illegal sale cannot be conveyed from the place of purchase to any other place for any purpose.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. § 138.\*]

**3. INTOXICATING LIQUORS (§ 146\*)—LAWFUL PURCHASE.**

A lawful purchase of whisky, as contemplated by our statute at the time this offense is alleged to have been committed, is to be had only by interstate shipment, or from an authorized state dispensary.

[Ed. Note.—For other cases, see Intoxicating Liquors, Dec. Dig. § 146.\*]

**4. INTOXICATING LIQUORS (§ 138\*)—LAWFUL PURCHASE—CONVEYANCE WITHIN THE STATE.**

(a) Under the statute, a lawful purchase of whisky cannot be conveyed from one place to another, when such whisky is intended for an unlawful purpose.

(b) A lawful purchase of such liquor, intended for lawful purpose, to wit, a person's own use, may be transported or conveyed from one place to another in this state as may become necessary, so long as no other provision of the prohibitory act is violated.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 148; Dec. Dig. § 138.\*]

**5. CRIMINAL LAW (§ 1172\*)—INSTRUCTIONS—HARMLESS ERROR.**

When the testimony of an accused on trial clearly shows his guilt, an erroneous instruction given by the court limiting the application of the law is not sufficient to justify a reversal of the judgment.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



**6. INTOXICATING LIQUORS (§ 236\*)—ILLEGAL CONVEYANCE—EVIDENCE.**

In prosecutions for unlawfully conveying intoxicating liquor, the state is only required to show by the evidence beyond a reasonable doubt that the intoxicating liquor charged to have been conveyed, or some portion of it, was conveyed as alleged.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 236.\*]

Appeal from Kingfisher County Court; John M. Graham, Judge.

Clarence Maynes was convicted of violating the prohibitory law, and brings error. Affirmed.

D. K. Cunningham, for plaintiff in error.

**ARMSTRONG, J.** The accused was prosecuted by information in the county court of Kingfisher county on a charge of unlawfully conveying three half pints of whisky and four pints of beer from one place in Kingfisher county to another place therein, to wit, from one D. S. Gregg's place of business to about 50 feet north of said Gregg's place of business, and that said conveyance of such intoxicating liquors, as aforesaid, was not then and there the conveyance of a lawful purchase, but was a conveyance of intoxicating liquors purchased from one D. S. Gregg. He was convicted and sentenced to pay a fine of \$100 and costs, and to be confined in the county jail for a period of 30 days.

It appears that the accused lived on a farm near the town of Kingfisher in Kingfisher county, Okla. On the evening of the 29th of July he drove into town in a buggy, hitched his team a short distance from D. S. Gregg's place of business, took a light laprobe from the buggy, and went into this place. Sheriff Tate was standing near and saw accused as he went in, and testified that he thought he had an empty gunny sack under his arm at that time; that he came out of the house with something concealed in what he took to be the sack, went to the buggy, and was in the act of placing the package in the buggy when he walked up and found a small block of ice and a few bottles of beer in the laprobe, and two or three bottles of whisky in accused's pockets. The information charges the conveyance of three half pints of whisky and four pints of beer. The accused denied having carried the beer from Gregg's place of business, but admitted on his own examination that he did carry the whisky. This is sufficient to justify the conviction.

[1] Counsel's first contention is that the information does not charge an offense, and argues that the offense charged, if it be one, is for carrying three half pints of whisky and four pints of beer from one place in the city of Kingfisher to another place therein, and does not charge that it was being carried for the purpose of selling it or any oth-

er illegal purpose. His contention is that the conveying clause of the statute was intended to cut off conveying intoxicating liquors from one town to another, or across the country, for the purpose of selling or giving it away, and was not intended to prevent a person from carrying whisky for his own use, whether the purchase be at a lawful sale or not.

[2] We cannot agree that this contention is correct. A person cannot purchase whisky at an illegal sale, and convey it anywhere. The law clearly forbids the conveyance from one place to another of intoxicating liquor for any purpose, except such liquor as is purchased at a lawful sale.

[3] This includes a purchase at an authorized state dispensary, or by means of interstate shipments. Any person who purchases whisky from what is commonly termed a "boot legger," and carries it any distance, however short, is subject to the same penalty for so doing as the boot legger is for making the sale.

[4] The law, in our opinion, also forbids the conveyance of a lawful purchase of intoxicating liquor from one place to another, when such purchase is intended for an unlawful purpose. A lawful purchase intended for a lawful purpose, to wit, a person's own use, may be transported or conveyed from one place to another as may become necessary, so long as no other provision of the prohibitory act is violated. The accused in this case is guilty of unlawfully conveying intoxicating liquor under his own testimony.

Counsel contends that, the county attorney having elected to allege the whisky was purchased from D. S. Gregg, it was necessary for the proof to so show. The writer is of the opinion that this is the better rule, but this court has held that the portion of the information alleging from whom the purchase was made is surplusage and need not be proved, and a majority of the present judges reaffirm this doctrine.

Counsel next complains of the following instruction of the court: "Under the laws of Oklahoma, it is a crime for a person to ship or in any way convey any malt, spirituous, vinous, or fermented liquor from one place within the state to another place therein, except that it is lawful to convey liquor lawfully purchased. By a lawful purchase is meant liquor purchased from a lawfully constituted agency or dispensary, duly authorized to dispense liquor by the state of Oklahoma." The instruction should have gone further and included a purchase by interstate shipment.

[5] This instruction, however, was not prejudicial to any substantial right of the accused, because, as heretofore indicated, his own testimony was in effect a plea of guilty under the holdings of this court. The accus-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed did not contend that the liquor was a lawful purchase.

[8] All the state is required to do in cases of this kind is to show by the evidence beyond a reasonable doubt that the intoxicating liquor or some portion of it was conveyed from one place to another place named in the information.

Finding no substantial error in the record, the judgment is affirmed with directions to the trial court to enforce it.

FURMAN, P. J., and DOYLE, J., concur.

# FIDELITY & CASUALTY CO. OF NEW YORK v. FRESNO FLUME & IRRIGATION CO. (S. F. 5,541.)

(Supreme Court of California. Dec. 4, 1911. Rehearing Denied Jan. 3, 1912.)

## 1. INSURANCE (§ 129\*)—VARYING INSURANCE POLICY—REPRESENTATION OF AN AGENT.

Where a written insurance policy, accepted by the insured, expressly provided that no condition or provision could be altered, except by the written consent of the president or secretary, an insured cannot escape payment of premiums due on such policy, because the insured relied upon the representations of the agent.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 129.\*]

## 2. INSURANCE (§ 142\*)—ACTIONS FOR PREMIUM—RATIFICATION—ORAL CONTRACT.

Where an insurance policy provided for the payment of a certain premium which the agent orally represented would not be collected, an action upon the written policy was no ratification of the agent's oral representations.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 263, 264; Dec. Dig. § 142.\*]

## 3. INSURANCE (§ 136\*)—ACCEPTANCE OF POLICY—EFFECT.

An insurance policy, though not signed by the insured, is, when accepted, conclusive as to its obligations upon both parties, for under Civ. Code, § 1539, providing that the acceptance by one party of a paper signed by another purporting to embody all the terms of the contract binds both parties.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 136.\*]

## 4. APPEAL AND ERROR (§ 1175\*)—DECISIONS—RENDITION OF JUDGMENT.

In an action on an insurance policy, findings of fact by the trial court that the agent had represented that the premium would be much less than the amount stated in the written policy and that the contract was entered into upon faith of his representation will not, where a judgment for insured has been reversed on appeal, authorize the court on appeal to render judgment for the insurer.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4573-4587; Dec. Dig. § 1175.\*]

In Bank. Appeal from Superior Court, Fresno County; Geo. E. Church, Judge.

Action by the Fidelity & Casualty Company of New York against the Fresno Flume & Irrigation Company. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Chickering & Gregory, for appellant. L. L. Cory (Goodfellow, Bells & Orrick, of counsel), for respondent.

PER CURIAM. The appeal in this case was taken to the District Court of Appeal, which rendered a judgment of reversal. A rehearing was ordered, and, upon the second submission, two of the justices adhered to the views first announced, while the third wrote an opinion for affirmance. Upon this failure to agree the appeal was transferred to this court for hearing and determination.

Our own examination of the case has satisfied us of the correctness of the disposition first made by the Court of Appeal, and we adopt the following opinion of Hall, J., giving the reasons upon which that court based its judgment of reversal.

"This is an appeal from a judgment in favor of defendant taken within 60 days after the entry thereof. The action was brought to recover a balance of premiums unpaid upon two insurance policies executed and delivered by plaintiff to defendant and accepted by defendant, whereby plaintiff insured defendant against loss or damage resulting from liability for damages or injuries to employes of defendant during the period of one year from the date of the policies. At the time of the execution of the policies a certain sum was paid as premium, based on the amount of wages that defendant estimated that it would pay to its employes during the year. The policies are attached to and made a part of the complaint. The policies clearly and without ambiguity provide that the premium to be paid shall be a certain given per cent. of the wages actually paid during the year by the defendant to its employes, and provide that, if the wages actually paid exceed the estimated wages stated in the schedule contained in the policies, the assured shall pay the additional premium earned, and, if the wages actually paid shall be less than the estimated wages stated, the insurer shall return to the assured the unearned premium pro rata. As a defense to the two causes of action set forth in plaintiff's complaint, the defendant pleaded: 'That heretofore, and on or about the 14th day of April, 1902, the plaintiff made application to the defendant to insure and indemnify it for one year from April 14, 1902, against all loss from any of the matters and things set forth in the complaint of the plaintiff herein. That the defendant thereupon informed the plaintiff that as it was then insured in another company covering all the matters and things set forth in the complaint of plaintiff, and for all such insurance paid as a premium a flat rate of \$850 per annum, and the plaintiff thereupon assured the defendant that it would insure the defendant for one year upon the same terms, and it was then and there agreed

upon, by and between the plaintiff and defendant, that the plaintiff would issue and deliver to the defendant, and the defendant would thereupon accept, the policies of insurance set forth in plaintiff's complaint, and that the defendant would be charged therefor and would only be required to pay a flat rate of \$850 per annum in lieu and stead of the sliding scale and rate as set forth in plaintiff's complaint, and each cause of action therein, and that thereupon, and in pursuance to said agreement, and not otherwise, the policies of insurance set forth in plaintiff's complaint were so issued and delivered to the defendant, and the defendant accepted the same. That the sole inducement to the defendant leading it to accept said policies of insurance from the plaintiff was the statement and agreement and representation of the plaintiff that it would accept from the defendant the sum of \$850 in full for all premiums due, or to become due, upon said policies of insurance, covering said policy year, and that no other sum of premium of any kind would be required or demanded or exacted of the defendant by the plaintiff. That at the time said policies of insurance set forth in plaintiff's complaint were issued and delivered to the defendant, the plaintiff then and there stated, represented, and assured the defendant that, notwithstanding the rate and terms of said policies of insurance, all the premiums that the defendant would be required to pay for said policies of insurance was the flat rate of \$850, and in consideration of said assurances and statements the defendant was induced to, and did actually, accept said policies of insurance.' The court found the facts to be in accordance with the above allegations of the answer, and gave judgment for defendant accordingly.

"The only evidence to support the above findings of fact consisted of testimony as to statements and agreements orally made by Mr. Shepherd, the local agent of plaintiff at Fresno, to and with Mr. Shaver as the president of the defendant, and oral statements and conversations between Mr. Bosworth, the general agent of the plaintiff at San Francisco and Mr. Shepherd. This testimony as to oral negotiations and conversations, both before and at the time of the delivery of the policies, was admitted over the objections and exceptions of plaintiff, and these rulings are now relied upon as grounds for reversing the judgment.

[1] "It is not claimed that according to the written terms of the policies accepted by defendant the amount sued for is not owing from defendant to plaintiff, but it is claimed by defendant that it is not bound by the terms of the written contracts.

"The theory of defendant, upon which it claims that this case is taken out of the general rule that, where the terms of a contract are reduced to writing, parol evidence

is not admissible to vary or contradict the terms of the writing, is that it would be a fraud to allow one party to enforce the covenants of the writing contrary to his oral agreement by which the other party was induced to enter into the contract. In support of this contention respondent has cited a number of cases, among which are *Murray v. Dake*, 46 Cal. 644, *Isenhoot v. Chamberlain*, 59 Cal. 637, and *Eva v. McMahon*, 77 Cal. 472, 19 Pac. 872.

"But conceding that a court of equity will not permit one party to enforce a written contract contrary to his oral agreement, where to do so would work a fraud upon the other party to the contract, and that the same matter may be set up in defense of an action at law on such written contract, without seeking a reformation of the written contract (*Eva v. McMahon*, supra; *Hoppough v. Struble*, 60 N. Y. 430; *Walker v. Brem*, 67 Cal. 600, 8 Pac. 320), it is essential that such oral agreement be made by the party to the contract or by his agent, acting with authority, actual or ostensible.

"The policies delivered to and accepted by respondent were signed by the president and secretary of plaintiff, and countersigned by its general agent, Bosworth. No evidence of the authority of Bosworth was given other than that he was the general agent of the plaintiff, and none was given as to the authority of Shepherd other than that he was the local agent of Fresno, and by the terms of his employment had no authority to change a policy in any way.

"It may be conceded that this was sufficient to clothe the agents with ostensible authority coextensive with the business intrusted to them, in the absence of any notice of a limitation thereon. But the policies accepted and retained by defendant contained the provision that 'no condition or provision of this policy shall be varied or altered by any one unless by written consent of the president or secretary of the company.' This was a limitation upon the authority of agents of which defendant had notice. That such provisions in policies are valid has frequently been decided. The matter is discussed at great length in *Northern Assurance Co. v. Grand View Building Association*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213, and it was there held (syllabus) that 'it is competent and reasonable for insurance companies to make it matter of condition in their policies that their agents shall not be deemed to have authority to alter or contradict the express terms of the policies as executed and delivered.'

"In *Cleaver v. Traders' Ins. Co.*, 65 Mich. 527, 32 N. W. 660, 8 Am. St. Rep. 908, the Supreme Court of Michigan said: 'Where the policy of insurance, as in this case, contains an express limitation upon the power of the agent, such agent has no legal right to contract as agent of the company with the in-

sured, so as to change the conditions of the policy, or to dispense with the performance of any essential requisite contained therein, either by parol or writing; and the holder of the policy is estopped, by accepting the policy, from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy.' To precisely the same effect are *Catoir v. Am. Life Ins. & Trust Co.*, 33 N. J. Law, 487; *Weidert v. State Ins. Co.*, 19 Or. 261, 24 Pac. 242, 20 Am. St. Rep. 809.

"The same rule is followed in Massachusetts. 'The company which has seen fit to prescribe that the terms and conditions of its policies shall only be waived by its written or printed assent has prescribed only a reasonable rule to guard against the uncertainties of oral evidence, and by this the assured has assented to be bound.' *Kyte v. Commercial Union Assurance Co.*, 144 Mass. 43, 10 N. E. 518.

"To the same effect are *Quinlan v. Providence Washington Ins. Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645, and *Hankins v. Rockford Ins. Co.*, 70 Wis. 1, 35 N. W. 34.

"Limitations upon the power of agents contained in a policy, similar to the limitations contained in the policies sued on in this case, were held reasonable and binding on the assured in *Westerfeld v. New York Life Ins. Co.*, 129 Cal. 68, 58 Pac. 92, 61 Pac. 667.

"Defendant in the case at bar accepted the policies and retained them until the expiration of the insurance year, with full knowledge of their terms. There is no pretense that any misrepresentations were made as to their actual terms, or that any trick or device was resorted to by which defendant was prevented from reading them, and under such circumstances defendant must be presumed to have known the contents of the policies. *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532.

"Defendant thus knew that the agent had no power to alter the provisions of the policies without the written consent of the president or secretary of the insuring company. If defendant chose to rely upon the oral agreement of the agent, it did so at its peril. The oral representations and agreement thus made were not the representations or agreement of the plaintiff, and for this reason the findings to that effect are not sustained by the evidence, and the evidence of such oral agreement and representations should not have been admitted in evidence.

[2] "We do not think the contention of respondent that plaintiff ratified the alleged oral modification of the contracts by bringing this action can be sustained. We are unable to assent to the proposition that by attempting to enforce a written contract according to its terms plaintiff ratifies unauthorized oral modifications thereof."

[3] Upon the second argument in the Court of Appeal, and in presenting the case here,

the respondent has laid special stress upon the point that, because the policy was signed by the insurer alone, and not by the insured, it is conclusive with respect to its obligations alone, and not with respect to those of the party not signing. But we think there is no merit in this position. The receipt and acceptance by one party of a paper signed by the other, and purporting to embody all the terms of a contract between the two, binds the acceptor, as well as the signer, to the terms of the paper. 9 Cyc. 260, 391; Civ. Code, § 1589; *Watkins v. Rymill*, L. R. 10 Q. B. D. 178, 188. Under the common-law rules of pleading, the fact that one of the parties had not executed the writing, if it were a specialty, would have required that he be sued in assumpsit, rather than in covenant; but the binding force of his obligation and the extent of his liability would not have been affected by the mere form of action. *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 100.

The respondent cites a number of cases in which, notwithstanding the existence of an agreement in writing (signed by one of the parties alone), the party not signing has been permitted to prove the real agreement by parol evidence. But none of these dealt with the situation here presented, i. e., that of a writing which was intended, when signed by one of the parties, and accepted by the other, to operate as a contract embodying all of the obligations on both sides. The authorities relied upon all fall within recognized exceptions to the parol evidence rule. Some of them deal with writings which were prepared for execution by both parties, but were signed by only one. The opinion in *Cavanaugh v. Casselman*, 88 Cal. 543, 26 Pac. 515, while generally favorable to the contentions of the appellant, contains some references bearing upon this point. See, also, *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683. Other citations are to cases laying down the well-settled rule that recitals of consideration are not conclusive. *Byers v. Locke*, 93 Cal. 493, 29 Pac. 119, 27 Am. St. Rep. 212. This rule is not applicable here, where the clause relied upon is not a mere recital, but is a positive undertaking to pay premiums according to a specified mode of computation. The remaining authorities of respondent, so far as they have any bearing on the point under discussion, have to do with writings which were not intended to embody the entire agreement of the parties, but were either memoranda in the nature of receipts or were silent with respect to some of the terms upon which the parties had agreed. *Mobile R. R. Co. v. Jurey*, 111 U. S. 584, 4 Sup. Ct. 568, 28 L. Ed. 527; *Bank of Palmer*, L. R. 1897 App. Cas. 540; *Routledge v. Worthington Co.*, 119 N. Y. 592, 23 N. E. 1111; *Rapp v. Giddings*, 4 S. D. 492, 57 N. W. 237; *Ames v. S. P. Co.*, 141 Cal. 728, 75 Pac. 810, 99 Am. St. Rep. 98.

On the other hand, the contention of appellant that a policy of insurance, when accepted by the insured, is conclusive evidence of the engagements of the parties with respect to the obligations declared in it, and may not be contradicted by evidence of previous verbal arrangements, is abundantly sustained. *Ins. Co. v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; *Thompson v. Ins. Co.*, 104 U. S. 252, 26 L. Ed. 765; *Northern Assur. Co. v. Grand View Ass'n*, 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 218; *L. & L. G. Ins. Co. v. Lumber Co.*, 11 Okl. 579, 89 Pac. 930; *Niagara Fire Ins. Co. v. Johnson*, 4 Kan. App. 16, 45 Pac. 789; *Franklin F. Ins. Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271; *Moore v. State Ins. Co.*, 72 Iowa, 414, 34 N. W. 183; *U. S. Cas. Co. v. Charleston, etc., Mfg. Co. (C. C.)* 183 Fed. 238. The reasoning of these cases lends no support to the respondent's supposed distinction between the obligations of the party signing and those of the party not signing the policy. Indeed, the case last cited is, in this respect, precisely like the one before us.

[4] We cannot, however, give assent to appellant's claim that judgment in its favor should be ordered. The findings, as they stand, would not support such a judgment. Under such circumstances, it has been the usual practice of this court, where a reversal was found necessary, to send the case back for a new trial. There may be exceptional instances justifying a different procedure (see *Finnell v. Goodman & Co. Bank*, 156 Cal. 18, 26, 103 Pac. 483); but we see no reason, in the present appeal, for departing from the ordinary course.

The judgment is reversed.

### HAUGHAWOUT v. PERCIVAL.

(L. A. 2,768.)

(Supreme Court of California. Dec. 6, 1911.)

#### 1. MUNICIPAL CORPORATIONS (§ 289\*)—STREET ASSESSMENTS—COMPLIANCE WITH STATUTES.

Proceedings for street assessments must be based on a compliance with the statute authorizing the assessment, especially in so far as the statute provides for the giving of notice or other steps precedent to jurisdiction to order the work done.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 762-765; Dec. Dig. § 289.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 294\*)—STREET ASSESSMENTS—NOTICE—"NEAR."

The word "near," in the Vrooman act (St. 1885, p. 147), as amended by St. 1891, p. 196, providing for the posting of notices in street assessment proceedings "on or near the chamber door of" the city council, etc., is a relative term, and its meaning must be determined by reference to the subject-matter, and the posting of the notices on a bulletin board in the city hall in which the council chamber was located was sufficient where such bulletin board was in plain view from the main entrance of the hall, and so placed as to be likely to bring the notices to the attention of persons visiting

the council chamber, though the bulletin board was far removed from the council chamber.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 776-788; Dec. Dig. § 294.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4687-4690.]

Department 1. Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by W. J. Haughawout against Catherine A. Percival. From a judgment for plaintiff, defendant appeals. Affirmed.

Leslie R. Hewitt and Lee, Chase, Overton & Valentine, for appellant. Henry J. Stevens and O'Melveny, Stevens & Millikin, for respondent.

SLOSS, J. The defendant appeals from a judgment foreclosing the lien of a street assessment for sewer work done in the city of Los Angeles. The proceedings were had under the Vrooman act. St. 1885, p. 147. Section 3 of that act, as amended in 1891 (St. 1891, p. 196), provides that the resolution of intention passed by the city council shall be "posted conspicuously for two days on or near the chamber door of said council." Section 5 requires that the notice inviting sealed proposals shall be "posted conspicuously for five days on or near the council chamber door of said council," and that notice of award of contract shall be posted in the same manner. St. 1891, pp. 199, 200. The complaint alleged a posting of the various documents for the required time "conspicuously near the chamber door of the council." The answer denied such posting. The finding was in favor of the plaintiff. The appellant attacks this finding as unsupported, and the only question argued is whether the court was justified in determining that the various postings were made near the council chamber door.

The case was submitted on a stipulation of facts, which described with particularity the place where the resolution and notices were posted. The room or chamber in which the city council met is on the second floor of the city hall of the said city of Los Angeles. The city hall is situated on the easterly line of Broadway. The main entrance of the building is on the Broadway frontage, access to the interior being had through a door opening from a porch or portico, which runs for a length of some 55 feet in a northerly and southerly direction along the outer side of the front wall of the building. To reach the council chamber, it is necessary to enter the building through said door, and then, after proceeding to the stairs or elevator, ascend to the second floor, and walk to said chamber from the head of the stairs or the place where the elevator stops. By way of the stairs this would require a journey of about 40 feet from the main entrance door of the building to the foot of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the stairs, 26 feet in mounting the stairway, and 30 feet on the second floor from the stairs to the door of the council chamber. One going by elevator would be required to walk 56 feet on the main floor, and, after ascending 18 feet in the elevator, he would land on the second floor at a point 12 feet from the council chamber door. Either route involves several turns or changes of direction. The resolution and notices were posted upon a bulletin board situated upon the portico above referred to at a point about 20 feet northerly from the main entrance door of the building. All notices required to be posted by city officials were during the time of these proceedings, and for several years theretofore, posted upon this board. Any paper so posted would be in plain view of any one entering the city hall through the main entrance door, but notices could not be read by one standing at said door. There is a side entrance to the city hall, which is occasionally used by some of the public, but mainly by city officers and employés. The bulletin board would not be visible from this side entrance door, but the Broadway entrance is the one generally used by the public, and the customary and usual way by which the public reached the room in which the city council met is to pass through said Broadway or front entrance, and thence by way of the stairs or the elevator, to the upper floor.

[1] Was a paper posted upon the bulletin board thus situated posted "near the chamber door of the council"? Proceedings for street assessments, being in invitum, must, in order to charge the property of the owner, be based upon a compliance with the provisions of the statute authorizing the assessment, in so far, at least, as those provisions have to do with the giving of notice or other steps precedent to the jurisdiction of the board to order the work done. *Himmelman v. Cahn*, 49 Cal. 285; *Brooks v. Satterlee*, 49 Cal. 289; *Dehail v. Morford*, 95 Cal. 457, 30 Pac. 593. In the case last cited the court says that "it is a fundamental principle, in proceedings of this character, that every requirement of the statute which has a semblance of benefit to the owner must be observed, in order to give to the municipality jurisdiction in the premises." Accordingly, if the notice is required by the statute to be posted at a certain place, a posting at a different place will not support an attempt to create a lien. This proposition, which, as above suggested, is elementary, is conceded by the respondent.

But, in looking to the statute to see what its requirements are, we are not compelled to give its terms the most restricted and literal construction. Section 53 of the Vrooman act, as amended by Laws 1891, p. 466, provides that "the provisions of this act shall be liberally construed to promote the objects thereof." The provisions regarding the posting of notices, and the like, are,

therefore, to be read in the light of the purposes sought to be accomplished.

[2] The statute directs that the posting shall be "on or near" the council chamber door. The word "near" does not signify any precise measure of distance. It is a relative term, and its meaning must be determined with reference to the subject-matter. *Kirkbride v. Lafayette Co.*, 108 U. S. 211, 2 Sup. Ct. 501, 27 L. Ed. 705; *Barrett v. Schuyler Co.*, 44 Mo. 202. In this case, the subject-matter is the action of the city council in initiating and carrying on proceedings for street improvements. The object of the posting is to give notice of the steps taken to owners of property to be affected by the work, and the Legislature has presumably prescribed a method which in its judgment, would be likely to bring notice to such owners. The theory underlying the requirement that the posting should be made "on or near" the door of the council chamber was, no doubt, that owners whose property might be subjected to liens would, in seeking to learn whether proceedings had been instituted, and what they were, naturally visit the place of meeting of the council, the body charged with the duty and power of ordering the improvement. Since no exact place for posting was prescribed, it is reasonable to interpret the language of the law as requiring a posting in such location, convenient to and in the vicinity of the council chamber, as would be likely to catch the eye of any one approaching the chamber. It cannot be said, as matter of law, that the location must be within 10, or 50, or 100 feet of the door of the council chamber. Whether the place be "near" such door or not is, in each case, a question of fact to be decided upon the considerations suggested.

In the present instance we think the conclusion of the trial court was not without fair support from the facts shown. The council chamber was in the city hall. The bulletin board upon which the papers were posted was in a part of said city hall, and in plain view from its main entrance. This entrance was the one generally used by those who had occasion to visit the council chamber, and it was the board upon which notices were customarily posted. It was therefore so placed as to be likely to bring notices affixed to it to the attention of persons having occasion to visit the council chamber. Of course, if this place was not "near the door of the council chamber," the mere fact that a notice there posted would be as likely to be seen by persons interested as one posted at the point designated by the statute would not save the proceedings from failure. But, as we have said, the use by the Legislature of the indefinite term "near" necessarily left to the officials conducting the posting a measure of latitude. This, we think, was not exceeded by the posting here made.

The authorities cited by the appellant are not, we think, in conflict with this conclu-

sion. It would not be profitable to review them, since the holding, in each instance, is based upon statutory language differing from that before us, and upon a state of facts unlike that here presented. It may, however, be said that the reasoning of most of these cases is in harmony with the views we have announced.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

**WRIGHT v. ANGLO-CALIFORNIAN BANK, Limited. (S. F. 5,820.)**

(Supreme Court of California. Dec. 7, 1911.)

**1. PLEADING (§ 129\*) — CROSS-COMPLAINT — ADMISSIONS.**

The allegations of a cross-complaint in a suit to quiet title, when not denied, stand as admitted facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. § 129.\*]

**2. TAXATION (§ 734\*) — SALES — NOTICE TO OWNER.**

Under Pol. Code, § 3897, requiring a tax collector, before selling for the state land sold to it for taxes, to mail a copy of notice of sale to the person to whom the land was last assessed next before the sale at his last known post office address, the mailing of the notice, where the address is known or shown on the assessment roll, is essential to the validity of a sale by the state of land purchased by it for delinquent taxes.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.\*]

Department 1. Appeal from Superior Court, Mendocino County; J. Q. White, Judge.

Action by E. R. Wright against the Anglo-Californian Bank, Limited. From a judgment for defendant, plaintiff appeals. Affirmed.

Preston & Preston, for appellant. Thomas, Pemberton & Thomas and Jordan, Rowe & Brann, for respondent.

SHAW, J. The land in controversy was sold to the state on June 28, 1901, for non-payment of taxes. No redemption was made, and on November 4, 1907, in pursuance of proceedings for that purpose, the tax collector of the county sold and conveyed the same to the plaintiff. The plaintiff then began this action to quiet title. The complaint was in the usual form alleging that plaintiff was the owner of the land, but not giving the details of his title. One Fechheimer was the owner of the land on January 19, 1901, and on that day he executed a deed purporting to convey the same to defendant. The defendant, by cross-complaint, set up the title thus acquired asking judgment that plaintiff is not the owner of the land and that defendant is the owner thereof. Judgment was given for defend-

ant. Plaintiff appeals from the judgment and from an order denying a new trial.

The cross-complaint alleges that the defendant was the party to whom the land was last assessed next before the sale and deed by the collector to the plaintiff, that its address was then, is now, and for many years has been, San Francisco, Cal., that said address was well known to said tax collector, and that no copy of the notice of the proposed sale of the land by the state was mailed to the defendant prior to the sale, as required by section 3897 of the Political Code.

[1] These allegations are not denied, and they therefore stand as admitted facts of the case.

[2] This brings the case within the rule established by *Smith v. Furlong*, 117 Pac. 527, *Campbell v. Moran*, 119 Pac. 89, decided November 9, 1911, and *Smith v. Boston*, 119 Pac. 91, decided November 10, 1911. The mailing of this notice, where the address is known, or shown on the assessment roll so that it can be ascertained, is essential to the validity of a sale by the state of lands purchased by it for delinquent taxes. The judgment was therefore correct. It is not necessary to notice the other points presented.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

**CLOPTON v. CLOPTON et al. (L. A. 2,912.)**

(Supreme Court of California. Dec. 5, 1911.)

**HUSBAND AND WIFE (§ 299\*) — SEPARATE MAINTENANCE—DECREE—NOTICE.**

Plaintiff recovered, in an action for separate maintenance, a decree against her husband for payment of a certain sum. Grantees of said defendant were made parties, and all the parties defendant appealed from an order denying a new trial. Pending the appeal, plaintiff obtained an order on an oral motion, requiring the defendant to pay a certain sum as attorney's fees. No notice was given to the grantees of the husband. *Held*, that an order granting the allowance and providing that it should be a lien on the property conveyed by the husband to his codefendants, entered without any notice to such codefendants, will be reversed.

[Ed. Note.—For other cases, see Husband and Wife, Dec. Dig. § 299.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Z. B. West, Judge.

Action by Jennie M. Clopton against Hoggatt Clopton, Pearl Clopton, and another. From a judgment for plaintiff, the last-named defendants appeal. Reversed.

Kendrick & Ardis, for appellants. H. T. Gordon and John E. Daly, for respondent.

ANGELLOTTI, J. Plaintiff recovered judgment in an action brought by her to ob-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tain a decree requiring defendant Hoggatt Clopton, her husband, to pay monthly a certain sum for her maintenance and support. The judgment therein required said defendant to pay her \$75 per month for maintenance, as well as \$250 for her counsel fees. Pearl Clopton and Hugh Clopton were parties defendant in said action; they being the respective grantees of said Hoggatt Clopton of certain parcels of real property owned by him at the time of his marriage to plaintiff; the theory of plaintiff being that the conveyances to them by her husband were without consideration, and were made to enable him to escape her claim for support and maintenance. On July 1, 1910, the defendants' motion for a new trial was denied. An appeal was taken by all the defendants from the order denying the motion for a new trial, which appeal is still pending.

During the pendency of this appeal, plaintiff gave to the defendants written notice of a motion, to be made November 14, 1910, for an order requiring defendant Hoggatt Clopton to pay plaintiff \$500 as attorney's fees for prosecuting the suit on appeal, and \$50 as suit money in preparing her brief and otherwise appearing in the Supreme Court.

On November 14, 1910, pursuant to such notice, plaintiff orally moved the court for an order requiring defendant Hoggatt Clopton to pay to plaintiff \$500 for her attorney's fees on such appeal, and \$100 per month for alimony and support of plaintiff pending such appeal, and \$50 suit money for preparing her briefs and otherwise appearing in the Supreme Court. Nothing was said, either in the written notice or in the motion itself, about making the land conveyed to Pearl Clopton and Hugh Clopton liable for any of the amounts that might be ordered paid, or subjecting any of such land to a lien for the payment thereof.

Neither defendant Pearl Clopton nor Hugh Clopton is shown to have taken any part in the proceedings on the hearing of the motion, apparently assuming that no relief was asked against them or their property, which they were entirely warranted in doing, in view of the terms of both notice and oral motion. Defendant Hoggatt Clopton alone objected to the introduction of evidence offered by plaintiff, excepted to rulings made on such objections, and introduced evidence in opposition to the making of the order.

The motion being submitted for decision, the court made its order, directing the payment of certain amounts by Hoggatt Clopton to plaintiff for expenses of appeal, and counsel fees on appeal, and providing "that this allowance be, and the same is hereby, declared a lien upon all the property formerly standing in the name of said defendant, conveyed by him to his codefendants Pearl and Hugh Clopton, and which was released from the former judgment in favor of the

plaintiff against said defendant, situate in the county of Orange." Pearl Clopton and Hugh Clopton alone appeal from this order, asking that it be reversed as to them.

No argument has been made or brief filed in support of the order, in so far as it purports to impose any lien for the allowance made upon the property conveyed to and standing in the name of either Pearl Clopton or Hugh Clopton.

It is unnecessary for the purposes of this appeal to consider whether, upon a motion of this character, property standing in the name of another than the husband, and claimed by such other, can be subjected, as against such other person, to a lien in favor of the wife for any allowance made thereon, or whether there was any legal evidence adduced on the hearing of the motion warranting the imposition of such a lien in this case. Certainly no such lien can be adjudicated without notice to such claimant that such relief is asked. An application for counsel fees, etc., pendente lite, "though it cannot be considered as a separate suit, is a proceeding for a separate judgment," and notice of the application and an opportunity to be heard thereon are essential (*Baker v. Baker*, 136 Cal. 302, 68 Pac. 971), and such an application must be determined upon the evidence introduced on the hearing thereof. The only notice afforded appellants as to the claim of plaintiff on this motion was such as was given them by the written notice of the motion, and possibly the motion itself, orally made in open court at the time fixed, if they were present in court at that time, in person or by their attorneys of record, and made no objection that no proper written notice thereof had been given. But there was no hint in either the notice or the motion itself that any such relief was asked, and there is nothing in the record on this appeal warranting the conclusion that appellants were at any time advised that plaintiff sought anything more than an order requiring Hoggatt Clopton to pay to plaintiff certain amounts of money. As said by their attorneys in their brief, "that part of the order (the part adjudicating a lien on the property they claim) does not appear to be on motion of plaintiff, but upon the court's own motion, and without any notice."

The portion of the order reading as follows, viz.: "That this allowance be, and the same is hereby, declared a lien upon all the property formerly standing in the name of said defendant, conveyed by him to his codefendants Pearl and Hugh Clopton, and which was released from the former judgment in favor of the plaintiff against said defendant, situate in the county of Orange"—is, as to the appellants Hugh Clopton and Pearl Clopton, reversed.

We concur: SHAW, J.; SLOSS, J.



**JACOBSON v. OAKLAND MEAT & PACKING CO. (S. F. 5,484.)**

(Supreme Court of California. Dec. 1, 1911.  
Rehearing Denied Dec. 28, 1911.)

**1. NEGLIGENCE (§ 136\*)—JURY QUESTIONS—CONTRIBUTORY NEGLIGENCE.**

The existence of contributory negligence is generally a jury question.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 333-336; Dec. Dig. § 136.\*]

**2. MASTER AND SERVANT (§ 236\*)—INJURY TO EMPLOYÉ—CONTRIBUTORY NEGLIGENCE—MOMENTARY FORGETFULNESS.**

Ordinarily an employer is not liable for injury sustained by an employé through the latter's momentary forgetfulness of danger, but, under particular circumstances, such forgetfulness may not constitute contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 681; Dec. Dig. § 236.\*]

**3. MASTER AND SERVANT (§ 261\*)—INJURY TO EMPLOYÉ—COMPLAINT—SUFFICIENCY—CONTRIBUTORY NEGLIGENCE.**

A complaint for personal injury to an employé caused by unguarded cogwheels did not show that he was guilty of contributory negligence, where it alleged that the wheels were dangerous to a vice principal's knowledge, that plaintiff was informed that a guard had been removed for repairs, but that he was led by the vice principal to believe that it would be replaced the same day and before it should be necessary for plaintiff to work near the cogwheels; that plaintiff did not know until after his injury that the guard was not replaced; that one hour was a reasonable time for replacement of the guard; that because of knowledge of such facts and of such assurance plaintiff did not tax his mind with the fact of the removal; and that absence of the guard was not apparent to plaintiff on account of dimness of the light, etc.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 849-854; Dec. Dig. § 261.\*]

**4. MASTER AND SERVANT (§ 258\*)—INJURY TO EMPLOYÉ—COMPLAINT—SUFFICIENCY—NEGLIGENCE.**

A complaint for personal injury to an employé caused by unguarded cogwheels, stating that the vice principal controlled plaintiff's services and led him to believe that a guard removed from the wheels would be promptly replaced, that the vice principal knew of the danger from the unprotected wheels, and failed to tell plaintiff that the guard was not replaced sufficiently, shows a breach of duty to plaintiff.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 816-836; Dec. Dig. § 258.\*]

**5. MASTER AND SERVANT (§ 121\*)—NEGLIGENCE TOWARD EMPLOYÉ—UNGUARDED COGWHEELS.**

A vice principal was negligent toward an employé in failing to either replace a guard over dangerous cogwheels or to warn him of the peril involved in working near them.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

**6. MASTER AND SERVANT (§ 217\*)—INJURY TO EMPLOYÉ—ASSUMPTION OF RISK.**

To bar recovery by an employé for an injury caused by unguarded cogwheels, it must appear that he knew, not only the unsafe con-

dition, but consented to work in the place of danger after fully comprehending the risks.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

**7. MASTER AND SERVANT (§ 280\*)—COMPLAINT—ASSUMPTION OF RISK—ANTICIPATION OF DEFENSE.**

An employé suing for personal injury need not anticipate a defense of assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 844-848; Dec. Dig. § 280.\*]

**8. MASTER AND SERVANT (§ 121\*)—COGWHEELS—DUTY TO GUARD.**

An employer must adopt and keep in place a simple device constructed to guard dangerous cogwheels.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

**9. MASTER AND SERVANT (§ 258\*)—INJURY TO EMPLOYÉ—PLEADING—SUFFICIENCY.**

A complaint for personal injury to an employé caused by unguarded cogwheels was not uncertain in stating that plaintiff was led by a vice principal to believe that a guard removed from the wheels would be replaced immediately.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 258.\*]

Department 2. Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Action by Jacob Jacobson against the Oakland Meat & Packing Company. Judgment for defendant, and plaintiff appeals. Reversed, with instructions.

Fitzgerald & Abbott, for appellant. L. A. Redman, for respondent.

MELVIN, J. In this case, in which plaintiff sought damages for personal injuries, the court sustained the demurrer to the amended complaint, and, plaintiff not desiring further to amend, judgment of dismissal was entered accordingly. From said judgment this appeal is taken, and the only question presented to this court relates to the correctness or error of the trial court in the ruling on the demurrer.

The complaint, after alleging the corporate capacity of the defendant, asserts that on October 6, 1908, and for about one year prior thereto, plaintiff was and had been continuously employed by defendant as a night watchman; that one Howard Monson was defendant's chief engineer, having the right at all times to control and direct the services of plaintiff; that one of plaintiff's duties as night watchman was to operate a certain pump which was moved by a powerful electric motor; that plaintiff had performed this duty for about a year prior to October 6, 1908; that, in operating the pump, it was necessary for plaintiff to open a certain oil cup after he had turned on the power; "that, in order to open said oil cup, it was necessary for plaintiff to lean and reach over and across two cogwheels.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

one large and one small, which cogwheels, when said power was on, revolved each in and upon the other; that at the time plaintiff began to operate said pump as aforesaid, and up to and including the 2d day of October, 1908, or thereabouts, said cogwheels were completely covered and protected by an iron guard; that, when said cogwheels were so protected and guarded, there was no danger attendant upon leaning or reaching over or across said cogwheels, when the same were in motion, in order to open said oil cup, or at all; that on or about the said 2d day of October, 1908, said Howard Monson, acting in the course of his said employment, removed said iron guard from said cogwheels for the purpose of having said guard repaired, and that said Howard Monson did not, nor did any other person, replace said guard, or put any other guard over said cogwheels, or in any wise protect or guard said cogwheels until after the injury to plaintiff; \* \* \* that said cogwheels, when they were not guarded, were dangerous to plaintiff's life and limb, and that said Howard Monson knew and was aware of said danger; that plaintiff was informed that said guard was removed at or about the time of said removal, and was informed that said guard was removed for the purpose of having the same repaired, and was led by said Howard Monson to believe that said guard would be repaired immediately and replaced on the same day it was removed, and before it should be necessary for plaintiff to again operate said pump, and plaintiff did not know until after the injury to plaintiff herein described that said guard was not replaced as plaintiff had been led by said Howard Monson to believe that it would be; that a reasonable time for repairing said guard and for replacing the same was one hour, and that plaintiff knew at the time said guard was removed that one hour was a reasonable time for said repair and replacing, and because of said knowledge, and because he was led to believe that said guard would be replaced before he should be required to again operate said pump, plaintiff did not tax his mind with the fact of said removal, and wholly forgot before the injury \* \* \* that said guard had been removed; that plaintiff was not informed by said Howard Monson or at all that said guard was not replaced within one hour, or at any other time until after the injury to plaintiff; \* \* \* that the light in said pumping house was dim, and that the fact that said guard was not replaced was not apparent to plaintiff because of the said dimness of the light in said pumping house; that said Howard Monson, acting in the course of his said employment, knew that said guard was not replaced, and knew that plaintiff relied upon him to replace said guard, and knew that the absence of said guard would not be apparent to plaintiff, and knew of the danger to which plaintiff

was exposed, but that said Howard Monson wholly failed and neglected to replace said or any guard over said cogwheels, and wholly failed and neglected to warn plaintiff of his danger, and plaintiff was not warned of any danger by said Howard Monson or at all." Then follow averments that on the night of October 6, 1908, plaintiff entered the pumping house and turned on the power as usual; "that he was not aware of the fact that said guard had not been replaced, and the absence of said guard was not apparent to him; that, after turning on said power, he leaned and reached over and across said cogwheels as he had been accustomed to do for about one year for the purpose of opening said oil cup; that as he leaned and reached over and across said cogwheels his sleeve was caught by said cogwheels, and his right arm was drawn in and between said cogwheels and broken in many places; \* \* \* that said injury to plaintiff was caused by and resulted from the fact that said cogwheels were not guarded, and by the fact that plaintiff was not warned of the absence of said guard, and was caused by and resulted from the negligence and carelessness of the said Howard Monson, acting in the course of his said employment." The complaint closes with allegations of the permanent and complete character of plaintiff's injuries and a prayer for damages in the sum of \$50,000.

[1] The court's ruling in sustaining the demurrer is, in effect, a finding that as matter of law the complaint alleges contributory negligence on plaintiff's part. While a court must sustain a demurrer to a complaint when the facts stated show that in any view of the law the plaintiff is guilty of contributory negligence, appellant contends that he stated in his pleading a case sufficient, if all of his allegations were proven, to go to a jury. That the existence or absence of contributory negligence is in general a matter primarily for the jury there can be no doubt. The rule with reference to the respective functions of the court and jury in cases involving a determination whether contributory negligence appears from a given state of facts or not is thus stated in *Wahlgren v. Market St. Ry. Co.*, 132 Cal. 663, 62 Pac. 310, 64 Pac. 993: "If but one conclusion can reasonably be reached from the evidence, it is a question of law for the court; but if one sensible and impartial man might decide that the plaintiff had exercised ordinary care, and another equally sensible and impartial man that he had not exercised such care, it must be left to the jury. *McKune v. Santa Clara Co.*, 110 Cal. 480 [42 Pac. 880]." That the guard over the cogwheels had been removed was a fact of which plaintiff was aware, but he knew that the repairs would require only a short time, and relied upon Monson to keep his word to the effect that the guard should be replaced on the very day of its removal. Respondent's counsel insist that

this is a case of mere forgetfulness on the part of appellant. His only excuse for failure to observe the absence of the guard, they say, was that he had forgotten the circumstance of its removal. Forgetfulness, they insist, is as matter of law negligence which will defeat recovery.

[2] It is true that one employed in the vicinity of a known danger cannot ordinarily recover from his employer for injuries sustained by reason of a momentary forgetfulness of the danger, but it does not follow by any means that under all circumstances does failure to remember a source of peril constitute negligence. Appellant's counsel admit the force of the general rule announced in such cases as *Towne v. United Electric Co.*, 146 Cal. 770, 81 Pac. 124, 70 L. R. A. 214, *Brett v. S. H. Frank & Co.*, 153 Cal. 271, 94 Pac. 1051, *Davis v. California St. Cable R. R. Co.*, 105 Cal. 135, 38 Pac. 647, *McGraw v. Friend & Terry Lumber Co.*, 120 Cal. 575, 52 Pac. 1004, and *Ergo v. Merced Falls G. & E. Co.*, Sac. No. 1751, 119 Pac. 101 (opinion filed November 9, 1911), but they contend that the circumstances of every one of those cases are vastly different from the facts pleaded and for the purposes of demurrer admitted in the case at bar. Undoubtedly there was one element in all of those cases which is missing in this one, and that is the plaintiff's familiarity with the danger which he forgot. Plaintiff in this case had relied on his understanding with Monson that the guard would be replaced, and lulled by his confidence in the performance of a clear duty by his superior had forgotten its removal. The rule with reference to forgetfulness of a known danger has been declared by this court in *Giraudi v. Electric Imp. Co.*, 107 Cal. 125, 40 Pac. 110, 28 L. R. A. 596, 48 Am. St. Rep. 114, as follows: "It is said that, if one was aware of a fact which should have put him upon his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forgot it. This is true as a general proposition, but, like all other rules upon this subject, it must have a reasonable construction. To forget is not negligence, unless it shows the want of ordinary care, and it is a question for the jury. Illustrations of this proposition are found in the cases of brakemen who are injured by obstructions over or near the track of the road. They have been allowed to recover, although it is shown that they knew of the obstruction, on the ground that they cannot be expected to retain at all times, a complete outline of the track, and because, in the hurry of their work, they would not be likely to keep these things in mind. That is, to forget, under the circumstances, did not prove absence of ordinary care. See *Dorsey v. Phillips, etc., Co.*, 42 Wis. 583." In other jurisdictions mere forgetfulness of even a well-known danger or object which may

cause injury is held not necessarily to be negligence. In *Dwyer v. Salt Lake City*, 19 Utah, 525, 57 Pac. 536, this question is discussed, and some of the leading authorities are cited. In that case the proof showed that on a dark night, in passing from his house to his buggy on the street, plaintiff was injured by falling over an embankment, the existence of which was well known to him, but had been forgotten. The court said: "Although the respondent had previous knowledge of the condition of the sidewalk and embankment, and undertook to cross the embankment on a dark night, and momentarily forgot about it, yet such knowledge, undertaking, and forgetfulness were not conclusive evidence of such contributory negligence as would bar a recovery. He was not bound to absolutely refrain from using the sidewalk and street in front of his premises merely because of his knowledge of its dangerous condition. Such knowledge, and the manner and time of using the sidewalk, had a very important bearing in determining whether or not the respondent was in the exercise of proper care when the accident occurred, but did not as matter of law establish contributory negligence. He was bound to exercise such care as a man of ordinary prudence and caution would, under similar circumstances, have exercised, and, there being evidence tending to show that the injured, just before falling over the embankment, had proceeded cautiously, whether or not he exercised due care, was, under all the circumstances, a question of fact to be submitted to the jury, under proper instructions, and not one of law for the court." While the rule announced in the opinion last quoted is perhaps somewhat more liberal than the one followed in California (*McGraw v. Friend & Terry Co.*, supra; *Davis v. Railroad Co.*, supra), the quotation illustrates the unwillingness of courts to declare that forgetting a known danger always amounts to negligence.

[3] The complaint before us, measured by California precedent, states a cause of action.

[4] It is insisted that the complaint contains no statement of Monson's duty to replace the guard over the cogwheels. There is a pleading to the effect that Monson directed and controlled plaintiff's services, and averments, also, that he led plaintiff to believe the guard would be promptly replaced; that Monson knew of the danger from the unprotected wheels; and that Monson failed to tell plaintiff that the guard was not replaced according to promise, within an hour of its removal. While these statements do not amount to a declaration of Monson's obligation to replace the guard, they are equivalent to a pleading that he was deficient in his duty to plaintiff.

[5] Representing, as he did, plaintiff's principal, it was his duty either to restore the protecting agency over the dangerous cogs

or to warn plaintiff of the peril involved in working near them. By failing to perform one of these duties he was guilty of negligence. Whether plaintiff knew the danger from the uncovered machinery or not (and the peril of such cogs is not necessarily obvious for it depends largely upon the direction in which the wheels revolve) Monson's failure to undeceive plaintiff with reference to the prompt restoration of the guard amounted, under the circumstances of this case, as pleaded, to a breach of duty in permitting Jacobson to work in a dim and dangerous place without warning of the risk incurred.

[6] And this becomes more emphatically apparent when we consider that, to charge plaintiff with such conduct as would bar recovery, it must appear that he knew not only the unsafe condition of the machine without the guard, but consented to work in the place of danger after full comprehension and appreciation of the risks which he thereby incurred. Section 1970, Civ. Code; *Silveira v. Iversen*, 128 Cal. 192, 80 Pac. 687; *Morgan v. Robinson Co.*, 157 Cal. 354, 107 Pac. 695.

[7] It was not the pleader's duty to allege in the complaint the nonexistence of the circumstances which would prevent recovery under the Code section cited above. A plaintiff is not required to anticipate a defense. *Woodroof v. Howes*, 88 Cal. 194, 26 Pac. 111; *Jaffe v. Lillenthal*, 86 Cal. 92, 24 Pac. 835.

[8] Respondent argues that neither by contract nor by law was the corporation under any obligation to keep the cogwheels covered. On the contrary, it is the duty of one owning machinery to exercise reasonable care for the protection of employes who operate it. This complaint charges that there was no danger to the person oiling the machinery when the iron guard was in place, but that the risk incurred by him was very great when the wheels were exposed. Evidently there was a simple device for the complete protection of respondent's servants, and this it was the corporation's duty to adopt and keep in place. *Larsen v. Bloemer*, 156 Cal. 755, 106 Pac. 62; *Quinn v. Electric L. Co.*, 155 Cal. 503, 101 Pac. 794; *Skelton v. Pacific Lum. Co.*, 140 Cal. 511, 74 Pac. 13.

[9] We find no merit in respondent's special demurrer for uncertainty to that part of the complaint in which it is averred that appellant was "led by said Howard Monson to believe that said guard would be replaced immediately." This was an allegation of an ultimate fact quite sufficient to apprise defendant of the issue which it was called upon to meet. Greater particularity, which would probably involve the pleading of evidentiary matter, is not required. 2 *Labatt on Master & Servant*, § 863.

The complaint stated a case sufficient, if

proven, to go to a jury, and in that pleading negligence on plaintiff's part sufficient to defeat recovery does not appear as matter of law from the facts alleged.

The judgment is reversed, with instructions to the court below to overrule the demurrer to the complaint.

We concur: HENSHAW, J.; LORIGAN, J.

GOSEWISCH v. DORAN et al. (L. A. 2,761.) (Supreme Court of California. Dec. 9, 1911.)

1. LIBEL AND SLANDER (§ 38\*)—"PRIVILEGED COMMUNICATION"—ALLEGATIONS IN PLEADINGS.

Civ. Code, § 45, defines libel as a false and unprivileged communication exposing a person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned and avoided, or which has a tendency to injure him in his occupation. Section 47 enumerates as a privileged publication one made in any legislative or judicial proceeding, or in any other official proceeding authorized by law. Held that, where minority stockholders in a corporation sued plaintiff as its president for alleged illegal management, an allegation in the complaint that plaintiff was guilty of misappropriation and embezzlement of the corporation's funds was relevant to the inquiry, and was therefore privileged, even if section 47 be construed as only making such allegations in a judicial proceeding privileged as are relevant to the inquiry.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 120; Dec. Dig. § 38.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5591-5598; vol. 8, p. 7764.]

2. LIBEL AND SLANDER (§ 51\*)—"PRIVILEGED PUBLICATION"—JUDICIAL PROCEEDINGS—MALICE.

Where an alleged libelous allegation in a complaint charging the president of a corporation with misappropriation and embezzlement of the corporation's funds was absolutely privileged, it could not be rendered actionable because malicious; malice being irrelevant under such circumstances.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 149, 150; Dec. Dig. § 51.\*]

3. CORPORATIONS (§ 320\*)—ABATEMENT AND REVIVAL (§ 9\*)—STOCKHOLDERS—RIGHT TO SUE—PERSONS IN CONTROL—ANOTHER ACTION PENDING.

A minority stockholder of a corporation may sue to enforce a claim of the corporation against one who is president of the corporation and who is in control of the board of directors, and can thus prevent an action in the name of the corporation itself.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 1429-1430; Dec. Dig. § 320.\* *Abatement and Revival*, Cent. Dig. §§ 73-75; Dec. Dig. § 9.\*]

4. LIBEL AND SLANDER (§ 97\*)—"PRIVILEGE"—PLEADING—COMPLAINT.

While ordinarily, privilege is a defense to an action for libel, which must be affirmatively pleaded, yet if the complaint shows on its face that the publication was privileged, the point may be raised by demurrer.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 234-236; Dec. Dig. § 97.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by W. R. Gosewisch against J. J. Doran and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Munson & Barclay and A. J. Mitchell, for appellant. William Fleet Palmer, Valentine & Newby, Frank James, Smith & Smith, and Williams, Goudge & Chandler, for respondents.

**SLOSS, J.** The plaintiff instituted this action to recover damages for libel. The defendants demurred to an amended complaint, and the court below sustained their demurrers and gave judgment in their favor. The plaintiff appeals.

The amended complaint charges that in January, 1909, the defendants, as plaintiffs, commenced an action in the superior court of Los Angeles county, against the plaintiff herein and others as defendants. In said action they "maliciously and without reasonable or probable cause" filed a complaint in which they charged plaintiff with the misappropriation and embezzlement of the funds of a corporation of which they were stockholders and the plaintiff was a director and president. A copy of the complaint in said action is annexed to and made a part of the amended complaint herein. The plaintiff alleges that the charges against him were published in a daily newspaper in the city of Los Angeles, but inasmuch as there is no suggestion that the defendants were in any way responsible for, or connected with, such newspaper publication, this averment has no relevancy to the cause of action attempted to be stated. It is alleged that "all of said publications were and are false, malicious, and defamatory, and wholly without justification or excuse, and were not pertinent or material or at all necessary to the proceedings instituted by the filing of said complaint."

[1] The claim of the respondents is that the publication of the charges against plaintiff by means of a pleading in an action was privileged. Section 45 of the Civil Code defines libel as "a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." Section 47 of the same Code enumerates five classes of privileged publication. One of these is a publication made "(2) In any legislative or judicial proceeding, or in any other official proceeding authorized by law." This subdivision, in its present form, was added to the section by an amendment adopted in 1874.

The prevailing rule in England and in some of the American states has been that the privilege attaching to defamatory statements made in the course of judicial proceed-

ings is absolute. Townshend, in his work on Slander and Libel, states, at section 221, that he believes the "better and prevailing rule to be that for any defamatory matter contained in a pleading in a court of civil jurisdiction no action for libel can be maintained." *Cutler v. Dixon*, 4 Coke, 12; *Wilkins v. Hyde*, 142 Ind. 260, 41 N. E. 536; *Runge v. Franklin*, 72 Tex. 585, 10 S. W. 721, 3 L. R. A. 417, 13 Am. St. Rep. 833; 25 Cyc. 376. On the other hand, many courts in this country have limited the privilege to declarations pertinent and material to the matter in controversy. *Hoar v. Wood*, 3 Metc. (Mass.) 193; *McLaughlin v. Cowley*, 127 Mass. 316; *Moore v. M'fra. Nat. Bank*, 123 N. Y. 420, 25 N. E. 1048, 11 L. R. A. 753; *Wilson v. Sullivan*, 81 Ga. 238, 7 S. E. 274; *Ash v. Zwietusch*, 159 Ill. 455, 42 N. E. 854; 25 Cyc. 377. And this limitation of the rule was applied in a case arising in this state prior to the amendment of 1874 to section 47 of the Civil Code. *Wyatt v. Buell*, 47 Cal. 624. The language of subdivision 2 of the amended section is, however, broad and unrestricted in its terms, and this court, in *Hollis v. Meux*, 69 Cal. 625, 11 Pac. 248, 58 Am. Rep. 574, suggested a doubt as to whether the Legislature, by enacting that subdivision, intended to change the rule announced in *Wyatt v. Buell*, so as to render communications made in a judicial proceeding absolutely privileged. The court concluded, in the *Hollis* Case, that the charges there made were relevant and material to the proceeding in which they were published, and therefore found it unnecessary to resolve this doubt. It may, however, be remarked that in *Ball v. Rawles*, 93 Cal. 222, 236, 28 Pac. 937, 27 Am. St. Rep. 174, the privilege is declared to be absolute, and *Hollis v. Meux* is cited as authority for the declaration. See, also, *Duncan v. A., T. & S. F. Ry. Co.*, 72 Fed. 808, 19 C. C. A. 202. But if, notwithstanding the provision of our Code, and these utterances of the court, we take the view that the privilege is not absolute, the only limitation upon it is that the defamatory matter must be pertinent and material to the cause or subject of inquiry before the court.

[2] If it be pertinent, the defendant's malice or bad faith does not affect the privileged character of the publication. "Malice," says the court in *Hollis v. Meux*, "cannot be predicated of it. No one is permitted to allege that what was rightly done in a judicial proceeding was done with malice." That malice is not a subject of inquiry where a defamatory statement, relevant to the inquiry, is made in the course of a judicial proceeding, is not only established by the decided cases (*Moore v. M. N. Bank*, supra; *Wilson v. Sullivan*, supra; *Hartung v. Shaw*, 130 Mich. 177, 89 N. W. 701; *Bartlett v. Christliff*, 69 Md. 219, 14 Atl. 518), but it is plainly shown by the

terms of section 47 of the Civil Code. Subdivisions 3, 4, and 5 of that section, dealing, respectively, with communications to a person interested therein, with reports in public journals of judicial, legislative or other public proceedings, and with reports of the proceedings of public meetings, make the privilege, in each case, dependent upon the want of malice. But subdivision 2 is not so qualified. All of the cases cited by appellant come within the terms of one or another of subdivisions 3, 4, and 5. What is said in these cases with reference to malice has no application to a case depending on the terms of subdivision 2. Subject to the possible limitation of relevancy and materiality, the privilege attaching to statements made in the course of judicial proceedings is absolute.

We are satisfied that the charges made against plaintiff in the complaint filed by the defendants were pertinent and material to the subject of the action in which such complaint was filed, and hence could not be the foundation of an action for libel, even if the more limited rule of privilege be applied. The complaint in question undertook to set forth a cause of action by minority stockholders of a corporation, on behalf of themselves and such other stockholders as might come in, against the corporation and its directors, of whom the plaintiff herein was one, to compel the said plaintiff, who, as was alleged, held the majority of the stock and controlled the board of directors, to account to the corporation for moneys collected under invalid assessments and appropriated by him to his own use, and for other moneys of the corporation so appropriated. An injunction and other relief was also asked.

[3] That any stockholder may bring an action to enforce a claim of the corporation against one who is in control of the board of directors and can thus prevent an action in the name of the corporation itself is well settled. 2 Cook, Corp. § 645; Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401. And it is equally clear that the alleged misappropriations of corporate funds by one occupying a fiduciary relation to the corporation were the very gist of the cause of action asserted, and that the averments of which the plaintiff here complains were relevant and material to that cause of action. As against the showing of the exact contents of the pleading which was thus filed against the plaintiff, his allegation in his complaint for libel that the publications charging him with misconduct were not pertinent or material is a mere conclusion of law, which is not admitted by the demurrer (Glide v. Dwyer, 83 Cal. 477, 23 Pac. 706; Burling v. Newlands, 112 Cal. 476, 44 Pac. 810), and must be disregarded as contrary to the facts alleged.

[4] While it is ordinarily true that privilege is to be pleaded as affirmative matter of defense to an action for libel (Gilman v. McClatchy, 111 Cal. 606, 44 Pac. 241), yet where the complaint shows on its face that the publication was privileged, the point may be raised on general demurrer. In each of the cases of Hollis v. Meux, supra, and Ball v. Rawles, supra, a demurrer to the complaint had been sustained, and the action of the court below was upheld on appeal.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

#### CORDLER v. KEFFEL (L. A. 2,752.)

(Supreme Court of California. Dec. 5, 1911.)

##### 1. MASTER AND SERVANT (§ 289\*)—ACTIONS FOR INJURIES—QUESTION FOR JURY.

In an action by plaintiff, who was employed as a gardener about defendant's premises, for personal injuries resulting from falling into a well, alleged to have been negligently covered by the defendant, *held*, that the question of plaintiff's contributory negligence in walking across the cover was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1106; Dec. Dig. § 289.\*]

##### 2. APPEAL AND ERROR (§ 999\*) — REVIEW — VERDICT—CONCLUSIVENESS.

On appeal to the Supreme Court, the decision of the jury on a question of fact is conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.\*]

##### 3. MASTER AND SERVANT (§ 89\*)—MASTER'S LIABILITY—SCOPE OF EMPLOYMENT.

Plaintiff, who was employed by defendant to work as a gardener, had walked to his place of work, obtained a rake from the toolhouse, and then went to hang his coat on a standpipe near a covered well, and to get a drink of water therefrom, during which he crossed the covering of an old well which lay in his way, and by reason of the decayed condition of the covering fell into the well, and was injured. *Held* that, in crossing the covered well, he was acting within the scope of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 153-156; Dec. Dig. § 89.\*]

##### 4. MASTER AND SERVANT (§ 124\*) — SAFE PLACE TO WORK—INSPECTION.

Where the covering to an old well located on defendant's premises became dangerous through gradual decay, the defendant, on employing one to work about the premises, was not bound to make reasonable inspection of the premises at the time he set the employé to work, nor to continuously fulfill the duty of inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 237; Dec. Dig. § 124.\*]

##### 5. MASTER AND SERVANT (§ 124\*) — SAFE PLACE TO WORK—FAILURE OF MASTER TO INSPECT.

Where an owner of premises on which an old well 125 feet deep, covered with boards, was located did not examine the covering, which had been on the well for 11 years, but once, 4 years before the time an employé on the premises fell through the covering, and was injured,

his failure to inspect the covering would, under the circumstances, be negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

**6. APPEAL AND ERROR (§ 1064\*) — HARMLESS ERROR—INSTRUCTIONS.**

In an action for personal injuries resulting from falling through a board covering of a well located on premises where plaintiff was employed, error in an instruction as to defendant's duty of inspection is harmless, where his failure to inspect was shown to be negligent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219-4224; Dec. Dig. § 1064.\*]

**7. MASTER AND SERVANT (§ 124\*) — SAFE PLACE TO WORK — INSPECTION — HIDDEN DANGERS.**

The duty of a master to his servant requires him to make a reasonably careful inspection to enable him to learn of dangers, not apparent to the eye, to which the servant may be exposed while engaged at the place where he is directed to work; and this duty applies where the master sets a servant to work on premises in which a deep well is located, covered only with boards, damp and subject to decay.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 235-242; Dec. Dig. § 124.\*]

**8. MASTER AND SERVANT (§ 219\*)—ASSUMPTION OF RISK—NATURE AND EXTENT.**

Where an employé, acting in the scope of his employment, voluntarily takes a place which he is not required to take, he assumes the risk which may attach to such place, which is obvious to him by the use of ordinary care, and which is greater than the risk which he may have taken by reason of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 610-624; Dec. Dig. § 219.\*]

**9. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In an action for personal injuries resulting to plaintiff from falling through a covering of a deep well located on premises where he was employed, a witness, who had at least glanced at the under surface of the cover, was asked whether he noticed anything decayed about the covering at that time, and subsequently testified that he saw nothing peculiar about the covering, and in effect answered the question. *Held*, that the exclusion of the question was harmless error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4200-4206; Dec. Dig. § 1058.\*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Fred Cordler against Max E. H. Keffel. Judgment for plaintiff, and defendant appeals. Affirmed.

H. T. Morrow, for appellant. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, for respondent.

SHAW, J. Appeals are here presented from the judgment and from an order refusing a new trial.

Plaintiff sued for damages alleged to have been caused by the negligence of the defendant. The verdict was in favor of the plaintiff, and judgment followed. The points presented upon this appeal arise upon the rul-

ing upon the motion for a new trial, consisting entirely of alleged insufficiency of the evidence and errors of law occurring at the trial.

1. It is first contended that the evidence shows that the plaintiff's injury was in part caused by his own negligence. He was employed by the defendant to work as a gardener in a nursery belonging to the defendant. In the nursery grounds was a well 125 feet deep, 30 feet of which was filled with water. It was dug many years before, and was not in use. It was covered with boards lying flat a little above the natural surface of the earth. By reason of age and decay, they had become weak and insufficient to support the plaintiff's weight. Plaintiff did not know of the existence of the well, defendant did not inform him thereof, and the appearance of the boards did not indicate to him that there was a well or excavation beneath them. He had been working about the premises for some time. The ground around and near the well had been spaded the day before the accident. The plaintiff had been directed to rake and pulverize the soil turned up by the spading. On the morning of the injury, he walked 2½ miles to the nursery, and got his rake out of the toolhouse in the nursery to go to work. He had been in the habit, while at work, of taking off his coat and hanging it upon a standpipe near this well, and also in the habit of obtaining water to drink from said standpipe. Feeling thirsty from his walk, he went to the standpipe to get a drink and hang his coat thereon. In doing so, the covering of this well lay directly in his way, and he walked over it, whereupon it broke with his weight, and he fell into the well. It is alleged that the defendant was negligent in permitting the boards to remain upon the well until they had become weak from decay, and in failing to inform the plaintiff of the existence of the well and the condition of the boards.

The plaintiff's testimony is to the effect that he did not know of the existence of the well until he fell into it, that the defendant did not tell him of it, and that there was nothing in the appearance of the boards to indicate that there was a well under them; that it was about five or six inches above the level of the ground and all level; and that the boards looked all right when he stepped upon them. He had seen them the day before, but had paid no particular attention to them. There was other testimony to the effect that the boards were supported by stringers or crosspieces, which were in a condition of dry rot on the underside, and that from an inspection of the upper surface they did not look decayed. There was a trapdoor, about two feet square, framed in the middle of the covering and flush with the other boards, fastened with hinges and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

latch, but the plaintiff did not observe it. There was some other evidence contrary to some of these facts, and tending to show that the platform was raised somewhat higher than the plaintiff's testimony indicated.

[1, 2] We see nothing here to compel the conclusion that the plaintiff failed to use due care in walking across the covering. It was obviously laid so that persons walking across it would not fall into the well. Under the circumstances, it was for the jury to determine whether or not a reasonably prudent man would walk across it or around it. The decision of the jury in such a case can be vacated only by the trial court on motion for a new trial. On appeal, it is conclusive.

[3] 2. There is no just basis for the claim that the plaintiff was not engaged in the service for which he was employed while walking over the boards. He had reached the place of work and the time was at hand; he had obtained the rake from the toolhouse, and was proceeding to hang his coat at the usual place, when the accident occurred. He was clearly within the general scope of his employment, was going where he had a right to go, and where he might reasonably be expected to go, if occasion arose. He was, therefore, not a mere licensee or trespasser, and he did not assume the risk of injury from the rotten condition of the boards, of which he was unaware.

[4-6] 3. The court instructed the jury that the duty of the employer to furnish the employé a safe place in which to work, and see to it that there are no concealed dangers to the employé, requires the employer to "make reasonable inspection of the premises at the time he sets the servant to work"; that "the duty of inspection must be continuously fulfilled and positively performed." This is assigned as error. We do not agree to the proposition that in a case such as this, where the defect arises from the gradual processes of decay, the employer is required to examine the condition of the boards and the supporting timbers every day. Reasonable care would scarcely demand such diligence. If the question of the exact time of inspection was at all important, or could have had any effect upon the verdict, and the instruction is to be so understood, a reversal would be necessary. But the defendant's testimony was that the covering had been on the well 11 years, and that he had examined it but once, about 4 years before the accident. He did not say or claim that the examination then was for the purpose of discovering decay. The failure to examine such a covering over a well of that depth for that length of time, if the well were situated where persons might be expected to go upon it, would be unreasonable and negligent, under the circumstances of this case. The instruction could not have prejudiced the defendant.

[7] 4. There was no error in the instruc-

tion that if the defect in the platform was secret and unknown, and was incident to ordinary wear and tear, and could not have been discovered by reasonable inspection, the jury should find for the defendant. The supposed error was in the insertion of the phrase "and could not have been discovered by a reasonably careful inspection." The duty of a master to his servant requires him to make a reasonably careful inspection at reasonable intervals to learn of dangers, not apparent to the eye, to which the servant may be exposed while engaged at the place where he is directed to work. Each case of this sort depends largely upon its own peculiar circumstances. This well was very deep. A fall into it would be attended with great danger and probably cause death. The water below would tend to keep the under-surface of the boards damp, and this would cause decay. They had been in place 11 years without any careful inspection. Under these circumstances, a reasonably careful man would not have been content to allow them to remain without some inspection, or something more than a passing glance at the upper surface. It being defendant's duty, therefore, to make a reasonably careful inspection and discover the defects reasonably to be apprehended after such a lapse of time, but not obvious without inspection, the qualification was a proper one. The decision in *Baddeley v. Shea*, 114 Cal. 1, 45 Pac. 990, 33 L. R. A. 747, 55 Am. St. Rep. 56, is not in conflict with this conclusion. The circumstances were different. The front steps there involved had not been in place so long; they were in daily use, and the danger to be apprehended from their breaking down would not be so great.

[8] 5. Another instruction excepted to is as follows: "The court instructs you that, if an employé in the discharge of his duties voluntarily takes a place which he is not required to take, he assumes the risk which may attach to such place which is obvious to him by the use of ordinary care, and which is greater than the risk attached to the place he may have taken by reason of his employment." This instruction was asked by the defendant, except the phrase "which is obvious to him by the use of ordinary care," the insertion of which clause is claimed to be error. If the plaintiff had been going beyond the scope of his duty, the insertion of this clause may have been unwarranted by the law. As to this, we need not decide. As we have seen, he was engaged in the work at which he was set, and in that case he would only be required to use ordinary care to avoid danger. The instruction, as applied to this case, was correct.

[9] 6. A witness who had looked into the well two weeks before the accident was asked the question: "Did you notice anything rotten about the wood or covering at that time?" An objection that this was



Incompetent, irrelevant, and immaterial was sustained. Counsel are frequently too much given to such objections, and the trial courts are too ready to sustain them. They interrupt the orderly introduction of the evidence and produce no benefit. The question was proper, though unimportant. The witness had at least glanced at the covering on its undersurface at that time. If that glance, although he was not looking for decay, had not caused him to notice such decay, the fact would have been evidence in favor of the defendant that no decay was obvious. But in his subsequent testimony he said that he saw nothing peculiar about these boards. In substance, therefore, he did answer the question, and the ruling caused no injury.

These appear to be all the points urged in favor of reversal. We find no prejudicial error in the record.

The judgment and order are affirmed.

We concur: ANGELLOTTI, J.; SLOSS, J.

### FLORA v. BIMINI WATER CO.

(L.A. 2,748.)

(Supreme Court of California. Dec. 7, 1911.)

#### 1. THEATERS AND SHOWS (§ 6\*)—INJURIES—FINDINGS—CONSTRUCTION.

In an action for the alleged drowning of plaintiff's intestate in defendant's natatorium, the court found for defendant on the averment of negligence. Two other findings as to contributory negligence, however, recited that "if plaintiff sustained the injuries set forth in the complaint the same were not caused wholly and entirely by his fault and negligence, and without any fault, carelessness or negligence on defendant's part," and that the injuries were not caused without any fault, carelessness, or negligence on the part of defendant. *Held* that, though as a mere matter of grammatical construction such findings indicated that the injuries were caused by defendant's negligence, the findings were not to be so construed under the rule that all the findings are to be read as a whole and so interpreted as to uphold the judgment.

[Ed. Note.—For other cases, see *Theaters and Shows*, Dec. Dig. § 6.\*]

#### 2. THEATERS AND SHOWS (§ 6\*)—DANGEROUS PREMISES—NATATORIUM—GUARDS.

In an action for the drowning of plaintiff's intestate in defendant's natatorium, evidence *held* to sustain a finding that defendant was not negligent in failing to provide sufficient life guards, experienced in life saving to rescue persons exposed to drowning.

[Ed. Note.—For other cases, see *Theaters and Shows*, Dec. Dig. § 6.\*]

Department 1. Appeal from Superior Court, Los Angeles County; W. R. Hervey, Judge.

Action by Mary Flora against the Bimini Water Company. Judgment for defendant, and plaintiff appeals. Affirmed.

E. B. Drake, for appellant. John Murray Marshall and Wilbur Bassett, for respondent.

SLOSS, J. This action was brought to recover damages for the death of plaintiff's 12 year old son, Veach Criswell. The defendant is the proprietor of a bathing establishment in the city of Los Angeles. On February 26, 1909, young Criswell visited said establishment, and, entering a swimming tank or plunge therein, was drowned. The complaint alleges that his death was due to the negligent failure of defendant "to provide a person or persons experienced in life-saving to be then and there present for the purpose of rescuing the deceased, or anyone else, who was liable then and there to drown." It further alleged that defendant had knowledge of the dangerous character of the plunge when used without a proper life guard stationed at or near the place where the boy was drowned, but that, notwithstanding such knowledge it negligently failed to provide any such life guard. The answer denied the allegations of negligence, and set up, as an affirmative defense, that plaintiff was guilty of contributory negligence, and that if he sustained any of the injuries set forth in said complaint, "the same were caused wholly and entirely by the fault, carelessness, and negligence of plaintiff, and without any fault, carelessness or negligence upon the part of this defendant." The contributory negligence of the infant himself is alleged in similar terms.

The cause was tried by the court without a jury. The findings were against the plaintiff on her averments of negligence, and judgment went in favor of the defendant. The plaintiff appeals from the judgment, bringing up the evidence by means of a bill of exceptions.

[1] The principal contention on this appeal is that the evidence is insufficient to sustain the findings negating negligence on the part of the defendant. Before considering this question, we may, however, briefly notice the claim of appellant that the findings themselves do not support the judgment. This claim is based upon the language used by the court in making its findings in response to the issue of contributory negligence. It found, in finding No. 10, that the plaintiff was not guilty of contributory negligence, and that "if the plaintiff sustained the injuries set forth in said complaint, the same were not caused wholly and entirely by the fault, carelessness, and negligence of plaintiff and without any fault, carelessness, and negligence on the part of the defendant." A similar finding (No. 11) was made with respect to the plea of contributory negligence on the part of Veach Criswell himself. It is said that these findings declare that the injuries were not caused "without any fault, carelessness, or negligence on the part of the defendant"; that they therefore find, in effect, that the injuries were caused by the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

defendant's negligence, and that they are so directly in conflict with the findings in favor of defendant on the issue of its negligence that the judgment cannot be supported. But it seems clear that findings 10 and 11 were not intended to declare, as a fact found, that the defendant had been guilty of negligence. As a mere matter of grammatical construction they may bear such meaning. But the findings of the court are to be read as a whole, and are, if possible, to be so interpreted as to uphold the judgment entered upon them. *Krasky v. Wollpert*, 134 Cal. 338, 66 Pac. 309; *Paine v. San B. V. T. Co.*, 143 Cal. 654, 77 Pac. 659. Findings 10 and 11 were evidently intended to meet the issue of contributory negligence, and that alone. They follow the exact form of the defenses averring such contributory negligence, and traverse every element of that defense. The court might have stopped with a finding that the injuries were not caused by the negligence of the plaintiff or of Veach Criswell. In going on and finding, further, that such injuries were not caused "without the fault, carelessness, or negligence of the defendant," it sought to find on everything stated in the attempted defense, and it inadvertently used language which was not entirely appropriate to convey the idea in its mind. But it certainly cannot have intended, in finding against the plea of contributory negligence, to make a finding which should be directly contradictory to what it had already found on the main issue of defendant's negligence. Reading the findings as thus suggested, they may readily be harmonized, and in such manner as to give effect to the apparent intention of the court making them.

[2] On the question of the sufficiency of the evidence, the only question is whether there was enough to justify the finding that the defendant provided and caused to be present persons experienced in life-saving for the purpose of rescuing any person who was liable to drown; and did provide proper life guards at said time and place. We need not enter into any discussion concerning the rules of law governing the duty of one maintaining a swimming or bathing establishment frequented by the public. Since the court found in this case that the defendant did have present persons experienced in life-saving and did provide proper life guards, it is immaterial whether it be said that the duty of furnishing such protection arises, as matter of law, or that the necessity for such provision is, in each case, a question of fact for the trial court or jury. See *Larkin v. Saltair Beach Co.*, 30 Utah, 86, 83 Pac. 686, 3 L. R. A. (N. S.) 982, 116 Am. St. Rep. 818; *Brotherton v. Manhattan Beach Imp. Co.*, 48 Neb. 563, 67 N. W. 479, 33 L. R. A. 598, 58 Am. St. Rep. 709, s. c. 50 Neb. 214, 69 N. W. 757.

The defendant's establishment was in a

building containing three pools or tanks. Two of these were situated side by side, running for a distance of 92 feet along the longer axis of the building. They were separated by a tile wall 21 inches in width. One of them, the one in which the plaintiff's son met his death, was 40 feet wide, the other 30. The first was graded in depth, beginning with 3 feet of water at one end, and increasing to 7 at the other. The third pool ran across the building, opposite the ends of the two first mentioned. It was 70 feet in length, and was separated from the others by a cement deck 8 feet wide. The deep water in the first pool was at the end farthest removed from this deck. The depth of the tank at various points was plainly indicated by signs painted on the sides.

The accident resulting in Criswell's death occurred at about 8 o'clock in the evening. There were some 25 or 30 bathers in the tank at the time. Criswell had gone to the baths with another boy, Harold Rampe. Both, it appears, were able to swim. Criswell jumped in at the deep end. He failed to rise above the surface. Rampe, observing this, dove in and attempted a rescue. Falling, he got out of the pool, and ran to the cement deck at the other end, where he found a life guard, upon whom he called for help. The guard at once ran (or "trotted") along the dividing wall of the two tanks toward the scene of the trouble. When he reached a point opposite the spot where the boy had sunk, having taken, as he said, about 15 seconds to get there, the body had already been taken out of the water by other bathers. Every possible effort to resuscitate the boy was made, but in vain. Rampe testified that he had repeatedly shouted for help while he was in the water with the drowning boy, but there was ample evidence to justify the court below in discrediting this statement. So, too, the testimony was such as to warrant the conclusion that any struggle on the part of either boy took place under the surface of the water.

The life guard who responded to the call for help was an expert swimmer and life-saver. He was employed at the baths as a teacher of swimming, and it was his duty to act as life guard. He was so acting on the evening in question, and had taken his station on the deck opposite the shallow end of the first pool, at a point from which he could watch the three pools, and he was watching them. At the moment of the drowning, he was facing in such manner that his side was turned toward the tank in which the boys were. He heard no cry for help, and observed no struggle in the water. He testified that, from the point at which he was standing, he could not have seen Criswell struggling below the surface. The first intimation of trouble came to him with the appeal of the other boy for help. There were other employes, stationed at various points about the tank. Three of

them were women, who had various duties to perform, but each had instructions to watch the pool. One of them, who testified that she was about 30 feet from the place of drowning, had been trained in the use of the life buoys and life poles which were at hand for use near the deep water. A foreman was also on duty watching the pool. At the time of the occurrence in question he was with the swimming teacher.

On this state of facts there is no foundation for the claim that the finding that the defendant had not been guilty of negligence was unsustained by the evidence. The showing was that a rather elaborate and complete system for the vigilant supervision of the pools had been established, and there was nothing to compel the inference that the persons charged with the duty of watching the pools were not giving proper attention to this duty. The mere fact that a drowning occurred, regrettable though it be, is not, of course, conclusive proof of negligence. Nor can it be said that the defendant was, as matter of law, bound to have a guard stationed in immediate proximity to the deep water end of the pool. It was possible that bathers at other points might get into positions of danger, and it was for the court below to determine, under all the facts, whether the arrangements made were reasonably adapted to the end of protecting the defendant's patrons, and were such as an ordinarily prudent person, situated as defendant was, would have made.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

#### STEIN v. LEEMAN. (Sac. 1,863.)

(Supreme Court of California. Dec. 8, 1911.)

##### 1. INTEREST (§ 50\*)—EFFECT OF TENDER.

On specific performance of a contract to convey, the purchaser should not be required to pay interest from the date of a refused tender of payment.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 114; Dec. Dig. § 50.\*]

##### 2. APPEAL AND ERROR (§ 1177\*)—REVERSAL—EFFECT.

Reversal of a judgment for plaintiff and an order refusing a new trial, remanded the cause to the lower court for new trial on all the issues made by the pleadings, judgment for defendant without trial on going down of remittitur being improper.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4597-4620; Dec. Dig. § 1177.\*]

##### 3. ESTOPPEL (§ 68\*)—CLAIM IN JUDICIAL PROCEEDING.

One holding an option to purchase an undivided half interest in land at \$4 an acre, by claiming on a former trial of a suit for specific performance, that the option was an offer to sell the vendor's interest at \$2 an acre and that a tender made in the language of the option was a tender of that amount, was not estopped to claim on a subsequent trial, and after the Supreme Court decided on appeal

that the price was \$4 an acre and not \$2 as found by the trial court, to present his offer as a sufficient tender at \$4 an acre and as an acceptance of the option; he not having been put in default by any demand by the vendor for payment.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.\*]

##### 4. ESTOPPEL (§ 68\*)—EQUITABLE ESTOPPEL—ESSENTIALS.

An equitable estoppel is not raised by conduct of one party to a suit unless, by reason thereof, the other party has been so placed as to make it unjust to him to allow the first party to change position.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.\*]

##### 5. ESTOPPEL (§ 68\*)—CLAIM IN JUDICIAL PROCEEDING.

One suing on a contract can claim a construction unjustly favorable to him and ask for a larger judgment than he is entitled to without being estopped to claim his lawful right before the cause is determined, if the other party will not be prejudiced by the change of claim.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.\*]

##### 6. ESTOPPEL (§§ 54, 58\*)—ESSENTIALS—PREJUDICE.

To constitute estoppel, the condition caused by the conduct of him to be estopped, must be such that the other party will be prejudiced, if the first party is permitted to pursue another course, and claimant of the estoppel must himself have been ignorant of the truth of the matter or of the extent of his rights concerning the same.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 128, 144; Dec. Dig. §§ 54, 58.\*]

##### 7. VENDOR AND PURCHASER (§ 170\*)—TENDER OF PRICE—SUFFICIENCY.

Under Civ. Code, § 1489, permitting a tender to be made at a creditor's residence if he evades the debtor, where a vendor evades the purchaser to prevent a tender of performance, the tender may be made at the vendor's residence.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 844; Dec. Dig. § 170.\*]

##### 8. VENDOR AND PURCHASER (§ 170\*)—TENDER—EVASION—EVIDENCE—SUFFICIENCY.

Evidence held to show evasion by the vendor under a contract to convey, of a tender of performance by the purchaser, permitting a tender at the vendor's residence under Civ. Code, § 1489.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 170.\*]

##### 9. VENDOR AND PURCHASER (§ 18\*)—OPTION—CONSIDERATION—SUFFICIENCY.

An agreement by the grantee of an option to purchase land to bear a share of the expense of farming the land during the term of the option is sufficient consideration to support the option.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.\*]

##### 10. VENDOR AND PURCHASER (§ 18\*)—OPTION—EXTENSION—CONSIDERATION—SUFFICIENCY.

Under Civ. Code, § 1605, making any benefit to which one is not lawfully entitled, sufficient consideration for a promise, an agreement to extend an option to purchase land, is sustained by the grantee extending the time for settlement by the grantor of an account arising under the original contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 23; Dec. Dig. § 18.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

In Bank. Appeal from Superior Court, Madero County; J. J. Trabucco, Judge.

Action by M. P. Stein against Letitia A. Leeman, administratrix of the estate of J. F. Archibald. From a judgment for plaintiff and from an order denying a new trial, defendant appeals. Affirmed in department, and, on rehearing, affirmed by the Supreme Court.

Robert L. Hargrove and Frank H. Farrar, for appellant. Nicol & Orr and Francis A. Fee (Bert Schlesinger, of counsel), for respondent.

**PER CURIAM.** A re-examination of the questions involved in this case convinces the court of the soundness of the opinion and judgment rendered in department.

[1] To the contention, for the first time advanced in the petition for a rehearing, that Stein should be compelled to pay interest from the date of his tender, a complete answer is found in *Ferrea v. Tubbs*, 125 Cal. 687, 58 Pac. 308, and *Wadleigh v. Phelps*, 149 Cal. 642, 87 Pac. 93. For the reasons given in the department opinion, hereto appended, the judgment and order are affirmed.

"Shaw, J.: This is an appeal from the judgment, and from an order denying defendant's motion for a new trial.

[2] "The cause was heretofore considered by this court upon an appeal by the defendant from a judgment given upon a previous trial and from an order denying defendant's motion for a new trial. The judgment and order then appealed from were reversed. *Stein v. Archibald*, 151 Cal. 220, 90 Pac. 536. After the first trial J. F. Archibald, the original defendant, died, and the present defendant, as administratrix of his estate, was substituted. The effect of the reversal was that the cause was remanded to the lower court for a new trial of all the issues made by the pleadings. There is no force in the defendant's contention that the decision of that appeal by this court required the lower court, upon the going down of the remittitur, to enter judgment for the defendant without trial, and no merit in the motion of defendant to enter such judgment. *Davis v. Le Mesnager*, 155 Cal. 520, 101 Pac. 910. Upon the new trial which took place judgment was again given for plaintiff.

[3] "The action was to compel specific performance of an alleged agreement to sell and convey real estate, and for an accounting of the income therefrom. The agreement is set forth in the opinion upon the former appeal and it is not necessary to repeat it in full. It covered 9,640 acres of land. Its date was October 9, 1897. By its terms Archibald agreed to sell to Stein, 'an undivided one-half interest' in the tract, at any time within three years from its date, if, within that time, Stein should pay him '\$4 per acre for the undivided one-half of all of said described land.' The time was after-

wards extended to October 9, 1902. Upon the first trial the lower court construed the above quoted language to mean that Stein was to pay only at the rate of \$2 for the entire area of land, which it then found to be only 9,640 acres. It adjudged performance by Archibald upon payment to him of \$19,280. The only point decided by this court, upon the appeal from that judgment, was that this interpretation was erroneous, and that Stein was bound to pay, in performance of the contract, at the rate of \$4 per acre for the entire area, for an undivided one-half interest therein.

"Before beginning the action Stein made a written offer of performance, following therein the exact language of the agreement with respect to the price, but not stating the sum total. It stated, 'You will please take notice that I am now able, ready, and willing and hereby offer to pay you the sum of \$4 per acre for an undivided one-half of all those certain lands,' describing them, upon the execution of a deed thereof, and it demanded a conveyance of said interest in said lands. The complaint, in substantially the same language, averred the making of the offer and the ability and readiness of plaintiff to pay upon the making of the proper deed. It did not allege the total sum or otherwise state the price of the land. The answer denied that the plaintiff had at any time offered to pay \$4 per acre, or any other sum, for a conveyance of the land, or that plaintiff was able or ready to pay said sum, or any sum for such conveyance. Upon the first trial, the amount of money called for by the contract and covered by the offer was not mentioned or discussed. The written offer was produced as evidence and the plaintiff then in open court declared that he offered to 'pay to the defendant the sum of \$4 per acre for an undivided one-half of the land,' and to bring the money into court; but no computation of the amount was made or demanded, nor was anything said to indicate whether plaintiff thereby intended to offer to pay \$4 per acre for half the area, or \$4 per acre for the entire area. The only place in the record of that trial in which the total price of the land appears to have been mentioned or considered was in the conclusions of law and judgment filed and rendered on February 8, 1905, each of which declared that the plaintiff was entitled to a deed upon payment of \$19,280.

"Thereafter the plaintiff insisted that this sum was the price fixed by the contract, and in opposing the appeal he claimed the full benefit of the judgment upon that construction until it was finally reversed and the cause remanded for a new trial. Upon the last trial plaintiff again relied upon the original written offer, presenting it at that time as a sufficient tender of the entire sum of \$38,720, and he then formally offered to bring that sum of money, naming it, into court. The court, upon the last trial, found

that the area was 9,680 acres. The appellant claims that the plaintiff, by his conduct, while obtaining the first judgment and upon the appeal therefrom, in claiming that the agreement was an offer to sell the undivided one-half of the land for \$19,360 and that the written offer was a tender of that amount, only, was estopped, on the second trial, to present the offer as a tender of \$38,720, or to assert that it was sufficient as an offer of performance, or as an acceptance of the option.

"In the opinion upon the former appeal it was said that the language of the option referred to the area and not to the interest, and that it called for the payment of \$38,720 as the price of the undivided one-half interest to be sold. If the option had this legal effect, it necessarily follows that the several offers to perform made in the written tender, repeated in the complaint, and again stated in court, being couched in the same language, would have the same legal effect. Therefore the tender was sufficient to convert the option into an enforceable agreement to buy and sell, and the complaint stated a good cause of action for specific performance. It does not appear that the defendant, at any time prior to the conclusion of the first trial and the filing of the findings and conclusions of law, made any objection to the language of the offer, or suggested that the sum offered was less than the price agreed to or that the offer did not specify the total amount of money offered, or that it was in any wise uncertain or ambiguous. Upon the written offer, according to its true meaning, the plaintiff was entitled to a decree of specific performance, at the time the cause was submitted upon the first trial, upon payment by him of \$38,720. No demand of that sum, or offer to accept it, had been made by the defendant to put the plaintiff in default, and the plaintiff's offer, by its legal effect, was a good offer of performance for that amount. The plaintiff did not succeed in maintaining the judgment declaring him entitled to receive a conveyance upon the payment of half that sum. He failed in that contention and he gained nothing thereby. Neither did the defendant lose anything by reason thereof. His position was not changed for the worse by the erroneous judgment or by the unsuccessful effort of plaintiff to maintain the same upon the appeal. It is true that he incurred costs in prosecuting that appeal, but that outlay was recovered by the judgment. Defendant had the right, at any time before or after that decision, to offer a deed and demand the full sum of \$38,720 as a condition of its delivery, and if, upon such demand, the plaintiff had failed to pay, he would have been in default, and the contract would have been at an end thenceforth. Defendant did not see fit to make any such offer or demand. His situation is substantially the same now as it was prior to the first judgment.

[4] "The case lacks some of the essential elements of an estoppel. An equitable estoppel is not raised by the conduct of one party in the course of a lawsuit, unless, by reason thereof, the other party has done some act or has been placed in a position that would render it unjust to him to allow the first party to change his own position in regard to the matter. Speaking of estoppels in the course of proceedings in court, Mr. Bigelow says: 'Where, then, no wrong would be done to the court or to the other parties to a cause by permitting a change of position, a change should in principle and will in fact be allowed.' Bigelow on Estoppel, 723.

[5] "A party suing upon a contract has a right to claim a construction thereof more favorable to him than it will bear and ask for a larger judgment than he is entitled to, and if he is refused such relief before the cause is determined, and the other party will not be prejudiced by a change of plaintiff's claim, plaintiff will still be at liberty to contend for that which is his lawful right.

[6] "In order to constitute an estoppel, the condition brought about by the conduct of the party to be estopped must be such that the other party will be injured or placed in a worse position if the first party is allowed to pursue another course or assert the fact to be contrary to his first statement, and the party claiming the estoppel must himself have been ignorant of the truth of the matter, or of the extent of his rights concerning the same. *Boggs v. Merced M. Co.*, 14 Cal. 368; *Davis v. Davis*, 26 Cal. 40, 85 Am. Dec. 157; *Dean v. Parker*, 88 Cal. 287, 26 Pac. 91. These elements of estoppel, as we have seen, did not exist. The defendant may still preserve the rights he has under the contract, notwithstanding the unfounded claim of the plaintiff as to the price. The defendant was not at any time during the litigation ignorant of the terms of the contract, or of his rights under it. He was, in fact, insisting that the option had expired, and was unwilling to sell at the price he agreed to take by the terms of the option, namely, \$38,720. We hold that the plaintiff is not estopped to insist now that his offer of performance was an offer to pay the true amount fixed by the contract as construed upon the former appeal.

[7, 8] "The appellant further contends that the written offer was insufficient because it was not made to Archibald in person. Stein resided at Stockton; Archibald resided near Madera on the land. On September 20, 1902, Stein sent a letter by registered mail addressed to Archibald at Madera, which was his post office address, stating therein his intention to settle with Archibald, and close the deal. Archibald was in Madera on that day, and again on September 25th. The letter was delivered to his sister, on September 24th, and Archibald did not receive it until October 18th. About the 1st of October,

Archibald left his house in a wagon and traveled to Alameda county, and from thence to Santa Cruz and Watsonville, staying but a short time in one place, and remained away from Madera until October 13th. This and other evidence, which we need not state in detail, shows clearly that he was endeavoring to evade the making of any offer by Stein. On the 6th of October, 1902, Stein went to Madera and made fruitless inquiries there for Archibald. From thence he went to Archibald's residence and inquired of his sister as to his whereabouts, and was informed that he was away from his home and that she did not know where he was. Thereupon, at Archibald's said residence, Stein delivered to her for Archibald the written tender in question. He also deposited a copy thereof in the post office at Madera, addressed to Archibald. The action was begun on October 8, 1902. These facts we think are sufficient to show that the tender was properly made. 'An offer of performance must be made to the creditor, \* \* \* if such creditor is present at the place where the offer may be made; and if not, wherever the creditor may be found.' Civ. Code, § 1488. If this were the only provision of law upon the subject, the tender might be insufficient, but section 1489 of the Civil Code is as follows:

"In the absence of an express provision to the contrary an offer of performance may be made, at the option of the debtor:

"(1) At any place appointed by the creditor; or,

"(2) Wherever the person to whom the offer ought to be made can be found; or,

"(3) If such person cannot, with reasonable diligence, be found within this state, and within a reasonable distance from his residence or place of business, or if he evades the debtor, then at his residence or place of business, if the same can, with reasonable diligence, be found within the state; or,

"(4) If this cannot be done, then at any place within this state.'

"It appears from this provision that where the seller of land evades the buyer for the purpose of preventing a due offer of performance, the offer may be made at his place of residence. As we have said, the evidence shows that Archibald absented himself in order to evade the making of such offer. In that event it could have been made at his residence, and as it was made at that place on the 6th of October, 1902, two days before the suit was begun, the tender was complete.

[9, 10] "Appellant also claims that the agreement is merely an option and that it was without any consideration. This contention cannot be maintained. It is true that the agreement was a mere option, but a sufficient consideration therefor appears from the terms of the instrument itself. It recites

that 'such party of the first part, in consideration of the agreements hereinafter expressed, to be performed by the party of the second part' (Stein), agrees to sell and convey the land, within three years. Another clause in the agreement provides that, during the terms of years therein specified, Stein would bear equally with Archibald all the expenses incurred in farming the land, and that Stein was to have one-half of the gross income arising therefrom. This agreement of Stein to assist in the farming operation was a sufficient consideration for the option. It was further contended that the two years' extension of the term of the agreement was without consideration. This claim also is without foundation. There is evidence to show that Stein and Archibald had farmed the land together for the first two years of the term of the contract, that Stein had paid out about \$5,000 to assist therein, that Archibald had received and retained all the income therefrom, and that the account of these transactions required a settlement before it could be ascertained how much Stein should pay if he desired to purchase the land. The original contract expired on October 9, 1900. On that day Stein told Archibald that he was ready to settle the account and find out what was owing, and wanted to pay him whatever was due and receive a deed for half the land. Archibald then said he was not ready to make a settlement, but would try to get up the account as soon as possible, and upon Stein's objection that the contract was about to expire, Archibald said that he would renew it, and thereupon he executed a written contract extending the time for two years. Any benefit received by the maker of a promise to which he is not lawfully entitled is a sufficient consideration for its execution. Civ. Code, § 1605. Archibald by this promise obtained an extension of the time within which to get his account ready. The benefit may have been trifling, but he was not otherwise lawfully entitled to it, and it was sufficient to sustain the contract, as a matter of law. *Smith v. Bangham*, 156 Cal. 364, 104 Pac. 689, 28 L. R. A. (N. S.) 522.

"These comprise all the points which we deem it necessary to discuss."

BEATTY, C. J., does not participate in the foregoing decision.

**KRISTE et al. v. INTERNATIONAL SAVINGS & EXCHANGE BANK.**  
(Civ. 967.)

(District Court of Appeal, Second District, California. Oct. 24, 1911.)

1. EVIDENCE (§ 340\*) — EVIDENCE OF JUDGMENT AS DEFENSE—PAROL EVIDENCE.

Code Civ. Proc. § 911, prescribes the entries to be made in a justice's docket, includ-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ing the statement of the title of the action, the amount of the claim, a minute of the pleadings, and the judgment of the court, and section 912 makes such entries or a certified transcript thereof prima facie evidence of the facts stated. *Held*, that defendant, a banking corporation, in an action to recover a deposit, was entitled to introduce in evidence the docket record of a justice of the peace showing a judgment against plaintiff, and an execution against defendant, as garnishee; defendant claiming that the amount due plaintiff was paid to the constable in satisfaction of such execution.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 340.\*]

## 2. JUSTICES OF THE PEACE (§ 58\*)—JURISDICTION.

Until proof of service of summons, the record of a justice's docket not showing summons does not furnish complete proof in support of the judgment rendered.

[Ed. Note.—For other cases, see Justices of the Peace, Dec. Dig. § 58.\*]

## 3. EVIDENCE (§ 178\*)—BEST EVIDENCE—LOSS OF RECORD.

Where it was shown, in an action where defendant had set up a payment of a former judgment against plaintiffs as a defense, that the summons in the justice court had been lost, it was competent to prove by the justice's clerk that summons was issued and served.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 580-594; Dec. Dig. § 178.\*]

## 4. NAMES (§ 16\*)—IDEM SONANS.

The surnames "Christe" and "Prkachin" as defendants against whom judgment was entered in a justice's court are idem sonans with the surnames "Kriste" and "Perkacin" in an action in which the justice's judgment is pleaded as a defense.

[Ed. Note.—For other cases, see Names, Dec. Dig. § 16.\*]

## 5. NAMES (§ 18\*)—IDENTITY OF PARTIES.

Where a justice's judgment against "Christe" and "Prkachin" has been set up as a defense to an action by "Kriste" and "Perkacin," the record of the justice's court becomes prima facie evidence under Code Civ. Proc. § 1963, subd. 25, which presumes identity of persons from identity of names, and, in the absence of evidence to the contrary, a finding that the parties were not identical was unsupported.

[Ed. Note.—For other cases, see Names, Dec. Dig. § 18.\*]

## 6. JUDGMENT (§ 949\*)—PLEADING JUDGMENT AS DEFENSE—ALLEGATIONS.

The allegations in an answer, attempting to set up a judgment against plaintiffs as a defense, "that such proceedings were had thereafter as provided by law, that on the 14th day of March, 1910, judgment was rendered by said justice's court," do not comply with Code Civ. Proc. § 456, which permits a judgment of an inferior court to be pleaded merely as having been "duly given or made."

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1795-1803; Dec. Dig. § 949.\*]

## 7. APPEAL AND ERROR (§ 192\*)—NECESSITY OF OBJECTIONS—DEFECT IN PLEADING.

A defect in a pleading, setting up a judgment of an inferior court as a defense, cannot be raised for the first time on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1221-1225; Dec. Dig. § 192.\*]

## 8. BANKS AND BANKING (§ 171\*)—FAILURE TO COLLECT—NOTICE OF NONPAYMENT—LIABILITY.

Plaintiffs had deposited with defendant bank for collection certain time checks, due thereafter on March 5, 1910, and defendant failed to collect the notes, and gave no notice of nonpayment to plaintiffs until more than a month after the bills were payable, and plaintiffs lost their right to proceed against their indorser and were damaged. Civ. Code, § 3149, provides that, where the holder of a negotiable instrument at the time of its dishonor is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same way as to an indorser. *Held*, in an action for damages for defendant's failure to give seasonable notice of nonpayment, that defendant was liable.

[Ed. Note.—For other cases, see Banks and Banking, Dec. Dig. § 171.\*]

Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by Geo. Kriste and G. Perkacin, co-partners, doing business under the firm name of Geo. Kriste & Company, against the International Savings & Exchange Bank. Judgment for plaintiffs, and defendant appeals. Reversed.

Robert A. Todd, for appellant. Leonard B. Slosson, for respondents.

**JAMES, J.** This action was brought by plaintiffs upon two alleged demands against defendant; the first being to recover the sum of \$306.50, money alleged to have been deposited with defendant bank and which the latter had refused to repay the plaintiffs; the second being for the sum of \$126 as damages alleged to have been suffered by plaintiffs because of the failure of defendant to give seasonable notice to the plaintiffs of the dishonor of certain negotiable instruments in the form of time checks, which had been indorsed to defendant for the purpose of collection. The judgment was in favor of the plaintiffs on both counts of their complaint, and this appeal is taken from that judgment, and also from an order denying a motion for a new trial.

In answering the first cause of action alleged by the plaintiffs, defendant admitted that the sum of money first claimed had been deposited with it in the usual course of its banking business and placed to the credit of plaintiffs. It was then set out by way of special defense that this credit had been levied upon under writ of execution issued on a judgment of the justice's court of Los Angeles township in an action brought by one Brodzevich against the plaintiffs, and that the full amount deposited had been paid to the constable holding such writ, upon his demand. At the trial, for the purpose of establishing this defense, the defendant called the clerk of the justice's court as a witness, who produced the docket of the justice and the files in the justice court action. The docket record was then offered in evidence;

but upon a general objection being made by plaintiffs that this offered record was incompetent, irrelevant, and immaterial, the court refused to allow the evidence to be received. The bill of exceptions shows that, after the offer had been made, the trial judge examined the record. The bill of exceptions then proceeds: "The Court: I find no summons here. Defendant's Attorney: The summons is not there, Judge; it's gone. The Court: There is a complaint and execution. Thereupon the court sustained the plaintiffs' objection to the question aforesaid propounded to the witness and as corrected by the court, to wit: 'Q. Now, you have the docket. Will you please read the court the docket in the case?' And refused to permit the justice's docket to be introduced and read in evidence." The witness was allowed to testify that he knew that a summons in the justice court case had been returned, and that since its return it had been lost; that he had made a diligent search, but could not find it. This witness was asked several questions to which objections were made and sustained by the court. Among these questions was the following: "Now, Mr. Clerk, what day was that summons issued?" The court, after sustaining an objection to this question, remarked: "If you are going to prove a lost summons, you will have to prove its contents by somebody who saw it and remembers its contents." Counsel for defendant then proceeded with the following questions: "Well, do you know whether on the 7th day of March of this year, in the case of Mike Brodzevich against George Christe and Prkachin, a summons was issued?" "Do you know what the contents of that summons was, if one was issued?" To each question objection made by the plaintiffs was sustained. The writ of execution as issued on the justice court judgment was allowed in evidence by the trial judge, and, so far as the bill of exceptions shows, this writ was the only document of the files of the justice's court which was permitted to be introduced in evidence, and there was no testimony, other than that stated, which referred to that action. Such was the state of the evidence with reference to the first cause of action when defendant rested, and the plaintiffs offered no testimony of any sort in rebuttal.

[1] If it appeared from the docket record of the justice referred to that the action in which judgment was rendered and the execution mentioned had issued was an action in which the plaintiffs here were defendants, then such record was admissible in evidence. Section 911 of the Code of Civil Procedure prescribes what entries shall be made in a justice's docket, and section 912 of the same Code provides that such entries, or a transcript thereof, certified by the justice, are prima facie evidence of the facts stated. In the entries required to be made in a justice's court docket is a statement of the title of

the action, the amount of the claim, a minute of the pleadings, and the judgment of the court. As a part of its preliminary proof, defendant was entitled to have the docket record received in evidence.

[2] Of course, this record would not furnish complete proof in support of the judgment rendered by the justice until proof had been made of service of summons. *Rowley v. Howard*, 23 Cal. 401; *Fisk v. Mitchell*, 124 Cal. 359, 57 Pac. 149; *Kane v. Desmond*, 63 Cal. 464, and cases therein cited.

[3] It having appeared that the summons in the justice court action had been lost, the justice's clerk was a competent witness by whom to prove the issuance and service thereof. The questions asked of this witness, to which objection was sustained by the court, tended to that end. The witness was asked to state whether he knew that a summons was issued, also what the contents of the summons was; but these questions he was not permitted to answer. In the findings of the court, however, it is determined that an action was brought in the justice's court against Geo. Christe and Geo. Perkochin; that judgment was rendered therein and execution issued; and that the defendant paid to the constable holding the execution, upon his demand, the amount of plaintiffs' deposit. It is further found that the defendants in that action were not the plaintiffs in this suit.

Appellant argues, and very properly, we think, that it having been found by the court in accordance with the allegations of the answer that a judgment was rendered in the justice's court upon which the execution was issued, the further finding of the court that the plaintiffs in this action are not the same as the defendants in the justice court action is not sustained by the evidence.

[4] In the justice's court action the names of the defendants there were spelled "Christe" and "Prkachin," while the true names of plaintiffs were spelled "Kriste" and "Perkacin." These names as so differently spelled were of such similar sound as to make the rule of *idem sonans* clearly applicable. *Donohoe-Kelly Banking Co. v. S. P. Co.*, 138 Cal. 183, 71 Pac. 93, 94 Am. St. Rep. 28.

[5] Identity of persons is presumed from identity of names. Section 1963, Code Civ. Proc. subd. 25. Therefore, the record of the justice's court would have furnished prima facie evidence of the identity of the defendants in that action with the plaintiffs here. As before noted, the plaintiffs did not, on their own behalf, attempt to show that in fact they were not the persons designated as defendants in the action brought in the justice's court. There was, therefore, no sufficient evidence upon which to base the finding made by the trial judge that the identity of the parties was not the same. Counsel for respondents, however, argues that the finding of the court, wherein it is determined



that there was an action and judgment in the justice's court against Christe and Prkachin, is not a sufficient finding that there was a valid judgment there rendered. This argument does not come with much force; but, even though we concede that the finding is not as complete as it might have been upon that subject, the same result must follow when we refer to the rulings of the court made upon the admission of testimony. The defendant did attempt to prove the fact that an action had been brought, resulting in a judgment against the plaintiffs in the justice's court; but all of its offered testimony, both as to the record of the justice showing the proceedings had in the justice's court, and as to the issuance of a summons, was excluded. In our opinion, by these rulings the trial court erred.

[6.7] So far as the record on appeal discloses, no objection was raised in the superior court as to the sufficiency of the answer of the defendant, wherein the judgment of the justice's court upon which the execution hereinbefore referred to was issued, was attempted to be pleaded. It seems to have been treated by all parties and the court as a sufficient statement of the facts therein purporting to be set out. Respondents now for the first time make the objection that this plea was insufficiently alleged; but it is too late for such an objection to be presented. While the allegation appearing in the answer, "that such proceedings were had thereafter as provided by law, that on the 14th day of March, 1910, judgment was rendered by said justice's court," cannot be said to be a compliance with the provisions of section 456 of the Code of Civil Procedure, which permit a judgment of an inferior court to be pleaded merely as having been "duly given or made," still there was not a total absence of averment, and the pleading, as we have stated, was treated by the parties at the trial as being sufficient. That under such conditions advantage cannot be taken of a defect by objection made for the first time in an appellate court is held in the cases of *White v. S. R. & S. Q. R. R. Co.*, 50 Cal. 417; *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 599, 14 Pac. 379; *Ortega v. Cordero*, 88 Cal. 221, 28 Pac. 80; *Sauer v. Eagle Brewing Co.*, 3 Cal. App. 127, 84 Pac. 425.

[8] While it necessarily follows from the conclusions expressed in the foregoing that the judgment must be reversed and a new trial had of the action, brief consideration may be given the questions argued affecting the correctness of the conclusions of the trial court made as to the cause of action which related to the negotiable instruments called time checks which were transferred to defendant for the purpose of collection. On this branch of the case we agree with the determination as made by the trial judge. It appears that the Patillo Contracting Com-

pany drew certain orders, 11 in number, against itself, payable to the persons whose names appeared therein as payees, or their order, and that several of the payees indorsed these time checks over to the plaintiffs, who in turn deposited them with defendant for collection. These time checks were payable at the office of the contracting company on March 5, 1910, and were deposited with the defendant bank prior to that date. Defendant bank failed to secure payment of these orders and gave no notice of nonpayment to plaintiffs until April 6, 1910, more than one month after the several bills became payable. No excuse for the delay in giving notice of dishonor of these negotiable instruments was offered by defendant, except the plea was made that the bank had handled the time checks in the manner it was accustomed to handle such matters; and further it was pleaded in defense that the Patillo Contracting Company had on the 5th day of March, 1910, become insolvent. It was not shown in evidence that plaintiffs had notice of the custom of the bank as to the time of giving notice of nonpayment, or that, by any condition of agreement made with the bank at the time the checks were deposited for collection, plaintiffs excused defendant from the duty of giving prompt notice of nonpayment of such checks. Section 3149, Civil Code, provides that "when the holder of a negotiable instrument, at the time of its dishonor, is a mere agent for the owner, it is sufficient for him to give notice to his principal in the same manner as to an indorser, and his principal may give notice to any other party to be charged, as if he were himself an indorser." Plaintiffs, in order to protect themselves in their right of recourse against their immediate indorser, were required to give notice to the latter promptly upon payment of the checks being refused by the maker, failing in which the indorser would be discharged from liability. Under the facts shown in this case, because of the delay of defendant bank in giving such a notice to the plaintiffs, they lost their right to proceed against their indorser, and were for that reason damaged because of defendant's negligence. We quote from *Bolles' Modern Law of Banking*, p. 573: "In an action on an indorsed note, check, or other instrument whereby, through the bank's negligence, the indorser is discharged, prima facie the owner of the paper has been injured to the amount of the face of it. This rule is founded on the presumption that the indorser was solvent. If the fact is otherwise, this may be shown in reducing the damages." In our opinion, the liability of defendant for the amount claimed in the last cause of action alleged in plaintiffs' complaint was clearly made out by the evidence.

The judgment and order are reversed.

We concur: ALLEN, P. J.; SHAW, J.

## In re JONES' ESTATE.

JONES v. DENROCHE. (Civ. 1,030.)

(District Court of Appeal, First District, California. Oct. 30, 1911. Rehearing Denied by Supreme Court, Dec. 28, 1911.)

## 1. RECORDS (§ 17\*)—RESTORATION.

A court has the right of its own motion to restore its own records.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 28; Dec. Dig. § 17.\*]

## 2. RECORDS (§ 17\*)—RESTORING DESTROYED RECORDS—STATUTORY PROVISIONS.

The sole object of St. 1906, p. 73, providing for the restoration of court records which have been destroyed by conflagration, is to restore the record as it existed, regardless of its regularity or legal effect.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 35; Dec. Dig. § 17.\*]

## 3. RECORDS (§ 17\*)—RESTORING DESTROYED RECORDS—PARTIES ENTITLED TO REMEDY.

A final decree was made following the terms of a will and distributing certain real property to the testator's son as sole heir for the period of his natural life with a disposition on his death, "provided, however, that in case of the death of the son before his wife she should have during her natural life and while she remained his widow, the sum of \$300 per month and one-half of the income given to her children under the will." Thereafter the wife obtained a divorce from the son, and was awarded permanent alimony, and the son thereafter married again, and at his death left a will providing that the divorced wife should receive alimony as agreed. *Held*, that the wife was a party entitled to have the probate records restored under St. 1906, p. 73.

[Ed. Note.—For other cases, see Records, Cent. Dig. § 25; Dec. Dig. § 17.\*]

Appeal from Superior Court, City and County of San Francisco; Thomas F. Graham, Judge.

In the matter of the estate of Simon L. Jones, deceased. Petition by Eugenia J. Jones for the restoration of destroyed records, opposed by Elsie P. Denroche. Judgment for plaintiff, and defendant appeals. Affirmed.

Powell & Dow, for appellant. Charles L. James, for respondent.

KERRIGAN, J. This is an appeal from an order made after final judgment, restoring certain lost and destroyed records.

In 1890 Simon L. Jones died, leaving a will. About a year later, the estate having been duly administered, a final decree of distribution was made therein which, following the terms of the will, distributed certain real property to the son and sole heir of the deceased, Everitt D. Jones, for the period of his natural life, and decreed that upon his death said real property should vest in equal shares in Elsie P. Denroche, the appellant, and Sidney Lloyd Jones, children of Everitt D. Jones, "provided, however, that in case of the death of said Everitt before his wife Eugenia, she should have during her natu-

ral life and while she remained his widow, the sum of three hundred (\$300) dollars per month and one-half of the income given to the children of Everitt under this will." Thereafter, in 1899, in an action which had been instituted by Eugenia, she was granted a final decree of divorce from Everitt, and was awarded \$160 per month permanent alimony. In March, 1907, Everitt, on his deathbed, married Bertha Grace Turner, and a few hours later died, leaving a will, which, among other things, provided that his former wife, Eugenia, should receive during the term of her natural life the sum of \$160 per month as provided in the decree of divorce. In the conflagration of April, 1906, in San Francisco, all the papers and records in the estate of Simon L. Jones were destroyed. Two years later Eugenia Jones filed for the restoration of that record, which petition was opposed by Elsie P. Denroche, principally upon the ground that Eugenia was not a party or person interested in the record sought to be restored within the terms of the statute relating to the restoration of lost or destroyed records. Stat. 1906, p. 73. After full hearing the trial court held with petitioner, and accordingly ordered the records and papers restored.

The appellant argues that the petitioner, having divorced her husband, has no interest in the record, and consequently it should not have been restored at her instance.

We cannot agree with this position. The obvious purpose of the proceeding permitted by the statute in question is to have conclusive evidence of the contents of the record, and thus to dispense with the necessity of resorting to secondary evidence in any litigation that may arise to enforce rights or obligations established by such record, or in other cases where resort to it is usual or necessary. It is perfectly clear, we think, from the provisions of the decree of distribution in the record sought to be restored above recited that the petitioner has such an interest in said record as to entitle her to have it restored. She is directly mentioned in said decree of distribution, and substantial rights given to her under certain contingencies. The evidence introduced by the appellant upon the hearing of the petition in the court below certainly fails to show that the petitioner is a mere interloper, with no possible or debatable interest in the record, in which event only should she be denied the restoration of the record sought. Even if an examination of the authorities would show, as claimed by appellant, that the petitioner having divorced Everitt D. Jones prior to his death, she is not entitled to the provision made for her under the will of Simon L. Jones (upon which question we express no opinion); still that is not a question to be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

determined in a proceeding to restore a record, especially where upon the face of the record itself her interest is undisputed. We think it entirely proper that in such a case the record should be restored, and the parties be put into a position to litigate their differences precisely as if the record had not been destroyed. In the language of the court in the case of *Vail v. Iglehart*, 69 Ill. 332: "The sole object of this proceeding is to restore a record; and we do not conceive that the ends of justice would be promoted by complicating it with other issues."

There is nothing in the case of *Garwood v. Garwood*, 29 Cal. 514, in conflict with this view. In that case in a certain estate a petition for letters of administration by Henrietta M. Garwood was resisted by Joseph Garwood, and, after a hearing it was ordered that the objections to her appointment be held for naught. Thereupon, when the first annual account of the administratrix came up for settlement, Joseph Garwood applied to the court for permission to contest the same, but the court found that he had no interest in the estate, and denied his petition. There the question of interest did not arise, as here, in an independent proceeding; but even in that case, notwithstanding that the superior court had just previously gone fully into the subject of Garwood's interest in the estate, the Supreme Court plainly intimated that it would have been a proper exercise of discretion to have allowed Garwood to contest the account. In that case the views of the court are stated in the syllabus as follows: "However remote or contingent the interest of a person may be who asks to be allowed to contest an administrator's account, his right to contest should not be denied."

[1] Under the circumstances of this case, and in view of the fact that the court had the power of its own motion to restore its own records (34 Cyc. 606), we are at a loss to understand upon what reasonable theory it can be said that the trial court in restoring the record abused its discretion.

[2] The authorities are numerous to the effect that the sole object of statutes like the one here under consideration is to restore the record as it existed, and that as a rule the regularity or legal effect of the record will not be considered. *Kanke v. Herrum*, 48 Iowa, 276; *Whitney v. Jasper Land Co.*, 119 Ala. 497, 500, 24 South. 259; 19 Am. & Eng. Ency. of Law, 558; 34 Cyc. 610. This principle was applied in *Vail v. Iglehart*, 69 Ill. 332, 336, where it was held improper to allow a person opposing a motion to restore a lost record to show that the attorney who confessed the judgment had no power to do so, the court observing that questions affecting the judgment, other than those which appear on the face of the record

sought to be substituted, should not be investigated in such a proceeding. Continuing the court said that the record should be restored substantially as it was, even if voidable, and the other party left to make whatever defenses not appearing from the face of the record that might exist, precisely as he could had the record not been destroyed.

[3] So, in the present case, it appears from the face of the record that the petitioner is a beneficiary under the terms of the will of Simon L. Jones; and under the doctrine of the cases just referred to the record should be restored, and the appellant left to such defenses as she may have just as though the record had not been lost or destroyed.

The order appealed from is affirmed.

We concur: LENNON, P. J.; HALL, J.

# VALENTINE v. GRAND LODGE, A. O. U. W., OF CALIFORNIA.

(Civ. 868.)

(District Court of Appeal, First District, California. Oct. 27, 1911.)

## 1. INSURANCE (§ 756\*)—FRATERNAL INSURANCE—FORFEITURE OF CERTIFICATE.

Where a member of a fraternal benefit society, operated under the lodge system, applied for an indorsement of his certificate as a paid-up certificate pursuant to the laws of the society, and agreed in his application that the failure to pay any amount required by the laws of the society should forfeit all claims under the certificate as provided by the laws of the society, declaring that where a member fails to pay dues within the time specified he shall stand suspended and no action on the part of the lodge or any officer thereof shall be essential to effect his suspension, his failure to pay dues called for by the laws of the society operated as a forfeiture of the certificate without action by the society or subordinate lodge.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1917; Dec. Dig. § 756.\*]

## 2. INSURANCE (§ 756\*)—FRATERNAL INSURANCE—SUSPENSION FROM ORDER—FORFEITURE OF CERTIFICATE.

A member of a fraternal benefit society may forfeit his rights under a certificate without being suspended from the society, and the laws of the society for suspension for nonpayment of dues do not control special provisions of the contract for forfeiture of the certificate for nonpayment of dues.

[Ed. Note.—For other cases, see Insurance, Dec. Dig. § 756.\*]

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Mathilde Valentine against the Grand Lodge of Ancient Order of United Workmen of California. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

D. S. Hirshberg, for appellant. Edmund Tauszky, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

HALL, J. This is an appeal from a judgment in favor of plaintiff and against defendant for the sum of \$1,247.20, being the amount of the principal and interest of a beneficiary certificate issued by defendant to Jacob Valentine in his lifetime, and payable on his death to plaintiff. The appeal comes to this court upon the judgment roll, and the appellant contends that on the facts found the judgment should have been for defendant.

From the facts found it appears, among other things, that defendant is, and for more than 30 years last past has been, a fraternal, charitable, beneficial, and benevolent society, having for its objects, among other things, to pledge the members to the payment of a stipulated sum to such beneficiary as a deceased member may have designated, while living, under such restrictions and upon such conditions as the laws of the order may prescribe. The defendant is a corporation organized as such under the laws of the state of California, and ever since the incorporation of defendant San Francisco Lodge No. 4 has been a subordinate lodge thereof under and within its jurisdiction. Jacob Valentine became a member of the said lodge and the order in 1876, and the usual beneficiary certificate was issued to him, in the sum of \$2,000, payable to L. Meyerstein. In his application for membership in said lodge said Jacob Valentine agreed "that compliance on my part with all the laws, regulations and requirements which are or may be enacted by said order is the express condition upon which I am to be entitled to participate in the beneficiary fund, and to have and enjoy all the other rights, benefits and privileges of said order." Subsequently said Jacob Valentine surrendered this certificate and took out another, in which he designated the plaintiff, Mathilde Valentine, as the person to whom the \$2,000 should be paid at his death. Subsequently, in 1903, defendant adopted certain amendments to its constitution, whereby the assessments to be paid to the beneficiary fund, by members holding beneficiary certificates, were increased, and in and by said amendments members 55 years of age and over were given the option or surrendering their certificates and taking out one of several different sorts of beneficiary certificates. Among these was one designated as option No. 2, under which such members had the right: "To surrender their certificate to be indorsed 'Paid up' for the amount of the reserve, if any (including the deficiency specified in these laws, if any), payable to the designated beneficiaries upon the death of the member, provided he remains in good standing to the time of his death, by the payment of such special assessments, lodge dues (monthly), per capita taxes and extension funds of the order as may be levied." Jacob Valentine, being about 73 years of age, on the 1st of January, 1904, made written ap-

plication for the indorsement of his certificate in accordance with option No. 2.

This application contained the following provision: "And the failure by me to pay interest on any loans heretofore made, or any amounts required of me either by this option or by the laws of the order shall in such case forfeit all of my claims or those of my beneficiary on account of said certificate, the same as is provided by the laws of the said Grand Lodge for failure to pay any assessment for the beneficiary fund." His certificate was thereupon indorsed by the proper officers of defendant as follows: "The amount payable at death as stated in this certificate is hereby reduced to \$1,044.00 and indorsed for such amount (to be paid from the guarantee fund) in accordance with the provisions of indorsed certificate option as defined in option No. 2, and the application therefor of the member herein dated January 1, 1904"—and duly returned to said Valentine.

The laws of the Grand Lodge (section 63) provided that: "The beneficiary certificate of each member who has not paid his assessment to the financier of his lodge, the only authorized officer to receive and receipt for all assessments and dues, on or before the 28th day of each month, shall by the fact of such nonpayment to said financier stand suspended, and no action upon the part of the lodge or any officer thereof shall be required as essential to such suspension." The said Jacob Valentine, under his reduced and indorsed certificate, was not required to pay any assessments until the 1st of October, 1906. In August, 1906, defendant, by certain amendments to its constitution, in terms provided that each holder of a certificate such as was then held by said Jacob Valentine should pay to the financier of the lodge, on or before the 28th day of each month, a special assessment at the rate fixed for the holders of the ordinary certificates, based upon his attained age January 1, 1906, for a \$1,000 beneficiary certificate, increased or diminished in the ratio that the indorsed value of his beneficiary certificate shall bear to the sum of \$1,000. The laws of the order and of the lodge to which said Jacob Valentine belonged required each member to pay into the funds of the lodge the sum of \$1 per month. The constitution of the defendant in this connection provided that: "Any member who neglects or refuses to pay the dues as fixed by the by-laws of the lodge for the period of three months shall not be entitled to vote, nor to the S. A. Password, and shall be disqualified from holding office. Any member neglecting or refusing to pay for the period of six months shall be reported to the lodge by the financier, and the master workman shall, unless otherwise directed by the lodge, thereupon declare such member suspended from the order." The said Jacob Valentine paid none of the so-called special

assessments required by the amendments to the constitution of defendant adopted August, 1906, and paid no lodge dues for any month subsequent to March, 1906. He died November 5, 1906.

The contention of appellant is that all rights under the beneficiary certificate held by Jacob Valentine were lost: (1) By his failure to pay the special assessment required by the amendments to the constitution of August, 1906, to be paid monthly by him; and (2) by his failure to pay the dues for each month subsequent to March, 1906, up to the time of his death.

In answer to the first contention respondent contends that the so-called special assessment was not in fact a special assessment; that, as it was required to be paid monthly, it was in fact and in law a regular assessment, and as such was not such an assessment as could be exacted of said Jacob Valentine under the terms of his contract with defendant, which it is claimed subjected him only to the payment of such "special assessments" \* \* \* as may be levied."

[1] We do not think it necessary to determine this point, for we are of the opinion that all rights under the certificate held by Jacob Valentine were forfeited by his failure to pay lodge dues. Section 63 of the constitution of defendant provided that: "The beneficiary certificate of each member who has not paid his assessment to the financier of his lodge, the only authorized officer to receive and receipt for all assessments and dues; on or before the 28th day of each month, shall by the fact of such nonpayment to said financier stand suspended, and no action upon the part of the lodge or any officer thereof shall be required as essential to such suspension." Under this law of the defendant the failure to pay assessments on or before the designated day ipso facto forfeited all rights under the beneficiary certificate. *Butler v. Grand Lodge of Ancient Order of United Workmen of California*, 146 Cal. 172, 79 Pac. 861; *Marshall v. Grand Lodge, A. O. U. W.*, 133 Cal. 686, 66 Pac. 25; *Carlson v. Supreme Council, etc.*, 115 Cal. 468, 47 Pac. 375, 35 L. R. A. 643. The written application for the reduced certificate made by said Jacob Valentine, and dated January 1, 1905, provided that "the failure by me to pay interest on any loans heretofore made, or any of the amounts required of me either by this option or by the laws of the order, shall in such case forfeit all of my claims or those of my beneficiary on account of said certificate the same as is provided by the laws of the said Grand Lodge for failure to pay any assessment for the beneficiary fund." The certificate was thereupon indorsed and the amount reduced to \$1,044 "in accordance with the provisions of indorsed certificate option as defined in option No. 2, and the application therefor of the member herein named, dated January 1, 1904." The application for the indorsed

certificate was a part of the contract. Both option No. 2 and the laws of the order required the member to pay monthly lodge dues. His contract with the defendant provided that his failure to pay any of the amounts required of him either by option No. 2, or by the laws of the order, should in such case forfeit all his claims or those of his beneficiary on account of his certificate, *the same as is provided by the laws of the said Grand Lodge for failure to pay any assessment for the beneficiary fund*. In other words, the forfeiture occurred upon the failure to make the payments when due, and no action upon the part of the lodge, or of any officer thereof, was required as essential to such suspension. In any aspect of this case the monthly dues for the months of April, May, June, July, August, September, and October had become due and payable before the death of the member, and he had failed and neglected to pay the same or any part thereof, though all were delinquent before he died.

[2] On October 3, 1906, the financier of the lodge reported to the lodge that said Jacob Valentine had neglected to pay dues for the period of six months, and the master workman thereupon declared said Jacob Valentine suspended from the order. The validity of this order of suspension from the order is attacked by respondent for various reasons which we do not deem necessary to discuss, for, as we view the contract involved in this case, the forfeiture of rights under the certificate is quite a different matter from suspension from the order. A member may forfeit his rights under his beneficiary certificate without being suspended from the order. The provisions for suspension from the order for nonpayment of dues do not control the special provisions of the contract hereinbefore adverted to relating to the forfeiture of rights under the beneficiary certificate involved in this case.

The facts of this case differ materially from the facts in the case of *Scheufler v. Grand Lodge, etc.*, 45 Minn. 256, 47 N. W. 799, cited by respondent. In that case there was no provision of the contract making the provisions for forfeiture of rights under the beneficiary certificate applicable to the case of failure to pay dues. The case is not in point.

Under the contract invoked in this case the failure to pay lodge dues operated a forfeiture of rights under the certificate the same as would a failure to pay assessments without any action upon the part of the lodge or any officer thereof.

On the facts found the plaintiff was not entitled to recover.

The judgment is reversed, and the court directed to enter judgment on the findings for defendant.

We concur: LENNON, P. J.; KERRIGAN, J.

**PEOPLE v. MERLE.** (Cr. 346.)

(District Court of Appeal, First District, California. Nov. 1, 1911.)

**CRIMINAL LAW (§§ 1130, 1178\*)—APPEAL—FAILURE TO ARGUE OR FILE BRIEF.**

Where on appeal in a criminal case counsel for the defendant was granted time to prepare and present his points and authorities, but no further extension was requested or granted, on a failure to orally argue the points or file briefs within the time allowed by the court, there is nothing for review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2970, 3012; Dec. Dig. §§ 1130, 1178.\*]

Appeal from Superior Court, City and County of San Francisco; Geo. H. Cabaniss, Judge.

Alphonse Merle was convicted of murder in the second degree, and appeals. Affirmed.

Nathan C. Coghlan, for appellant. Attorney General Webb, for the People.

**LENNON, P. J.** The defendant was charged with the crime of murder, and found guilty of murder in the second degree. He was sentenced to serve 30 years in the state prison at San Quentin. An appeal was taken from the judgment and the order denying defendant's motion for a new trial.

The appeal came on regularly to be heard by this court on the 22d day of August, 1911, whereupon counsel for defendant requested and was granted 15 days within which to prepare and present his points and authorities in support of the appeal. No further extension of time for this purpose has been granted or even requested, and the case now stands before us upon the bare record of the proceedings and testimony had in the trial court.

No oral argument having been made when the case was regularly called upon the calendar, and no briefs having been filed within the time allowed by the court, or at all, it is ordered that the judgment and order appealed from be affirmed.

Incidentally we will state that, although not required to do so, we have made an examination of the record, and find that the defendant was fairly tried and properly convicted.

We concur: **KERRIGAN, J.; HALL, J.**

**In re BURT.** (Civ. 1,071.)

(District Court of Appeal, Second District, California. Oct. 25, 1911.)

**1. PROHIBITION (§ 3\*)—JURISDICTION—ORIGINAL JURISDICTION.**

A District Court of Appeal, though having original as well as appellate jurisdiction in prohibition, will not exercise original jurisdiction where the petitioner has the right of

appeal from a judgment in the court where the original proceeding was commenced.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.\*]

**2. PROHIBITION (§ 3\*)—ORIGINAL JURISDICTION.**

Under Supreme Court rule 26 (78 Pac. xi), requiring an applicant for prohibition to show facts rendering it proper that the writ should issue originally from the court of appeal, where a party filed in the superior court a petition for prohibition, and the court after hearing denied the writ, and the judgment has not become final because the time for appeal has not elapsed, a District Court of Appeal will not, on the party's petition, exercise its original jurisdiction to issue the writ.

[Ed. Note.—For other cases, see Prohibition, Dec. Dig. § 3.\*]

Application of **W. J. Burt** for a writ of prohibition. Denied.

**R. J. Adcock and Kendrick & Ardie**, for petitioner.

**PER CURIAM.** It affirmatively appears from the petition filed that a proceeding in prohibition involving the same matter was instituted in the superior court of Los Angeles county, a hearing had therein, and writ denied, which judgment has not yet become final; the time for appeal not having elapsed.

[1] Under the Constitution of this state, this court has appellate jurisdiction in prohibition, and, while it also has original jurisdiction in such proceedings, it will not exercise the same where the petitioner possesses the right of appeal from a judgment had in the court where the original proceeding was commenced.

[2] Under rule 26 of the Supreme Court (78 Pac. xi), this court will not issue writs of the character herein prayed for, in the absence of some showing rendering it proper that the writ should issue from this court. Here petitioner elected to proceed in the superior court, and the action of this court can only be had by a review on appeal from the judgment there rendered. It is apparent, therefore, considering the Constitution and the rule above referred to, that this court should, under the circumstances of this case, exercise its authority in refusing to issue the original writ.

Writ denied.

**BLACK v. BOARD OF POLICE & FIRE COM'RS OF CITY OF SAN JOSE**  
et al. (Civ. 787.)

(District Court of Appeal, First District, California. May 13, 1911. On Rehearing, Oct. 26, 1911. Rehearing Denied by Supreme Court Dec. 23, 1911.)

**1. OFFICERS (§ 95\*)—WRONGFUL DISCHARGE—RECOVERY OF SALARY—MANDAMUS.**

Where there is an actual incumbent of an office from which petitioner was discharged, holding his position and exercising the functions thereof under color of right, manda-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

mus will not lie to compel payment of the salary attached to the office to relator until the title to the office has been determined by an appropriate proceeding.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 134, 139; Dec. Dig. § 95.\*]

## 2. MANDAMUS (§ 77\*)—TITLE TO OFFICE.

Mandamus will not lie to try title to an office.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 161-169; Dec. Dig. § 77.\*]

## 3. MANDAMUS (§ 174\*)—TRIAL—FINDINGS.

Where in mandamus to compel payment of the salary attached to the office of captain of police, which relator had held prior to his alleged unlawful discharge, defendant pleaded occupancy of the office by relator's successor, and that he had since discharged the duties thereof and received the salary, and that at no time had relator rendered any services since he was superseded, such allegations having been sustained by proof, it was error to omit to find in accordance therewith; it appearing that the title to the office had not been determined.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 386, 387; Dec. Dig. § 174.\*]

Appeal from Superior Court, Santa Clara County; John E. Richards, Judge.

Mandamus, on the relation of John N. Black, against the Board of Police and Fire Commissioners of the City of San Jose and others. Judgment for plaintiff, and defendants appeal. Reversed.

H. L. Partridge, for appellants. J. C. Black, for respondent.

HALL, J. Plaintiff brought a proceeding against the board of police and fire commissioners of the city of San Jose for a writ of mandate to compel said board to audit and allow his claim, in the sum of \$724.50, as captain of police of said city, from the 22d day of July, 1908, to the 1st of February, 1909. The trial court gave judgment for plaintiff against said board as prayed for, and denied the motion of said board for a new trial. The board in due time appealed both from the judgment and the order.

Plaintiff was appointed a member of the police force of said city in the year 1904, and in December, 1906, he was appointed a captain of police of said city. On July 22, 1908, certain charges of violating certain provisions of the charter of said city made by the chief of police of said city against plaintiff were filed with the said board (appellant). The board thereupon, on said day, made an order suspending plaintiff from his position, and appointed one Elton R. Bailey thereto, who at once entered into the occupation of the office, and has ever since occupied said office and discharged the duties thereof, and claimed and been paid by the city of San Jose the salary thereof, as successor of plaintiff, who at no time since said 22d day of July, 1908, has rendered any service to the city of San Jose, or discharg-

ed any duty of said office, though he has each month made a demand for the salary attached to said office. On the 26th day of August, 1908, the board made another order, reorganizing the police force of said city, and reducing the number thereof from 25 to 19. This order named and designated all the members of said police force, and did not contain the name of plaintiff, but did contain the name of Elton R. Bailey, as captain of police, in his place. Ever since said date, as well as since the 22d day of July, 1908, said Elton R. Bailey has occupied and discharged the duties of the office formerly held and still claimed by plaintiff, and has claimed and been paid the salary thereof, while plaintiff, as before stated, has discharged no duty thereof, but upon his suspension turned over to the proper authorities all property in his possession as said captain of police. Bailey is not a party to this proceeding. Appellant, as a defense to this proceeding in mandamus, pleaded the facts as to the occupancy by Bailey under claim of right of the office for which plaintiff seeks in this proceeding to compel payment to him of the salary attached thereto. Although the evidence clearly and without dispute proved the facts thus pleaded, the court made no finding thereon, and this was and is assigned as an error requiring a new trial.

[1] The contention of appellant in this regard is that mandamus will not lie to compel the payment to a plaintiff of the salary attached to an office in the actual occupation and possession of another person, under color of right, until by appropriate proceedings the title to the office has been first determined. And this we think to be the correct rule, amply supported in reason and by authority. The rule is thus stated in High's Extraordinary Legal Remedies (3d Ed.) § 103: "When there is an actual incumbent of an office, holding his position and exercising its functions under color of right, mandamus will not lie to a State Auditor to compel him to audit the claim of another person for the salary of the office. In such case it is sufficient objection to relief by mandamus that a conflict of title is presented, which can be determined only by proceedings in quo warranto, and the Auditor himself has no power to inquire into the regularity of the commission issued for the office, or to determine the disputed title. And the title to an office will not be determined in a proceeding by mandamus to compel payment of its salary to a claimant of the office."

The question was very carefully considered in *Selby v. City of Portland*, 14 Or. 243, 12 Pac. 377, 58 Am. Rep. 307, where, as the court indicated, certain police officers had probably been improperly removed, and successors appointed in their places. After reviewing many cases upon the subject the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

court said: "None of the cases referred to indicate that an action to recover the salary of an office could be maintained while occupied by a de facto officer, until the right to the office has been determined by proper adjudication. Such a determination could not properly be had in this case, as it would determine the rights of parties not before the court. It would be a determination that the incumbents who succeeded the appellant and his assignors were intruders and usurpers, when they were not before the court." The court directed the trial court to dismiss the proceeding.

The Court of Errors and Appeals of Delaware, in *Lee v. Mayor, etc.*, 1 Marv. 65, 40 Atl. 683, lays down the same rule, and distinctly holds that a de jure officer out of possession cannot recover the salary of an office in the possession of a de facto officer until he has had his right to the office established in an appropriate action, in which the de facto officer is made a party. This case cites with approval the Oregon case above cited.

The case of *Gorley v. City of Louisville*, 104 Ky. 372, 47 S. W. 263, decided by the Court of Appeals of Kentucky, lays down the same rule, and quotes with approval from *Selby v. City of Portland*, supra. This was also the case of a removed police officer seeking to recover his salary.

*Goodnow v. Police Commissioners*, 80 Mo. App. 207, was, like the case at bar, a proceeding in mandamus by a discharged policeman to compel payment of his salary. The court said: "But if it should be granted that the discharge was not for the purpose of reducing the force, and that the place was filled by another appointee, there would still be a barrier to the relief claimed by the relator. He is asking for the payment of salary for a period when he was not in possession of the office occupied by another, before his right to the office has been adjudicated by a judgment of reinstatement. It has been and is an unsettled question whether an officer can recover unearned fees or salary. But it ought to be clear that an action for the salary cannot be maintained by the party out of possession of the office before his right to the office has been judicially ascertained, and that it cannot be ascertained by the mere action for the salary, where the occupant of the office cannot be a party. The question has recently undergone a thorough discussion in the Supreme Courts of Delaware, Kentucky, and Oregon, the two latter being cases of discharged policemen, and the first being the case of discharged register of births and secretary to the board of health. The cases are logically and ably reasoned and the conclusion reached that such action cannot be maintained."

[2] It was held in *Meredith v. Board of Supervisors*, 50 Cal. 433, that a writ of man-

date does not lie to try the title to an office, and that in such an action the right to the fees cannot be determined until the title to the office, occupied by a de facto officer, has been determined.

None of the cases cited by respondent are in conflict with the rule as laid down in the cases above cited. In all of the cases cited by respondent, where a plaintiff was allowed to compel payment of salary in mandamus, he had either first established his title to the office in an appropriate proceeding, in which the occupant had been made a party, or was found to be both the de jure and de facto officer. In making this statement we have not overlooked *McKannay v. Horton*, 151 Cal. 711, 91 Pac. 598, 13 L. R. A. (N. S.) 661, 121 Am. St. Rep. 146. There two persons were claiming to be de jure and de facto secretaries of the mayor of San Francisco. *McKannay* claimed under an appointment from Dr. Taylor, who claimed to be both the de facto and de jure mayor; while the other, *Boyle*, claimed under appointment from *Schmitz*, who, though recently convicted of a felony, claimed to be both de facto and de jure mayor. The Supreme Court required the petition and the alternative writ to be served both upon *Boyle* and *Schmitz*. Both *Schmitz* and Dr. Taylor were exercising some of the functions of the office of mayor. *Boyle* was acting as secretary to *Schmitz*, and *McKannay* was acting as secretary to Dr. Taylor. The court said: "There cannot be two de facto incumbents of one office at the same time; and where two are acting simultaneously, each under claim of right, that one alone will be recognized who appears to have the better legal title." The court then proceeded to determine that Dr. Taylor was the de jure mayor, and therefore the de facto mayor. From this it necessarily followed that *McKannay*, his appointee, was both the de jure and de facto secretary. We cannot consider the *McKannay* Case as holding that one wholly out of possession of an office may compel payment of the salary without first establishing his title thereto by the usual and appropriate proceeding against the person in the actual and complete possession of the office under claim and color of office. This is what plaintiff in the case at bar has attempted to do, and which we are of the opinion may not be done.

[3] The court therefore erred in a most material matter in failing to find upon the issue presented as to the occupancy of the office.

Under the views we entertain upon the point discussed, it is not necessary to pass upon the other questions raised by counsel as to the legality of the action of the board in discharging plaintiff and appointing another to his position. Especially is this true in view of the fact that the actual occupant of the office, whose rights will be vitally affect-



ed by the determination of the other questions discussed, is not before the court.

The order denying the motion for a new trial is reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

#### On Rehearing.

HALL, J. This court on the 13th day of May last rendered a decision in this case, but afterwards granted a rehearing, principally that the court might give the matter further consideration in the light of what was said in the case of *Bannerman v. Boyle*, 116 Pac. 732, decided by the Supreme Court, June 8th last.

Upon further consideration we adhere to the views expressed in the opinion filed May 13th last, and readopt the same as the views of this court. Unlike the case at bar, in *Bannerman v. Boyle*, supra, the petitioner for the writ of mandate was in exclusive possession of the office as a de facto officer, and performed all the duties of the office during the time for which he claimed his salary. At the very outset of the opinion it is stated that this was conceded. The Supreme Court also determined that he was the de jure officer as well. Being both the de facto and the de jure officer, there is no doubt but that he could compel, by writ of mandate, the fiscal officer of the city to audit his salary demand. But in the case at bar petitioner was not in possession of the office, and performed no duties thereof during the time for which he claimed his salary, but another person was in possession of the office, under claim and color of right, and had performed and was still performing all the duties thereof under such claim and color of right, and had claimed and been paid the salary therefor. Under such circumstances the authorities cited in our former opinion expressly and pointedly hold that one out of possession of the office and performing no duties thereof cannot enforce the payment of his salary until he has had his right to the office adjudicated in an appropriate action to which the person in possession must be a party. See to the same effect *Dillon on Municipal Corp.* § 831.

The judgment and order are therefore reversed.

We concur: LENNON, P. J.; KERRIGAN, J.

#### CITY OF LONG BEACH v. BOYNTON, City Clerk. (Civ. 1,046.)

(District Court of Appeal, Second District,  
California. Oct. 20, 1911.)

#### 1. MUNICIPAL CORPORATIONS (§ 918\*) — BONDS—AUTHORITY TO ISSUE.

Long Beach City Charter, § 3, subd. 8, authorizes the issue of bonds to acquire water-works, etc., on a two-thirds vote of the elec-

tors voting on such question. Subdivision 11 authorizes the construction and repair of wharves and piers, but does not authorize bonds therefor. Section 21 of article 11 authorizes incurring debt for public improvements on proceedings conforming to the general laws of the state. St. 1901, p. 28, § 3, requires two-thirds of all the votes cast at the election to issue bonds. *Held*, that subdivision 8 is limited to the improvements authorized by it, and does not authorize bonds for a pier improvement under subdivision 11; such improvements being governed by section 21.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1919-1923; Dec. Dig. § 918.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 935\*) — BONDS—CURATIVE STATUTES—APPLICATION.

St. 1911, p. 421, legalizing municipal bonds authorized by a vote of not less than two-thirds of the qualified electors voting at an election, does not legalize bonds on an affirmative vote of two-thirds of the electors voting on the proposition, but less than two-thirds of those voting at the election.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 935.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 935\*)—CURATIVE ACTS—VALIDITY—MUNICIPAL CORPORATIONS.

A curative act, to be effective, must refer to proceedings which the Legislature might in the first instance regulate and control; and hence St. 1911, p. 421, legalizing municipal bonds, does not validate bonds insufficiently voted under a municipal charter, the issue of such bonds being a municipal affair over which the Legislature has no control.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 935.\*]

#### 4. WORDS AND PHRASES—"ORDINARY."

"Ordinary" means methodical, regular, according to established order, common, usual, often recurring.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 6, p. 5027.]

#### 5. MUNICIPAL CORPORATIONS (§ 911\*) — BONDS—AUTHORITY TO ISSUE.

Long Beach City Charter, § 3, subd. 11, authorizes construction and repair of wharves and piers, but does not authorize bonds therefor. Section 21 of article 11 authorizes incurring of debt for public improvements on proceedings conforming to general laws. *Held*, that there is authority to issue bonds to construct a pier, but not to repair one.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 911.\*]

#### 6. MUNICIPAL CORPORATIONS (§ 910\*) — BONDS—AUTHORITY TO ISSUE.

Specific charter authority to issue municipal bonds excludes the right to issue for purposes not specified.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 910.\*]

Application by the City of Long Beach for writ of mandate against C. O. Boynton, city clerk of the city of Long Beach. Writ denied.

Stephen G. Long and Percy Hight, for petitioner. H. J. Stevens and O'Melveny, Stevens & Millikin, for respondent.

ALLEN, P. J. It appears from the petition: That Long Beach is, and was at all times mentioned in the petition, a charter

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

city. That in February of 1910 the council of such city duly adopted resolutions determining that the public interest and necessity demanded the acquisition, construction, and completion by the city of the following named public improvements: (1) The acquisition, construction, and completion of certain repairs upon a double-deck, cylinder pier belonging to the city; and (2) the acquisition, construction, and completion of a new pier one thousand feet in length at a point designated in said city. That at a subsequent meeting of the council an ordinance was duly adopted giving notice of a special election to be held in said city, submitting to the qualified voters the proposition of incurring an indebtedness in the amount of \$75,000 for the first and \$50,000 for the second improvement named, and further, that both of the issues did not exceed 15 per cent. of the assessed value of the real and personal property in said city, and that the cost of the acquisition, construction, and completion of said public improvements is and will be too great to be paid out of the ordinary annual income and revenue of said municipality. That by said ordinance it was further provided that bonds be issued for each of the said improvements, one-fourth of the principal and the interest at the specified rate to be paid annually, and providing further for a tax levy to meet such payments, and further providing for all of the matters provided by the charter or by the general law for the holding of an election pursuant to such ordinance. It is further made to appear that, with reference to the first-mentioned improvement, more than two-thirds of the electors voting at said election voted "Yes"; that, as to the second proposition, less than two-thirds of those voting at such election, but more than two-thirds of those voting upon the proposition, voted, "Yes"; that the first levy necessary for the annual payment of the principal and interest upon the bonds has been made and collected without protest by the taxpayers; that, subsequent to the passage of the ordinance, another ordinance was passed providing for the issuance of city bonds to cover the amount so voted at such election; that the city clerk refuses to attest said bonds and declines so to do, and this writ is sought to compel the attestation thereof.

[1] Section 3 of the charter of the city of Long Beach, defining the general powers of the city, contains 28 subdivisions. In the eighth subdivision thereof, with reference to supplying the city and its inhabitants with water and gas, electricity, conduits, or railroads, or with either, it is provided that bonds may be issued for the acquisition of such public improvements, and that two-thirds of the votes cast on the question of such issue of bonds, if in the affirmative, shall be sufficient. Subsequently, in the eleventh subdivision, the power to construct and keep in repair wharves and piers is

provided for, no reference being there made as to issue of bonds, or the number of votes requisite in the event of the issuance of bonds therefor. In section 21, art. 11, of the charter it is provided: "Whenever the council shall determine that the public necessity requires the construction, or acquisition, or completion of any permanent municipal building, \* \* \* or other public improvement or utility, the cost of which, in addition to the other expenditures of the city, will exceed the income and revenue provided for in any one year, they may, by ordinance, submit a proposition to incur a debt for that purpose, and proceed therein as provided in section 18, article xi, of the Constitution of this state, and general law or laws thereof." The general law of the state (St. 1901, p. 27) in section 3 provides: "\* \* \* It shall require the votes of two-thirds of all the voters voting at such special election to authorize the issuance of the bonds herein provided." This section has received a construction by the Supreme Court of this state in the case of *Law v. San Francisco*, 144 Cal. 384, 77 Pac. 1014, wherein it is determined that where two propositions were submitted that each, in order to carry, must receive two-thirds of all the votes cast at the election, and that the failure of one to carry does not affect the validity of the other which has received the requisite number of votes. We are of opinion that a fair construction of the charter of the city of Long Beach requires us to say that subdivision 8 of section 3 of the charter, wherein it specifies the number of affirmative votes requisite to carry an election, applies only to the matters referred to in said subdivision 8. To say that subdivision 8, with reference to the requisite number of votes, applies to the improvements specified in subdivision 11 and section 21, art. 11, would be to establish a conflict between sections 3 and 21 of the charter. This should not be done, if both sections can be given operative effect through a different construction. We hold, therefore, that as to the power to incur indebtedness and to issue bonds for the character of improvements under consideration, section 21 of the charter applies, and the proceedings in connection with such bond issue must be in pursuance to the general law.

[2] Nor do we regard the curative act of 1911 (St. 1911, p. 421) as applicable to the matter under consideration. That act provides that it shall not operate to legalize any bonds of any municipality that have not been at the time of the passage of that act authorized by a vote of not less than two-thirds of the qualified electors of such municipality voting at any such election. It being conceded that less than two-thirds of the voters voting at such special election voted in favor of the \$50,000 bond issue, such defect was not cured by the legalizing act last above referred to. We are of opin-

ion, therefore, that the clerk properly refused to attest the issue of bonds for the \$50,000 so attempted to be authorized for the construction of the new pier.

[3] As to the first proposition involving the issuance of bonds in the amount of \$75,000 for the completion and repairs of an existing wharf, it is urged by respondent that, such improvement being a municipal affair, the provisions of the charter with reference thereto are controlling, and that it is not within the province of the Legislature to legalize, through the curative act before mentioned, a bond issue not authorized by the charter. With this we agree. It is well-settled law that a curative act to be effective must be with reference to proceedings which the Legislature might in the first instance regulate and control. The charter in this instance has treated fully of the power of the corporation to issue bonds in connection with the wharves of the city, and of the conditions and emergencies controlling the issuance thereof. This being a municipal affair, the provisions of the charter must control, and, unless such charter provisions authorize the issuance of bonds for such purposes, the Legislature may not legalize bonds which are violative of the provisions of the charter. This leads us, then, to determine whether or not, under the charter, authority is given for the issuance of bonds to complete repairs upon wharves of the city. It is insisted by respondent that section 21 of the charter, authorizing the acquisition, construction, or completion of any permanent public building, or other public improvement, and the issuance of bonds therefor, does not comprehend repairs incident to such improvements, and, it affirmatively appearing that this bond issue of \$75,000 was sought for the purpose of completing repairs only, no authority is conferred by section 21 to issue bonds therefor, but that the funds requisite for such repairs must be realized from a general tax levy. While the general power to repair municipal public property is conferred by the charter, the power to issue bonds for the cost thereof is not so expressly conferred. "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of the power is resolved by the courts against the corporation, and the power is denied." *Hyatt v. Williams*, 148 Cal. 587, 84 Pac. 42, and authorities cited. We are of opinion that it cannot be said from the language of the ordinances adopted relative to these bond issues that the issue of bonds for such repairs is indispensable;

the language of the ordinance being, "the cost of the improvements will be too great to be paid out of the ordinary annual income and revenue of the city." This is far from a declaration of matters required in section 21 of the charter, which provides that bonds may be issued only in the event that the cost of the improvement contemplated, in addition to the other expenditures of the city will exceed the income and revenue provided for in any one year. The charter fixes the limit and extent of the income provided in any one year as being \$1 upon each hundred of the valuation of assessed property. The language of the ordinances is open to the construction that the city council have declared that, in their opinion, the cost is too heavy to be borne out of the ordinary revenue; in other words, that it is inexpedient or inconvenient to so increase the tax levy as to cover the cost of these repairs.

[4] The word "ordinary" is defined by Webster as "methodical, regular, according to established order." "Ordinary" is defined as "common, usual, often recurring." *Chicago & A. R. Co. v. House*, 172 Ill. 601, 50 N. E. 151. For aught that appears, the ordinary, or, in other words, the usual, income of Long Beach may be far below the amount which could be realized under a general tax levy. We cannot, therefore, say that from the whole record it appears that a necessity did exist for the issuance of bonds to pay for such repairs. Assuming, without deciding, that the repairs necessarily entailed in caring for a public improvement may be said to be essential and incidental to the power of construction, acquisition, and completion, and that to deny the right to issue bonds for repairs in all instances might render nugatory the general power to keep such property in repair, nevertheless, we are satisfied that no power is vested by the charter in the city of Long Beach to issue bonds for repairs to public property, unless it is made to appear that the same is absolutely necessary for the preservation of such public property. Under this view, we are compelled to hold that the \$75,000 bond issue here involved for repairs was not authorized by the charter, and that no duty devolved upon respondent to attest either series of bonds so presented and sought to be issued by petitioner.

Peremptory writ denied.

JAMES and SHAW, JJ. [5] We concur in the judgment and in all that is said by the presiding justice referring to the bonds proposed to be issued to secure money with which to build a new pier; i. e., the \$50,000 issue. As to the bond issue proposed to be made for the purpose of securing \$75,000 to cover cost of repairs on the pier already constructed by the city of Long Beach, we are of the opinion that the provisions of the charter do not expressly, or by any reasonable implication, authorize the municipi-

pality to issue bonds for such a purpose, and that any necessity which may render the making of such repairs imperative is immaterial, and cannot be considered.

[6] Where it is provided that a bonded indebtedness may be created for specified purposes, the permission and authority so given is exclusive of every purpose not expressly so named. The municipality of Long Beach may lawfully issue bonds to obtain funds with which to construct a wharf or pier, but, when such wharf or pier is once constructed, the cost of maintenance thereof and repairs thereon must be paid from the ordinary revenue of the city, which is the revenue obtained by the exercise of the power to raise funds for general municipal purposes by annual tax levy within the maximum rate fixed by law as the limit of such levy.

**CALKINS et al. v. MONROE**, Superior Judge.  
(Civ. 1,025.)

(District Court of Appeal, Second District, California. Oct. 27, 1911.)

**1. JUDGMENT (§ 303\*)—AMENDMENT AND CORRECTION — MATTERS AMENDABLE — "MATERIALLY."**

A court may at any time correct a judgment as to immaterial matters occasioned by inadvertence; but this right does not exist where such amendment materially affects the rights of litigants objecting thereto, using the word "materially" to mean affecting the rights of objecting litigants.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 594; Dec. Dig. § 303.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4408-4409.]

**2. EXCEPTIONS, BILL OF (§ 53\*)—PROCEEDINGS TO COMPEL SIGNATURE.**

Applicants for mandamus to compel the judge of a trial court to sign a bill of exceptions averred that after judgment the court amended the judgment, and decreed certain rights to a party substituted at trial in lieu of one of the litigants; that the applicants applied in due time for settlement of a bill of exceptions involving the right to amend the judgment, and the return of the trial judge showed that he had refused to sign it; but neither the application nor return showed whether the amendment was material to the applicants' rights. *Held*, that the rights of all parties would be best subserved by a signature to the bill of exceptions, so that the whole matter might be submitted on appeal, and that a peremptory writ issue.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 80-88; Dec. Dig. § 53.\*]

Mandamus by C. C. Calkins and another against Charles Monroe, Judge of the Superior Court in and for the County of Los Angeles. Peremptory writ to issue.

Willis & Robinson and W. W. Kaye, for petitioners. Wm. Chambers, for respondent.

**PER CURIAM.** It is averred by petitioners that a certain judgment was rendered

by the superior court, in an action and proceeding to which petitioners were parties, in August, 1910; that thereafter, in February, 1911, the court amended the judgment in certain respects, notably in that it decreed and adjudged certain rights to a party substituted in lieu of one of the litigants at the time of the trial, and within due time after the amendment petitioners, after notice of appeal, applied to the court to settle a bill of exceptions involving the right of the court, under the circumstances of the case, to amend the judgment. This bill of exceptions the court refused to sign, upon the theory, as appears from the return of the judge, that the amendment to the judgment was not such as in any wise affected the rights of petitioners, and that the effect of the decree was to cast upon petitioners, or their property, no burden, other than that imposed by the original decree, which, it is claimed, settled and determined petitioners' rights to the property.

[1] It may be assumed that the court may at any time correct a judgment as to immaterial matters occasioned by inadvertence, but that this right does not exist, should such amendment materially affect the rights of litigants objecting to such amendment. The question, therefore, for determination upon this application is as to the materiality of the matters involved in the amendment to the judgment; and when we say "materiality" we mean to say, as affecting the rights of objecting litigants. It is not made clear, either by the petition or by the return, whether or not this amendment was made on account of any inadvertence, and was immaterial, in so far as petitioners' rights were concerned. Nor can the same be determined without a careful examination of the pleadings, report of the referee, and the original judgment, in connection with the amendment. These matters are not presented to the court upon this application; nor has the respondent made it clear to us that in the ordering of the amendment he was within the rule permitting such an amendment as to immaterial matters.

[2] Our Supreme Court has said that when a trial court is in doubt as to the right of a party to have a bill of exceptions or statement of the case settled, because the same has not been presented within time, the better practice is for the trial court to sign the bill of exceptions or statement, subject to objections thereto, the evidence in support of which should be incorporated in a bill of exceptions, so that the appellate court upon appeal will be in a position to determine whether or not such statement or bill was presented for signature within time. *Gay v. Torrance*, 143 Cal. 17, 18, 76 Pac. 717. This rule is no doubt based upon the theory that it is the policy of the law to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

protect the right of appeal, which might in certain cases be materially affected or destroyed by a refusal of the court to sign bills or statements, and that if, upon the appeal, it is made to appear that the bill or statement was not within the time required it is within the province of the appellate court to dismiss the appeal, or to refuse to entertain questions involved in such bill or statement. For this reason, it appears to us that the rights of all parties are best subserved by the trial court signing the bill of exceptions presented, under the rule above stated, to the end that the whole matter may be submitted to this court upon the appeal, in which will be presented and before us all of the pleadings, reports, and judgment, an inspection of which will enable us the better to understand and determine correctly the questions involved.

It is therefore ordered that the peremptory writ issue as prayed for.

**GUMAER et ux. v. BELL.**

(Supreme Court of Colorado. Dec. 4, 1911.  
Rehearing Denied Dec. 4, 1911.)

**1. JUDGMENT (§ 143\*)—DEFAULT—VACATING—EXCUSABLE NEGLIGENCE.**

A defendant who was out of the state was served by leaving summons with his wife, and she did not notify him of the suit until the time for the filing of an appearance had nearly expired. He immediately took steps to have his attorney file an appearance. *Held* that, under Rev. Code, § 81, providing that, in the furtherance of justice, the court may relieve a party from a judgment taken against him through excusable neglect, the neglect of defendant was excusable, and he was entitled to have a default vacated.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 272; Dec. Dig. § 143.\*]

**2. JUDGMENT (§ 143\*)—DEFAULT—VACATING—EXCUSABLE NEGLIGENCE.**

Where a suit was brought against both the husband and wife, and personal service was had only upon the wife, and she, expecting that her husband, who was without the state, would return in sufficient time to attend to the matter, failed to notify him until it was too late for him to have an appearance filed, her neglect, in view of the fact that she was unacquainted with business and her husband had always acted as her agent, was excusable, under Rev. Code, § 81, providing that the court may, in the furtherance of justice, relieve a party from a judgment taken against him through mistake, excusable neglect, or the like.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 272; Dec. Dig. § 143.\*]

**3. JUDGMENT (§ 145\*)—DEFAULT—SETTING ASIDE—MERITORIOUS DEFENSE—NECESSITY.**

Before a defendant is entitled to have a default against him set aside, he must show a defense to the action, which is substantial, not technical or frivolous, and which may change the result upon the trial.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292-295; Dec. Dig. § 145.\*]

**4. JUDGMENT (§ 145\*)—DEFAULT—SETTING ASIDE—MERITORIOUS DEFENSE—SUFFICIENCY OF SHOWING.**

A showing by defendant, against whom a default had been taken, that the notes in suit were due more than nine years before the commencement of the action, that plaintiff received them long after they were due, and that defendant had expended money on behalf of the original holders, and that plaintiff had converted collateral given to secure the notes, was a sufficient showing of a meritorious defense to entitle defendant to a vacation of the default.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 271, 292-295; Dec. Dig. § 145.\*]

**5. JUDGMENT (§ 143\*)—DEFAULT—VACATING—STATUTE.**

Defendants, who were husband and wife, failed to appear within the time limited, owing to the failure of the wife to notify her husband of the existence of the suit. A few days after the default and before judgment defendants moved for a change of venue. Without notice to defendants, this motion was stricken from the files, and judgment rendered in favor of plaintiff. Defendants moved to set aside the judgment and default, and made a showing of a meritorious defense. *Held* that, under Rev. Code, § 81, providing that, in the furtherance of justice, the court may relieve a party from a judgment taken against him through excusable neglect, and in view of section 478, providing that all provisions of the Code shall be liberally construed to assist parties in obtaining justice, the default judgment should be set aside, and defendants allowed to answer.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 272; Dec. Dig. § 143.\*]

**6. APPEAL AND ERROR (§ 957\*)—JUDGMENT (§ 139\*)—REVIEW—DISCRETION OF TRIAL COURT—OPENING DEFAULT.**

While the vacating of a default rests within the discretion of the trial court, such discretion is a legal discretion, and not an arbitrary one; and, when the appellate court is convinced that such discretion has not been properly exercised, it may review the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3823; Dec. Dig. § 957.\* Judgment, Cent. Dig. §§ 265-268; Dec. Dig. § 139.\*]

Gabbert and Garrigues, JJ., dissenting.

En Banc. Error to District Court, El Paso County; Robert E. Lewis, Judge.

Action by Dennistoun M. Bell against A. R. Gumaer and wife. Judgment for plaintiff, and defendants bring error. Reversed and remanded.

Richardson & Hawkins, for plaintiffs in error. Lunt, Brooks & Wilcox, for defendant in error.

MUSSER, J. On July 12, 1905, an action was commenced by the defendant in error as plaintiff against the plaintiffs in error as defendants in the district court of El Paso county upon two promissory notes, each dated October 18, 1894, the one for the sum of \$4,800, the other for the sum of \$2,500, payable, respectively, in fifteen months and one year after date, with interest at 6 per cent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

per annum. On July 18, 1905, summons in said action was served upon the defendant A. R. Gumaer by leaving a copy of the summons and complaint in the action at his usual place of abode in Fremont county with a member of his family residing with him over the age of 15 years, to wit, his wife, the defendant E. L. Gumaer, and at the same time service was made on the wife. The defendants had until and including the whole of the 17th day of August, at least, in which to appear in the said action. No appearance having been made by these defendants, default was entered against them on the 18th day of August. On the 21st day of August, the 20th being Sunday, the defendants filed a motion for change of venue to Fremont county, on the ground that the plaintiff was a resident of the state of New York, and the defendants were residents of Fremont county, in which county service was made upon them, and the notes were payable in the state of New York, as appeared from the complaint. This motion was supported by affidavit as well as by the sheriff's return and complaint. On the 25th day of August, the court, on motion of plaintiff, without any notice to the defendants, struck the motion for change of venue from the files, and on the same day entered judgment against the defendants in the sum of \$11,545. In due time the defendants filed a motion to set aside the judgment and default, and, in support of this motion, the following facts appeared from affidavits filed in support thereof:

The defendant A. R. Gumaer, at the time of the service of said summons, was, and for some time prior thereto had been, absent from the state of Colorado, and in the state of New York. He expected to return home about August 10th from New York and so informed his wife, and for that reason she retained the summons and complaint, intending to deliver them upon her husband's return. He did not return on the 10th day of August, as expected, and afterwards his wife learned that he did not expect to return for some time, and on the 13th day of August she mailed the summons and complaint to her husband in New York, informing him that they had been delivered to her. Upon their receipt he immediately mailed them, by special delivery letter, to his attorney in Denver, instructing him to at once enter an appearance in the case. The attorney received the letter with the papers about 5 o'clock p. m. on Saturday, August 19th, and immediately called by telephone for the district clerk and the attorney for plaintiff at Colorado Springs, but could not reach either of them. The attorney, being unable to reach the parties at Colorado Springs, mailed the motion for change of venue to the clerk of the District Court at Colorado Springs on Saturday, August 19th, to be filed, and at the same time a copy thereof to plaintiff's attorney. On Monday, Au-

gust 21st, the clerk called up the attorney at Denver, and informed him that a default had been entered in the case, but no judgment. Thereafter some correspondence took place between the respective attorneys. A. R. Gumaer had always acted for and as the agent of his wife in all business matters, and she had no knowledge of the defendant's defense to the action, or the subject-matter thereof. She was without business experience, and waited for her husband's return, expecting that he would take charge of the litigation. An affidavit of the defendants stated that they had a good and valid defense to the complaint; that they were in no way indebted to the plaintiff; that a small payment indorsed on said notes, as of July 18, 1899, had been made to the original holder; that they had come to the hands of the plaintiff and his immediate predecessor in title from the original holder many years after they became due, subject to offsets and counterclaims, in favor of the defendants, and set up in detail a long statement of their alleged defenses, offsets, and counterclaims to the said notes arising out of numerous transactions with the original holder through many years. The affidavit of merits was supplemented by the affidavit of the defendant's attorney, stating that, from the statements made to him by Mr. Gumaer, he believed that the defendants had a good and valid defense, and that there should be an accounting between the parties. The motion to vacate the judgment and default was denied by the court on September 14, 1905, and to review the judgment and the action of the court in denying the motion the defendants have brought the case here on error. The effect of the filing of the motion for change of venue, after the default and before the entry of judgment, will not be considered because defendants asked to be permitted to answer.

[1] Section 81, Rev. Code, provides for the allowance, in furtherance of justice, of amendments, enlargement of time to plead, correction of mistakes, etc., and that the court may, upon such terms as may be just, and upon payment of costs relieve a party from a judgment, order, or other proceeding taken against him through mistake, inadvertence, surprise, or excusable neglect. The defendants were duly served with summons in the action, and it was neglect on their part, under the circumstances, if they failed to respond thereto within the time required by law. The first actual knowledge appearing in the record that the defendant A. R. Gumaer had of the service of the papers was after August 13th, such a length of time after that date as was required for the papers to reach him by mail from Florence, Colo., to New York. On this point the affidavit is not specific enough to satisfy plaintiff, but, without being unduly critical and technical and ascribing to defendants' bad faith and an effort to deceive the court, no other conclu-

sion can be fairly drawn from it, for, on the whole, it appears to be a narration of what Mrs. Gumaer did with reference to the matter after receiving the papers. The plaintiff took his default on the 18th, the first day that he could do so. To have saved it, the motion for a change of venue ought to have been filed on August 17th. The time intervening between his receipt of the papers and the last day for appearance was to be computed in hours, and he was away—the distance from Colorado to New York. In his affidavit he says that, when he received the papers, he made a mistake in computing the time in which he had to appear in the action, and thought that the papers would reach the attorney by mail in time for an appearance, though he does not state how or in what manner he made the mistake. The fact that Gumaer knew the notes were in an attorney's hands for collection about three months before the action was brought can have no bearing in showing the quality of the neglect after the action was commenced and process served. Whatever neglect there was on the part of A. R. Gumaer prior to the time that he received the papers, so far as this record shows was but constructive neglect, if such a term be permitted, or imputed neglect, if the negligence of his wife can be imputed to him. As soon as he received the papers, he evinced at once a desire to defend the action. After the default, in response to the notice of his attorney, he came home quickly, put the attorney in possession of the facts and his defense, and had the motion to set aside the default and judgment made promptly filed and heard. If, on the whole showing as made, in view of the manner of service, Gumaer's absence from the state, the very short time that the appearance of defendants was delayed, the fact that plaintiff was not disadvantaged thereby, his neglect was not excusable within the spirit of our Code, as hereinafter shown, then excusable neglect cannot be recognized.

[2] The wife, E. L. Gumaer, is shown to have been without business experience. Her husband was her agent in the conduct of her business, and she relied and depended on him. He had carried on the transactions concerning these old notes and the transactions out of which arose the alleged defense thereto, and she had no knowledge of them. She expected, and it is shown that she had a right to expect, that her husband would return by the 10th of August, in ample time to appear in the action and make defense. When he did not come, and learning that he would not return for some time, inexperienced in business and accustomed to rely on her husband, she did what such a woman was likely to do—sent the papers to him for attention, informing him that they had been delivered to her. Her neglect, such as it was, was unintentional and apparently ignorantly done, and committed, no doubt, in endeavoring to do what she thought was best to do. This

record does not disclose but that her negligence was the result of the best impressions of an inexperienced woman, accustomed to rely on her husband. Under such circumstances, the degree of negligence in the wife cannot be measured as though she were a stranger dependent on herself. Her conduct brought ill only to herself and her husband. Her husband was excusable. Both have shown merit. If he is let in to defend and his wife not, the result may be a judgment in his favor, or a greatly reduced one against him. Then would the present judgment against the wife stand only as a penalty against her for unintentionally managing the matter so that she failed by two or three days in getting in an appearance. Eleven thousand dollars is too great a penalty for such a slight offense, when under the Code reasonable terms could have been imposed, and the possibility that such an injustice may be worked out is enough to excuse this woman, and to let her in with her husband to defend.

[3] But the authorities hold that it is not sufficient to show that the neglect which brought about the default is excusable. The defendant must also show a meritorious defense to the action. It is sufficient to show that the defense is *prima facie* meritorious, and must be stated so that the court will be enabled to see that it is not frivolous. Where a meritorious defense is shown to part of plaintiff's cause of action, it is sufficient. 6 Ency. Pl. & Pr. 185-188. It is said that, when a sworn answer is filed, it will be accepted as a sufficient affidavit of merits, and it will be examined by the court only to determine whether it is frivolous and not to ascertain whether it will prevail if established on a new trial, unless it is apparent that it cannot possibly prevail. *Id.* 188. In line with these expressions, our Court of Appeals, on the question of showing merits said: "There must be sufficient showing to the court to demonstrate the possibility, at least, that, if the judgment was vacated and a new trial had, the result would be different." *Donald v. Bratt*, 15 Colo. App. 414, 416, 62 Pac. 580, 581. From this it is seen that if the showing is of a defense that is substantial, not technical, meritorious, not frivolous, and that may change the result upon trial, it is sufficient. We cannot pause to analyze in this opinion the long affidavit filed, nor try the case in advance.

[4] The showing demonstrates the possibility, at least, that on the trial the result will be different, and is substantial and meritorious in the sense that such a showing is required to be. The notes sued on in this case were each due more than nine years before the commencement of the action. They came into the hands of the plaintiff's father from the original holder several years after they became due, and the showing is that many transactions took place between the original holder and the defendants before the notes

were transferred, giving rise, it is claimed, to liabilities chargeable against the notes. Money was paid out by the defendant A. R. Gumaer for the use of the original holder at his request it is said. Collateral of value belonging to the said defendant and securing the notes is alleged to have been converted by the plaintiff to his own use, all of which clearly demonstrates that in justice and fairness the defendants ought to have had an opportunity to be heard and submit their claims against the old notes to the court for adjudication. The views herein expressed with regard to this case are in harmony and are supported by the spirit of our Code and the intendments of section 81.

[5] Section 478, Rev. Code, says that the provisions of the Code and all proceedings under it shall be liberally construed to assist the parties in obtaining justice. In 6 Ency. of Pl. & Pr. 154, it is said that "a statute providing for the opening or vacation of a judgment by default is remedial and should be liberally construed by the courts, especially in those cases where such a construction is calculated to advance justice." Section 81 of our Code is practically the same as what was formerly the sixty-eighth section of the practice act of California, and the portion thereof relating to a relief from a judgment or order on account of inadvertence, surprise, or excusable neglect is precisely the same in both. Speaking of this section, the court said in *Roland v. Kreyenhagen*, 18 Cal. 455: "The power of the court should be freely and liberally exercised under this and other sections of the act to mold and direct its proceedings, so as to dispose of cases upon their substantial merits, and without unreasonable delay, regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right. \* \* \* It can also usually prevent unjust or unfair advantages or serious injury arising from casualities or inadvertence. The design of the act was to call into requisition its equitable powers in this respect." And in *Watson v. S. F. & H. B. R. R. Co.*, 41 Cal. 17, speaking of applications for relief against default judgments, it is said that: "Applications of this character are addressed to the discretion—the legal discretion—of the court in which the default has occurred, and should be disposed of by it as substantial justice may seem to require. Each case must be determined upon its own peculiar facts, for perhaps no two cases will be found to present the same circumstances for consideration. As a general rule, however, in cases where, as here, the application is made so immediately after default entered as that no considerable delay to the plaintiff is to be occasioned by permitting a defense on the merits, the court ought to incline to relieve. The exercise of the mere discretion of the court ought to tend in a reasonable degree, at least, to bring about a

judgment on the very merits of the case; and, when the circumstances are such as to lead the court to hesitate upon the motion to open the default, it is better, as a general rule, that the doubt should be resolved in favor of the application."

Viewing the present case in the light of these authorities and intendments of the Code, what is there to show that justice was done by not setting aside this judgment and permitting the defendants to put in their defense and the case to be heard on its substantial merits? While the defendants were guilty of neglect, yet, in the light of all the circumstances of the case, it can truly be said to be excusable. They have shown sufficient merit as has been seen. It has not been pointed out, nor can it be perceived, that any injustice would have been wrought to plaintiff had the judgment been set aside on September 14th. True, if the defendants had been let in and the case tried in September, he may not have obtained as large a judgment as he had obtained by default a few days before, in August, or he may have been defeated altogether. For plaintiff to have lost out on a fair trial is not an injustice. If error would have been committed against him, he had the right to have it corrected on review. The truth is, his position was in no manner prejudiced by the short delay of defendants—indeed, it could not be. He was just as able to prove his case on September 14th as he had been on August 25th. If his cause was just, he no doubt would have prevailed. If his cause was unjust, he ought not to have prevailed. On the other hand, great injustice may have been done defendants by denying this motion. It is possible that the defendants would have prevailed, or they may have succeeded in materially lessening the judgment against them. If they could have done so, then the refusal to vacate worked a positive injustice to them, and this judgment for over \$11,000 stands as a penalty against them for having failed by two or three days to put in an appearance, for which failure they were excusable. This is not assisting the parties in obtaining justice, nor is it calculated to advance justice. Under section 81 the court could have set aside the default upon reasonable terms, more or less severe, by which the defendants would have been sufficiently penalized, if a penalty was proper. After this review of the facts and circumstances of this case, there remains no reason why it ought not to have been heard on its substantial merits. The contentions and arguments of the plaintiff savor of harshness out of harmony with the spirit of the law, as shown by the above authorities. He insists that the court should protect his rights. There is no question about that. Courts, however, are as much bound to protect the rights of the defendants as those of the plaintiff. After all, viewed in the light of a remedial statute, the right of the plaintiff



is a technical one. It partakes more of the nature of an advantage than of a substantial right. He took the default subject to being set aside under section 81 of the Code. He obtained his judgment after the defendants had filed a motion in the case—a motion that probably would have ousted the court of jurisdiction had it been filed before default—and we do not decide what effect it had when filed afterwards. This motion, at least, apprised the court and plaintiff that the defendants were on hand ready to contest the action after a delay of not to exceed three days, and it was deemed necessary to strike it from the files without notice to the defendants, in order to take judgment against them. It may be that the plaintiff was within his strictly technical rights. Such rights should have due and weighty consideration at all times, and in proper cases preserved. But it must be remembered that plaintiff secured the rights he did, knowing them to be and under circumstances that made them subject to judicial scrutiny, bringing in view all the circumstances of the whole case, illuminated by the remedial provisions of section 81 and liable to be taken away by that section, in the application of which, as said by the Supreme Court of California, the equitable powers of a court are called into requisition, and technicalities are regarded as "obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial rights."

[6] The authorities cited by plaintiff have been examined. In none of them are the facts as in this case nor do the delinquent parties appear so excusable, nor does it so plainly appear that no damage or injustice would have inured to the plaintiff and that injustice might have inured to the defendant. It is true that these authorities announce the rule to be that a motion to vacate and set aside a default and judgment thereon is addressed to the sound discretion of the trial court, and its ruling thereon will not be disturbed, unless it clearly appears that the discretion was abused. The rule was announced in *Bannerot v. McClure*, 39 Colo. 472, 90 Pac. 70, 12 L. R. A. (N. S.) 126. There, however, default was not entered until more than 18 months after service, and the motion to set aside was not made until nearly eight months after the default was entered, and the court said that the affidavit, filed in support of the action, utterly failed to show any excuse for the neglect, and that no attempt was made to show a meritorious defense. The rule was announced in *Morrell Hdw. Co. v. Princess G. M. Co.*, 16 Colo. App. 54, 63 Pac. 807. In that case the complaint was against the court for setting aside the default and judgment. The affidavit in support of the motion was not satisfactory, but the showing of merits was clear, and the Court of Appeals said it could not say that the lower court abused its discretion in setting aside the judgment and default. The

rule was announced in *Donald v. Bradt*, supra; but in that case the motion was not made until nearly six months after judgment, and the court thought that that was an important factor to consider; besides, the court was clear that the showing of merits was insufficient on its face.

In *Elliott v. Quinn*, 40 Colo. 329, 90 Pac. 607, this court held that the default ought to have been set aside, and reversed the judgment because it had not been, yet in that case the matter rested in the sound discretion of the court as much as in the case at bar. So in *State Bd. of Agriculture v. Meyers*, 13 Colo. App. 500, 58 Pac. 879. In some of the authorities cited from other states there was a conflict in affidavits as to the degree of negligence, and the court announced the rule under such circumstances. The nearest approach to the facts in this case is in *Jordan v. Hutchinson*, 39 Wash. 373, 81 Pac. 867. There, the appellants actually knew of and wrote a letter about the case to an attorney in Seattle 13 days before the default was entered. Besides, it appears from that case that the Code of Washington did not provide for excusable neglect, but provided that the court may, in its discretion, set aside any default upon affidavit, showing good and sufficient cause. The court said the record showed no more than neglect without reference to whether it was excusable or not, and for that reason no sufficient cause was shown. Under our Code, excusable neglect is a sufficient cause, and, had the Code of Washington been the same, the decision might have been different. The discretion intended by the rule "is not a capricious or arbitrary one, but is an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." *Bailey v. Taaffe*, 29 Cal. 424.

Appellate courts are not precluded by the rule from reviewing the exercise of discretion and in proper case correcting it. Each case must be determined upon its own facts, for no two cases are alike, and all the facts and circumstances of each case must be scrutinized. When a court of review, upon an examination of these facts, becomes convinced that the exercise of discretion by the lower court, in a particular case, is not in conformity with the spirit of the law and has not been properly exercised, there is but one duty to perform, and that is to correct the error, and send the case back for trial. The reversal of this judgment is well within the rule announced by the authorities.

The former opinion is withdrawn and this opinion filed in lieu thereof, but the conclusion heretofore reached will be adhered to, and that is that the judgment of the district

court is reversed and the cause remanded, with instructions that upon payment by the defendants, within 30 days, of all the costs that had accrued in the action, to and including the 14th day of September, 1905, the judgment and default in the district court be set aside and these defendants given leave to file their answer to the complaint in the action, as they asked in their motion to vacate, within such reasonable time as may be fixed by the court. The motion for rehearing is denied.

Reversed and remanded. Motion for rehearing denied.

GABBERT and GARRIGUES, JJ., dissent. CAMPBELL, C. J., not participating.

GABBERT, J. (dissenting). A motion to set aside a default is addressed to the sound discretion of the trial court, and its judgment thereon will not be disturbed unless it clearly appears that there was an abuse of such discretion. *Bannerot v. McClure*, 39 Colo. 472, 90 Pac. 70, 12 L. R. A. (N. S.) 126; *Morrell Hdwre. Co. v. Princess G. M. Co.*, 16 Colo. App. 54, 63 Pac. 807. Tested by this rule, which is universal, not only in this, but in every other jurisdiction, it is manifest the judgment of the district court refusing to set aside the default should not be disturbed.

The note sued upon had been in the hands of counsel for plaintiff several months before suit was brought. It appears from the record that through correspondence between counsel now representing the respective parties Mr. Gumaer had conferred with his present counsel regarding these identical notes something like four months before action was brought against him. In the affidavit filed in support of the motion to set aside the default, Mrs. Gumaer says that she expected her husband to return to their home at Florence, in this state, about August 10th, or only seven days before the time for entering an appearance would expire; that he did not return, as expected, and two or three days later, namely, on the 13th of August, having learned that he would not return for some time, she mailed the papers to him in the city of New York, or only four days before the time when the process served required an appearance to be made. What steps she took, or how she ascertained when he would return, is not stated. But four days remained after she started the papers to New York from Florence, in this state. She must be presumed to have known when an appearance was necessary. She does not state she did not. What excuse does she offer for not communicating with her husband regarding the matter in a manner which would have advised him that suit had been commenced, and enabled him to have communicated with counsel in ample time to have prevented a default? On this subject the record is entirely silent. Parties

desirous to be relieved on the ground of excusable neglect must show diligence. She has failed to make such a showing. Mr. Gumaer knew of these notes, knew that they were in the hands of attorneys for collection, had employed counsel to represent him, and a brief message by wire from his wife would have sufficiently advised him of the situation, so that he could, by the exercise of reasonable diligence, have taken steps to prevent a default. But the failure to exercise diligence does not stop with the neglect of Mrs. Gumaer. When the papers reached her husband in New York, after being mailed to him from Florence on the 13th of August, common knowledge with respect to the distance between the two points and the time it requires for mail to go from one point to the other warrants the assumption that but little time would remain for entering an appearance after he received the papers by mail, and which, from his own statement, or at least, from the results that followed, did not leave him sufficient time to communicate with his attorneys by mail, and yet he mailed the papers to them in the city of Denver; but they did not reach their destination until August 19th. What date Mr. Gumaer received the papers he does not state, but contents himself with the statement that he thought they would reach Denver in time. What excuse does he offer for pursuing this course? Why did he not wire his attorneys, with whom, months before, he had conferred regarding the notes? The only one offered is that he made a mistake in computing the time when he would have to appear. How was he mistaken? That he does not attempt to explain. The rule is that a party seeking to set aside a default must affirmatively show diligence and state facts which will excuse his neglect. Conclusions and abstract statements which might raise a surmise are not sufficient. The court to which an application to set aside a default is addressed cannot make apologies or invent excuses for a defaulting defendant. He must unequivocally state the facts which clearly establish excusable neglect.

And here it should be observed that the statement in the majority opinion to the effect that the first actual knowledge disclosed by the record that Gumaer had of the pendency of the action was when he received the papers in New York is not justified. Mr. Gumaer does not say so, nor any one else for him. True, the record is silent on the subject, but silence does not affirmatively establish a fact which, if material, it is incumbent upon him to prove. The statement in the affidavit of the defendant to the effect that Mrs. Gumaer was without business experience, and was not sufficiently advised regarding the subject-matter of litigation, so that she could intelligently consult with counsel, is of no moment. In the first place, it appears that

Mr. Gumaer had already consulted counsel with respect to the notes; and, had his wife exercised reasonable diligence in advising him of the service of process, as she was in law bound to do, he could readily have taken steps to prevent a default; and, next, the want of knowledge on the part of Mrs. Gumaer as to defenses which could be interposed did not excuse her from taking steps to have an appearance entered, or notifying her husband in time after service of process, so that he could have communicated with counsel.

Reduced to its final analysis, all there is material in the affidavit of defendants is simply this: Mrs. Gumaer held the process until the 10th of August, or until within seven days of the time when appearance would have to be entered, expecting her husband would return about that time. When he did not, she waited three days longer, or until the 13th, only four days before the time for appearance would expire, and then mailed the papers to her husband in New York, when he, in turn, mailed them to his counsel in the city of Denver. They did not reach their destination in time. If this shows such diligence on the part of the defendants as excused their failure to enter an appearance in the time fixed by the process, then they are excused; but it is submitted that it does not. Parties cannot be permitted to disregard the process of our courts, and after default is taken against them, come in and have it set aside, unless it affirmatively appears that they exercised due diligence to prevent a default. The record in this case, not only shows that the court did not abuse its discretion in refusing to set aside the default, but that, had it done so, it would have been an abuse of discretion to the prejudice of the plaintiff.

The judgment of the district court in refusing to set aside the default should be affirmed.

# PIEL v. PEOPLE.

(Supreme Court of Colorado. Dec. 4, 1911.)

## 1. CRIMINAL LAW (§ 1048\*)—APPEAL—PRESENTATION BELOW.

The Supreme Court has no power to decide matters which have not been submitted for its consideration in a legal manner.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2656-2670; Dec. Dig. § 1048.\*]

## 2. CRIMINAL LAW (§ 968\*)—MOTION IN ARREST OF JUDGMENT.

A motion in arrest of judgment, which does not affect the real merits of the offense, should be denied.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 968.\*]

## 3. CRIMINAL LAW (§ 935\*)—NEW TRIAL—INSUFFICIENCY OF EVIDENCE.

While it is peculiarly the trial court's province to determine issues of fact, it is its duty,

when the sufficiency of the evidence to support the verdict is challenged, to carefully weigh the evidence and to grant a new trial unless satisfied with the verdict, and its approval of the verdict should not be given when its mind cannot concur in its correctness, and its honest convictions lead it to believe that the verdict should have been for the other party.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2297, 2298; Dec. Dig. § 935.\*]

## 4. CRIMINAL LAW (§ 1160\*)—APPEAL—VERDICT—CONCLUSIVENESS.

The Supreme Court will not permit a verdict to stand unless both the jury and the trial court could have properly approved it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3084; Dec. Dig. § 1160.\*]

## 5. HOMICIDE (§ 332\*)—APPEAL—VERDICT—CONCLUSIVENESS—DEATH PENALTY.

The Supreme Court must be certain that a judgment of conviction imposing a death penalty is sustained by the weight of the evidence before it will permit it to stand.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 690-704; Dec. Dig. § 332.\*]

En Banc. Error to District Court, Weld County; James E. Garrigues, Judge.

Fred Piel was convicted of murder, and he brings error. Reversed.

F. W. Sanborn and G. Q. Richmond, for plaintiff in error. John T. Barnett, Atty. Gen., James M. Brinson, Deputy Atty. Gen., Benjamin Griffith, Atty. Gen., and Theo. M. Stuart, Asst. Atty. Gen., for the People.

WHITE, J. Fred Piel, a native of Russia, unable to speak or understand the English language, was tried for, and convicted of, the murder of George Kerber, and, upon the verdict of the jury sentenced to death. He brings the case here for review.

The difficulty, resulting in the death, occurred at the home of Henry Frank, the father-in-law of the defendant, about dusk of the evening of October 24, 1909. Mr. Frank, who is also a Russian, had invited the members of his family, and a few friends, to celebrate the Sunday in a way common among the Russians in that section. He provided for the occasion a keg of beer and a bottle of whisky. In the forenoon of the day, defendant at his own home drank several glasses of whisky, becoming somewhat intoxicated, and in the afternoon, still under the influence of the liquor, he, as an invited guest, went to Henry Frank's house, taking with him a quart bottle of whisky. Thereafter the defendant, with other members of the Frank family, and three or four neighbors, drank the greater portion of the keg of beer; the defendant imbibing from 15 to 20 glasses. About 4 o'clock the deceased, with two friends, none of whom had been invited, but who all appeared to be welcome, stopped at the Frank house and participated in the festivities. They, in company with the defendant and others, drank a few glasses of whisky, and, in an apparently friendly manner, remained in the house about half an

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

hour talking. Defendant and deceased thereupon became involved in a quarrel over the ownership or value of a beer keg, which had been used at some previous like party or picnic. Thereupon Lizzie Frank, the defendant's sister-in-law, requested them to be quiet and to leave the house. The parties, except defendant and the Frank family, presently retired to the yard congregating at, or near, the southwest corner of a house belonging to one Weigant, a neighbor residing about 100 feet south of the Frank house. There they engaged in general conversation relative to their crops and the harvesting thereof. About 15 minutes thereafter, defendant came out of his father-in-law's house and went to the barn to answer a call of nature. Emerging from the barn, he saw the group at the corner of the Weigant house and joined them. Upon approaching and seeing the deceased, defendant asked him why he had struck him in the house, to which deceased replied: "Stand back, I don't want to talk to you." Thereupon the defendant and deceased almost simultaneously began fighting, striking each other with their fists, across or over the shoulders of one Wray; the latter placing his hands on each of the combatants and endeavoring to keep them apart. They pushed Wray aside, and the deceased stepped back a few feet and picked up a board, an inch or so thick, three or four inches wide, and three or four feet long. As the deceased was raising up to strike defendant with the board, or simultaneously with the stroke therefrom, the defendant drew from his pocket an ordinary pocket knife, having a blade about two inches long, and in a dazed condition stabbed the deceased with the knife, penetrating the abdominal wall, inflicting the wound from which the deceased died. When the board struck or fell upon the head of defendant, the latter stumbled to the ground, while the deceased turned, walked to the barn, and presently returned exhibiting the wound, and announcing his belief that he would die therefrom. The defendant, without comment or giving utterance to any words, made his way into his father-in-law's house, wiped the blood from his face, caused by the blows, and lay down upon a bed. He thereafter, the same night, with his wife and child, drove to his own home, at which place he was later arrested.

John Weigant, Jr., a boy not quite 15 years old, testified that he was standing at the door of his father's house—the house 100 feet south of the Frank house—when Piel came out of the latter house; that Kerber and the other men had stepped to the corner of the Weigant house, a few feet away; that, when Piel came out of the Frank house, he had his hand in his coat pocket and held a knife therein with a blade five inches long; that he came down talking, and when he got near to Kerber the latter said, "Stand back, I don't want to speak to you"; that, as Kerber said, "Stand back," Piel "struck at

George Kerber, and George Kerber struck. He had turned Jim Wray out between the two. Then when Jim Wray was out Piel went around, and Kerber picked up a board, and, when he was about to strike, he stabbed him, and then he dropped the board and hit him a little bit with the board, and then he ran around the barn and when he came back he was stabbed."

Other evidence shows that deceased and defendant lived upon the same farm within 200 feet of each other; that they were employed by the same man; that deceased visited at defendant's home, and the two were good friends.

No exceptions were taken at the trial to the decisions of the court in admitting or rejecting evidence, or to the instructions given to the jury in behalf of the people. The defendant made no request for instructions. The only exceptions taken were to the decision of the court in overruling the motion for a new trial, the refusal of the court to allow the filing of a motion in arrest of judgment, and to permit counsel, at the time of sentence, to interpose objections and exceptions to the instructions given. It is proper to say that counsel representing defendant here did not represent him at the trial below, and here urge many matters which they conceive to be erroneous.

[1] Under the authority vested in us, and the forms of law prescribed, we have no power to decide matters which in no legal manner have been submitted for our consideration. *Smith v. People*, 1 Colo. 121; *Noble v. People*, 23 Colo. 9, 45 Pac. 376; *Chipman v. People*, 24 Colo. 520, 523, 52 Pac. 677; *Keady v. People*, 32 Colo. 57, 64, 74 Pac. 892, 66 L. R. A. 353; *Weaver v. People*, 47 Colo. 617, 618, 108 Pac. 331.

[2] Were we to assume that defendant had a right to file a motion in arrest of judgment, the denial of such right in no wise prejudiced him. No alleged error exists in support of such motion, which cannot, without the motion, be properly presented for determination. Defendant's counsel practically concede this. They admit that a motion in arrest of judgment, that does not affect the real merits of the offense charged, should be denied, and that they are not in a position to advance any special grounds why the motion, if filed, should have been sustained.

Under the condition of the record, the only matter which we can consider is whether the evidence is sufficient to support the verdict and sentence.

We are not impressed with young Weigant's testimony. He is in no wise corroborated. Other witnesses having better opportunity than he saw no knife until after the fist encounter. It is very clear that, while the blows with the fists were being struck, defendant had no knife in his hand. If young Weigant saw a knife with a blade five inches long, inclosed in defendant's hand, protruding from his coat pocket, as he passed from

the house towards the barn, it was not the knife the other witnesses saw, including those for the state, and with which the fatal blow was struck. Moreover, the altercation occurred in the dusk of the evening when it was difficult for those in the immediate presence of the combatants to see distinctly what took place, making it very improbable that young Weigant, at a distance of 100 feet, could see a knife blade sticking out of a coat pocket.

In denying defendant's application for leave to file a motion in arrest of judgment, the trial court stated, among other things: "I have no pardoning power. Clemency does not rest with me; it rests with the Governor. The jury has convicted this man and found him guilty of murder in the first degree. This is not a strong case. I have known of stronger cases where the defendant has gone scott free. I have tried murder cases in this district stronger than this where the man was acquitted; but that does not matter. There is evidence upon which to base this verdict."

[3] While it is the peculiar province of the jury to determine the issues of fact, when they have done so, and the sufficiency of the evidence to support their verdict is challenged, it becomes the duty of the trial court to carefully weigh and consider all the evidence and the facts and circumstances in the case, and, unless satisfied with the verdict to such an extent that its reason and judgment approve it, a new trial should be granted. And "the approval of a verdict does not mean that formal approval which is inferred from the act of rendering judgment on it, but it means the assent and approval of the mind, after due consideration; and when the mind of the court refuses to concur in the correctness of a verdict, and its honest convictions lead it to believe that it ought to have been for the other party, then the verdict is not supported by the evidence so as to merit its approval, for in passing on a motion for a new trial it is the court, and not the jury, that must weigh and determine the effects of the evidence. It cannot be said that a court approves a verdict when its reason and judgment rebel against the conclusion it expresses. The rule requiring a juror to be satisfied with the verdict is no stronger than the rule which makes it the duty of the trial court to approve or disapprove a verdict as dictated by its own conscience and judgment. It may be here suggested, however, that, as one juror may yield his opinions and accept those of the other jurors, so may the court yield his impressions or opinions and adopt those of the jury; but such surrendering of his own views must be the result of consideration and reasoning, and can only be done where it, through such process, finally, reaches the conclusion that the verdict is right and, by reason thereof, approves it." *Yarnell v. Kilgore*, 15 Okl. 591, 593, 82 Pac. 990.

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And in *Hogan et al. v. Bailey*, 27 Okl. 15, 110 Pac. 890, 892, the same court said: "The trial court has a higher function under our jurisprudence than to act merely as a moderator or umpire between contending adversaries before a jury. Not only is it charged with the duty of seeing that the course and conduct of the trial gives to each of the litigants a fair opportunity to present his cause, and to have the facts weighed in the light of proper instructions declaring the law relative thereto, but it is the imperative, abiding duty of the court, after the jury has returned its verdict, and awarded to one or the other success in the controversy, where the justness of the same is challenged as in this case, to carefully weigh the entire matter, and, unless it is satisfied that the verdict is responsive to the demands of justice, to set the verdict aside and grant a new trial. Not only must the jury be satisfied of the righteousness of the conclusion to which it arrives, but, unless that conclusion meets the affirmative, considerate approval of the mind and conscience of the court, it should not, where challenged, be permitted to stand."

In *State v. Bridges*, 29 Kan. 138, 142, it is said: "Even in a civil case, when the judgment of a trial judge tells him that the verdict is wrong, that whether from mistake, or prejudice, or other cause, the jury have erred and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict and remanding the question to another jury. *Railway Co. v. Kunkel*, 17 Kan. 145. In a criminal case this duty is still more important, and a trial judge ought never to sentence a prisoner upon a verdict which is properly challenged, unless he is willing to declare that the verdict of the jury should be accepted as just."

When it appears to the trial court, exercising a sound judgment, that the jury have found against the weight of the evidence, it is the imperative duty of such court to set the verdict aside. We repeat and adopt the language of Mr. Justice Brewer in *K. P. Railway Co. v. Kunkel*, 17 Kan. 145, 172, where he said: "We do not mean that he (the trial judge) is to substitute his own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong, that, whether from mistake, or prejudice, or other cause, the jury have erred, and found against the fair preponderance of the evidence, then no duty is more impera-

tive than that of setting aside the verdict and remanding the question to another jury."

[4] Moreover, it has been the unvarying rule of this court to permit no verdict to stand, unless both the jury and the court, trying the cause, could, within the rules prescribed, approve the same.

In *Petite v. People*, 8 Colo. 518, 524, 9 Pac. 622, 626, we said: "This court, in common with other courts of last resort, hesitates to assume the responsibility of nullifying the verdicts of juries on account of insufficient evidence to authorize the same. Such verdicts, as a rule, will not be molested unless there is reason to believe either that the jury must have been influenced by passion or prejudice, or that they misconceived the scope and effect of the evidence. But, under all the circumstances disclosed in the case at bar, we feel constrained to say that our duty commands us to interfere. \* \* \* We cannot reasonably find, from the proofs in this record, sufficient warrant for the penalty of death; the jury must have misunderstood the evidence or misconceived its scope and effect."

The same rule is recognized in *Nilan v. People*, 27 Colo. 206, 213, 60 Pac. 485, 487, where it is said: "\* \* \* We are impressed with the inadequacy of the evidence to prove either degree of murder."

And in *Hackett v. People*, 8 Colo. 390, 391, 8 Pac. 574, 575, speaking through Mr. Justice Helm, this court said: "But we reverse the judgment in this case willingly for another reason. Surprising as the fact may be, it is nevertheless true that the verdict was not warranted by the evidence. \* \* \* But, discarding entirely the accident theory, the evidence, at most, sustains only the conclusion that the fatal shot was fired in a sudden heat of passion, during a drunken brawl between companions; deceased having first choked Hackett (the defendant), thrown him on the bed, and otherwise maltreated him."

No one can read the record before us without being impelled to the belief that the verdict is manifestly against the weight of the evidence. A doubt will certainly arise regarding the justice of such verdict, as it evidently did in the mind of the trial judge giving rise to his language hereinbefore quoted. In a case of this character, not only should the jury be convinced beyond a reasonable doubt before agreeing upon such a verdict, and fixing the penalty at death, but the trial court should likewise entertain a firm belief in the justness of the verdict before pronouncing judgment.

[5] Moreover, this court must be very certain that the verdict and judgment are justified by the weight of the evidence before we can sanction the infliction of the penalty here imposed. As said by Mr. Bishop in

his work on *Criminal Procedure* (paragraph 80 [2d Ed.]): "If a man is charged with acts to which the law attached the penalty of imprisonment, and then he is hung for those acts, he is not punished; he is murdered. It is no more just to take his life on a charge of acts to which the law affixes the punishment of imprisonment only, than it is to do the same thing without any charge."

Evidence may be offered at another trial which will sustain a like verdict to the one before us. As the record is, we are unable to read therefrom that premeditation and express malice essential to constitute murder in the first degree. The judgment is therefore reversed.

Judgment reversed.

CAMPBELL, C. J., and GARRIGUES, J., not participating.

### STARRETT v. RUTH.

(Supreme Court of Colorado. Dec. 4, 1911.)

#### 1. JUSTICES OF THE PEACE (§ 47\*)—JURISDICTION—EQUITABLE ACTIONS.

A settlement of partnership accounts is an equitable matter, over which a justice of the peace has no jurisdiction, so that the county court would have no jurisdiction on appeal in such an action.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 184-188; Dec. Dig. § 47.\*]

#### 2. JUSTICES OF THE PEACE (§ 47\*)—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence in an action originating before a justice of the peace held to show that the payment of a certain sum to defendant was a part of a partnership transaction, so as to remove such transaction from the jurisdiction of such justice, and of the county court on appeal.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 184-188; Dec. Dig. § 47.\*]

#### 3. TRIAL (§ 296\*)—INSTRUCTIONS—CURING ERRORS.

In an action for the value of services claimed to have been furnished defendant, the court instructed that if the jury found from the evidence that defendant employed plaintiff to work in a restaurant, and did not disclose to him that defendant was not the owner, plaintiff could look to defendant for his wages, but further instructed that if defendant was simply the manager of the restaurant, and not the proprietor, and plaintiff knew that fact, he could not sue defendant for the work performed. Held, that any error in the first part of the instruction in ignoring the fact that plaintiff might have known who owned the restaurant when he engaged work therein was cured by the second part thereof.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 705-718; Dec. Dig. § 296.\*]

#### 4. TRIAL (§ 295\*)—INSTRUCTIONS—CONSTRUCTION.

Instructions should be construed as a whole.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 703-717; Dec. Dig. § 295.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Error to Rio Grande County Court; Alden Bassett, Judge.

Action by B. A. Starrett against Chester A. Ruth. Judgment for defendant, and plaintiff brings error. Modified and affirmed.

Ira J. Bloomfield, for plaintiff in error.  
James P. VeerKamp, for defendant in error.

HILL, J. The defendant in error instituted this action before a justice of the peace. Upon appeal to the county court, judgment was in his favor for \$133.33. The plaintiff in error brings the case here for review upon error.

[1] It stands admitted that, as tried before the justice of the peace, the action included items of, and an accounting pertaining to, a partnership existing between the parties. At the trial in the county court, upon objection, some of these partnership items were eliminated. The court correctly held that a settlement of partnership accounts is an equitable matter, over which a justice of the peace has no jurisdiction, and that in such case the county court was without jurisdiction over them upon appeal. *Robinson v. Compher*, 13 Colo. App. 343, 57 Pac. 754.

Regardless of this ruling, the plaintiff thereafter was allowed to prove that he had paid the defendant \$100 under a written agreement, which, in substance, stated by virtue of said payment that plaintiff became the owner of one share of stock, of the par value of \$100, in the Bellevue Baking Company. The agreement further provided that the plaintiff was to act as foreman of said bakery, etc., and was to receive one-half of the net profits of everything baked and sold. Said bakery was to be opened as soon as practicable. It further provided that at a subsequent date plaintiff was to pay said company an additional \$100, at which time he was to own a one-third of said bakery business and to have one-half of the net profits. This contract stated that it was to remain in force as long as mutually agreeable, and could only be terminated by death, disability, or by mutual agreement of all parties interested.

The evidence discloses that at the time of the execution of this contract and the payment of this \$100 no such a corporation as therein named had ever been formed, and that no such was thereafter created, but, regardless of this, that the parties opened up such an establishment upon some kind of a partnership basis. The particular arrangements under which they were to act are not disclosed.

The plaintiff testified that he paid the \$100 named in the contract to become a part owner in the bakery business, and that he gave his work and this \$100 to get a one-half interest; that he was to pay \$100 more, which was not yet due; that he did not expect the \$100 to be paid back until the bakery business was settled up; that there had never

been any settlement between them; that he claimed a one-half interest in the goods on hand as part owner in the business, and also a half interest in the net profits of the sales. The plaintiff's judgment included this \$100.

[2] Instructions were given upon the theory that, if the defendant had never delivered this share of stock, the plaintiff could recover for the \$100 paid; that it was no part of the partnership transaction. In this the court erred. While the contract is somewhat ambiguous, the evidence discloses that it was a part of the partnership transaction; that the plaintiff so treated it, and upon the strength of this payment entered into the partnership business, and so continued until certain difficulties arose between the partners.

[3] The remainder of the judgment, \$33.33, was for labor performed by the plaintiff at the instance and request of the defendant. It is admitted that this item had no connection with the partnership matters. The defendant disclaimed any liability, for the reason, as he alleges, that these services were performed for his wife, and not for him; that, while he hired the plaintiff, he did so as his wife's agent. He complains of instruction No. 1 given upon this subject. It reads as follows: "The court instructs the jury that if you find from the evidence in this case that the defendant employed plaintiff to work in the restaurant, and did not disclose to the plaintiff that he was not the owner, then and in that event the plaintiff could hold the defendant in law for his pay."

It is claimed this instruction is faulty, in that it ignores the fact that the plaintiff may have known who owned the restaurant, and that, although the defendant did not disclose to the plaintiff that he was not the owner, yet if the plaintiff knew this fact, and knew that he was being hired to work for some one else, he could not recover against the defendant. It is unnecessary to determine this question, for the reason that another instruction was given which included everything contended for by the defendant on this question. The part pertinent reads: "If the jury finds from the evidence that the defendant was simply the manager of the Bellevue Café or Restaurant, and was not the proprietor, and that fact was known to the plaintiff, then he could not bring suit against the agent or manager, but should bring suit against the proprietor."

[4] Instructions are to be considered as a whole, and when these are so construed, even if defendant is right in his contention pertaining to instruction No. 1, it was cured in the giving of the other. We find no error in this respect. If any question can be raised concerning them, it would be whether they were not more liberal to the defendant than he was entitled to. *Hewes v. Andrews et al.*, 12 Colo. 161, 20 Pac. 338.

It follows that there was no prejudicial error pertaining to the item for labor performed by the plaintiff at the instance and request of the defendant, in the sum of \$33.-33. The plaintiff was entitled to a judgment for that amount, with his costs of suit. That portion of the judgment for the \$100 connected with the partnership transaction is erroneous.

The judgment will be modified. The cause will be remanded, with directions to modify the judgment in accordance with the views herein expressed, and, as so modified, it will stand affirmed. The plaintiff in error is entitled to recover his costs in the prosecution of this writ of error.

Modified and affirmed.

MUSSER and GABBERT, JJ., concur.

KESSLER v. FRITCHMAN, Mayor.  
(Supreme Court of Idaho. Dec. 23, 1911.)

(Syllabus by the Court.)

1. STATUTES (§ 89\*)—GENERAL OR SPECIAL LAWS—CLASSIFICATION OF CITIES.

Sections 1 and 2 of the act of March 13, 1911 (Sess. Laws 1911, p. 280) are not in conflict with section 1, art. 12, of the Constitution of this state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 97; Dec. Dig. § 89.\*]

2. STATUTES (§ 199\*)—CONSTRUCTION—"GENERAL ELECTION."

The words "general election," as generally used in Constitutions and statutes, have reference to general elections held for the purpose of electing state and county officers.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 199.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3062, 3063; vol. 8, p. 7669.]

3. MUNICIPAL CORPORATIONS (§ 48\*)—ORGANIZATION—SUBMISSION OF QUESTION TO POPULAR VOTE—"GENERAL ELECTION."

The words "general election," as used in section 1 of article 12 of the Constitution, mean that the general election should be a general election for the purpose of changing the form of government, at which the people having the general qualifications of electors to vote should have a free and open opportunity of expressing themselves upon the questions submitted, and that such qualification should not be limited to any special qualification, and does not mean that such election shall be at the time of a general election under either the general election laws of the state or the municipality holding such election.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 48.\*]

4. MUNICIPAL CORPORATIONS (§ 46\*)—AMENDMENT TO SPECIAL CHARTER.

Special charters issued to cities by the territorial Legislature prior to the adoption of the Constitution of this state can only be amended by special acts of the Legislature, and the general laws relating to purely municipal affairs of local concern to the government of cities do not apply to those cities operating under special charters without the consent of the electors of such municipality.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 123-125; Dec. Dig. § 46.\*]

5. MUNICIPAL CORPORATIONS (§ 48\*)—ORGANIZATION OF CITIES—AMENDMENT OF CHARTER.

Section 1, art. 12, of the Constitution, reserves the right to the people of a city organized under special charter issued prior to the adoption of the Constitution to change the form of government by vote of a majority of the electors at an election held for such purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 48.\*]

6. MUNICIPAL CORPORATIONS (§ 48\*)—ORGANIZATION OF CITIES.

The act of March 13, 1911, is a general law of the state, but it in no way changes or alters or amends the powers of cities previously organized either under a special charter or the general laws, unless such law is adopted by the electors of such cities and approved as the form of government for such cities.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 48.\*]

7. MUNICIPAL CORPORATIONS (§ 48\*)—GENERAL OR SPECIAL LAWS—ORGANIZATION OF CITIES.

Under the provisions of section 3 of the act of March 13, 1911, whenever a change of form of government is made from that under a special charter or from an organization under the general laws to the new form of government provided by said act, the provisions of the act are made to apply alike to all such cities making such change, under the classification made by the act.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 48.\*]

8. STATUTES (§ 120\*)—SUBJECTS AND TITLES—MUNICIPAL CORPORATIONS.

The title of the act of March 13, 1911: "Providing a form of government for cities of the state of Idaho now or hereafter having a population of two thousand five hundred or over; providing that any such city may become organized under the provisions of this act through the adoption thereof by special election, and providing the procedure therefor; providing for the holding of general and special municipal elections; prescribing the powers and duties of officials under this act; providing for the recall of elective officials; providing for the initiation of legislation by the people and for the submission of measures and ordinances to a vote of the electors of cities adopting the provisions of this act, and prescribing the procedure therefor; providing for granting of franchises and making of contracts and providing other powers, functions, rights and privileges usually exercised by cities of like character and degree; providing a method whereby any city adopting the provisions of this act may discontinue the same after a certain time; providing that nothing in this act shall be construed as repealing or modifying any existing general laws governing such cities unless such general laws are inconsistent with the provisions of this act, \* \* \*" is sufficient, and states the general subject to be treated by the act, to wit, a form of government for cities, and thereafter specifies the particular measures and methods embraced within the same, carrying out the general purpose and objects of the act. There is nothing in the statute which could in any way mislead the Legislature in passing the same, or which could mislead the people as to the intent and purpose of the Legislature in enacting such law, and it does not violate article 3, § 16, of the Constitution.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 120.\*]



**9. STATUTES (§ 93\*)—GENERAL OR SPECIAL LAWS—MUNICIPAL CORPORATIONS.**

The act of March 13, 1911, is not special or class legislation and is not in violation of section 19, art. 3, of the Constitution, but by its provisions classifies the cities of the state as clearly authorized under the provisions of section 1, art. 12, of the Constitution, and this section in no way limits the power of the Legislature in enacting a general law providing for the organization of cities under a commission form of government, and that such form of government may be adopted by the cities of the state having a population of 2,500 or more by a majority vote at an election held for that purpose.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 93.\*]

**10. CLASSIFICATION OF CITIES—CONSTITUTIONALITY.**

*Held*, by Stewart, C. J., under the classification of cities made by the act of March 13, 1911, the Legislature intended to make a classification according to population, and that all cities, towns, or villages having a population of 2,500 or more might be organized under the new form of government, while cities, towns, or villages having less than 2,500 population should remain as cities, towns, or villages under the general laws under which they were organized, or special charters, as the case might be, until such time as they became organized under said act. (Ailshie, J., reserves his opinion on this paragraph.)

Sullivan, J., dissents.

Application by Harry S. Kessler for a writ of mandate to Harry K. Fritchman, Mayor of Boise City. Granted.

Charles F. Reddock, John F. Nugent, Gustave Kroeger, and Harry S. Kessler, for plaintiff. P. E. Cavaney, City Atty., and Alfred A. Fraser, for defendant. E. G. Davis, amicus curiæ.

STEWART, C. J. This is an original application for a writ of mandate. The application for the writ alleges that the plaintiff is a resident and taxpayer of Boise City; that a petition signed by a number of the qualified electors of Boise City equal to and in excess of 25 per cent. of the votes cast for all the candidates for mayor at the last preceding general election held in said city had been filed with the defendant mayor of Boise City, petitioning said mayor to call an election for the purpose of submitting the question of the adoption of the commission form of government, as provided for in an act adopted by the Legislature of this state on the 13th day of March, 1911 (Sess. Laws 1911, p. 280); that more than 10 days have elapsed since said petition was presented to said mayor; and that said mayor has failed and refused to call said election. Counsel for the defendant mayor has appeared and filed a demurrer to the complaint, and counsel amicus curiæ has also appeared and filed a brief in support of the demurrer.

Two questions are presented by the demurrer: First, can Boise City, being organized and now existing under a special charter antedating the Constitution of the state, come

under the act of the Legislature mentioned and set forth in plaintiff's application for a writ of mandate. Second, is the title to the act set forth in plaintiff's application sufficient to constitute a constitutional enactment of said law and make it applicable to Boise City.

The portions of the act of March 13, 1911, which are important and involved in this case are as follows:

"Section 1. That any city within the state of Idaho, organized under the general laws of the state, or under special charter, or under a general incorporating act, now or hereafter having, as shown by the last preceding state or national census a population of two thousand five hundred persons, or over that number, may become organized as a city under the provisions of this act by proceedings as hereinafter provided.

"Sec. 2. Upon petition of electors equal in number to twenty-five (25) per centum of the votes cast for all candidates for mayor at the last preceding general city election of any such city, the mayor shall, by proclamation, issued within ten (10) days after filing of such petitions, submit the question of organizing as a city under this act at a special election to be held at a time specified therein, and within sixty (60) days after said petition is filed. If said plan is not adopted at the special election so called, the question of adopting said plan shall not be resubmitted to the voters of said city for adoption within two (2) years thereafter, and then the question to adopt may be resubmitted upon the presentation of a new petition signed by the electors of such city equal in number to twenty-five (25) per centum of the votes cast for all candidates for mayor at the last preceding general city election. \* \* \*

"Sec. 3. All general laws of the state of Idaho governing or pertaining to such cities and not inconsistent with the provisions of this act, shall apply to and govern cities organized under this act; provided: That no provisions of any special charter or other special act or law which any such city may be operating under at the time of its becoming organized under this act shall thereafter be applicable to such city while it is operating under the provisions of this act. All by-laws, ordinances and resolutions lawfully passed and in force in such city under its former organization shall remain in full force until altered or repealed by the council elected under the provisions of this act. The territorial limits of such city shall remain the same as under its former organization, but such territorial limits may be extended or changed as provided by law, and all rights and property of every description which are vested in any such city under its former organization shall vest in the same under the organization herein contemplated, and no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

right or liability, either in favor of or against it, existing at the time, and no suit or prosecution of any kind shall be affected by such change, and such city shall be the successor of the former organization and shall have perpetual succession; it shall have and exercise all powers, functions, rights and privileges, now or hereafter given or granted it, and shall be subject to all the duties, obligations, liabilities and limitations now or hereafter imposed upon such municipal corporations by the Constitution and laws of the state of Idaho, and shall have and exercise all other powers, functions, rights and privileges usually exercised by, or which are incidental to, or inhere in, such municipal incorporations of like character and degree."

It is the contention of the defendant in this case that sections 1 and 2 of the act of March 13, 1911, are in conflict with section 1, art. 12, of the Constitution, and in the brief of counsel amicus curiæ it is contended that said sections and also section 3 of said act violate section 19 of article 3 of the Constitution. We have also set out a portion of section 3 of the act in question for the reason that it seems to this court that such section is in a way involved in determining the questions presented upon this demurrer. Section 1, art. 12, of the Constitution reads as follows: "The Legislature shall provide by general laws for the incorporation, organization and classification of the cities, and towns in proportion to the population, which laws may be altered, amended, or repealed by the general laws. Cities and towns heretofore incorporated, may become organized under such general laws; whenever a majority of the electors at a general election, shall so determine, under such provision therefor as may be made by the Legislature."

Section 19, art. 3, of the Constitution provides: "The Legislature shall not pass local or special laws in any of the following enumerated cases, that is to say." And then follow the enumerated cases in which local and special laws may not be enacted.

[1] Referring now to section 1, article 12, of the Constitution, quoted above, we find this section of the Constitution grants power to the Legislature of the state to provide by general laws for the incorporation, organization, and classification of cities and towns in proportion to the population, and that such laws may be altered, amended, or repealed by general laws, and that cities and towns incorporated prior to the adoption of the Constitution may become organized under such general laws whenever a majority of the electors at a general election shall so determine under such provisions as may be provided by the Legislature.

Boise City was organized as a municipality under a special charter from the Legislature, approved January 11, 1866, while Idaho was a territory, and before the Constitution was adopted. This special charter was recognized by the people in the provisions of the

Constitution when it was adopted, and it was specifically provided that cities and towns heretofore incorporated might become organized under the general laws whenever a majority of the electors at a general election should so determine, under such provisions therefor as may be made by the Legislature. This special charter of Boise City has also been preserved and recognized by the Legislature of the state by providing for amendments thereto by special acts made applicable to such city, and it would seem from the provisions of the act of March 13, 1911, that the Legislature intended to enact a law whereby the electors of cities and towns incorporated under a special charter as recognized in the Constitution might become organized under such general law.

[2] But it is the contention of counsel for the defendant that section 2 of the act in question, wherein it provides that the mayor shall call an election and submit the question of organizing as a city under the act at a special election to be held at a time specified therein and within 60 days, is a violation of the provisions of section 1 of article 12 of the Constitution because the act of the Legislature provides that the change of the form of government from a special charter to an organization under the general laws shall only be determined at a general election. This involves the construction of the said section of the Constitution as to what was intended by the makers of the Constitution in incorporating in said section the words "general election." It is contended by counsel for the mayor that "general election," as used in this section of the Constitution, was intended to mean a general election held under the general election laws of the state for the election of state and county officers; or, if it did not mean a general election held under the general election laws of the state, that it must mean a general election held under the general election laws of the municipality, and in this instance the city of Boise, and that it does not include and could not include a special election called by the mayor at a time to be by him specified and within 60 days after the petition is filed. The term "general election" in state Constitutions and in legislative enactments has been defined in various ways by the courts where such question has come before them for decision. The only use made of the words "general election" in the Constitution other than found in section 1, art. 12, above referred to, may be found in sections 6 and 9 of article 21 of the Constitution. In section 6 provision is made for submitting to the qualified electors of the then territory, for adoption or rejection, the Constitution, and, after specifying the date at which such election shall be held, the section provides "that the same shall be conducted in all respects in the same manner as provided by the laws of the territory for general elections"; and in section 9 of said article 21

it is provided for holding the first state election after the Constitution has been adopted and specifies: "Said election shall be conducted in all respects in the same manner as provided by the laws of the territory for general elections." The use made of the words "general election" in these two sections of article 21 indicates very clearly that such words are used with reference to general elections held for the purpose of electing state and county officers, and we think that the courts generally, in construing the words "general election," have held that such words mean elections held for the purpose of electing state and county officers and members of Congress. *People v. Town of Berkeley*, 102 Cal. 298, 36 Pac. 591, 23 L. R. A. 838; *State v. Cobb*, 2 Kan. 32; *Bond v. White*, 8 Kan. 333; *McIntyre v. Iliff*, 64 Kan. 747, 68 Pac. 633; *Westinghausen v. People*, 44 Mich. 265, 6 N. W. 641; *State v. Tausick* (Wash.) 116 Pac. 651.

The Legislature of the territory enacted a statute which was in force at the time the Constitution was adopted, which provided for general elections and fixed a special date for holding the same. An examination of the authorities construing statutory and constitutional provisions which contain provisions relating to general elections show that they reached the conclusion that "general elections" meant such elections as were held for state and county officers and members of Congress, and this same conclusion must also be drawn from the use of such words in the Constitution of this state above referred to, and also in the statute. But in the use thus made of such words in Constitutions and statutes, it generally clearly appears that such words have been used in such a way as to clearly indicate that "general elections" meant elections held for the purpose of electing state and county officers.

[3] But the words "general elections," as found in section 1, art. 12, of the Constitution, are not used in relation to the general subject of elections, but are intended to apply to such elections as may be provided by the Legislature for the purpose of determining whether the electors of an incorporated city shall incorporate under the laws of the state, and the word "general" no doubt was intended to mean that it should be a popular election or an election by the people and should be open and available to all the electors as distinguished from any special class, who were electors and qualified to vote in such incorporated cities and towns. There is no connection between the words "general election," as used in this section, with any other provision of the Constitution, and no reference is made to any general law upon the subject of election, and nothing to indicate that the makers of the Constitution had in view a general election for state and county officers. But we are inclined to the view that the makers of the Constitution did have in contemplation that the election to be

held should be provided for by proper legislation and should be held at such time and in such form and manner as would be provided by law. This election might be called a "general election," or it might be called a "special election," or it might be called a "regular election"; but it is to be an election to be held under a law to be enacted by the Legislature. And it might be that the Legislature might provide for the holding of such election at the same time that general elections are held, or the Legislature might provide for holding it at a special time where the sole question to be voted upon at such election would be the question of organizing or changing the form of government from the form provided by the special charter to a form provided by the general law of the state.

In the case of *State v. Steunenberg*, 5 Idaho, 1, 45 Pac. 462, the court had under consideration the above section of the Constitution, and held that the election therein referred to was a general election held for the purpose of changing such form of government, and said: "The latter part of said section of the Constitution points out a means by which towns or villages which had been incorporated prior to the adoption of the Constitution may become organized into cities under such general laws; that is, whenever a majority of the electors, at a general election held for that purpose, so indicate by their votes. \* \* \* I think the intention to so organize may be shown by complying with the provisions of said act passed in pursuance of said section by dividing the town into wards, and holding a general election of such town for the election of city officers and electing them, and also in complying with all of the provisions of said act. The electors may then show their intention by a majority vote to organize under the general law, and that is all that the Constitution requires."

In the case of *Butler v. City of Lewiston*, 11 Idaho, 393, 83 Pac. 234, this court quotes with approval the language used in *State v. Steunenberg*, and in so doing changes the language used in the *Steunenberg* Case from "at a general election thereof" to "at a legal election held therefor."

We do not understand that these two decisions were deciding the question as to whether the Legislature had authority to pass a law providing for holding special elections to change the form of municipal government or the time of holding such elections, but were merely deciding that towns and villages which had been incorporated prior to the adoption of the Constitution might become organized as cities under the general laws of the state by holding a general election for that purpose. The court did not define the term "general election" as used in the Constitution, or hold that such words in any way referred to general elections, as defined by the statute.

In the case of *Boise City National Bank v. Boise City*, 15 Idaho, 792, 100 Pac. 93, this court expressly held that "under the provisions of section 1, art. 12, of the Constitution, it is provided that cities and towns theretofore incorporated may become organized under the general laws whenever the majority of the electors at a general election shall so determine, under such provisions therefor as may be made by the Legislature." This clearly indicates that cities incorporated under special charters do not come under the general laws of the state until the majority of the electors of such city at a general election held for that purpose shall so determine. This case clearly recognizes that an election might be provided for by the Legislature for changing the form of government of a city incorporated under a special charter into a city organized under the general laws by a vote of the majority of the electors of such city at a general election held for that purpose; that is, the election is a general election held for the purpose of determining whether the form of government shall be changed, and not that such election shall be a general election held under the general election laws of the state.

Had it not been the intention of the framers of the Constitution to leave entirely to the Legislature all formalities as to holding such elections, there would have been no necessity for using in that part of said section the following language: "Under such provisions therefor as may be made by the Legislature." This language clearly indicates to our mind that the election, and its name and the manner and time of holding, were delegated entirely to the legislative department.

The case of *State v. Tausick*, 116 Pac. 651, decided by the Supreme Court of the state of Washington, is very much like the case now under consideration, and is cited by counsel on both sides as authority upon the question now under consideration. In that case the petition for an election requested that such election should be called at the time of the regular city election, and it was contended that "general election," as used in the Constitution, meant general state election. The Constitution of the state of Washington, in section 10, art. 11, provides: "Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine." While section 2 of the act (Laws 1911, c. 116) involved in that case provided that the mayor should, upon a proper petition, by a proclamation submit the question of organizing as a city under such act to a special election to be held at a time specified therein and within 60 days after said petition is filed. In that case the court held: "Any election which is not regularly held for the election of officers, or for some other purpose which shall come before

the electors at regular fixed intervals, is necessarily a special election. Had the act in question merely provided for an election on the question of adopting the commission form of government, it would have been a special election. Had it gone further and directed that a general election should be called, it would still be a special election. Manifestly the word 'special' is surplusage and can be disregarded without affecting the validity or meaning of the statute. Moreover, the word 'general' found in the constitutional provision quoted does not in fact make general the election therein mentioned and authorized. The framers of the Constitution undoubtedly knew it would necessarily be a special election, whatever it might be called; their manifest intention was not to require a general election on the subject itself, but to require that the result of such election should be determined, not by a mere majority vote on the question, but by the majority of the vote at a general election. Chapter 116 does not fix the time of holding the election further than to provide it shall be within 60 days from the filing of the petition. When, as in this case, the petition was filed within 60 days prior to a general election, it became the duty of the appellant and the trial court to call the election at such a time as would comply with the constitutional requirement."

The main reasoning of that court for its conclusion we think is correct; but we do not indorse all that is there said with reference to the definition of "general election," especially in view of the purpose and intent in which such words are used in our Constitution. We are of the opinion that the framers of the Constitution, in using the words "general election" in section 1, art. 12, of the Constitution, had in mind that an election should be held, and that it should be a general election in the sense that it should be an election at which the people having the qualification of electors should have a free and open opportunity of expressing themselves upon the question submitted, and that such qualification should not be limited by any special qualification, and that the Legislature should make full provisions for such election by legislative enactment, and that it was not the intention of the framers of the Constitution that such election should be at a time of a general election under the general election laws of the state or the city, but was to be at such time and conducted in such form as should be provided by the Legislature.

[4] It is also contended that the special charter of Boise City cannot be amended by general law, and that the act of March 13, 1911, is a general law and provides for the amendment of the special charter of Boise City. This question has been determined by this court in a number of instances, and this court has held that special charters of municipalities could only be amended by spe-

cial acts of the Legislature, and that general laws relating to purely municipal affairs of local concern to the government of cities did not apply to those cities operating under special charters, without the consent of the electors of said municipality. *Wiggin v. City of Lewiston*, 8 Idaho, 527, 69 Pac. 286; *Boise City National Bank v. Boise City*, 15 Idaho, 792, 100 Pac. 98; *Mix v. Board of Commissioners*, 18 Idaho, 695, 112 Pac. 215, 32 L. R. A. (N. S.) 534.

[5] This rule of law we think is correct, and that a general law relating to municipal affairs of local concern to the government of cities cannot and does not amend or alter special charters under which cities have been organized prior to the adoption of the Constitution. The act under consideration, however, is a general law and relates to all cities in the state of a population of 2,500 or over, and provides for the organization of such cities under the form of government provided for by said act; but the act itself in no way alters or amends either the general laws of the state in relation to cities and towns or villages, or cities organized under a special charter, but merely prescribes a new form of government which may be adopted by the sovereign power of cities. Under this act, if a majority vote at the election provided for by the act is in favor of adopting the new form of government, then elections are held, and the machinery to carry out the provisions of the act is provided, and the people, the sovereign power of such cities, have suspended the charter under which the same were incorporated, and such cities have become organized under the provisions of said act, and the general laws of the state are made the charter of such cities. The Constitution has expressly reserved to the people the right and power to make a change in the form of government where special charters have been issued to municipalities, and the Legislature is permitted and authorized to prescribe the form and the method by which such change may take place. It is the people, the sovereign power of the municipality, who are given power by the Constitution to make this change in the form of government, and it is not the Legislature who are altering or changing the special charter. The Legislature in enacting laws are simply acting under authority delegated to them by the people and can only enact such laws as have been authorized by the people, and where the sovereign power has reserved the right to act upon any question, and the Legislature have merely provided the manner or means by which such will may be expressed, and the people act and change the form of government, such alteration in the system of government in such instance is made by the people instead of the Legislature.

[6] That said act is general and not special and applies to all cities within the state having a population of 2,500 or more,

either organized under the general laws or a special charter, appears by the provisions made in section 3 of said act, as follows: "All general laws of the state of Idaho governing or pertaining to such cities and not inconsistent with the provisions of this act, shall apply to and govern cities organized under this act; provided, that no provision of any special charter or other special act or law which any such city may be operating under at the time of its becoming organized under this act shall thereafter be applicable to such city while it is operating under the provisions of this act."

[7] Under the provisions of this section, wherever a change of form of government is made from that under a special charter or from an organization under the general laws to the new form of government provided by the act of March 13, 1911, the provisions of said act are made to apply to all such cities making such change, and the act merely classifies the cities, and specifies the laws which the people may adopt governing such classification. *Gillesby v. Board of Com'rs*, 17 Idaho, 586, 107 Pac. 71. This act of the Legislature also provides that the same power authorized by the Constitution to change the form of government from a special charter to an organization under the general law may also, after a period of six years, change from its organization under the general laws back to an organization under the special charter, and by such means the special charter will again become the law governing such municipality. There can be no question, it seems to us, but that under the Constitution all power of government is vested in the people, and the people may make such changes in the form of government as they may deem wise and proper; and when the people of the state adopted our Constitution and reserved the right to the people, who constitute a municipality organized under a special charter, to change that form of government at a special election held for that purpose, and the Legislature in carrying out that provision of the Constitution have provided for the holding of such elections, such action of the Legislature is clearly within the power of the Legislature as conferred by the Constitution.

[8] It is next contended that the title of the act in question is unconstitutional because violative of section 16, art. 3, of the Constitution, in that the title is not broad enough to embrace the subject-matter contained in the body of the act. The title of the act reads as follows: "An act providing a form of government for cities of the state of Idaho now or hereafter having a population of two thousand five hundred or over, providing that any such city may become organized under the provisions of this act through the adoption thereof by special election, and providing the procedure therefor," etc. The objection to this title is that it does not specify cities organized under spe-

cial charters. The title, however, says that it applies to a form of government for cities of the state of Idaho. This would seem to mean any and all cities within the state of Idaho, organized and existing under the general laws or special charters, having more than 2,500 population. The words "cities of the state of Idaho" does not limit the act to cities organized under the general laws of the state, but includes all cities, whether organized under the general laws or under special charter. This court has, in a number of instances, passed upon the sufficiency of titles to various acts, and the rule of law adhered to has been that when a law has but one general object, and such object is fairly indicated by the title, the title is sufficient and is not violative of any constitutional prohibition.

In the case of *State v. Doherty*, 3 Idaho, 384, 29 Pac. 855, in discussing the sufficiency of a title to an act this court held: "It is sufficient if the act treats of but one general subject, and that subject expressed in the title. To hold that each subdivision of the subject, and each and every of the ends and means necessary for the accomplishment of the object of the act, must be specifically mentioned in the title, would greatly embarrass legislation, and accomplish no legitimate purpose." This case has been quoted by this court in a number of other Idaho cases, and in the case of *State v. Dolan*, 13 Idaho, at page 701, 92 Pac. at page 996 (14 L. R. A. [N. S.] 1259), this court quotes and approves the language of Judge Cooley, in his work on Constitutional Limitations (6th Ed. pp. 171, 172), as follows: "If all parts of the act have a natural connection and reasonably relate, directly or indirectly, to one general, legitimate subject of legislation, the act is not open to the objection of plurality of subjects." And the court in that case further says: "So far as this court is concerned, it has been determined that the title should indicate the general scope and purpose of the legislative enactment, and be so comprehensive as to give notice of such proposed legislation. The title should not be of such a character as to mislead or deceive, either the lawmaking body, or the public, as to the legislative intent. It should not cover legislation which is contradictory or not connected with or related to the general subject stated in the act. It should be broad enough to cover the subjects dealt with in the act, but not too broad, so as to indicate an intention to legislate upon a subject which the body of the act falls short of accomplishing, or departs therefrom." Examining the title now under consideration in the light of this rule of construction, it will be observed that the act in question is general in its application. It provides a form of government for cities of the state of Idaho having a population of 2,500 or more, and provides how such cities

of this act through the adoption by special election, and also provides for the holding of general and special municipal elections; provides for the powers and duties of officers under the act; provides for the recall of elective officials; provides for the initiation of legislation by the people and for the submission of measures and ordinances to a vote of the electors of cities adopting the same, and the procedure; provides for granting franchises and making contracts, and other functions, rights, and privileges usually exercised by cities of like character and degree; provides a method whereby any city adopting the provisions of the act may discontinue the same after a certain time; and provides that nothing in the act should be construed as repealing or modifying any existing general laws governing such cities, unless such general laws are inconsistent with the provisions of the act, and that the act should be construed as an additional and concurrent authority to the political code for such cities as may become organized under the act, and declaring an emergency. This title states the general subject to be treated by the act, to wit, a form of government for cities, and thereafter specifies the particular measures and methods embraced within the act carrying out the general purpose and objects of the act. There is nothing in the title which could in any way have misled the Legislature passing the same, or which can mislead the people as to the intent and purpose of the Legislature in enacting such law. Our attention has not been called to any contradictory legislation within its provisions or any subjects not connected with or related to the general subject stated in the act. It seems to be broad enough to cover all the subjects dealt with in the act, but is not too broad so as to indicate any intention to legislate upon a subject which the body of the act does not cover. The title of the act seems to be clearly within the rule announced by this court in *State v. Doherty*, 3 Idaho, 384, 29 Pac. 855; *Pioneer Irr. Dist. v. Bradley*, 8 Idaho, 310, 68 Pac. 295, 101 Am. St. Rep. 201; *State v. Jones*, 9 Idaho, 693, 75 Pac. 819; *Turner v. Coffin*, 9 Idaho, 338, 74 Pac. 962; *Butler v. City of Lewiston*, 11 Idaho, 393, 83 Pac. 234; *State v. Dolan*, 13 Idaho, 693, 92 Pac. 995, 14 L. R. A. (N. S.) 1259.

[9] Counsel amicus curiæ has filed a brief in this case, and makes a very strong argument against the constitutionality of the act for the reason, as he contends, that it violates the provisions of section 1, art. 12, of the Constitution, in that it provides for the organization and classification of cities within the state in violation of the provisions of the Constitution; that is, that a classification is so made that it is not based upon population. It is claimed that the word "cities," as used in section 1, does not include towns or villages, and limits the right to organize under this law to cities only or

ganized under the general laws of the state or under special charters. Rev. Codes, § 2170, provides: "All cities, towns and villages containing more than one thousand and less than fifteen thousand inhabitants shall be cities of the second class, and be governed by the provisions of this chapter, unless they shall adopt a village government as hereinafter provided." And Rev. Codes, § 2222, provides: "Any town or village containing not less than two hundred nor more than one thousand inhabitants, now incorporated as a city, town or village, under the laws of this state, or that shall hereafter become organized pursuant to the provisions of this title, and any city of the second class which shall have adopted village government as provided by law, shall be a village, and shall have the rights, powers and immunities hereinafter granted, and none other, and shall be governed by the provisions of this chapter. \* \* \*

From the provisions of these two sections of the statute counsel contends that municipal corporations, having more than 200 and not more than 1,000 inhabitants, are villages, and that municipalities having more than 1,000 and less than 15,000 inhabitants are cities of the second class, and that a municipality having a population of 2,500 or over may be a city of the second class or a village, for the reason that section 2170 of the Revised Codes, above quoted, gives authority for any city of the second class to organize as a village, while section 2222 recognizes the right of any village or any city of the second class which has adopted village government to continue its village organization, no matter what its size; the only penalty being that its rights, powers, and immunities shall be limited to those granted to villages.

Counsel calls our attention to the case of *Carson v. City of Genesee*, 9 Idaho, 244, 74 Pac. 862, 108 Am. St. Rep. 127, in which it was held that there could be no such thing as an involuntary incorporation, and that, until the inhabitants of any territory make an application to become a city of the second class, no matter how numerous they might be, such organization for such territory and such inhabitants cannot come into existence. Under the statute as thus construed, it is argued that, if there be towns and villages having a population of more than 2,500 persons, such municipalities could not adopt the form of government as provided for by the act under consideration, because they are towns or villages and not cities; that a village having the required population desiring to adopt the form of government as provided for in the act would be required first to obtain the petition of a number of electors equal to three-fifths of the total vote cast at the last preceding election held in said village, for a change from the village form of government to that of a city of the second class; if the required num-

ber of electors could be obtained to unite in such petition, it would then be necessary for the board of village trustees to pass an ordinance declaring the said village to be a city of the second class, which resolution should be forwarded to the board of county commissioners of the county in which said village is located; that, this having been done, the board of trustees would have to divide the municipality into wards, and at the biennial election said city should elect its officers, but that the village could not become a city of the second class until these officers were elected and qualified; that the act under consideration, because of these various statutory provisions in the organization of towns and villages, prevents a village having the necessary population from adopting the proposed form of government.

It is claimed also that the act discriminates against villages; that a city of the second class may have an election for the purpose of voting on the proposition to adopt the proposed form of government upon a petition of a number of electors equal to one-fourth of all those voting for mayor at the last preceding biennial election, and can adopt the said new form of government upon the favorable vote of a majority of those voting at the election so called, but a village desiring to become a city of the second class for the purpose of being able to vote upon the adoption of such form of government would have to have three-fifths of all the electors voting at the last preceding election in favor of that form of government, because that number must unite in a petition to change from a village government to that of a city of the second class; and that, for a village to go through the process necessary to become organized under the new form of government, it would have to have three-fifths of the electors, while a city of the second class would only require a majority of those voting.

A similar question was considered by the Supreme Court of Washington in the case of *State v. Tausick*, 116 Pac. 651, and, while the precise difficulties which might seem to exist by reason of the classification of municipalities may not have been the same found in the Washington statute as are now urged against the statute now under consideration, yet the principle applied in that case may be applied to the case now under consideration. Section 1, art. 12, of the Constitution, provides that the Legislature shall provide by general laws for the incorporation, organization, and classification of the cities and towns in proportion to the population, and section 3 of the act under consideration provides: "All general laws of the state of Idaho governing or pertaining to such cities and not inconsistent with the provisions of this act shall apply to and govern cities organized under this act." Under the Constitution the Legislature is clearly authorized to classify towns, cities, and vil-

lages of the state according to the population, and while the Legislature by general laws has made a classification of cities, towns, and villages, this would not preclude or prevent the Legislature in enacting the law now under consideration, and the reclassification of cities, towns, and villages as cities, according to population, as a prerequisite to adopting the form of government provided in the act now under consideration.

[10] When the Legislature provided, by section 1 of the act, that any city within the state of Idaho having a population of 2,500 persons might become organized as a city under the provisions of this act, it was the intention to include cities, towns, or villages having a population of 2,500 persons, whether they had organized as cities and villages under the general laws of the state or had been designated as such by a special charter. In other words, the Legislature intended to provide a system of government which might be adopted for every municipality, whether it had been organized as a city or village, and fixed such classification according to population as provided by the Constitution, at the number of 2,500. In the case of *State v. Tausick*, supra, the court has considered the questions which arise under the contention of counsel and say: "The mere fact that the Constitution requires the classification of municipalities to be according to population does not further restrict the Legislature as to the manner in which they shall be made or created. This constitutional provision is an authorization and not a limitation. It was undoubtedly adopted to avoid any contention that a classification according to population would be an arbitrary one. Many courts have held that an act general in its terms and operation, applicable to certain cities, which may constitute a portion only of a class theretofore existing, creates a new classification in itself, and is valid as such." After quoting other authorities, the court further holds: "If a new classification can thus be created within a single class previously created, we are unable to understand why a new classification may not also be created, as has been done by chapter 116 [Laws 1911] now under consideration, by including therein all cities of one class, and a portion of the cities of another—the next lower class. Our conclusion is that the law is not local, private, or special; that it is general in its terms and application; that it is uniform in its operation throughout the state; that its classification is in no manner arbitrary; that it is valid and constitutional."

We are of the opinion that under the Constitution the Legislature had the authority to make a classification of the cities, and under the act in question it was the intent of the Legislature to make the classification according to population, and that all cities, towns, or villages having a population of

2,500 or more may become cities under the new form of government, while cities, towns, or villages having less than 2,500 population must remain as such organizations under the general laws under which they have been organized, or, where special charters have been issued, under such special charters; and that, whether a city has been organized as a village or a city under the general laws of the state or by special charter, such city or village may take upon itself the form of government as provided in the act, and the only qualification required is that such city or village shall have a population of 2,500 or more persons; and that a village organized under the general laws of the state is not required to pass through the process of becoming a city of the second class under the general laws of the state before it can petition for an election to form an organization under the act of March 13, 1911. This clearly was the intention of the Legislature, and such power we think the Constitution confers upon the Legislature.

It may be observed that the act now under consideration presents many new questions relative to municipal government in this state; that provision is made by which the people, the sovereign authority within a municipality, may by direct ballot make and unmake the laws governing such municipalities, and by which they may change from a form of government formed under laws provided by the Legislature, to a form and laws made by themselves. Before this court should hold that such a law is unconstitutional because of this decided change, or for any other reason appearing upon the face of the act now under consideration, we must find some good reason for so doing, and be satisfied that such statute is void beyond a reasonable doubt. In the case of *Doan v. Board of County Com'rs*, 3 Idaho, 38, 26 Pac. 167, this court laid down the general rule which should guide it in determining the constitutionality of a statute as follows: "A strained construction of the Constitution is not required nor permitted in order to work the repeal of statutes not clearly repugnant thereto. It is the duty of the court to give both to the statute and the Constitution such construction as will give effect to both, unless the statute is so clearly repugnant to the Constitution as to admit of no other reasonable construction."

In the case of *Sabin v. Curtis*, 3 Idaho, 662, 82 Pac. 1180, the court again announces: "The conflict or repugnancy between the statute and the constitutional provisions must be clear, and so contrary to each other that they cannot be reconciled. Only when the court is clearly satisfied that such conflict exists will they declare a statute unconstitutional. In cases of doubt as to the constitutionality of a statute, the statute is sustained. Courts interfere only in cases of unquestioned violation of the Constitution."



Later, in the case of Gillesby v. Board of County Com'rs, 17 Idaho, 586, 107 Pac. 71, this court quotes with approval the language of Chief Justice Shaw in the Wellington Case, 16 Pick. (Mass.) 89, 26 Am. Dec. 631, as follows: "When called upon to pronounce the invalidity of an act of legislation passed with all the forms and solemnities requisite to give it the force of law, courts will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void, unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt."

We have made careful examination both of the Constitution and the act involved in this case, and we have found nothing in the Constitution which prohibits the Legislature from enacting such a law. The wisdom or policy of such legislation is a matter entirely with the legislative department. With that the court has no concern, and in upholding this act we are guided by its provisions as they relate to the Constitution. We find no provision of the Constitution which prohibits such legislation.

The writ of mandate will therefore be allowed, and the mayor of Boise City is ordered and directed to issue forthwith a proclamation calling a special election as provided for and directed by section 2 of the act of March 13, 1911. Costs awarded to plaintiff.

AILSHIE, J. (concurring). I concur in the conclusion reached by the Chief Justice that a peremptory writ of mandate should issue.

1. In the first place, the act here under consideration is not an amendment to any previous legislation. On the contrary, it specifically declares that it does not intend to amend any existing law. This act provides an alternative form of government for cities already organized and leaves it optional with the electors thereof as to whether they will avail themselves of its provisions. Specially chartered cities are given the same opportunity as all other cities of accepting or rejecting the form of government therein prescribed, but no attempt is made by the act to amend any city charter.

2. I think the election provided for by the act is a general election within the meaning of the Constitution. Section 1, art. 12. It seems to me that the word "general," as here used, means unlimited or without special qualifications. Standard Dictionary. That is, an election in a special chartered city should be submitted to *all the electors* of the city, and should never be limited to taxpayers or heads of families or householders or *any class or set of electors*. This view is emphasized by noting that the

requirement that the question shall be determined by a "majority of the electors at a general election" applies only to "incorporated" cities changing the form of their local government and does not apply to the "incorporation" of cities or villages. The incorporation may be accomplished under the provision of the Constitution by electors having special qualifications, such as taxpayers, householders, or heads of families. At the time of the adoption of the Constitution, the statute (section 2224, Rev. Statutes of 1887) provided that a town or village might be incorporated upon petition of a majority of the taxable male inhabitants of such town or village within the territory proposed to be incorporated. The Constitution did not attempt a change or abrogate this method of organizing a municipal corporation in the first instance, but did propose that, before a city or town already incorporated should be taken out from under its special charter or the law under which it was then operating, the question should be submitted to *all the electors* of the municipality without qualification or limitation, and thus be determined by the *general electorate* of the city or town. The law still provides (section 2222, Rev. Codes) for the incorporation of a town or village upon petition of "a majority of the taxable inhabitants" of such town or village.

3. I am not satisfied at this time to give my concurrence to the holding of the Chief Justice that the word "city," as it is used in section 1 of the act of March 13, 1911, was intended by the Legislature to include villages. I doubt that proposition and reserve my judgment thereon. This would not, in my opinion, affect the constitutionality of the act, for the reason that the law already provides ample procedure whereby a village may become incorporated as a city. All cities as they now exist have had to go through with this procedure in order to pass from the state of a village to that of a city, and nothing more is required of a village now which may desire to adopt this new form of government. In other words, the general law now provides a method for the incorporation and organization of cities and towns in proportion to their population. This is in accordance with the Constitution. This new law providing a commission form of government provides that all municipalities which have attained to the class of cities and have a population exceeding 2,500 may avail themselves of the provisions of the new act. This, it seems to me, is within the provisions of the Constitution and would be a valid and constitutional classification.

For the foregoing reason, I concur in the judgment directing the issuance of the writ.

SULLIVAN, J. (dissenting). I am unable to concur in the conclusion reached by the majority of the court. Section 2 of said

act providing for a commission form of government for cities having a population of not less than 2,500 provides, upon the presentation of a petition, the mayor by proclamation must submit the question of organization under said act at a "special" election, etc. This contemplates a change from one form of government to another. Section 1 of article 12 of the Constitution, quoted in the majority opinion, authorizes the Legislature by general laws to provide for the incorporation, organization, and classification of cities and towns in proportion to the population, and provides that cities and towns theretofore incorporated may become organized under such general laws whenever a majority of the electors at a "general election" shall so determine. In the majority opinion it is held, in effect, that the words "special election," as used in said act mean the same and are synonymous with "general election" as used in said section of the Constitution. I am unable to agree with that conclusion. The framers of the Constitution no doubt had in mind and intended the words "general election" to have the meaning given them by section 465 of the Rev. Stat. of Idaho. Said section is as follows: "There must be held throughout the territory, on the first Tuesday after the first Monday of November, in the year eighteen hundred and eighty-eight, and in every second year thereafter, an election, to be known as the general election." Section 466 of the Rev. Stat. provides that at such general election a delegate to Congress, members of the territorial Legislature, and county and precinct officers shall be elected. Since the adoption of the Constitution, the Legislature adopted section 347, Rev. Codes, which is as follows: "A general election shall be held in the several precincts in this state on the Tuesday succeeding the first Monday of November, A. D. 1910, and on the Tuesday succeeding the first Monday of November every alternate year thereafter."

We find the term "general election" used in sections 347 to 353, inclusive, and in each section where that term is used it refers to the general state election held biennially on the first Tuesday succeeding the first Monday in November, when state, county, and precinct officers are elected.

In *Doan v. Board*, 3 Idaho, 38, 26 Pac. 107, this court held that the term "general election" meant the election at which the state, county, district, and precinct officers were elected. The term "general election," as used in the Constitution and statutes of other states, has been defined by courts of last resort. In *Westinghausen v. People*, 44 Mich. 265, 6 N. W. 641, the Supreme Court of that state said: "It will be seen from all this that under the Constitution there was only one election which was ever referred to as a general election, and that term was used as identical with the Novem-

ber election, which was previously annual, and thereby made biennial. That was the only election held simultaneously throughout all the state for officers to represent the whole state."

*State v. Tausick* (Wash.) 116 Pac. 655, was a case almost identical with the one at bar. A writ of mandate had been issued to compel the mayor of Walla Walla to call an election in that city under a statute providing for a commission form of government similar to the statute involved in this case. The Constitution of the state of Washington contains a provision similar to section 1 of article 12 of our state Constitution, and provides that cities and towns theretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine. The Supreme Court of that state held that the term "general election," as used in that Constitution, was an election in the city for the election of city officers, and the writ of mandate was authorized to issue commanding the mayor to call an election at said time. There the court held the term "general election" in said statute meant the general city election at which city officers were elected. Even under that decision, the writ ought not to issue in this case, as the application for the writ does not pray for the election to be held at the general city election, but that the mayor be compelled to call a "special" election at which only the one question involved in this case can be voted upon.

The term "general election," when used in the statutes, refers to the election required to be held on the Tuesday succeeding the first Monday in November of each year. See *State v. Cobb*, 2 Kan. 32; *Bond v. White*, 8 Kan. 333; *McIntyre v. Iliff*, 64 Kan. 747, 68 Pac. 633. When the Constitution commands how an act may be exercised, it prohibits the exercise of that right in some other way. The majority of the court are not satisfied with the meaning of the term "general election" as clearly indicated by the provisions of our Constitution and statute, but Chief Justice STEWART in his opinion has formulated the following unique definition of the term "general election": An election "at which the people having the general qualifications of electors to vote should have a free and open opportunity of expressing themselves upon the questions submitted." Under that definition every special election provided for under our statute is a general election, for at all such special elections the voter has "a free and open opportunity of expressing" himself upon the question submitted. That definition does violence to the obvious and plain meaning of the term "general election" as used both in our state Constitution and in our statutes. In case of a vacancy in this state of a member of the lower house of Congress,

the Governor, not having the power to fill the vacancy, is required to call a special election to fill the vacancy, at which election all qualified electors may vote and have a "free and open opportunity" to vote for whom they please; but that does not make such election a "general election." A special election is one held to elect a single officer or to vote upon a single question, and such an election is not a general election. The time for holding general elections under our statute is provided for by statute, and the date for holding special elections is not provided for, but fixed by the officer calling such special election as the law provides. It is not the "free and open opportunity to vote" that makes an election general, but it is an election at which the state, county, district, and precinct officers are elected. Or, if it be applied to a city, the term "general election" refers to the biennial election to be held in April for the election of the mayor and other city officers.

Said act is repugnant to the provisions of said section 1, art. 12, for the reason that it provides that the question of the change in the form of city government shall be submitted to the qualified electors at a special election, and the provisions of said section of the Constitution direct that such questions shall be submitted at a "general election."

Said act is also repugnant to the provisions of said section of the Constitution for the reason that it fails to classify the cities and towns in proportion to the population and only applies to those municipal corporations that have adopted the city form of government and have a population exceeding 2,500; whereas under the provisions of section 2170, Rev. Codes, cities, towns, and villages containing more than 1,000 and less than 15,000 inhabitants are declared to be cities of the second class, unless they shall adopt a village form of government as therein provided. It will be observed that cities of the second class having a population of between 2,500 and 15,000 may be villages by adopting the village form of government. Where such cities of the second class adopt the village form of government, they are by name villages and do not come within the meaning of the word "city" as used in the statute. Thus under the provisions of said act only cities containing not less than 2,500 can organize under the commission form of government, and second-class cities that have organized under the village form of government are not permitted to so organize. Therefore said act does not classify the municipal corporations which come within its provisions in proportion to the population each contains, but does classify them by name in violation of the mandate of the Constitution.

Chief Justice STEWART in the syllabus of his opinion states as follows, referring to the term "cities": "The Legislature intended to make a classification according to population, and that all cities, towns, or villages having a population of 2,500 or more might be organized" under said act. I fail to find the words "town or village" or their plurals mentioned in said act, and the learned Judge who prepared that opinion thought it necessary to inject into said act the words "towns or villages" in order to save said act and make the classification required by the Constitution. Said act does not classify cities, towns, and villages in proportion to the population, but simply by name, and is unconstitutional for that reason.

For the aforementioned reasons, and for others which I shall not discuss here, said act should be held unconstitutional and void.

CHICAGO, M. & P. S. RY. CO. v. FERRELL  
et al.

(Supreme Court of Idaho. Nov. 28, 1911.)

(Syllabus by the Court.)

INJUNCTION (§ 163\*) — INJUNCTION PENDENTE LITE—MODIFICATION.

Where a railway company built its railroad across land belonging to the United States, and was operating the same as a part of its railway system, and thereafter a mining claim is located on said right of way, and it is made to appear by the complaint and an affidavit filed on behalf of the company that the owners of such mining claim are working the same in a manner that interferes with the railroad company and its employees in operating its railway, and it appears from the answer and cross-complaint of the defendants that they claim that the railway company acquired no rights to its right of way across said land by reason of its being within a forest reserve, and the court grants an injunction pendente lite, ousting the mining claimants from the possession of said land and enjoining them from in any manner interfering with the railroad company in its possession of said land, *held*, that such injunction must be modified to the extent and in a manner to permit the mining claimants to retain such possession of said claim as will in no manner interfere with the railroad company in its occupation and possession of said land, and in the operation and conduct of its railroad business, until the final determination of the action.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357-371; Dec. Dig. § 163.\*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by the Chicago, Milwaukee & Puget Sound Railway Company against William W. Ferrell and James Sheehy. Judgment for plaintiff, and defendants appeal. Remanded, with instructions.

A. G. Kerns and Franklin Pärman, for appellants. Chas. F. Voorhees and F. M. Dudley, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

SULLIVAN, J. This is an appeal from an order granting a temporary injunction pendente lite. The plaintiff, the railway company, by its complaint, claims title to the land in dispute by virtue of an agreement with one who had settled upon said land as a part of the public domain, and also by virtue of its predecessor having complied with the act of Congress of March 3, 1875, c. 152, 18 Stat. 482, entitled "An act granting to railroads the right of way through public lands of the United States." The appellants claim right to the possession of said land by reason of their having located the same as a mining claim. It appears from the record that the predecessor of plaintiff had constructed a line of railroad over the land in dispute, and was operating its trains over the same prior to the time that appellants located the land in dispute as a mining claim. The railway company had also erected tenement houses thereon for its employes, and alleges that the appellants wrongfully entered upon and took possession of a portion of said right of way, and have placed, or are placing, a building thereon, and storing and using dynamite in excavating a mining tunnel thereon; that the use of such dynamite upon said land is dangerous to the operation of said railroad and to persons employed by said company and to passengers carried on said railroad, and is a menace to the safety of the passengers and employes of the railroad company and to its property and business, and prays that the defendants be enjoined and restrained from occupying said strip of land, and from in any manner interfering with the plaintiff's possession thereof.

Filed with the complaint was the affidavit of the station agent of said road, setting forth the facts that he is well acquainted with the land in dispute, and that the plaintiff maintains thereon main, side, spur, and other tracks connected with its railroad, also depot and other buildings and other structures, all of which are used in the transaction of the business of the plaintiff as a common carrier; that the plaintiff has also constructed thereon three tenement houses for use as living quarters for the employes of the plaintiff engaged in the operation of said railroad, and plaintiff intends to construct additional tenement houses for the same purpose; that said tenement houses are located about 1,200 feet easterly of the depot building at the station of Avery; that defendant Ferrell, on December 4, 1910, began the construction of a wooden shack or building upon the right of way of plaintiff a few feet easterly of the tenement houses before mentioned, and has completed the erection of said shack, and that the same is occupied by the defendants; that the defendants or their agents or servants are now engaged in excavating a hole or tunnel on said right of way just northerly of said tenement houses of the plaintiff, and are using dynamite in

making such excavation; that said hole or tunnel has been excavated to a depth of about 60 feet on the right of way of plaintiff, and that defendants are continuing such work; that the effect of the use of said dynamite is to throw out quantities of rock and earth from said hole or tunnel upon said right of way and in the vicinity and around said tenement houses; that during the month of December, 1910, the time when said affidavit was made, the defendants were continuing the work on said tunnel, and had taken possession of said right of way northerly of the depot building, and had begun clearing the ground and grading for the erection of another building upon said right of way.

Upon the filing of the complaint and said affidavit, the district judge issued an order to show cause, and also a temporary restraining order, enjoining the defendants from using or occupying the premises in dispute. Thereafter the defendants appeared specially, and moved to modify the temporary restraining order, so as to retain possession of the ground that was then in their actual possession. Said motion was made upon the complaint, and said affidavit upon the ground that the court had no jurisdiction to oust and eject the defendant from premises in their actual possession. The court thereafter modified said restraining order.

On January 3, 1911, defendants filed their answer and cross-complaint. The answer denied many of the material allegations of the complaint, and alleged the death of the settler mentioned in plaintiff's complaint, and denied that the plaintiff had obtained any title through him, and alleged that the premises in dispute were a part of a forest reserve specially reserved from sale by the government of the United States, and that the plaintiff never acquired any right thereto, and by their cross-complaint set up title to the ground in controversy as a part of a lode mining claim located by them in accordance with the mining laws of the United States, and on which they had expended, it is alleged, \$1,000 in driving a tunnel over 70 feet in depth; that in the month of May, 1910, plaintiff wrongfully entered upon and ousted defendants from a portion of their lode mining claim, and still wrongfully holds the same, and claim damages in the sum of \$2,000, and pray for a restoration of their possession and for damages.

On January 4, 1911, the hearing on the order to show cause was had, whereupon the judge made an order granting an injunction pendente lite, which injunction ousted and ejected the defendants from a right of way 200 feet wide, and restrained them from in any manner interfering with said land. The appeal is from that order.

But one error is assigned, and that is that the court erred in granting the injunction pendente lite, which ousted and ejected the defendants from land in their actual possession, and to which they claim title ad-

verse to the plaintiff, prior to the final determination of the issues raised by the pleadings.

The question then directly presented is: Did the court err in granting said injunction which ousted and ejected the defendants from the land in dispute?

That part of the writ of injunction involved here is as follows: "It is ordered that the said defendants and each of them, their agents, employes, and contractors, and the agents, employes, and contractors of each of them, be, and they are hereby, enjoined from occupying or taking possession of all or any portion of a strip of land described as follows, to wit, a strip of land two hundred (200) feet in width, having one hundred (100) feet of such width upon each side of the center line of the main track of the Chicago, Milwaukee & Puget Sound Railway Company, as the same is now constructed over and across what would be, if surveyed, section fifteen (15), in township forty-five (45) north, of range five (5) east of the Boise meridian, in Shoshone county, Idaho, and from excavating, grading, or displacing soil from said strip of land, or any thereof; and from erecting or occupying any building or other structure thereon, and from digging or blasting any holes, tunnels, or shafts thereon; and from making use of or exploding any dynamite or other explosives thereon; and from interfering with or molesting the said plaintiff, or any of its agents, servants, or employes, in the use, occupation, or possession of said strip of land, or of any part thereof; or in the operation of its railroad, or any of its engines, trains, or cars thereon; and from interfering with, disturbing, or hindering in any manner the business of the said plaintiff carried on upon said strip of land, or the use by the said plaintiff, or any of its agents, servants, or employes of any part of said strip of land, or any building or structure thereon; and from placing, piling, or depositing any lumber, building material, explosives, or other personal property upon said strip of land, or any thereof, save by and with the consent of the said plaintiff."

It appears from the record that said railroad was constructed across the land in dispute prior to the 1st day of January, 1909, and that said mining claim was located on the 10th day of April, 1909; therefore the railroad company was in possession of said ground prior to the date of the location of said mining claim. But it is contended by counsel for appellants that, as said railroad was constructed through a forest reserve, without permission from the United States, the railroad company acquired no rights by such construction.

The trial judge or the court had the power and jurisdiction in the case at bar to grant proper injunctive relief until the case

was determined on its merits, and this counsel for appellants concede, but contend that the injunction issued is too sweeping, and results in ousting appellants from the possession of said land, the title to which is in dispute.

After a careful consideration of the facts and law, we think the injunctive order is too sweeping. We therefore conclude that said writ of injunction must be modified, wherein it ousts the appellants from the possession of the disputed ground, and it must be modified so as to permit them to retain such possession thereof, and to operate the same in such a manner as will not interfere with the railway company in its occupation and possession of said land, and in the operation and conduct of its railroad business; and said writ must be continued in force as to that part of the injunction prohibiting appellants from in any manner interfering with the railroad company in the operation of its railroad or any of its engines or trains or cars thereof, and from interfering with, disturbing, or hindering the business of said plaintiff carried on on said strip of land, or in doing any acts on said land that would interfere in any manner with the plaintiff in its use of said land in the operation of its railway or in the conduct of its railway business.

The cause is remanded, with instructions to the district court to modify said injunction as above indicated. Costs of this appeal are awarded to the appellants.

STEWART, C. J., and AILSHIE, J., concur.

HEWITT v. WALTERS, District Judge, et al.  
(Supreme Court of Idaho. Dec. 19, 1911.)

*(Syllabus by the Court.)*

1. RECEIVERS (§ 154\*)—PRIORITIES OF LIEN—AUTHORITY OF COURT.

A court of equity has the power and authority to appoint a receiver to take charge of the property of a party to an action or proceeding on proper showing, for the purpose of taking care of and preserving and protecting the property and making payment of the claims of creditors out of the same, and has the authority and jurisdiction to decree that the charges and expenses of the receiver, incurred in the discharge of his duty, shall become a prior claim and lien against the property paramount to all existing mortgages or other liens or incumbrances thereon.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 279-282; Dec. Dig. § 154.\*]

2. RECEIVERS (§ 183\*)—MANAGEMENT OF PROPERTY—SALES UNDER ORDER OF COURT—MINIMUM BID.

It is not an excess of the jurisdiction of a court of equity, in ordering a sale of property in the hands of the receiver, to order and direct that no bid shall be received or accepted which is under a fixed and definite sum determined by

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes  
119 P.—45

the court as the minimum bid that shall be received or accepted for such property.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 229; Dec. Dig. § 133.\*]

### 3. RECEIVERS (§ 122\*)—CERTIFICATES—RATE OF INTEREST.

The court has no power or authority to order or direct the payment of interest on receiver's certificates in excess of the maximum rate of interest allowed by the statute on contract, or at any rate that would be usurious under the statute; but it is not an excess of jurisdiction for the court to allow a rate of interest in excess of the rate fixed by the statute to be allowed on money judgments and decrees of courts, and in cases where no rate is contracted.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 211, Dec. Dig. § 122.\*]

### 4. MORTGAGES (§ 497\*)—FORECLOSURE—CONCLUSIVENESS OF DECREE.

Where H. held a mortgage against the property of the G. W. B. S. Co., and thereafter, at the instance of a creditor of such company, a receiver was appointed to take charge of the property and assets of the company, and H. instituted an action for the foreclosure of his mortgage, and brought in parties asserting some lien, claim, or incumbrance upon the property covered by H.'s mortgage, and such proceedings were thereafter had that a decree was entered, ordering and adjudging that the property should be sold by the receiver without and free from the right of redemption, and that the costs and expense of the sale should first be paid out of the proceeds, and thereafter the receiver's certificates and such liens and claims as had been adjudged prior to H.'s mortgage, and thereafter H.'s mortgage should be paid out of any residue left from such sale, and no appeal was taken from such order and decree, and the same was allowed to become final, and H. thereafter joined with all the other parties to the foreclosure suit in filing his judgment and decree with the receiver in the receivership case, and petitioned to be admitted as a creditor, and the district court thereafter made an order admitting such creditors and adjudging the same priorities in the receivership case as had been adjudged in the foreclosure case, and ordered a sale of all the property in the hands of the receiver and the payment of costs, expense, and judgments in the order of their priorities, as adjudicated in both the foreclosure case and the receivership proceeding, and directed that such sale be without the right of redemption, *held*, that H. and all other parties to the foreclosure proceeding will be bound by such order and decree, and that a sale, made thereunder, will be without the right of redemption to any person who became a party to such proceeding.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 497.\*]

Original action by Henry Hewitt, Jr., praying for a writ of prohibition to E. A. Walters, Judge of the Fourth Judicial District, and another. Alternative writ issued, and on the return day demurrer was filed to the complaint and answer, and return was also filed. Demurrer sustained, writ quashed, and action dismissed.

Richards & Haga, T. S. Risser, and A. N. Soliss, for plaintiff. Sullivan & Sullivan, Wyman & Wyman, and E. M. Wolfe, for defendants.

ALLSHIE, J. The plaintiff applied to this court for an alternative writ of prohibition

against Hon. E. A. Walters, a judge of the Fourth judicial district, and O. E. Cannon, a receiver appointed by and acting under the direction of the judge of said court, to prohibit and restrain further proceedings under an order of sale made and entered by the judge of said court. At the suit of a creditor of the Great Western Beet Sugar Company, a receiver was appointed to take charge of the property and business of the corporation, who thereafter qualified and took charge of its property, and continued to conduct the business under the direction of the court. Various phases of that question have been considered by this court in the following cases: Idaho Fruit Land Co. v. Great Western Beet Sugar Co. et al., 17 Idaho, 273, 105 Pac. 562; *Id.*, 18 Idaho, 1, 107 Pac. 989; Hewitt v. Great Western Beet Sugar Co., 118 Pac. 296.

The plaintiff herein held a mortgage on the property of the Great Western Beet Sugar Company, and on about the 4th day of August, 1906, commenced his action in the district court of the Fourth judicial district, in and for Elmore county, to foreclose the same, and such proceedings were thereafter had as resulted in the entering of a decree of foreclosure on the 21st day of July, 1910, adjudging the plaintiff entitled to recover the sum of \$109,275 from the Great Western Beet Sugar Company, and giving him a decree of foreclosure for that sum. It appears that the receiver in some way became a party to this foreclosure suit. Whether he was brought in by order of the court or by supplementary proceedings or on petition in intervention does not appear, but that he was taken into consideration and treated as a party to the action by the decree is clear upon the face of the decree itself. Most of the defendants defaulted, but a number appeared and answered and filed cross-complaints. It was adjudged and decreed that some nine of these defendants had claims that were prior and superior to the claim of the plaintiff. They were accordingly given priorities by the decree. The decree thereupon describes the property to be sold, and orders and adjudges that the property shall be sold by the receiver, and out of the proceeds of the sale the receiver shall pay "all costs, claims, and expenses incurred by said receiver, including all receiver's certificates issued by said receiver prior to the date of such payment, and all receiver's certificates heretofore issued by Norman Isachsen, receiver, under order of this court, for his costs and expenses as receiver, and for the care, preservation, protection, repair, and maintenance of said system, and the costs of sale, and all other expenses of whatsoever kind properly chargeable against said estate." This foreclosure decree further adjudged and decreed: "That the said The Great Western

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Beet Sugar Company, and all persons claiming by, through, or under it, and all lien claimants and judgment creditors, be debarred and foreclosed of all right of redemption from such sale, and upon such sale being confirmed by the court, or the judge thereof at chambers, said receiver shall execute and deliver a deed or deeds of conveyance of the property so sold to the purchaser or purchasers thereof." Thereafter, and on the 17th day of October, 1911, the attorneys who represented the plaintiff, Hewitt, in the foreclosure suit, and the attorneys who represented the defendants who appeared in that case, signed a stipulation which was entitled in the receivership case, and filed the same with the receiver. This stipulation is as follows:

"In the Matter of the Receivership of the Great Western Beet Sugar Co.

"To O. E. Cannon, Receiver:

"The undersigned, attorneys for parties plaintiff and defendant in that certain action in the district court of the Fourth judicial district of the state of Idaho, in and for Elmore county, wherein Henry Hewitt, Jr., was plaintiff, and the Great Western Beet Sugar Company et al. were defendants, present herewith a copy of the decree made and entered in said action for your approval, and request that said parties plaintiff and defendant, each of them respectively, be accepted and admitted by you as creditors, mortgagees, and lienholders of said Great Western Beet Sugar Company, and in the order of priority, as in said decree set forth.

"Dated October 17, 1911. J. G. Watts. J. M. Owen. L. B. Green. E. M. Wolfe. W. C. Howie. Dan McLaughlin and Page & Englert. J. L. Niday. B. T. Griffith. Ira E. Barber. Chas. F. Koelsch. Oavanah & Blake. A. F. Soliss, by O. O. Haga. Richards & Haga. K. I. Perky. Wyman & Wyman, for Bessie Stoctzel."

Thereafter, and on the 10th day of November, 1911, the judge heard the petition and application of the receiver for authority and an order to sell the property of the Great Western Beet Sugar Company, and thereupon made and entered an order, directing a sale of the property and estate of the company in the hands of the receiver. At the same time the court directed that the same preferences, priorities, and order of distribution of the proceeds of the sale be observed as directed by the decree of foreclosure. It is parts of this order of sale that the plaintiff herein contends are in excess of and beyond the jurisdiction of the court. It contains a great many recitals and orders and directions to the receiver, which it is unnecessary to recite or consider here. We will only give the substance and effect of those portions of the order to which the plaintiff herein objects and urges as constituting an excess of jurisdiction. They are, in substance, as follows:

(1) The order adjudged all indebtedness and expense of all kinds incurred by O. E. Cannon, as receiver and by his predecessor, one Norman Isachson, aggregating upwards of \$43,000, to be a first and prior lien on the property covered by the mortgage of the plaintiff herein, and that the same should be paid before the payment of the plaintiff, or any of the other liens or claims adjudged and decreed by the foreclosure judgment.

(2) The order directed that no bid should be received or accepted by the receiver for a less sum than \$56,546.79.

(3) It was ordered and directed that the receiver, after making the sale, should pay all receiver's certificates, together with the interest thereon at the rate of 10 per cent. per annum from the date of their issuance.

(4) It was ordered and directed that the sale should be made *without the right of redemption*, and that no redemption should be allowed after the acceptance of the bid and the confirmation of the sale by the judge of the court, and that a deed absolute should thereupon be made to the purchaser.

We will consider the foregoing questions in the order in which they are above stated.

[1] 1. It has already been adjudicated by this court that the trial court had the power and authority in this case to authorize the receiver to issue receiver's certificates, and to make them a prior and first lien against the property of the company superior to all existing mortgages and other liens and incumbrances. *Hewitt v. Great Western Beet Sugar Co.*, 118 Pac. 296. The case, however, in which the foregoing adjudication was made only involved the certificates, amounting to \$17,675, issued by the receiver, Isachson, under order and direction of the court. The balance of the receiver's certificates, approximating about \$25,000, were issued by the receiver, Cannon, who is the successor of Isachson. It is firmly established, however, in this state that a court of equity has the power and authority to appoint a receiver to take charge of property, and to care for and protect the same, and decree the charges therefor as a prior claim and lien against the property paramount to all mortgages or other liens or incumbrances. *Dalliba v. Winschell*, 11 Idaho, 364, 82 Pac. 107, 114 Am. St. Rep. 267; *Hewitt v. Great Western Beet Sugar Co.*, 118 Pac. 296.

[2] 2. The fact that the trial judge fixed the sum of \$56,546.79 as the minimum bid for the property which would be received or considered was not an excess of jurisdiction, and it cannot be ascertained whether it was even erroneous or not, until after an attempt has been made under such order to sell the property, and it has actually been exposed for sale. The court has had this property in its custody for a couple of years, and is presumably familiar with the nature and character of the property and its approximate value. If a bid had been received and accepted by the receiver, the court would never-

theless be at liberty to reject the bid as not being adequate or commensurate with the value of the property. It appeals to us as being a very proper and wise exercise of the discretion of the court to fix a minimum bid, in the first place, if the court is, at the time of making the order of sale, so advised or informed as to enable it to fairly judge of the probable value of the property. This practice seems to have been adopted by other courts, and to have received the sanction of appellate courts. See *Bryan & Brown Shoe Co. v. Block*, 52 Ark. 458, 12 S. W. 1073; *Slaughter v. Strother*, 99 Ga. 633, 27 S. E. 764; *In re Newark Savings Inst.* (N. J.) 9 Atl. 375; 34 Cyc. 319 (v); *First National Bank v. Bunting & Co.*, 7 Idaho, 387, 63 Pac. 694; *Nisbet v. Great Northern Clay Co.*, 41 Wash. 107, 83 Pac. 15.

[3] 3. The plaintiff complains of the action of the court in ordering and directing that the receiver's certificates should draw interest at the rate of 10 per cent. per annum. This, it is urged, was an excess of jurisdiction. The argument in this respect seems to be based on the fact that, under our statute (section 1537, Rev. Codes), money due on judgments and decrees of courts draws interest at the rate of 7 per cent. per annum, and that in all cases where there is no express contract in writing, fixing a rate of interest, interest shall be charged at the rate of 7 per cent. Seven per cent., however, does not mark the *maximum* rate of interest which is permissible in this state. Under section 1538, Rev. Codes, parties may agree in writing for the payment of any rate of interest, *not exceeding 12 per cent. per annum*, and interest does not become usurious in this state until it exceeds the rate of 12 per cent. Now it must be conceded, we think, and plaintiff's authorities support the proposition, that a court of equity should not and cannot allow a usurious rate of interest, or, in other words, a rate of interest greater than the maximum rate allowed by the law of the state. *Meyer v. Johnston*, 53 Ala. 237, at page 351; 24 Am. & Eng. Ency. of Law, p. 41, par. 9. We do not think it wise or expedient to authorize receiver's certificates to draw a greater rate of interest than the statutory rate allowed on judgments and decrees of courts, and this should be especially observed in cases where such certificates are to take precedence over mortgages, judgments, and other liens and incumbrances existing at the time that the receivership proceedings are instituted. The fixing of the rate of interest, however, so long as the court keeps within the maximum allowed by law, is not an excess of jurisdiction.

[4] 4. The chief objection urged in this proceeding is that the court exceeded its jurisdiction in ordering and directing that the sale should be made without the right of redemption, and that upon the confirmation of such sale a deed absolute should be executed, and that no redemption should be allowed

from such sale. This objection presents a question which must be determined upon the peculiar facts and conditions of this particular case. In the first place, it is conceded that the statute of this state nowhere in express terms grants the right of redemption from a receiver's sale. The statute confers the right of redemption from sales made on execution (section 4491) and foreclosure sales (section 4520), and other sales under foreclosure of various liens. Under section 4491, a creditor having a lien by judgment or mortgage on the property sold, subsequent to the lien on which the sale was made, has the right of redemption, the same as the judgment debtor would have. The plaintiff in this case would have, under the statute, the right to redeem the property from any sale made for the satisfaction of judgments or liens that were prior to his mortgage. It is now claimed that to deprive him of the right of redeeming the property from any sale that may be made for the purpose of raising the preferred sum of \$58,546.79 required by the court in order to liquidate the receiver's certificates and other liens prior to the plaintiff's mortgage has the effect of depriving him of his property without due process of law, in that it deprives him of his right of redemption, which was conferred by statute at the time he took the mortgage. As to whether or not the plaintiff could have been brought in to the receivership proceedings without his consent, and over his protest, and had his mortgage and claim subjected to that proceeding, and the property sold by the receiver, without the right of redemption, for the purpose of paying the expenses of the receiver and other prior claims, and applying any balance to the payment of plaintiff's claim, is a doubtful question, and one upon which the authorities are by no means clear.

For discussions of the right and power of courts to order receiver's sales without the right of redemption, see the following authorities, which have been cited by respective counsel: *Locey Coal Mines v. Chicago, Wilmington & Vermillion Coal Co.*, 131 Ill. 9, 22 N. E. 503, 8 L. R. A. 598; *Watkins v. Minn. Thresher Mfg. Co.*, 41 Minn. 150, 42 N. W. 862; *Farmers' Loan & Trust Co. v. Iowa Water Co.* (C. C.) 78 Fed. 881; *Pacific N. W. Pkg. Co. v. Allen*, 116 Fed. 312, 54 C. C. A. 648; *Hammock v. Farmers' Loan & Trust Co.*, 105 U. S. 77, 26 L. Ed. 1111; *McKenzie v. Bismarck Water Co.*, 6 N. D. 361, 71 N. W. 608; *Dilley v. Jasper Lumber Co.* (Tex. Civ. App.) 114 S. W. 878; *Mercantile Realty Co. v. Stetson*, 120 Iowa, 324, 94 N. W. 859; *High on Receivers* (4th Ed.) § 199c; *Blair v. Ills. Steel Co.*, 31 L. R. A. 269, 159 Ill. 350, 42 N. E. 895.

It is unnecessary, however, for us to determine that question in this case, and we reserve our judgment thereon, for the reason that the facts of this case remove it from the contingency above suggested. Here, in some way, the receiver was either brought, or



voluntarily came, into plaintiff's foreclosure proceeding, and, instead of the plaintiff's decree directing that the sheriff sell the property to make the amount of plaintiff's debt and costs, it directs that the receiver sell the property; and it likewise directs that the receiver first retain the cost of the sale, and, secondly, the amount of the receiver's certificates, and then pay the liens and claims that are prior to the plaintiff, before applying any of the proceeds to the payment of plaintiff's mortgage debt. It also directs that the sale be made *without right of redemption*, and that a deed absolute be given. This judgment and decree has become final, and the plaintiff prosecuted no appeal from these objectionable features of his decree. Pursuing this course of action and acquiescence on the part of plaintiff a step further, we find that he and all of the defendants who obtained relief on their cross-bills in the foreclosure proceedings took their decree over into the receivership case and filed it there, and obtained an order from the court, allowing the same preferences in the receiver's sale of the property as had been ordered under the foreclosure decree; and they there filed their judgments and claims with the receiver, and asked that the same be allowed, and that they be accepted as creditors of the Great Western Beet Sugar Company. Under this state of facts, there is no doubt but that the plaintiff is, and all other parties to the foreclosure suit are, bound by the judgment and orders had in the receivership case, and are subject to the order of the court, directing the sale of the property without the right of redemption. In other words, the sale here being made is not a sale on foreclosure, but is a sale by the court's receiver, under direct authority and supervision of the court. The plaintiff has consented to and acquiesced in the order and decree, and is now bound thereby. Under the facts of this case, the court had the authority and jurisdiction to order that the sale be made without the right of redemption, and such order is binding on all parties to the proceedings, and will effectually bar all such parties and their privies from any right of redemption they might otherwise have had.

The demurrer to the complaint is sustained, the writ is quashed, and the action is dismissed. Costs awarded to defendants.

STEWART, C. J., and SULLIVAN, J., concur.

KING v. GREAT NORTHERN RY. CO.  
(Supreme Court of Idaho. Dec. 2, 1911.)  
(Syllabus by the Court.)

1. PUBLIC LANDS (§ 103\*)—HOMESTEAD—RIGHT OF CONTESTANT—FIRES—RIGHT OF ACTION.

Where C. made a homestead entry on certain land in 1902, and erected a cabin

thereon, and on February 15, 1906, K. entered upon said land and took possession of said cabin, with the intention of contesting C.'s entry and entering said land as a homestead, and thereafter, in May, 1906, filed a contest in the United States land office, and in July, 1906, a large amount of the timber standing on said land was destroyed by a fire, alleged to have been negligently set by the railway company, and thereafter, on the 18th day of December, 1907, said contest was decided in K.'s favor, and on January 14, 1908, K. entered said land as a homestead, *held* that, as K. had not made her homestead entry prior to the date of the destruction of said timber by fire, she was not the owner of said timber, and could not maintain an action to recover the value of the timber so destroyed.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 103.\*]

2. PUBLIC LANDS (§ 103\*)—LAND OF UNITED STATES—HOMESTEAD ENTRY.

So long as C.'s entry remained uncancelled, the land included therein was segregated from the public domain, and precluded K. from acquiring an inceptive right thereto by virtue of her residence on said land.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 298-307; Dec. Dig. § 103.\*]

3. PUBLIC LANDS (§ 103\*)—LANDS OF UNITED STATES—HOMESTEAD ENTRY—EFFECT OF CONTEST.

Section 2297, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1398) prescribes the procedure for the cancellation of a homestead entry, where the entryman has failed to comply with the law; and in case a contest is instituted against a homestead entry, and is successfully prosecuted, upon the cancellation of such entry, the land so entered reverts to the government, with a preference right to the contestee to enter the same as a homestead, under the rules and regulations of the department, after the cancellation of the contested entry.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 298-307; Dec. Dig. § 103.\*]

4. PUBLIC LANDS (§ 114\*)—LANDS OF UNITED STATES—PATENTS—RELATION BACK.

As K.'s homestead entry was made on the 14th of January, 1908, upon the issuance of the patent, the right of K., under the doctrine of relation, only relates back to the date of her entry, and not to the date when the contest was begun.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 314-322; Dec. Dig. § 114.\*]

5. PUBLIC LANDS (§ 103\*)—HOMESTEAD—RIGHT OF CONTESTANT—FIRES—RIGHT OF ACTION.

*Held*, under the facts of this case, that K. had no such right or interest in the land and the timber growing thereon at the date such timber was destroyed by fire as to entitle her to maintain this action.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 298-307; Dec. Dig. § 103.\*]

Appeal from District Court, Bonner County; Robt. N. Dunn, Judge.

Action by Racheal King against the Great Northern Railway Company for the negligent destruction of standing timber by fire. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with instructions to enter judgment for defendant.

H. H. Taylor, for appellant. B. S. Bennett and Peter Johnson, for respondent.

**SULLIVAN, J.** This action was brought by the plaintiff, who is respondent here, against the Great Northern Railway Company, a corporation, to obtain damages for the alleged negligent destruction by fire of certain standing timber growing on the N. E.  $\frac{1}{4}$  of section 30, township 59 N., range 1 W. of Boise meridian, in Bonner county, and was tried upon a second amended complaint, which will be referred to as the complaint.

To said complaint a demurrer was interposed, on the ground that the complaint did not state facts sufficient to constitute a cause of action, and was overruled by the court. All of the allegations of the complaint were denied, except the allegations of the incorporation of the defendant railroad company and its compliance with the laws of Idaho in regard to foreign corporations.

Upon the issues thus made, the cause was tried by the court with a jury, and verdict and judgment given and entered in favor of the plaintiff for the sum of \$5,000 and costs of suit. A motion for a new trial was denied, and this appeal is from the judgment, and from the order denying the new trial. The overruling of the general demurrer to the complaint is the first error assigned.

It is alleged in the complaint, among other things, that at the time the plaintiff took possession of the land described therein, to wit, February 15, 1906, "the same had been previously filed upon by one Charles A. Campbell, on December 2, 1902," as a homestead; that plaintiff had resided thereon ever since February 15, 1906; that she instituted a contest in the United States land office at Cœur d'Alene on May 28, 1906, against the Campbell entry; that on December 18, 1907, because of her contest, Campbell's homestead entry was canceled; and that on January 14, 1908, plaintiff made homestead entry for said land. The damage by fire is alleged to have occurred on July 24, 1906.

Plaintiff seeks to recover for standing timber which she alleges was burned through the carelessness and negligence of the defendant, and the main question raised on this appeal is whether or not the plaintiff's interest in the land in question and the timber growing thereon was sufficient at the time of its destruction by fire to give her a right to maintain this action; and all of the assignments of error are based upon the contention of defendant that the plaintiff had no right to maintain this action, for the reason that she was not the owner of and had no interest in the land or the timber growing thereon at the time of the destruction of the timber. The plaintiff had not made a homestead entry for said land at the time said timber was destroyed, but had filed a contest against the entry of said Campbell. She prosecuted her contest successfully, and

said Campbell's entry was canceled by the Commissioner of the General Land Office on December 18, 1907, and thereafter, on the 14th of January, 1908, she entered the land as a homestead.

[1] The question, then, is directly presented whether, under that state of facts, she had such an interest in said land and the timber growing thereon as would give her a right to maintain this action and recover for timber destroyed about 18 months prior to the time she made her homestead entry.

We will first determine what right or interest, if any, the respondent had in and to said land and the timber standing thereon at the date the fire occurred, to wit, July 24, 1906. She had settled on said land by moving into the cabin owned by Campbell, the first entryman, and had put in some garden, and had done a little fencing. In May prior to the fire, she had entered a contest against the entry of Campbell, which contest was finally determined in her favor on December 18, 1907. While her entry and residence on said land was not in any manner interfered with by Campbell, the first entryman, she acquired no special rights thereunder to the timber standing on said land. By her successful contest against Campbell's entry, she acquired, on December 18, 1907, a preference right for 30 days to enter or file upon said land in the local United States land office. This she did on the 14th of January, 1908, and on that date she first connected herself with the title in the government in a manner that would entitle her to a patent from the government for said land, on her compliance with the homestead law. The preference right that was given her under the law and the rules of the Land Department was a mere privilege, which might have been waived by her, or would have been lost, had she not exercised it within the time limited for its exercise.

[2] So long as Campbell's entry for said land remained uncanceled of record, it segregated said tract of land from the public domain, and precluded any person from acquiring an inceptive right thereto by virtue of a settlement or residence on said land. See *McMichael v. Murphy*, 197 U. S. 304, 25 Sup. Ct. 460, 49 L. Ed. 766.

In *Holt v. Classen et al.*, 19 Okl. 131, 91 Pac. 866, the court held that a settlement or entry on public land already covered, of record, by another entry, valid on its face, does not give the second entryman any right in the land, notwithstanding the fact that such entry may subsequently be relinquished, or is ascertained to be invalid by reason of facts dehors the record of such entry, and quotes from the case of *Hodges v. Colcord*, 193 U. S. 192, 24 Sup. Ct. 433, 48 L. Ed. 677. Referring to that case, the court said: "An examination of the case last above cited shows that such an entry, although void, by reason of the disqualification of the entryman to make it, nevertheless operates to so

segregate the tract involved from the public domain as to preclude the initiation of another homestead right to the same tract by entry, until the voidable entry has been canceled." Such an entry is voidable, but not absolutely void.

It was held, in *Witherspoon v. Duncan*, 4 Wall. 210, 18 L. Ed. 339, that under the rulings of the Land Department entries of record prima facie valid appropriate the lands covered thereby, and while they remain uncanceled the land is not subject to further entry.

It was held in *Atherton v. Fowler*, 96 U. S. 513, 24 L. Ed. 732, that a right to make a settlement on the public domain was to be exercised on unsettled land; to make improvements on unimproved land; that to erect a dwelling house did not mean to seize some other man's dwelling; that such right had reference to vacant land—to unimproved land.

[3] The provisions of section 2297, Revised Statutes of the United States (U. S. Comp. St. 1901, p. 1398), prescribe the procedure or method for the cancellation of a homestead entry where the entryman has failed to comply with the law, and after due notice to the entryman and certain proof offered, showing that the entryman has changed his residence or abandoned the land for more than six months at a time, "then and in that event the land so entered shall revert to the government." A valid entry presumptively so remains until it has been canceled as provided by law, and the land covered thereby is not subject to re-entry until the first entry has been thus canceled. As said land was not subject to entry at the date the respondent settled upon it, she could not acquire any special right or interest in the title to said land until after her contest had been determined, and until she had entered the same as a homestead, or made the proper application under the law, which she did on January 14, 1908.

[4] Applying the recognized doctrine that upon issuance of a patent the right of the patentee relates back to the inception of his right, respondent's right would only relate back to January 14, 1908, the date she made her homestead entry. That being true, she could acquire no right under the law until Campbell's entry was canceled, and she had made the proper entry therefor. And, if her right did not relate back to the time the timber was burned (the 24th of July, 1906), she had no such right to the land and the timber thereon at that date as would enable her to maintain this action. The government was the owner and had the title to said land at the date of the destruction of said timber by fire, and the right to institute an action for damages for destruction of

said timber, if vested in any one, was vested by law in the United States, as it was the real owner of the property.

In the case of *Mathews v. Great Northern Railway Co.*, 7 N. D. 81, 72 N. W. 1085, the court had under consideration an action for the recovery of damages for the destruction of hay and standing grass, and the defendant in that case defended on the ground that the plaintiff had no title to the property, which the court held it might do. In the course of the opinion, the court said: "The injury in such a case is suffered by the real owner, and not by the one who has possession, without right, as against such real owner. \* \* \* But, when the property itself is destroyed by the wrongful act of another, the wrongdoer is allowed to interpose the defense that the plaintiff has no title, in order to protect himself against double liability; the right to institute the action for damages in such a case being vested by the law in the real owner of the property, and not in the one who, without shadow of right, is in the possession thereof. These principles are elementary, although courts, from failure to discriminate, have sometimes departed from them, as in *Railroad Co. v. Lewis*, 2 C. C. A. 446, 51 Fed. 658. The law on this subject is stated with great clearness and force by Mr. Justice Peckham, in *Railroad Co. v. Lewis*, 162 U. S. 366, 16 Sup. Ct. 831 [40 L. Ed. 1002]." *Mo. Pac. Ry. Co. v. Cullers*, 81 Tex. 882, 17 S. W. 19, 13 L. R. A. 542.

The timber involved in the case at bar was standing timber, and a part of the realty, and prior to the issuance of the final certificate to the respondent her rights as a homestead entryman in respect to the timber standing on the land entered were simply analogous to those of a tenant for life or for years. *Shiver v. U. S.*, 159 U. S. 491, 16 Sup. Ct. 54, 40 L. Ed. 231. But she had not connected herself with the government by entry of said land until about 18 months after the timber in question had been destroyed.

[5] We therefore hold that the respondent had no such right or interest in said real estate or the timber growing thereon at the time said timber was destroyed as would give her a right to maintain this action. Having so concluded, it will not be necessary for us to pass upon the other errors assigned on this appeal. The judgment is therefore reversed, and the cause remanded, with instructions to the lower court to enter judgment in favor of the appellant. Costs of this appeal are awarded to the appellant.

STEWART, C. J., and AILSHIE, J., concur.

**HOFFMAN v. WOODWARD.**

(Supreme Court of Kansas. Dec. 9, 1911.)

*(Syllabus by the Court.)***TAXATION (§ 762\*) — TAX TITLE — VALIDITY OF TAX DEED.**

A tax deed issued under section 9475 of the General Statutes of 1909, upon a compromise of delinquent taxes, contained the following recital:

"And whereas, three years had expired from the date of said sale and no person had offered to redeem said property, or to purchase the same, for the amount of taxes, penalties and costs due thereon; whereupon the county commissioners of said county did, on the 3d day of January, A. D. 1899, by an order of said board, authorize the county treasurer to execute and the county clerk to assign the several certificates of the sale of the several tracts of property hereinbefore numbered and described to John Plummer, on payment to said treasurer of the several sums of money, as follows: \* \* \*

The deed, which had been of record more than five years, purported to convey different tracts, sold in different years, and showed a sale of the tract in question, in September, 1896, for the taxes of 1895. It is held that, under the rule of liberal construction applied to tax deeds on record for five years, the recital that three years had expired from the date of sale should prevail over the date of the order of the commissioners, as expressed in the deed, and that the deed should be upheld.

[Ed. Note.—For other cases, see *Taxation*, Dec. Dig. § 762.\*]

Appeal from District Court, Stanton County.

Action by Charles E. Hoffman against Charles T. Woodward. From a judgment for plaintiff, defendant appeals. Reversed, with directions to enter judgment for defendant.

George Getty, for appellant. Scates & Watkins, for appellee.

**BENSON, J.** This action is in ejectment to recover a quarter section of land in the possession of the defendant, Woodward, claiming title under a tax deed which had been of record more than seven years when the action was commenced. The district court held that the tax deed was void upon its face, allowed a lien for taxes, and gave judgment for the plaintiff, Hoffman, for recovery of the land. The defendant appealed.

A question of the sufficiency of the appellee's title was presented on the trial, and is discussed in the briefs, but if the appellant's tax title is valid the controversy is ended, and that question need not be considered. Several objections were made to the tax deed when it was offered in evidence, but only one is insisted upon in the brief, and will now be considered. The deed was issued upon a compromise of taxes, made by order of the county commissioners, under the authority of section 9475 of the General Statutes of 1909, and contains the following recitals:

"And whereas, three years had expired

from the date of said sale and no person had offered to redeem said property, or to purchase the same, for the amount of taxes, penalties and costs due thereon; whereupon the county commissioners of said county did, on the 3d day of January, A. D. 1899, by an order of said board, authorize the county treasurer to execute and the county clerk to assign the several certificates of the sale of the several tracts of property hereinbefore numbered and described to John Plummer, on payment to said treasurer of the several sums of money, as follows:

"For that numbered 2, forty dollars and — cents.

"For that numbered 3, forty dollars.

"\* \* \* Said several sums having been paid to the treasurer of said county on the 10th day of February, A. D. 1900, the said treasurer did give to John Plummer, of the county of Stanton and state of Kansas, certificates of that date, as in such case provided by law, for and concerning each of the said parcels, tracts and lots, and the county clerk of said county did, on the same day, duly assign to the purchaser aforesaid the said certificates of sale, and all the interest of said county in said property. \* \* \*

The deed included tracts sold in different years, but the sale of the tract in controversy was for the delinquent taxes of 1895, and was made in September, 1896. The objection is that the recitals show that the commissioners ordered the compromise in less than three years from the date of the tax sale, when they had no power to do so. The statute provides: "Whenever any lands or town lots that may have been or shall hereafter be sold for any taxes due thereon that have been or shall hereafter be bought in by any county for such taxes are or hereafter shall be unredeemed for three years from date of sale, and no person shall offer to purchase the same for the taxes, penalties and costs due thereon, the county commissioners of the county where such lands or town lots are located may permit the owner, his agents or attorney, to redeem the same, or may authorize the county treasurer to execute and the county clerk to assign tax-sale certificates for such lands or town lots for any sum less than the legal tax and interest thereon, as shall be in their judgment for the best interest of the county, which assignment shall have the same force and effect as if the full amount of all taxes, interest and penalties had been paid therefor. \* \* \* Gen. Stat. 1909, § 9475.

The argument is that, until the expiration of the three-year period named in the statute, the commissioners have no jurisdiction to compromise taxes, and that their action was therefore a nullity. On the other hand, the appellant contends that, as the assignment was not made until after the statutory period had elapsed, no injury resulted, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the order, if prematurely made, was an irregularity only, and of no consequence after the deed had been of record for five years.

It will be observed that, preceding the recital of the date of the order of the commissioners, the deed recited that three years had expired from the date of the sale. This was impossible, if the order was made on the date given; and, conversely, if three years had expired after the sale, before the order was made, an impossible date is given. This ambiguity was patent, and but one of these recitals can prevail in the construction of this deed. If the recital that three years had elapsed be true, the deed is valid. The liberal rule of construction prevailing when a tax deed has been of record for five years requires that a recital consistent with its validity shall prevail, rather than one that will overthrow it, unless the other appears to be more consistent with the context. It is argued that, as it appears that one of the tracts was sold in 1894 and another in 1895, the recital referred to should be construed as relating only to such sales. The language used, however, contains no such restriction. It will also be observed that the money was paid and the assignment was made on February 10, 1900—more than 13 months after the date of the order as expressed in the deed; while, if the order was in fact made after the three-year period had elapsed, the assignment was executed within a short time afterwards, and according to usual practice. It is true that this circumstance may be of little weight, still it may properly be considered in solving the ambiguity.

The statute declares that any suit to defeat or avoid a conveyance for taxes, unless the taxes have been paid or the land redeemed, shall be commenced within five years from the time of recording the tax deed, and not thereafter. Gen. Stat. 1909, § 9483. It is held that this statute applies to a deed prima facie good, but not to one which shows upon its face that it is executed in violation of law. *Shoat v. Walker*, 6 Kan. 66; *Gibson v. Kueffer*, 69 Kan. 534, 77 Pac. 282. Presumptions and inferences are not indulged to defeat, but are indulged to sustain, the validity of a tax deed after it has been of record for five years. *Carson v. Platt*, 76 Kan. 636, 92 Pac. 705; *Taylor v. Danley*, 83 Kan. 646, 112 Pac. 595. Every presumption in favor of such a deed, not negatived by the recitals therein, must be indulged in its favor. *Gibson v. Cockrum*, 81 Kan. 772, 107 Pac. 82. In *Gow v. Blackman*, 78 Kan. 489, 96 Pac. 799, it was held that an omission of an important date might be supplied by inference from other recitals. The opinion in that case was referred to in *Downer v. Schmidt*, 85 Kan. 513, 117 Pac. 1013, where it was held that a mistaken date might be rejected if, from reading the en-

tire instrument, it appeared that it had been inadvertently given, or was a clerical error. The date referred to in the case last cited was in the recital that the land was subject to taxation for the year 1890, the year in which it was sold. After referring to other recitals in the deed, the court said: "It is manifest from these recitals that the land was sold for the taxes of a year preceding 1890, and the granting clause of the deed satisfactorily shows that the sale was for the taxes of 1889. \* \* \*"

Conceding that the commissioners had no power to make the order of compromise until the three-year period had elapsed, the presumption that public officers have performed their duty may properly be considered in aid of the recital that the time had expired, and that recital should prevail as against a date apparently in conflict with it, but not supported by other provisions of the deed.

Following the rule of liberal construction applicable to tax deeds of record for five years, the deed in question is upheld, and the judgment is reversed, and the cause remanded, with directions to enter judgment for the appellant. All the Justices concurring.

#### BEAR v. KENYON.

(Supreme Court of Kansas. Dec. 9, 1911.)

#### (Syllabus by the Court.)

#### 1. EJECTMENT (§ 17\*)—RIGHT OF ACTION—RIGHT OF PLAINTIFF TO POSSESSION.

In 1887 the owner of a vacant and unoccupied quarter section of land mortgaged it, and shortly thereafter conveyed to a grantor of the defendant. In 1891 the land was sold under foreclosure to a grantor of the plaintiff; neither the mortgagor nor fee owner being a party to the foreclosure. The plaintiff and his grantors purchased in good faith for a valuable consideration, and paid all the taxes after the foreclosure. The plaintiff had a portion of the land broken and a crop was put in, a portion of which he was to receive, but the crop failed. He permitted another portion of the land to be fenced and used for a pasture, and, while the owner of the fence was still using the pasture with consent of the plaintiff, the defendant went upon the land, plowed and planted the broken portion, and ran a few furrows around the quarter section; the object being to gain possession. No payment or offer to pay any part of the mortgage debt was made. *Held*, that the plaintiff could maintain ejectment.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 63, 64; Dec. Dig. § 17.\*]

#### 2. PLEADING (§ 180\*)—APPEAL AND ERROR (§ 1039\*)—AMENDMENT—NEW CAUSE OF ACTION—HARMLESS ERROR.

In an action in ejectment, the plaintiff, over objection, was permitted to file a reply setting up a cause of action to quiet title. *Held*, that such amendment was improperly permitted and substantially changed the claim of plaintiff, but, as the matters in controversy were fully litigated and the judgment render-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ed ignored such amended reply the defendant was not substantially prejudiced thereby.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 358-384; Dec. Dig. § 180;\* Appeal and Error, Dec. Dig. § 1039.\*]

Appeal from District Court, Scott County.

Action by W. S. Bear against J. T. Kenyon. From a judgment for plaintiff, defendant appeals. Affirmed.

R. D. Armstrong, for appellant. J. D. Frazier, for appellee.

WEST, J. In 1887 the owner of the quarter section of land in controversy, which was then vacant and unoccupied, mortgaged it for \$350, and 26 days thereafter conveyed to the grantor of the defendant. In 1891 the land was sold under foreclosure to one Lincoln, who shortly thereafter conveyed to McReynolds, who in December, 1905, conveyed to the plaintiff. No part of the mortgage has ever been paid by the mortgagor or fee owner of the land, and all the taxes since the foreclosure sale have been paid by the plaintiff or his grantors. In 1906 the plaintiff had 40 acres of the land broken, and an adjoining owner put in a crop on an agreement that plaintiff was to have one-third thereof, but nothing was raised. About 60 acres of the land was fenced for pasture by the adjoining owner, who sold in 1908, and turned over to his grantee the fence surrounding the pasture, but the same was allowed to remain on plaintiff's land, the grantee being authorized by the plaintiff to use the land, who pastured the portion inclosed through the season of 1909. In the spring of 1909 the defendant went upon the land, and, having failed in an attempt to lease the same to the owner of the fence, requested him to remove the fence and proceeded to cultivate and use the land theretofore broken, also plowing a furrow or two around the quarter; the object of the entire proceeding being to gain possession. At that time a portion of the fence had been taken down, and it appears that its owner was intending to enlarge the pasture. In August, 1909, plaintiff brought an action to recover possession of the land, filing the ordinary statutory form of petition. The answer was a general denial and admission of possession under claim of ownership. The reply was an assertion that the defendant's possession was unlawfully taken and wrongfully held. Plaintiff afterwards filed an amended petition setting up in detail the facts claimed to entitle him to relief, to which the original answer was refiled. At the trial, plaintiff, over objection, was permitted to file an amended reply setting out in detail the claims of plaintiff and the supposed claims of the defendant, and praying for a decree quieting title. At the conclusion of the trial by the court judgment was rendered for plaintiff for possession of

the land and for costs, but no decree was entered quieting title.

[1] The defendant appeals, and assigns as error the permission to file the amended reply, and rendering judgment for plaintiff, instead of defendant. We have examined the evidence, and find that the trial court was warranted in holding for plaintiff on the question of possession. While no mention was made in the pleadings or upon the trial of the proposition that plaintiff occupied the position of a mortgagee in possession, the point is suggested in the brief, and it appears that, although the mortgagor or fee owner of the land was not made a party to the foreclosure suit, still the purchaser at the sheriff's sale and his grantees bought in good faith and paid a valuable consideration and paid the taxes, and no part of the mortgage has been paid or offered to be paid by the fee owner. For about three years the plaintiff was in possession of the land by tenant, and improved a portion thereof, and was claiming and exercising ownership when the defendants went upon the land. While it might have been proper for plaintiff to have brought suit to compel the defendant to redeem, still, having sued in ejectment and the defendant having asserted possession and ownership without any offer to pay or redeem, the matter resolved itself into one as to which party had the better title, and the finding of the court in favor of the plaintiff had sufficient support in the evidence to sustain it.

[2] The amended reply changed the nature of the action from ejectment to quiet title and should not have been permitted to be filed, but as the judgment appears to have been rendered on the amended petition and not on the amended reply, and the controversy was fully litigated, the judgment should not be reversed unless substantial prejudice resulted. Civ. Code, § 140 (Gen. St. 1909), permits amendment of pleadings in furtherance of justice "when such amendment does not change the claim or defense." The amended petition alleged with some detail the nature of the plaintiff's title and right of possession, and specifically charged that the defendant had unlawfully and forcibly taken possession of part of the land, and continued to hold the same. The amended reply set up these facts with still more detail, and also the alleged ground of the defendant's claim, and charged that the plaintiff had paid all the taxes and charges ever since the land had been taxable, and had been in the constructive possession of the same, and that he and his grantors had been in possession for more than 15 years, claiming ownership and paying taxes. There was no charge of possession on part of defendants, but a prayer that they might be forever barred from setting up any claim to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the land, and the plaintiff's title be quieted. It appears, therefore, that the amendment left the pleadings in the condition that the amended petition stated a cause of action in ejectment, and the amended reply a cause of action to quiet title. Had the plaintiff desired to change from the one position to the other, he should have obtained leave again to amend his petition, and thereby placed his pleadings in consistent, instead of contradictory or inconsistent form.

A petition alleging possession and equitable title, and that the defendant holds the legal title in trust for plaintiff, and praying for conveyance, may be amended so as to state an action to quiet title. *Newell v. Newell*, 14 Kan. 202. A petition for damages resulting from the purchase and sale of a horse for a particular purpose may be amended to show an express warranty. *Culp v. Steere*, 47 Kan. 746, 28 Pac. 987. A petition charging damages for personal injuries by the failure of a railroad company to perform its common-law duties may not be amended after the statute has run so as to charge statutory negligence of a fellow servant without being subject to the bar of the statute. *A., T. & S. F. R. Co. v. Schroeder*, 56 Kan. 731, 44 Pac. 1093. An action upon a promissory note cannot by amendment be changed to one upon a trust in favor of the plaintiff against the defendant, at least a refusal to permit such amendment is not in error. *Jewett v. Malott*, 60 Kan. 509, 57 Pac. 100. An action for breach of an express agreement to furnish passes during the natural lives of plaintiff and wife cannot by amendment be changed to one for damages for permanent appropriation of land. *Railway Co. v. Henrie*, 63 Kan. 330, 65 Pac. 665. At the close of the evidence in an action of tort, it was proper to refuse an amendment changing to an action on contract, the evidence having tended to prove a right thereon. *Ellis v. Flaherty*, 65 Kan. 621, 70 Pac. 586. A petition to quiet title may be amended before answer to one in ejectment where no prejudice to the defendant results. *Curtis v. Schmehr*, 69 Kan. 124, 76 Pac. 434. In an action before a justice of the peace a recovery was had for the value of corn injured and destroyed by trespassing cattle. The bill of particulars alleged, among other things, that the defendants wantonly drove their cattle to graze upon the plaintiff's standing corn; also facts sufficient for a statutory action for damages and lien under the herd law. At the trial the statutory phase of the case was abandoned, as well as the willful proposition, and the case proceeded as one for damages by cattle which were permitted to trespass on the cornfield. No objection and no mo-

tion to elect were made, and it was held that the substantial rights of the defendant were not impaired. *Hopkinson v. Conley*, 75 Kan. 65, 88 Pac. 549. A proceeding was begun as a suit to foreclose certain chattel mortgages, and was changed by amendment to an action in replevin for the same property. No request was made for the imposition of terms, and the trial did not take place until about three months after the amendment, and there was no showing that the defendants were unprepared to try the issue finally presented, or that the trial resulted in any hardship or wrong. It was held that, while such amendment was not in the ordinary course of practice, the substantial rights of defendants did not appear to have been affected; that the change contemplated by the Code does not refer to the form of remedy, but to the general identity of the transaction. *Snider v. Windsor*, 77 Kan. 67, 93 Pac. 600. An action for damages for the negligent setting out of a fire cannot, after the statute has run, be changed by amendment to one for damages caused by a different fire. *Railroad Co. v. Sweet*, 78 Kan. 243, 96 Pac. 657. In an action for damages for breach of contract to give plaintiff employment, the petition set forth a written contract, alleging that it was not in the possession of plaintiff. The answer set out a copy of the contract which differed materially from the one described in the petition. The reply alleged that the copy set out in the answer did not contain all the terms of the contract, and proceeded to state additional terms. It was held that the fact that formal reformation was not asked did not prevent the court from determining and enforcing the contract actually made, that plaintiff should have obtained leave to amend the petition and ask for reformation, but that the contentions were clearly stated and well understood under the pleadings as they were and the claims of both parties fully presented and tried, and no error was committed. *Hornick v. U. P. Railroad Co.*, 85 Kan. 568, 118 Pac. 60.

While the quoted section of the Code is to be construed liberally, and in furtherance of justice, and while it is always desirable to avoid multiplicity of suits and to settle in one action the whole subject-matter of any controversy (*Flint v. Dulaney*, 37 Kan. 336, 15 Pac. 208), it is not proper to permit amendments which substantially change the claim or defense. But when, as in this case, the entire controversy is litigated and each party fully presents his side of it, and the proper judgment is rendered, no substantial harm is shown to have resulted.

Finding no material error, the judgment is affirmed. All the Justices concurring.

**POHL v. FULTON et al.**

(Supreme Court of Kansas. Dec. 9, 1911.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 1041\*)—REVIEW—HARMLESS ERROR—AMENDMENT OF PLEADING AFTER VERDICT.**

Where, without undue advantage being taken, the issues presented by the pleadings are substantially enlarged at the trial and as enlarged are fully tried and duly submitted to the jury, it is not prejudicial error to permit the pleadings to be amended after verdict to conform to the proof.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.\*]

**2. GIFTS (§ 47\*)—ACCEPTANCE—PRESUMPTION.**

The law presumes the acceptance of a beneficial gift by one who, because of his feebleness of mind, is incapable of accepting it.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 84; Dec. Dig. § 47.\*]

**3. GIFTS (§ 23\*)—DELIVERY.**

The requirement of delivery is satisfied by the donor, who retains possession, constituting himself a trustee of the gift for the benefit of the donee.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. § 40; Dec. Dig. § 23.\*]

**4. GIFTS (§ 49\*)—EVIDENCE.**

The evidence considered, and held sufficient to show a completed gift.

[Ed. Note.—For other cases, see Gifts, Dec. Dig. § 49.\*]

Appeal from District Court, Brown County.

Action by Louis H. Pohl against Catherine M. Fulton and others. Judgment for defendants, and plaintiff appeals. Affirmed.

S. L. Ryan and Means & Archer, for appellant. Sample F. Newlon and S. M. Brewster, for appellees.

**BURCH, J.** The plaintiff, Louis H. Pohl, brought suit to recover on a promissory note, and to foreclose a real estate mortgage securing the note, given by John A. Fulton to the plaintiff's deceased wife, Belle B. Pohl, who was formerly the wife of Luther J. Stimple. The note was a renewal of a former note given by Fulton to I. B. Stimple (Belle B. Stimple) while she was a widow. The Stimples had an imbecile son, Hiram Stimple, whose guardian defended the action on the ground that the note and mortgage belonged to him. The plaintiff was defeated, and appeals.

In his petition the plaintiff claimed title to the instruments sued on as an innocent purchaser for value. At the trial this position was practically abandoned, and the court instructed the jury that the plaintiff might recover on two other theories of ownership: First, by gift from his wife, for the entire amount; and, second, as her heir under the statute of descents and distributions, for one-half of the amount claimed. The plaintiff asked a further instruction to the effect that

possession of the note and the exercise of rights of ownership over it would be sufficient to raise a presumption of ownership in him. The answer pleaded ownership of the money which was loaned in Hiram Stimple through inheritance from his father's estate. The evidence failed to sustain this position, there being nothing left of Luther J. Stimple's estate for his son after his debts and his widow's dower were paid. The evidence did show, however, that Belle B. Stimple received the money from the estate of her husband, as administered under the laws of the state of Arkansas, where he died, and that she made a gift of the amount loaned to her son, taking the paper in her own name for him. The jury were instructed that, if they found that the original consideration for the note belonged to Hiram J. Stimple, their verdict should be for his guardian. After the verdict for the guardian was returned, leave was granted to amend the answer to conform to the proof, and this action of the court is assigned as error.

The real issue in the case was the ownership of the note, and this issue was not substantially affected by the amendment. Conceding, however, that the issue made by the pleadings was substantially changed, each party went beyond the specific derivation of title stated in his pleading, the whole history of the paper was opened and fully investigated, the true facts were established, the verdict conformed to the facts, and the amendment was a mere matter of form to make the record consistent.

[1] In all such cases where, without surprise or undue advantage being taken, the issues are enlarged and as enlarged are fully tried and duly submitted to the jury, amendments to conform to the proof should be allowed as a matter of course, either before or after verdict. See *Bear v. Kenyon*, 86 Kan. 66, 119 Pac. 713, decided at the present session.

It is said that the evidence was insufficient to establish a gift of the money to Hiram Stimple from his mother. The evidence disclosed that before her marriage to the plaintiff, and in contemplation of that charge in her affairs, Belle B. Stimple determined to make provision for her imbecile son. She said that in reality the money received from Arkansas belonged to him, that she wanted it to go to him, and that she wanted the matter fixed up so that he would be secure. Therefore she sent for two of her brothers, and with them, at her father's home, in the presence of her father and sister, she undertook to carry out her purpose. She said the money belonged to her son, and that she wanted it loaned in his interest, so that he would get the benefit of it. The result was that John A. Fulton, one of the brothers, took \$1,000 of the money for which he gave

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



the note which preceded the one sued on. The other brother borrowed \$300 at the same time, for which he gave his note. A question arose as to whom John A. Fulton should give his note. A consultation was held, and because the imbecile had no guardian, and because the father of Belle B. Stimple and the Fulton brothers was getting old, it was decided that the note should be given to Belle B. Stimple herself. Afterwards the money was always spoken of as belonging to Hiram Stimple, and was understood to belong to him. The interest was spoken of and regarded as paid on his money. The note was renewed so that there would be no question, and Mrs. Stimple said she told Pohl that the money belonged to her son. After his wife's death, Pohl admitted that her son had "an interest" in the note. The only questions raised respecting the validity of this gift are those of delivery and acceptance, and the familiar cases upon those subjects are cited.

[2, 3] The law presumes the acceptance of a beneficial gift to one who is mentally incapable of accepting it (*Malone's Committee v. Lebus*, 116 Ky. 975, 77 S. W. 180), and the requirement of delivery is satisfied by the donor creating himself a trustee of the gift for the benefit of the donee. *Abegg v. Hirst*, 144 Iowa, 196, 199, 122 N. W. 838, 138 Am. St. Rep. 285; *Yokem v. Hicks*, 93 Ill. App. 667; *Malone's Committee v. Lebus*, 116 Ky. 975, 77 S. W. 180; *Krankel's Ex'r v. Krankel*, by, etc., 104 Ky. 745, 47 S. W. 1084; *Barkley, etc., v. Lane, Ex'r, etc.*, 6 Bush (Ky.) 587; *Cox v. Sprigg and Wife et al.*, 6 Md. 274, 284; *Love v. Francis*, 63 Mich. 181, 29 N. W. 843, 6 Am. St. Rep. 290; *Mize v. Bates County Nat. Bank*, 60 Mo. App. 358; *Martin v. Funk*, 75 N. Y. 134, 31 Am. Rep. 446; *Fulton v. Fulton*, 48 Barb. (N. Y.) 581; *Gadsden v. Whaley*, 14 S. C. 210. In the case of *Williamson v. Yager*, 91 Ky. 282, 15 S. W. 660, 34 Am. St. Rep. 184, the payee of certain promissory notes assigned them by written indorsements on the notes, and declared that she held them for the assignees. Afterwards, with the consent of all parties, the assignments were erased to allow the assignor to sue for the benefit of the assignees, and, after judgment was obtained, it was regarded as belonging to the assignees. The notes were retained in the possession of the assignor, and, treating the assignments as without consideration, it was held that the gifts were complete and effectual. The court said: "If one delivers possession of personal property to a trustee to hold as a gift for the donee, it is certainly a valid gift, and if he expressly says, or does acts amounting to the same thing, that he constitutes himself a trustee to hold the property for the donee, we perceive no reason why this should not be as valid and binding as a delivery of the property to a third person, to be held in trust for

the donee." In the case of *Barnhouse v. Dewey*, 83 Kan. 12, 109 Pac. 1081, 29 L. R. A. (N. S.) 166, the syllabus reads: "Where a donor decides to give to another a certificate of shares in a building and loan association and to make the payments thereon for the donee until maturity, and causes such certificate to be issued in the name of the donee, retaining possession thereof himself, and makes the subsequent payments thereon in the name of the donee, but at all times regards the certificate as the property of the donee and his possession as that of a trustee for such donee, the delivery to himself as trustee of the donee will be held sufficient to complete the gift."

In view of the origin and character of the property, the situation of Belle B. Stimple, her relationship to Hiram Stimple, his situation and mental condition, the purpose she had in view and her statements and conduct, the court has no hesitation in holding that a completed gift was fully proved.

The judgment of the district court is affirmed. All the Justices concurring.

#### MURPHY v. STONE & WEBSTER ENGINEERING CORPORATION.

(Supreme Court of Montana. Nov. 20, 1911.)

##### 1. REMOVAL OF CAUSES (§ 97\*)—EFFECT OF REMOVAL.

If a cause is removable, a state court is without jurisdiction to proceed with a trial, on proper proceedings being taken for removal, and its judgment must be reversed, though otherwise sustainable.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 206-211; Dec. Dig. § 97.\*]

##### 2. REMOVAL OF CAUSES (§ 49\*)—RIGHT TO REMOVAL.

A suit for personal injury against a non-resident employer and a resident fellow servant became a separate controversy, as to the employer, and removable to the federal Circuit Court, on plaintiff failing to summon or procure appearance by the fellow servant and announcing ready to proceed against the non-resident defendant alone.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 95-99; Dec. Dig. § 49.\*]

##### 3. REMOVAL OF CAUSES (§ 81\*)—WAIVER OF RIGHT.

Right to remove a cause may be waived by stipulation or by estoppel through failure to make timely application therefor.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 137, 138; Dec. Dig. § 81.\*]

##### 4. REMOVAL OF CAUSES (§ 94\*)—WAIVER OF RIGHT.

In a suit for personal injury against a nonresident employer and a resident fellow servant, the employer did not waive the right to a removal of the cause on plaintiff's failure to summon or procure the appearance of the resident defendant by stipulating that a setting of the case for trial should be canceled and the cause reset for trial and be tried "in said court" 10 days later, etc., where the circumstances warranted the nonresident

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

defendant in assuming that it would be compelled to submit to trial in that court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 203; Dec. Dig. § 94.\*]

Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge.

Action by Thomas Murphy against the Stone & Webster Engineering Corporation. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed and remanded.

E. C. Day, for appellant. Purcell & Horsky and Walsh & Nolan, for respondent.

BRANTLY, C. J. This action was brought by plaintiff to recover damages for personal injuries received by him during the course of his employment by the defendant corporation. When the action was commenced, one Edward Larmour, a fellow servant of plaintiff, was made codefendant with the corporation; it being alleged in the complaint that he was incompetent and known to be so by his codefendant, and that the injury was caused by his negligence concurring with that of his codefendant. He was not served with summons, nor did he appear in the action. The defendant corporation demurred to the complaint, on the grounds, among others, that several causes of action were improperly united therein, and that there was a misjoinder of parties defendant. The demurrer was overruled, and this defendant answered, denying the material allegations of the plaintiff, and alleging, as special defenses, that the injury was caused by the negligence of a fellow servant, and that the plaintiff had assumed the risk. The case was reached for trial on October 5, 1910. When counsel for plaintiff announced that they were ready for trial, counsel for defendant presented a petition for removal of the case to the Circuit Court of the United States for the District of Montana, on the ground that it had assumed the form of a separate controversy between citizens of different states; plaintiff being a citizen of Montana and the defendant a citizen of Massachusetts. The petition was accompanied by a good and sufficient bond. Counsel for plaintiff resisted the application, contending that the defendant had waived its right to have the case removed, by reason of the following stipulation: "(Title of court. Title of cause.) It is hereby stipulated and agreed by and between the parties in the above-entitled action, and their respective attorneys, the undersigned, that, at the request of defendant's attorneys, the setting of the trial of said case, set to be tried on June 2, 1910, shall be canceled; and it is further stipulated and agreed that the case shall be set down for trial in said court not earlier than June 12, 1910, and shall be tried in said court on said date, or as soon thereafter as shall be

convenient to said court to try the same. Dated May 19, 1910." The court sustained the contention of plaintiff's counsel and ordered the trial to proceed. The result was a verdict and judgment in favor of plaintiff. The defendant has appealed from the judgment and an order denying its motion for a new trial.

[1, 2] Was the case removable? If so, the district court was without jurisdiction to proceed with the trial, and its judgment must be reversed for this reason, whether it might otherwise be sustained or not. In *Golden v. Northern Pacific Ry. Co.*, 39 Mont. 435, 104 Pac. 549, it was held by this court that a case in which the plaintiff and one of two defendants are citizens of different states assumes the aspect of a separate controversy as to such defendant and becomes removable when counsel for plaintiff, having failed to serve summons upon the other defendant and thus bring him within the jurisdiction of the court, announce that they are ready to proceed against the nonresident defendant alone. This was held to be a necessary conclusion from the fact that the election amounts to a complete severance of the action as to the nonresident defendant, as effectively as if it had been originally brought against such defendant alone. In so holding this court accepted as authoritative and binding the construction of the statute (Act March 3, 1875, c. 137, 18 Stat. 471 [U. S. Comp. St. 1901, p. 510]) declared to be the only reasonable one in *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673. In this case the court stated its conclusion as follows: "The reasonable construction of the act of Congress, and the only one which will prevent the right of removal, to which the statute declares the party to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right; and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable case in the court in which it was brought. The result is that, when the plaintiff discontinued his action as against the individual defendants, the case for the first time became such a one as by the express terms of the statute the defendant railway company was entitled to remove; and therefore its petition for removal, filed immediately upon such discontinuance, was filed in due time."

[3, 4] The instant case falls clearly within the statute as thus construed. The petition for removal was therefore presented in time, and the defendant was entitled to removal,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

unless counsel had waived its right by entering into the stipulation; for the right, though a substantive one, being "modal and formal," may be waived either by stipulation or by estoppel because of failure to make timely application for it. *Ayres v. Watson*, 113 U. S. 594, 5 Sup. Ct. 641, 28 L. Ed. 1093; *Northern Pacific Ry. Co. v. Austin*, 135 U. S. 315, 10 Sup. Ct. 758, 34 L. Ed. 218; *Martin's Admr. v. Baltimore & Ohio Ry. Co.*, 151 U. S. 673, 14 Sup. Ct. 533, 38 L. Ed. 311; *Powers v. Chesapeake & Ohio Ry. Co.*, supra; *Golden v. Northern Pacific Ry. Co.*, supra; *Hanover v. Smith*, 13 Blatchf. 224, Fed. Cas. No. 6,035; *Insurance Co. v. Morse*, 20 Wall. 445, 22 L. Ed. 365.

"The rules applicable to the construction of contracts generally govern the courts in their interpretation of stipulations, and thus stipulations will receive a reasonable construction with a view to effecting the intent of the parties; but, in seeking the intention of the parties, the language used will not be so construed as to give it the effect of an admission of a fact obviously intended to be controverted, or the waiver of a right not plainly intended to be relinquished. \* \* \* 36 Cyc. 1291. In arriving at the intent, the circumstances under which the stipulation was made, its subject-matter, and the parties to it may also be considered. Rev. Codes, § 7877.

At the time the stipulation was entered into, the case was set for trial on June 2d, some 14 days later. In view of the action of the court upon defendant's demurrer, doubtless induced by the position assumed by counsel for the plaintiff, counsel for defendant had a right to presume that he would be compelled to submit to a trial in the state court, though the resident defendant had not then been brought within the jurisdiction of the court by service of summons. Indeed, there was no room for any other presumption, unless it be that counsel knew or had ground for the belief that counsel for plaintiff had brought the resident defendant into the case solely for the purpose of preventing a removal of it to the Circuit Court, intending then, and all the time up to the time the case was set for trial, not to have him served with summons. There is nothing in the record tending to show what the intention of plaintiff's counsel in this regard was. Counsel for defendant, therefore, must be presumed to have stipulated in view of the circumstances as they then existed, and unless the language of the stipulation compels the conclusion that he intended to waive all rights with reference to the case, except the right to have it tried in the state court, he should be held to have contemplated the existing circumstances only. The purpose to be accomplished by the stipulation was the vacation of the setting for June 2d, and a re-

setting of the case for June 12th, or upon the earliest day thereafter that would be convenient to the court. If this is so, the language used in the stipulation, viz., "and shall be tried in said court," upon which counsel for plaintiff rely for their assertion of waiver, could have no greater effect than the previous joinder of issue by the filing of the answer, which fact, as we have already pointed out, did not take away the right of removal. In our opinion the language referred to was intended to speak as to the existing condition of the case, and was not intended to include a right which might accrue in the future by a change of condition. In any event, it does not compel the conclusion that counsel for defendant intended to waive any right whatsoever. This being so, we think the district court erred in denying the petition for removal. This conclusion precludes us from considering the case upon the merits.

The judgment and order are reversed, and the cause is remanded.

Reversed and remanded.

SMITH and HOLLOWAY, JJ., concur.

#### IVERSON v. DILNO et al.

(Supreme Court of Montana. Dec. 5, 1911.)

##### 1. INJUNCTION (§ 12\*)—RESTRAINING PAST ACTS.

An injunction will not issue to restrain an act already committed, such as the publication and distribution of a circular to injure plaintiff's business.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 12; Dec. Dig. § 12.\*]

##### 2. INJUNCTION (§ 101\*)—INJURY TO BUSINESS.

The publication of a circular which merely advises the public that a particular person or firm is deemed unfair to organized labor will not be enjoined if it contains no threat to injure such person's business.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. § 101.\*]

##### 3. MUNICIPAL CORPORATIONS (§ 671\*)—OBSTRUCTING STREET—RIGHTS OF ADJUTING OWNERS.

If the members of a labor union and their sympathizers congregated in large numbers in the immediate vicinity of plaintiff's property, and impeded travel on the sidewalk and interfered with plaintiff and her customers in going to and from her place of business, their conduct constituted a nuisance, within Rev. Codes, § 6162, providing that anything which obstructs the free use of property, so as to interfere with its comfortable enjoyment, or unlawfully obstructs the free passage or use in the customary manner of any public street or highway, is a nuisance, to prevent which injunction will lie.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.\*]

##### 4. NUISANCE (§ 1\*)—DEFINITION.

The word "nuisance" means that which annoys or gives trouble; annoys or disturbs one in the possession of his property, making

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

its ordinary use or occupation physically uncomfortable to him.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4855-4864; vol. 8, p. 7734.]

**5. MUNICIPAL CORPORATIONS (§ 671\*) — OBSTRUCTING STREET—REMEDY OF ABUTTING OWNER—INJUNCTION.**

Equity will interpose by injunction to protect one from the maintenance of a nuisance, by interfering with traffic in the street in front of one's place of business.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.\*]

**6. MUNICIPAL CORPORATIONS (§ 703\*)—USE OF STREETS—SIDEWALKS.**

The general public has the right to use streets only for the purpose for which they were created; the right to so use them being limited by the extent and character of the use and the right of others to use the same highway.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. § 703.\*]

**7. MUNICIPAL CORPORATIONS (§ 669\*)—USE OF STREETS.**

The right to use streets must be exercised with due recognition of the rights of abutting owners to ingress and egress from their property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1445; Dec. Dig. § 669.\*]

**8. MUNICIPAL CORPORATION (§ 671\*)—ABUTTING OWNERS—ACCESS TO STREET—RIGHT OF ACTION.**

The annoyance or interference from the maintenance of a nuisance, by interference with traffic on a public street, must substantially injure one's ingress and egress, in order to afford right to an injunction.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1447-1450; Dec. Dig. § 671.\*]

**9. NUISANCE (§ 72\*)—PRIVATE NUISANCE.**

Defendant members of a labor union and their sympathizers congregated and paraded before plaintiff's boarding house to the annoyance of plaintiff and her patrons for the purpose of driving her patrons away from her boarding house, and committing breaches of the peace to bring her house into disrepute and ruin. *Held* that, under Rev. Codes, § 6171, permitting a private person to maintain an action for a public nuisance if it be specially injurious to himself, it was immaterial, upon plaintiff's right to an injunction to restrain defendants' acts, that they also constituted a public nuisance; plaintiff having sustained injury different in kind and degree from that suffered by the public generally.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 164-169; Dec. Dig. § 72.\*]

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Action for injunction by Louisa Iverson against Louis Dilno and others. From an order granting a motion to quash an order to show cause and refusing the injunction, plaintiff appeals. Reversed and remanded.

Cooper & Stephenson, for appellant. H. S. McGinley, for respondents.

**HOLLOWAY, J.** On May 24, 1911, this action was commenced by the plaintiff to secure an injunction, restraining the defendants from certain acts which, it is alleged, they have committed and threaten to repeat. An order to show cause was issued, and upon the return defendants moved the court to quash the order and refuse an injunction, on the ground that the complaint does not state a cause of action, or entitle the plaintiff to equitable relief. The motion was sustained, and plaintiff appealed from the order.

The complaint states that at the time this action was commenced, and at the time the alleged wrongful acts were committed, the plaintiff owned and was operating "the Larson Boarding House," in the city of Great Falls; that she had 20 or more boarders and lodgers; that the defendant union caused to be prepared a banner, upon which was inscribed in large letters the following: "Larson's Boarding House is Unfair to Organized Labor. By Order of H. R. E. I. A. Local No. 1"—and acting under the direction of the union defendant Aaron carried such banner, and paraded back and forth in front of plaintiff's property. It is further alleged that the defendants Aaron, Dilno, Nelson, and Freeman, together with a large number of others—members and sympathizers of the defendant union—acting at the instigation and request of these defendants, have congregated in the immediate vicinity of plaintiff's place of business and upon the sidewalk, impeding travel, to the great annoyance of plaintiff and her patrons; that the acts of defendants were done for the purpose of driving plaintiff's patrons from her place of business, and disturbing and committing breaches of the peace, for the sole purpose of bringing her boarding house into disrepute and ruining her business. By the motion made in the court below, the defendants confess the truth of these allegations, so far as they are well pleaded.

[1] There is also an allegation with reference to the publication and distribution of a circular, but, as it relates to a transaction now wholly past, and there is not any allegation of a threat or intent on the part of defendants to repeat it, further consideration is not necessary, except to say that an injunction will not issue to restrain an act already committed. This is the general rule. If there are exceptions, they do not have any application to a case of this character.

[2] 1. There is not any allegation that the words inscribed on the banner carried by Aaron velled a threat to plaintiff's business or to her or her patrons. In *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 96 Pac. 127, 18 L. R. A. (N. S.) 707, 127 Am. St. Rep. 722, we held that the mere publication of a circular which does not go further than to advise the public that a particular person, firm, or corporation is deemed unfair

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

to organized labor will not be enjoined. So far as applicable, the decision in that case is conclusive against the plaintiff here.

2. The Constitution of this state guarantees to every one the right to pursue happiness and to acquire, possess, and protect property in all lawful ways (article 3, § 3, Constitution of Montana), and this provision secures the right to peaceable possession and to free ingress to and egress from property. The rights thus secured cannot be invaded, unless the public health, morals, or safety, or the general welfare, require interference, or the owner is deprived of his rights by due process of law. As if to indicate in a measure the far-reaching extent of this constitutional guaranty, the Legislature has provided: "Anything which is injurious to health, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use in the customary manner, of \* \* \* any public park, square, street or highway, is a nuisance." Rev. Codes, § 6162. And section 6, art. 3, of the Constitution, declares that the courts shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character, and that right and justice shall be administered without sale, denial, or delay.

[3] If the allegations of this complaint are true, these defendants and their sympathizers, in congregating in large numbers in the immediate vicinity of plaintiff's property, impeding travel on the sidewalk and interfering with plaintiff and her customers in getting to and from her place of business, were committing a nuisance, within the meaning of section 6162, above. That this is true is not open to discussion. If acts of the character of those described in this complaint are not comprehended by the section quoted, then it would tax human ingenuity to the limit to find a meaning for the language employed by the Legislature. And the definition of a nuisance given in our Codes is not an unusual one. It is, in fact, the definition generally accepted by courts, lexicographers, and law writers.

[4] The word "nuisance" means that which annoys or gives trouble. Webster's International Dictionary. Blackstone defines nuisance as "anything that worketh hurt, inconvenience, or damage." 3 Blackstone Com. § 316. "That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him." B. & P. R. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739. See, also, Durfee v. Granite Mt. Min. Co., 13 Mont. 181, 33 Pac. 3. In sections 2 and 3 of Joyce on the Law of Nuisances, and in the notes to those sections, will be found a large number of definitions of the term "nuisance," gathered from the decisions of courts

and from the text-books, all of like tenor and similar to the definition given in our Codes.

[5] So frequently have the courts been called upon to consider cases of the same general character as the one before us that a review of the decisions is unnecessary. They are quite uniform in holding that equity will interpose to protect one against such acts as are described in this complaint. We content ourselves with the citation of a few of the leading cases, some of which present facts much more extreme than those alleged in this complaint. The difference, however, is of degree, rather than of kind. Mackall v. Ratchford (C. C.) 82 Fed. 41; Foster v. Retail Clerks' International Protective Ass'n, 39 Misc. Rep. 48, 78 N. Y. Supp. 860; American Steel & Wire Co. v. Wire Drawers' & Die Makers' Union (C. C.) 90 Fed. 608; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; Jensen v. Cooks' & Walters' Union, 39 Wash. 531, 81 Pac. 1069, 4 L. R. A. (N. S.) 302; San Francisco v. Buckman, 111 Cal. 25, 43 Pac. 396; Beck v. Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13, 42 L. R. A. 407, 74 Am. St. Rep. 421; People v. Cunningham, 1 Denio (N. Y.) 524, 43 Am. Dec. 709. See, also, Martin on Modern Law of Labor Unions, § 103.

[6] It is insisted that, as the street and sidewalk are public highways, defendants had a right to use them. However general the notion may be that one has an unrestricted right to the use of a public highway, it is erroneous. The least reflection will suggest that the right is a qualified one. No one would insist that he has a right to monopolize a street to the exclusion of every one else from its use, or that his right extends to a use entirely foreign to the purpose for which the street was set apart, and one injurious or obnoxious to others, or that he might so use the street as to deny to abutting property owners ingress to or egress from their property. Any right asserted to the use of a public highway must be understood to be limited (a) by the extent of the use; (b) by the character of the use; (c) by the right of others to use the same highway, and possibly by other considerations.

A. A merchant might not object to a single person stopping in front of his place of business, or to a single vehicle left standing in front of his store; but, if 100 persons or 20 vehicles stopped in front of his business for an unreasonable time and excluded his employes and patrons, he would have just cause to complain. Mackall v. Ratchford, supra.

B. When we speak of our right to use a public street, we mean the right to use it for the purposes for which the street was dedicated. Klipp v. Davis-Daly Copper Co., 41 Mont. 509, 110 Pac. 237. In Fairbanks v. Kerr, 70 Pa. 86, 10 Am. Rep. 664, the Su-

preme Court of Pennsylvania said: "A street may not be used, in strictness of law, for public speaking, even preaching or public worship; or a pavement before another's house may not be occupied to annoy him." A tradesman may not conduct his business in such manner as to collect a crowd in front of his store to such extent as to interfere with travel. 2 Elliott on Roads and Streets, § 881. Even a constable who conducts a public sale in the street may be guilty of committing a nuisance. Commonwealth v. Milliman, 13 Serg. & R. (Pa.) 403. Or a public parade may become a nuisance, if it materially obstructs travel, or becomes an actual annoyance. 15 Am. & Eng. Ency. of Law, 506; City of Charlton v. Simmons, 87 Iowa, 226, 54 N. W. 146.

[7] C. The right which any one asserts to use a public street must be exercised with a due recognition of the rights of abutting property owners to ingress to and egress from their property. As was said by Judge Hammond, in American S. & W Co. v. Wire D. & D. M. Union, above: "The right of the use of streets by any one is a qualified right. The owner of a house, be it dwelling house, storehouse, or millhouse; has a distinct right of property in the streets adjacent thereto and used as approaches to it. It is the right of access—free and uninterrupted ingress and egress. Any one who uses the streets must use them subject to this right of the householder. \* \* \* If any one violate the right of the householder to the streets that are appurtenant to his property as a part of it, by impairing his ingress and egress, he has a civil action, and he may also abate it by injunction in equity as a private nuisance. [Citing cases.] It is just as much a nuisance to block up the street and impair the right by the continual presence of bodies of men, great or small, who obstruct the ingress or egress, as it would be to build barricades and embankments in the street. There can be no denial of this, and when the blockading is done for the especial purpose of impairing the ingress to a particular house it is directly a nuisance, which may be abated by injunction, if necessary."

[8] Whether the acts of a single individual amount to a nuisance will depend upon the solution of the question: Do they fall within the meaning of section 6162 above? The annoyance, interference, or injury must, however, be a substantial one, as distinguished from a mere technical violation of plaintiff's rights. "De minimis non curat lex."

[9] It is immaterial that the defendants may have committed a public nuisance, for the allegations of this complaint disclose that the injury, annoyance, and inconvenience suffered by plaintiff differ in kind, as well as in degree, from those suffered by the

public generally; and section 6171, Revised Codes, provides: "A private person may maintain an action for a public nuisance, if it is specially injurious to himself, but not otherwise." Joyce on the Law of Nuisances, § 422. That injunction is an available remedy in a case of this character is recognized by the authorities generally. Joyce on the Law of Nuisances, § 363; Attorney General v. Brown, 24 N. J. Eq. 89; In re Debs, supra.

If the allegations of this complaint are true, plaintiff was entitled to relief, and in denying her a hearing the trial court erred. The order is reversed, and the cause is remanded for further proceedings.

Reversed and remanded.

BRANTLY, C. J., and SMITH, J., concur.

#### NUTT v. ISENSEE.

(Supreme Court of Oregon. Dec. 26, 1911.)

##### 1. TRIAL (§ 143\*)—DISMISSAL OR NONSUIT—CONFLICTING EVIDENCE.

Where, though the testimony is contradictory, it tends to sustain the allegations of the complaint, a refusal to grant a nonsuit is proper.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 342, 343; Dec. Dig. § 143.\*]

##### 2. TRIAL (§ 260\*)—INSTRUCTIONS—SUBSTANCE CONTAINED IN ANOTHER INSTRUCTION.

The refusal to give a requested instruction is proper, where its substance is covered by an instruction given as part of the general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 651; Dec. Dig. § 260.\*]

##### 3. MASTER AND SERVANT (§ 217\*)—INJURIES TO SERVANT—DEFECTIVE MACHINERY—KNOWLEDGE OF SERVANT.

To defeat a recovery by a servant for an injury from an alleged defective machine, it is not sufficient that the servant shall have known that the machine was defective, but he must also have known, or had reason to believe, that the defect was a probable source of danger.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

##### 4. TRIAL (§ 267\*)—INSTRUCTIONS—MODIFICATION OF REQUESTED INSTRUCTIONS.

The modification of a requested instruction is proper, where, taken in connection with the general charge, the law is correctly stated.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672; Dec. Dig. § 267.\*]

##### 5. TRIAL (§ 252\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

Where, in an action for injuries to a servant from alleged defective machinery, there was no evidence that machines like the one in suit were liable to often get out of order, and the evidence tended to show that with ordinary care and attention the machine in question was not liable to get out of order, a request to instruct that "machinery often gets out of order," etc., was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 596-612; Dec. Dig. § 252.\*]

Appeal from Circuit Court, Multnomah County; W. N. Gatens, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by N. G. Nutt against William Isensee. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action for damages for personal injuries. The complaint alleges, in substance, that in June, 1909, plaintiff was employed by defendant as a common laborer in defendant's blacksmith shop; that while so employed he was directed by defendant to operate a machine, called a "shears and punch," which was antiquated, defective, and worn out; that its parts were loose and insecure, its keys, bolts, and rivets so insecurely fastened as to be dangerous and unsafe while in operation, and particularly that an iron key was left by defendant without being securely fastened to the main machinery; that these defects were known to defendant, but were unknown to plaintiff; that at the date mentioned, while plaintiff, under defendant's direction, was attempting to operate the machine, the key loosened from its position, and was projected from its place with great force, striking plaintiff in the face and eyes, and severely injuring him. The answer is a general denial, coupled with a plea of assumption of risk and contributory negligence.

Defendant's counsel requested the following instructions, which the court refused:

"(2) The court further instructs you that the injury to plaintiff's chest, testified to by Dr. Rockey, cannot be considered in this case as an element of damages, but said testimony may be considered an element in determining the credibility of the plaintiff's testimony.

"(3) The court instructs you that if you believe from the evidence that the plaintiff had knowledge of the defective condition of the shears and punch while he was using it, and if you further believe that he was a man of ordinary or average intelligence, he cannot recover, although you find that the defendant knew of the defective condition of the machine."

"(5) The court instructs you that, if you believe from the evidence that in operating the punch when pressure is applied the key or plate could not, from the nature of the machine, fly out, then, in that case, you must find for the defendant.

"(6) The court instructs you that machinery often gets out of order; that it is not negligence on the part of defendant to work the shears and punch without the pins in the key or plate, if you believe from the evidence that when pressure is applied the key or plate could not fly out.

"(7) The court instructs you that if you believe from the evidence that plaintiff inserted a wedge or a flat piece of iron in the machine to make the punch go deeper, and it was the wedge that flew out and struck the plaintiff, or that both wedge and plate flew out at the same time, and that the wedge inserted in the machine was the cause of the injury, then plaintiff cannot recover."

Counsel also requested the following instruction, which the court gave, interpolating therein the words "provided the old machine be a reasonably safe one," which are included in brackets: "The court instructs you that every employer has the right to choose the machinery to be used in his business, and to conduct that business in a manner most agreeable to himself. He may select the appliances and run his shop with old or new machinery, just as he may ride in an old or new carriage, or navigate an old or new vessel, and he is not obliged to change his machinery from old to new in order to secure the greater safety of his employes [provided the old machine be a reasonably safe one], and an employe who enters his service with the knowledge of circumstances attending his employment cannot complain of his master's customs or habits, nor recover for injuries in and resulting from that particular service." Counsel excepted to the instruction as amended.

The testimony of Dr. Rockey, referred to, was introduced by defendant, and was to the effect that about two weeks after the injury plaintiff visited him professionally, in regard to an alleged injury to his chest, which he claimed to have received while working in defendant's shop, as the result of having been struck by a half-moon shaped piece of iron, which projected from a machine he was operating. It does not appear that counsel, at the time the testimony was introduced, attempted to limit its effect to any particular purpose, but introduced it generally.

Plaintiff had a verdict and judgment for \$300, and defendant appeals.

A. T. Lewis (E. S. J. McAllister, on the brief), for appellant. V. K. Strode and F. E. McGinnis (Mark O'Neill, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). [1] We have carefully examined the record in this case, and find it free from any material error. Without consuming space in the reports by a discussion of the testimony in detail, it is sufficient to say that, in our judgment, there was testimony tending, in some degree, to sustain the allegations of the complaint; and therefore the court did not err in its refusal to sustain a motion for a nonsuit. It is true that the testimony was contradictory, but the jury was the judge of its value and effect.

[2] There was no substantial error committed in the refusal of the court to give defendant's requested instruction No. 2, relating to the effect to be given to Dr. Rockey's testimony. The court in its general charge expressly told the jury that plaintiff's recovery must be limited to the particular injury alleged in the complaint, and the instruction requested amounted merely to a repetition of the same instruction in different language. We are of the opinion that the

subject was sufficiently covered by the instructions given.

[3] Instruction No. 3, requested by defendant, does not correctly state the law. It is not sufficient to defeat a recovery that plaintiff should have known that the machine was defective. He must also have known, or had reason to believe, that the defect was a probable source of danger. As was said by Mr. Justice Lord, in *Roth v. N. P. L. Co.*, 18 Or. 205, 22 Pac. 842: "It is to be borne in mind that there is a difference between a knowledge of the facts and a knowledge of the risks which they involve. One may know the facts, and yet not understand the risks; or, as Mr. Justice Byles observed, 'A servant, knowing the facts, may be utterly ignorant of the risks.'" To the same effect is *Johnson v. O. S. L. Ry. Co.*, 23 Or. 94, 31 Pac. 283.

[4, 5] There was no error in the court's modification of requested instruction No. 4. Taken in connection with the general charge, the law is correctly stated. Request No. 5 is substantially covered by the general charge. Request No. 6 was properly denied. It was not the business of the court to instruct the jury that "machinery often gets out of order," etc. The jury was considering the evidence in regard to the machine operated by plaintiff, and as to it, there was no evidence that such machines are liable to often get out of order, but there was strong evidence tending to show that, with ordinary care and attention used in fastening the key or friction plate to the machine, it was not likely to get out of position or fly off.

The last instruction requested is sufficiently covered in the general charge, which was admirable, and covered all the issues. A party is not entitled to have an instruction given in language suggested by himself, if the substance of it is covered by other instructions framed by the court.

In this case the court was exceedingly fair to the defendant, and we are sure that no instruction, refused or given, resulted in any substantial injury, and the verdict of \$300 seems to us to have been based upon an exceedingly moderate estimate of plaintiff's injuries.

The judgment is affirmed.

SABIN v. PHOENIX STONE CO. et al.  
(HEGELE et al., Interveners).

(Supreme Court of Oregon. Dec. 26, 1911.)

#### 1. ESCROWS (§ 14\*)—EFFECT OF RELATION.

A trust company, with which deeds for a stone quarry were deposited under an agreement executed by the trust company, the grantor and grantee, whereby the trust company agreed to hold the deeds in escrow for delivery to the grantee when the purchase-money notes were paid, occupied a fiduciary relation toward the grantor, enjoining upon it the strictest fi-

delity, and it violated such obligation by delivering the deeds before payment so as to impair the ability of the grantee to meet its obligation to complete the purchase under the contract.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. §§ 17-20; Dec. Dig. § 14.\*]

#### 2. ESCROWS (§ 14\*)—WRONGFUL DELIVERY—RATIFICATION.

Defendant stone company agreed with interveners to purchase their stone quarry, the price to be \$30,624 in cash, notes, and stock, deeds to be deposited in escrow with defendant trust company, also a party to the agreement, for delivery when the notes were paid, but on default the sale to be off, and the deeds and notes returned to their respective makers. The stone company could not pay the notes when due, and on January 23d made an offer, which interveners accepted to pay \$28,500 in full settlement, payable \$10,500 in cash, and \$18,000 in bonds of a proposed issue by the stone company. At the same time the stone company adopted a resolution authorizing payment of \$10,500 to interveners out of the proceeds of the bonds, and the delivery to them of the \$18,000 in bonds upon delivery to the stone company of all the instruments held in escrow, and providing that, until such amount was paid to interveners, no bonds should be sold, except on condition that the price might be refunded if the \$10,500 was not realized by a certain date. The stone company could not raise the \$10,500 in time, but the trust company, assuming that the accepted offer of January 23d terminated the escrow agreement, without interveners' knowledge, delivered the deeds to the stone company, surrendered the notes, and took a mortgage from the stone company, and recorded it and the deeds, and loaned to it \$10,000 secured by \$17,000 of the bonds issued. Interveners accepted the \$10,000 and the \$18,000 in bonds, not knowing the source of the money. Four thousand dollars of the pledged bonds were sold, and, by applying the proceeds and other payments, the note held by the trust company was reduced to \$4,197. The trust company foreclosed its pledge and bought in the bonds. Under a provision in the mortgage, a new trustee was substituted for the trust company, and suit was brought to foreclose the mortgage, in which the trust company answered, setting up its ownership of \$13,000 of the bonds. Interveners came in and charged conspiracy by the trust company to prevent them from realizing the full price of the quarry, and prayed that the trust company's bonds be canceled. *Held*, that interveners accepted no benefit from the trust company in the transaction so as to require them to also assume the burdens of the changed conditions caused by the trust company delivering the escrow deeds.

[Ed. Note.—For other cases, see *Escrows*, Cent. Dig. §§ 17-20; Dec. Dig. § 14.\*]

#### 3. CORPORATIONS (§ 482\*)—MORTGAGES—FORECLOSURE—PROCEEDS—DISPOSITION.

The fact that interveners purchased \$2,500 worth of the stone company's bonds at 90 would not require that they should share in the proceeds of the mortgage foreclosure sale on that basis, in view of the fiduciary relation which existed between the trust company and interveners, as interveners were entitled to go into the open market and buy the bonds as cheaply as possible.

[Ed. Note.—For other cases, see *Corporations*, Dec. Dig. § 482.\*]

#### 4. CORPORATIONS (§ 482\*)—MORTGAGES—FORECLOSURE—PROCEEDS—DISPOSITION.

The trust company would be entitled to share pro rata with interveners and other bondholders in the proceeds of the mortgage fore-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep' Indexes



closure sale to the extent of the \$4,197 advanced by the trust company for interveners' benefit, but payment of the remaining \$13,000 of the bonds held by it should be postponed until the rest of the bonded debt is paid.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 482.\*]

On petition for rehearing. Petition denied.

For former opinion, see 118 Pac. 494.

Teal, Minor & Winfree and W. A. Johnson, for appellant. Bauer & Greene, for respondent Sabin. Veazle & Veazle, for respondent Phoenix Stone Co.

BURNETT, J. [1] In its petition for a rehearing the Portland Trust Company of Oregon seems to proceed upon the theory that in the transaction in question it and the interveners and the Stone Company were all dealing at arms' length as to each other. It may be conceded that this is true as between the Stone Company and the interveners, and as between the Stone Company and the Trust Company. This, however, is not the case as between the Trust Company and the interveners. As to the latter, the Trust Company occupied a fiduciary relation entailing upon it the strictest fidelity to the interveners, who were, in fact, for the time being its *cestius que trustent*.

[2] It is contended in the petition for rehearing that the interveners accepted the benefits of the transaction named, and that they must be bound by its burdens or by the changed conditions brought about by the act of the Trust Company in delivering the escrow deed. The answer to that proposition is that the interveners accepted nothing from the Trust Company. What they received they had from the Stone Company. As between the interveners and the Trust Company, the escrow agreement was the standard of conduct to be observed. By operation of law one condition of that contract was that the latter should not act under it to the disadvantage of the former. Any act, therefore, of the Trust Company amounting to an impairment in any degree of the ability of the Stone Company to meet its obligations to the interveners, would be a violation in effect at least of the fiduciary obligations resting upon the Trust Company in respect to the interveners. The delivery of the deed left with the Trust Company in escrow rendered it possible for that company to acquire \$17,000 of the bonds of the Stone Company for the sum of \$10,000, and this was one of the results flowing from the transaction. The difference between those two amounts virtually represented a premium paid by the Stone Company for the use of the \$10,000. The payment of, or liability to pay, so large a premium as a result of the pledging transaction by that much diminished the ability of the Stone Company to pay the interven-

ers the obligation due to them. In this we think that the Trust Company was at fault, and equity will so mould the conduct of the parties as to make it comply with the standard prescribed by their own stipulations.

[3] It is also contended, in substance, that, because the interveners may have bought \$2,500 of the bonds of the Stone Company at 90 per cent., they should share in the proceeds of sale on that basis if the Trust Company is itself held to account for the difference between \$10,000 and \$17,000 the face of the bonds, or is to be relegated to a junior incumbrancer's place. This would be true probably except for the fiduciary relations between the Trust Company and the interveners already noted. The latter, however, owed no such duty to the Trust Company, and they were privileged to go into the open market and buy the bonds as cheaply as they could. And so with the Trust Company as against the Stone Company, but not as against the interveners on account of the trust relation existing. We do not feel called upon to analyze the transaction beyond its consummation in the loan of the \$10,000. If afterwards the Trust Company chose to loan money to the Stone Company, it was no concern of the interveners.

[4] We think, perhaps, that the conclusion on the former opinion was not as clearly stated as might be, and so we recast the matter in this way. As respects the bonds only without reference to other liens either prior or junior, the mortgage securing the bonds should be foreclosed, and the property sold in the manner provided by law. The proceeds of this sale should be applied pro rata to the payment of the bonds held by H. C. Leonard in the sum of \$5,000, Mrs. J. E. Hall \$1,000, the Commercial Bank of Oakland \$500, the interveners \$20,500, and the Trust Company in the sum of \$4,197.45; but the remainder of the \$13,000 of the bonds held by the Trust Company should be postponed to a second place in relation to the residue of the bonded debt already noted and paid only after such residue is satisfied.

With this modification, the decree of the court below is affirmed as stated in the former opinion.

Rehearing denied.

HAGESTROM et al. v. SWEENEY et al.  
(Supreme Court of Oregon. Jan. 2, 1912.)

1. EVIDENCE (§ 264\*) — ADMISSIONS — CONSTRUCTION — BUILDING CONTRACTS — BREACH — SPECIAL DAMAGES.

The testimony of a building contractor suing for his wrongful discharge from the job, and alleging that he was deprived of present and future work to his damage in a specified sum, that he has been at work during most of the time since the discharge, is an admission that no damages as alleged resulted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1028; Dec. Dig. § 264.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

## 2. EVIDENCE (§ 498\*)—OPINION—DAMAGES—BREACH OF CONTRACT—LOSS OF PROFITS.

A party to a contract, who seeks to recover loss of profits by breach of the contract, must establish the loss by proof of data from which the extent of the profits may be computed, and the opinion of witnesses as to what profits a contractor would have made if permitted to complete the work is inadmissible to establish such loss.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2289; Dec. Dig. § 498.\*]

## 3. APPEAL AND ERROR (§ 1140\*)—DISPOSITION OF CASE ON APPEAL—CONDITIONAL AFFIRMANCE.

Where the amount erroneously allowed as damages in an action for breach of contract is certain, the Supreme Court may affirm the judgment on condition that plaintiff remit such amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4462-4478; Dec. Dig. § 1140.\*]

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein, Judge.

Action by Pete Hagestrom and others, partners under the firm name and style of Pete Hagestrom & Company, against J. W. Sweeney and others, partners under the firm name and style of the J. W. Sweeney Construction Company. From a judgment for plaintiffs, both parties appeal. Conditionally affirmed.

This is an action to recover compensation for work done upon a contract and damages suffered by a breach of the contract. Plaintiffs, on July 28, 1909, contracted with defendants to build a railroad grade between certain stations in Washington county, Or., and to complete the work by June 1, 1910, for which defendants agreed to pay plaintiffs at certain rates, according to the estimates of the engineer, for removing rock and earth and for doing other work. According to the estimates furnished by the engineer in charge, the work done, as alleged by plaintiffs, amounted to \$6,173.40, against which they admit that defendants are entitled to credit for board, \$1,154.50; hospital fees, \$50; supplies, \$389.05; cash upon the contract, \$1,736.45; tools, etc., \$1,531.64, less a credit of \$34.45. The total, as stated, is \$4,661.46, leaving a balance due of \$1,511.94, no part of which has been paid, although demanded. For further cause of action, plaintiffs allege: That it is provided in the contract that "the order to stop and abandon said work shall be made in writing, signed by the contractor, and shall be delivered to the stationmen \* \* \* thirty days prior to the date when such order shall take effect. \* \* \* When the work shall cease at the expiration of said period of thirty days from the giving of such notice, the work shall be deemed to have been finally completed, and payment shall be made therefor in the manner hereinbefore provided in paragraph 7, and this contract shall be regarded as terminated and at an end." That on the 28th day of Feb-

ruary, defendants orally notified plaintiffs to cease work, took possession of plaintiffs' tools and implements, and closed the boarding house, so that plaintiffs were compelled to, and did, cease work, and left the camp. That, if they had been permitted to proceed with the work until June 1st, they could have accomplished much work. That by virtue of the cancellation of the contract plaintiffs were deprived of present and future work, to their great damage in the sum of \$2,000. The answer denies every allegation of the complaint and affirmatively alleges the contract briefly as set out in the complaint; that plaintiffs performed work thereunder; but that on February 28, 1910, without cause, they abandoned the work; and that defendants have paid and advanced to plaintiffs on the contract the sum of \$5,161.18. They also set up a counterclaim for damages. The reply denies the new matter of the answer, except in certain particulars. Upon the trial before a jury a verdict was rendered for plaintiffs in the sum of \$1,184.05, and the sum of \$1,000 damages. Upon a motion for a new trial, and as a condition of its denial, \$500 of the damages included in the verdict was, by plaintiffs, remitted, and judgment was rendered accordingly. Both parties appeal.

Alexander Bernstein (Bernstein & Cohen, on the brief), for plaintiffs. M. J. MacMahon, for defendants.

EAKIN, C. J. (after stating the facts as above). Defendants assign as error certain rulings of the court in the admission of evidence, which rulings we deem were not prejudicial, and they need not be further considered. They also assign as error the instruction given by the court to the jury as follows: "If you find that the plaintiffs were improperly discharged and not permitted to continue the work under the terms of the contract, then you may assess such damages, as would reasonably compensate them for the breach not to exceed \$2,000"—which was duly excepted to, upon the ground that there was not any evidence before the jury upon which to predicate a verdict for damages.

[1] There was no proof of specific damages arising out of the breach; the allegation of damages being that they were deprived of present and future work to their great damages in the sum of \$2,000. Plaintiffs testified that they have been at work during most of the time since being discharged from the job; that they have been continuously at work, which is an admission that no such damages resulted.

[2] Plaintiffs attempt to prove profits that would have resulted to them if allowed to complete the contract, but no proof was offered of facts from which profits could be estimated, such as the amount of rock or earth yet to be removed, or the probable ex-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

pense of its removal. On the contrary, opinion evidence was offered without proof of any data upon which to base it, and therefore was not competent evidence of any damage. Upon breach of a contract, where loss of profit is the measure of damages relied upon, such probable profits must be established by proof of data from which the extent of the profit, if any, may be computed. 4 Ency. Ev. 5, 14, 21; 8 Am. & Eng. E. L. 621, 622, and note; *Douglass v. Railroad Company*, 51 W. Va. 523, 41 S. E. 911; *Ramsey et al. v. Holmes Elec. Prot. Co.*, 85 Wis. 174, 55 N. W. 391; *Lentz et al. v. Choteau*, 42 Pa. 435; *Durkee v. Mott*, 8 Barb. (N. Y.) 423. The only evidence offered to prove loss of profits is disclosed by the questions to witnesses as to their opinion as to what the profits would have been, and the offer was properly denied. This conclusion renders it unnecessary to consider further plaintiffs' appeal, which related only to the damages remitted. The verdict was in favor of plaintiffs in the sum of \$1,184.05 and the further sum of \$1,000 damages, which, as stated, were reduced to \$500.

[3] As the damages are found in a separate item of the verdict, the amount erroneously found is fixed, and we may affirm the judgment on condition that plaintiffs remit from the judgment the amount of damages, namely, \$500, following *Gardner v. Kinney*, 117 Pac. 971.

Therefore it is ordered that if the plaintiffs shall, within 30 days, remit the sum of \$500 from the judgment of the lower court, the remainder of the judgment will be affirmed; otherwise, it will be reversed and remanded for a new trial. Defendants to recover costs in this court.

## SOUTHERN PAC. CO. v. RAILROAD COMMISSION OF OREGON.

(Supreme Court of Oregon. Dec. 26, 1911.)

### 1. CONSTITUTIONAL LAW (§§ 206, 241, 297\*)—RAILROADS (§§ 225, 226\*)—REGULATION OF RAILROADS—FOURTEENTH AMENDMENT.

The Legislature has power to enact legislation requiring railroad corporations to furnish reasonably adequate facilities for the transportation of freight and passengers; such legislation not being contrary to Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 625-643, 700, 701, 832-834; Dec. Dig. §§ 206, 241, 297;\* Railroads, Dec. Dig. §§ 225, 226.\*]

### 2. RAILROADS (§ 214\*)—TRANSPORTATION FACILITIES—DUTY TO FURNISH.

A railroad corporation's duty to furnish reasonable facilities for the transportation of passengers and freight is one which has always existed, and is not created by statute.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 711, 712; Dec. Dig. § 214.\*]

### 3. RAILROADS (§ 223\*)—ADEQUATE SERVICE—STATUTES—RAILROAD COMMISSION—"SERVICE."

Laws 1907, p. 71, § 12 (L. O. L. § 6887), requires every railroad to furnish reasonably adequate service, equipment, and facilities; and Laws 1907, p. 86, § 30 (L. O. L. § 6908), provides that the Railroad Commission is authorized, if it finds any service inadequate, to direct one that is adequate. *Held*, that the word "adequate" in such section did not presuppose that some service had existed, but was applicable to a case where the service was insufficient, because never established; and hence such sections conferred on the Railroad Commission power to compel a railroad corporation to install new facilities.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 725-729; Dec. Dig. § 223.\*]

### 4. RAILROADS (§ 9\*)—REASONABLE FACILITIES—INSTALLATION—EVIDENCE.

In an action to set aside an order of the Railroad Commission, evidence *held* to warrant an order of the Commission, requiring a railroad company to install a spur on its main line at a certain town, where the inhabitants were compelled to go to another town, a mile and a half away, before they could get railroad service.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 12-19; Dec. Dig. § 9.\*]

Appeal from Circuit Court, Marion County; Wm. Galloway, Judge.

Suit by the Southern Pacific Company against the Railroad Commission of Oregon. Judgment for defendant, and plaintiff appeals. Affirmed.

This is a suit to enjoin defendant from putting into effect its order, requiring plaintiff to construct and maintain a spur on its main line at the town of Edenbower, in Douglas county.

In December, 1909, certain citizens of Edenbower filed a complaint with the Railroad Commission, setting forth that a flag station for local passenger trains and a siding for freight and express trains were necessary, and asking that the defendant be required to install them. After hearing the testimony of the complainants and the defendant, the Railroad Commission denied the prayer of the complainants for a flag station and siding, but ordered the railroad company to construct a spur sufficient to accommodate three cars. Thereupon plaintiff brought this suit to set aside such order. Upon trial in the circuit court, the order of the Commission was sustained, and plaintiff appeals.

The following sections of the Railway Commission Act relate to the matters here in controversy, and are quoted, so far as applicable:

Section 6887, L. O. L. "Every such railroad is hereby required to furnish reasonably adequate service, equipment and facilities, and the charges made for any service rendered or to be rendered in the transportation of passengers or property or for any

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

service in connection therewith, or for the receiving, switching, delivering, storing, elevation, and transfer in transit, ventilation, refrigeration, or icing or handling of such property, or for union depot or terminal facilities, shall be reasonable and just, and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful."

Section 6897. "It shall be the duty of every railroad to provide and maintain adequate depots and depot buildings, and clean and suitable toilet rooms, or buildings, at its regular stations where an agent is maintained, for the accommodation of passengers, and said depot buildings shall be kept clean, well lighted and warmed, for the comfort and accommodation of the traveling public. All railroads shall keep and maintain adequate and suitable freight depots, buildings, switches, spurs and side tracks for the receiving, handling, and delivering of freight transported or to be transported by such railroads. \* \* \*"

Section 6908. "Whenever, upon an investigation made under the provisions of this act, the Commission shall find any existing rate or rates, fares, charges, or classifications, or any joint rate or rates, or any regulation or practice whatsoever affecting the transportation of persons or property, or any service in connection therewith, are unreasonable or unjustly discriminatory, or any service is inadequate, it shall determine and by order fix a reasonable rate, fare, charge, classification, or joint rate to be imposed, observed, and followed in the future in lieu of that found to be unreasonable or unjustly discriminatory, or inadequate, as the case may be, and it shall cause a certified copy of each such order to be delivered to an officer or station agent of the railroad affected thereby, which order shall of its own force take effect and become operative twenty days after the service thereof. All railroads to which the order applies shall make such changes in their schedule on file as may be necessary to make the same conform to said order, and no change shall thereafter be made by any railroad in any such rates, fares, or charges, or in any joint rate, or rates, without the approval of the Commission. Certified copies of all other orders of the Commission shall be delivered to the railroads affected thereby in like manner, and the same shall take effect within such time thereafter as the Commission shall prescribe."

By section 6910, a railway company is authorized to commence a suit in equity to vacate an order of the Railroad Commission, if the same is unlawful or unreasonable; and in such suit the burden of proof is upon the plaintiff to show the unlawfulness or unreasonableness of the order "by clear and satisfactory evidence."

Wm. D. Fenton (Geo. G. Bingham, Ben C. Dey, Dexter Rice, and Jas. E. Fenton, on the brief), for appellant. A. M. Crawford (C. L. McNary and Roy F. Shields, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). The validity of the order of the Railroad Commission is assailed upon three grounds, namely: (1) That the Legislature is without power to authorize the Commission to direct the building of new spurs or side tracks; (2) that, conceding that the Legislature had such power, it has not delegated it to the Commission; and (3) that the exercise of the power in the present instance is so unreasonable that it is void, or at least that the order should be reversed upon the facts shown to exist.

[1] Taking these propositions in the order stated, we are of the opinion that the Legislature has power to enact legislation authorizing the Railroad Commission to require railroad corporations to furnish reasonable and adequate facilities for the transportation of freight and passengers; and that such legislation is not contrary to the fourteenth amendment to the Constitution of the United States.

One of the primary duties, recognized by all civilized governments, is that of providing their citizens with facilities for public travel by means of roads, canals, and other similar structures. In the progress of civilization and the increase of public travel, it became apparent that the public could be better served, and public highways more readily built and operated, by allowing private enterprise to supplement the facilities provided by general taxation, and toll roads were authorized, and corporations, endowed with governmental authority to exercise the right of eminent domain, were authorized to construct such highways, receiving in the way of toll from the traveling public sums which, in some respects, were deemed a substitute for those previously paid by them in the form of taxes. Later, with the application of steam to the purposes of travel by land, the railroad succeeded the toll road. It is true that the railroad differed from the toll road, in that its proprietors furnished, not only the road, but the vehicle which carried the traveler, but, nevertheless, remained a public road; and the corporation which carried the freight or passengers continued to perform a public and governmental function, namely, that of expediting public travel. For these reasons it has always been held that railroads are public highways. *Mills on Em. Dom.* § 14; *Olcott v. Supervisors*, 16 Wall. 678, 21 L. Ed. 382; *Railroad Commissioners v. Portland & O. C. R. Co.*, 63 Me. 269, 18 Am. Rep. 206. In respect to their functions and powers, railway corporations are differentiated in a marked

degree from other corporations. No mining, merchandising, or banking corporation can use the authority of the government to condemn a rod of land—one of the highest attributes of sovereignty. The railway corporation is invested with the powers of the sovereign, because it is a trustee and agent of the sovereign, and therefore must exercise its public functions under the supervision of its superior. Its public duties are ministerial, namely, to carry out the objects of its creation with reference to what public necessity and convenience require, and the right to compel this must of necessity reside in its creator, the state.

[2] The duty of a railway corporation to provide reasonable facilities for the transportation of passengers and freight is one which always existed, and not one created by statute. The statute only provides a method by which these pre-existing duties may be enforced. The court well stated, in *Pittsburg, C. & St. L. Ry. Co. v. Railroad Commission of Indiana*, 171 Ind. 201, 86 N. E. 333, that: "In one sense of the term, appellant's property is private, and as such it is within the protection of the federal and state Constitutions; but such property is subject to due regulation, since it has been devoted to a public use, particularly since that use is, in a limited sense of the term, for the purposes of a public highway. *Lake Superior, etc., R. Co. v. United States*, 93 U. S. 442, 23 L. Ed. 965. As was said in *Barton v. Barbour*, 104 U. S. 126, 135, 26 L. Ed. 672: 'A railroad is authorized to be constructed more for the public good to be subserved than for private gain. As a highway for public transportation, it is a matter of public concern, and its construction and management belong primarily to the commonwealth, and are only put into private hands to subserve the public convenience and economy; but the public retain rights of vast consequence in the road and its appendages, with which neither the company nor any creditor or mortgagee can interfere. They take their rights, subject to the rights of the public, and must be content to enjoy them in subordination thereto.' While railroad companies are chartered for the purpose of affording due facilities of transportation, yet at the common law there are certain obligations of an imperfect character which have been left to such carriers, upon the presumption that their business interests will cause them sufficiently to discharge such duties, as in the building of interchange freight tracks, the erection of depots, and the like. It is clear, however, that the Legislature, which possesses the right to make all manner of reasonable and wholesome laws within constitutional limits, may, to the extent of that which is reasonable, convert such imperfect obligations into absolute legal duties." See, also, *State v. R. V. R. Co.*, 17 Neb. 647, 24 N. W. 329, 52 Am. Rep. 424; *Missouri, C. & G. Ry. v. State*, 28 Okl.

115, 113 Pac. 930; *Railroad Commission v. Portland & O. C. R. Co.*, 63 Me. 269, 18 Am. Rep. 208; *Railroad Commission v. Kansas City So. Ry.*, 111 La. 134, 35 South. 487; *Pecos & N. T. Ry. Co. v. Railroad Commission (Tex. Civ. App.)* 120 S. W. 1055.

[3] The second proposition, that, conceding that the power to compel a railway corporation to install new facilities exists, the Legislature has not delegated it to the Commission, is, in our opinion, negated by the terms of the act. Section 12 of chapter 53, Laws 1907 (section 6887, L. O. L.), requires every railroad to furnish "reasonably adequate service, equipment and facilities." There is nothing in the language used to indicate that it is intended to apply to places or stations then established, or that its application is intended to be limited in any way, except by the reasonable needs of the public. By section 30 of the same act (section 6908, L. O. L.), the Commission is authorized, if it finds any service inadequate, to direct one that is adequate. We do not agree with counsel that the word "inadequate," as used in this and other sections, presupposes that some service theretofore had been established or provided at the particular place which is the subject of investigation. Counsel's proposition is that no service or facilities are "not inadequate" service or facilities, but this method of reasoning proves either too much or too little.

It is claimed by plaintiff that the community of Edenbower is already provided with sufficient and adequate service and facilities by the depot and tracks at Roseburg, a mile and a half away. The Commission has found that a service at that distance is, under the conditions, inadequate to the needs of this community. Plaintiff does not claim that it has never furnished any service or facilities, but insists that it has done both. The inhabitants of Edenbower admit that plaintiff has furnished facilities, and that it has availed itself of them, but claim that those furnished are situated at so remote a distance from the seat of their industries that they are inadequate. We are of the opinion that the words "adequate" and "inadequate facilities" are used with reference to the wants of a community, rather than with reference to any particular station. Any other construction would permit a railway company to build a cannon-ball line through the whole state, and operate it with all its attendant inconveniences, without having a single station, except at terminals. It may be said that the interest of the corporation in obtaining business would prevent it from doing this, and, in the illustration used, that would probably be the case; but in an instance like the present one it is quite probable that the company, in any event, would get the largest part of the Edenbower business through the Roseburg station. That community would be put to the additional

expense and trouble incident to the longer haul by wagon to and from Roseburg, and the company would get a large part of the business without incurring the additional expense of installing a spur.

Taking the act as a whole, we are of the opinion that it was the intent of the Legislature to cover and include all those duties which a railway corporation, as a trustee of the state, owes to the public; that the language used is adequate to carry out that intention; and that the order made was one within the power of the Commission.

[4] We will now consider the third proposition, namely, the reasonableness of the order, viewed in the light of the facts. The statute provides that such order shall be deemed prima facie reasonable, and shall not be set aside, except upon clear and satisfactory evidence. We understand this to mean no more than that the Commission, being composed of experts in the line of work intrusted to them, and having opportunities of personal examination and investigation not available to the court, should be presumed to have acted reasonably and fairly. We do not understand that it is intended, by the language adverted to, to impose upon a plaintiff in a suit of this character the necessity of producing a greater amount of proof to sustain its case than would be required to overturn the finding of any other select body of experts, charged with the duty of ascertaining a fact by testimony and actual physical examination of conditions. The office of railroad commissioner is one of great responsibility, and charged with difficult and delicate functions. It involves, to some extent, the task of directing a railway corporation to use its funds for particular purposes of improvement, or for the betterment of its service, without its consent, and sometimes contrary to its wishes. That such a power should be exercised with extreme caution goes without saying, and the infrequency of appeals to this court from such decisions indicates that the commissioners, selected by the people of this state to see that the rights of the public in matters of transportation are properly protected, have performed that duty fairly and faithfully. Giving to the decisions of this body, in the language of the United States Supreme Court, in *Ill. Cent. R. Co. v. Interstate Commerce Commission*, 206 U. S. 441, 27 Sup. Ct. 700, 51 L. Ed. 1128, "the weight due to the decisions of a tribunal authorized by law and

informed by experience," we are unable to say that the order in question is unreasonable.

The proceedings before us show that the investigation was held near the place of the controversy, so that the commissioners had an opportunity, which we have not had, to view the premises. Testimony was taken on both sides, and the request for a flag station was disallowed. It is evident that there was no intent to be oppressive, and the order made does not seem to impose any great financial burden upon the company. It is true that there does not appear to be a great amount of traffic at this point at present, but there seems to be enough to justify the conclusion that the laying down of 300 feet of track will not require the plaintiff to do the business at Edenbower at a loss, or materially to diminish its profits therefrom. In coming to this conclusion, we do not take into consideration the chances for future increase of business by the impetus that may be given to the industries of Edenbower by improved facilities for transportation, because we do not conceive that either the Commission or this court should direct increased facilities to be installed for the purpose of making traffic, not shown to be potentially in existence. In other words, the power of the Commission should be exercised to facilitate actual business, not speculatively to create business where none exists. Giving to the investigations of the Commission their due weight, and taking into consideration the number of inhabitants whose shipping would naturally gravitate to Edenbower because of its accessibility, it seems not unreasonable to say that there is business enough in sight to justify the small outlay required by the Commission. If, in fact, it should transpire that such is not the case, the Commission could, and no doubt would, revoke its order, and the rails and ties would be available for use elsewhere.

It is contended that the construction of this spur, at the point designated, constitutes a danger to public travel. But it appears that other spurs in the vicinity are constructed upon grades no less than this, and while every spur and switch on a road tends in some degree to increase the risk of travel, and is, in a remote degree, an element of danger or delay, we apprehend that these dangers are not of any considerable magnitude.

The decree of the circuit court is affirmed.

CAVINESS v. LA GRANDE IRR. CO. et al.  
(Supreme Court of Oregon. Dec. 26, 1911.)

1. APPEAL AND ERROR (§ 1119\*)—DECISION—RELIEF AS BETWEEN CODEFENDANTS.

Where defendants, in a suit to establish water rights, who did not appeal from the decree, but were served with notices of appeal by other defendants, the award of the circuit court as to their claims must abide the decision on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4415, 4416; Dec. Dig. § 1119.\*]

2. WATERS AND WATER COURSES (§ 23\*)—APPROPRIATION—CHARACTER OF APPROPRIATION.

An appropriation of water from a non-navigable stream contemplates a tenancy in severalty with all other appropriators.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 15; Dec. Dig. § 23.\*]

3. WATERS AND WATER COURSES (§ 42\*)—RIPARIAN RIGHTS—CHARACTER OF CORPORATE RIGHTS.

The use of water from a nonnavigable stream by a riparian proprietor is essentially a tenancy in common with all other riparian proprietors on the same stream.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 33-37; Dec. Dig. § 42.\*]

4. WATERS AND WATER COURSES (§ 43\*)—RIPARIAN RIGHTS—EXTENT OF RIGHT TO WATER—DOMESTIC USES.

An upper riparian owner may take for domestic use, including water for his household and also for such animals as are essential to the proper sustenance of his family, so much of the water of a natural stream as may be necessary for that purpose, although none may be left for the lower riparian owners; such use being grounded on actual necessity.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 35; Dec. Dig. § 43.\*]

5. WATERS AND WATER COURSES (§ 44\*)—RIPARIAN RIGHTS—EXTENT—IRRIGATION PURPOSES.

Riparian use of water for irrigation purposes is limited by the condition that it must be so used as not to materially injure other riparian owners in their proportional use of the water of the stream for the irrigation of their riparian lands.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 36; Dec. Dig. § 44.\*]

6. WATERS AND WATER COURSES (§ 24\*)—APPROPRIATION—EXTENT OF USE.

An appropriator, subject to prior rights, may take all the water he can use, reasonably and without waste, for a beneficial project, although it may leave none for those claiming by subsequent right.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 16; Dec. Dig. § 24.\*]

7. WATERS AND WATER COURSES (§ 48\*)—NONNAVIGABLE STREAM—APPROPRIATION AS WAIVER OF RIPARIAN RIGHTS.

A settler upon public lands which border upon a nonnavigable stream may claim the use of water either as a riparian owner or as an appropriator, but he cannot claim in both rights, since the exercise of one right is in substance the waiver of the other; the tenancy and

characteristics of the two rights being essentially different.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 38; Dec. Dig. § 48.\*]

8. WATERS AND WATER COURSES (§ 49\*)—RIPARIAN RIGHTS—PROCEEDINGS TO ESTABLISH—FUTURE USE.

In the very nature of things, a court cannot fix in advance by its decree the quantity of water which will be reasonable for the future use of a riparian proprietor claiming the right to water as such.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 39, 40; Dec. Dig. § 49.\*]

9. WATERS AND WATER COURSES (§§ 213, 267\*)—WATER RIGHTS—IRRIGATION AND MINING—STATUTES.

Any use of the water of a natural stream for a beneficial purpose is free to one who has an opportunity to take it without infringing upon the property rights of another, the principle being one established by the exigencies of mining and agriculture, and Act Cong. July 26, 1866, c. 262, 14 Stat. 253 (U. S. Comp. St. 1901, p. 1437), and Act Cong. March 3, 1877, c. 108, 19 Stat. 377, known as the "desert land act," are declaratory of this law.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 304, 326; Dec. Dig. §§ 213, 267.\*]

10. WATERS AND WATER COURSES (§ 8\*)—APPROPRIATION—PERSONS ENTITLED TO APPROPRIATE—CONSENT OF RIPARIAN OWNER.

A nonriparian appropriator, provided he has the lawful right of access to a natural stream, has a right to the use and diversion of water similar to that of a riparian user; the essential condition of appropriation on public lands being the consent or acquiescence of the general government as the then riparian owner.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 8; Dec. Dig. § 8.\*]

11. WATERS AND WATER COURSES (§ 33\*)—ACTION TO ESTABLISH APPROPRIATION.

Where the pleadings showed that the plaintiff and one of the defendants in an action to establish water rights and to enjoin diversion by upper riparian users were riparian owners claiming as appropriators, and that the other defendants owned no lands, either riparian or away from the river, but merely conveyed water to such lands, the parties were before the court in the character of appropriators and not as riparian owners.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

12. WATERS AND WATER COURSES (§ 19\*)—APPROPRIATION—PRIORITIES.

One whose appropriation of water is prior in time is superior in right to the extent of his appropriation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 11, 12; Dec. Dig. § 19.\*]

13. WATERS AND WATER COURSES (§ 33\*)—APPROPRIATION—ACTION—PARTIES.

A corporation, which is organized merely to facilitate distribution of water among individual appropriators, though they do not surrender their rights to it, is yet in such a privity of estate with them as to enable it to defend in their behalf in litigation affecting their rights to the use of the water.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**14. CORPORATIONS (§ 370\*) — POWERS — ARTICLES OF INCORPORATION.**

The powers of a corporation are defined and limited by its articles, and, as against a stranger, it cannot go beyond them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1511-1515; Dec. Dig. § 370.\*]

**15. WATERS AND WATER COURSES (§ 33\*)—APPROPRIATION—PRIORITIES — CORPORATIONS—INDEPENDENT CLAIMS OR CLAIMS ANCILLARY TO STOCKHOLDERS.**

The charter of a corporation, defendant in an action to establish a right of appropriation and to enjoin a diversion of water, showed that it was engaged in the "appropriation of waters of the Grand Ronde river by a ditch or canal. \* \* \* said water to be used for irrigation and such other purposes as may be deemed expedient and profitable by said corporation." Another corporation defendant was chartered to take 5,000 inches of water from the river by canals or ditches for irrigation, and another was chartered to construct, maintain, and operate irrigating ditches, to buy, sell, or rent and irrigate real estate, but none of the corporations showed any transfer to themselves, either directly or by mesne conveyances, from any original settler of any water right or real estate to which such a right was appurtenant. *Held*, that the charters did not show any ancillary claims or privity with individual appropriators whose water rights the corporations had organized to facilitate and distribute, but the character of independent appropriators, and that their rights and priorities would be determined as of the dates of their incorporation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

**16. WATERS AND WATER COURSES (§ 32\*)—APPROPRIATION—FORFEITURE OR ESTOPPEL.**

Plaintiff, in an action to establish a right of appropriation and to enjoin diversion by upper riparian users, had formerly been president and manager of one of the defendant corporations and had enlarged that company's ditch, but such additional use did not sensibly diminish plaintiff's own prior appropriation. *Held* that, as no hostile claim was initiated by the subsequent diversion, plaintiff was not thereby estopped to complain of diversions by defendants.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 21, 22; Dec. Dig. § 32.\*]

**17. WATERS AND WATER COURSES (§ 33\*)—APPROPRIATION—ACTION TO ESTABLISH RIGHTS.**

In an action by a prior appropriator to establish his right and to enjoin private corporations from a diversion of water above his land, the circuit court has no power to adjudicate the rights of individual stockholders in the defendant corporations, since they were not parties to the suit, and their individual rights were not involved in the issues.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

**18. WATERS AND WATER COURSES (§ 33\*)—APPROPRIATION—ACTION—DECREE — RELIEF BETWEEN DEFENDANTS.**

Where defendants, in an action to establish a right of appropriation and to enjoin a diversion, raise no issue between themselves, the court cannot properly make a decree affecting the rights of defendants as to each other.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

**19. WATERS AND WATER COURSES (§ 33\*)—APPROPRIATION—QUANTITY OF WATER.**

Petition, in an action to establish a right to an appropriation, alleging that plaintiff was entitled to "five hundred cubic inches of water, miner's measurement, under six inches pressure," is sufficiently definite as to the quantity claimed, since, by rejecting the word "cubic" as surplusage, the meaning is plain.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

**20. WATERS AND WATER COURSES (§ 12\*)—APPROPRIATION—CONTINUITY OF APPROPRIATION.**

Plaintiff, in an action to establish a right of appropriation and to enjoin diversions, showed that he had appropriated in 1865 at least 265 inches of water, miner's measurement, under a 6-inch pressure, and, though not using every week or month in the same quantity or in the same place, had generally used the whole amount. *Held*, that as one appropriating water is within his rights, if he diligently does something useful with it, plaintiff's appropriation had been continuous.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 5; Dec. Dig. § 12.\*]

**21. WATERS AND WATER COURSES (§ 33\*)—APPROPRIATION—ACTION—DECREE.**

Where plaintiff, in an action to protect an appropriation of water and to enjoin diversions from above his point of use, has shown a prior appropriation of a certain quantity, and defendants have shown only subsequent attempts at appropriation, plaintiff is entitled to a decree establishing the appropriation shown and perpetually enjoining the defendants from interfering therewith.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

Appeal from Circuit Court, Union County; H. J. Bean, Judge.

Suit by J. L. Caviness against the La Grande Irrigation Company, the May Park Water Company, and others, with cross-petition by the May Park Water Company against its codefendants, and answers by the defendants, alleging new matter by way of counterclaim, with prayers for affirmative relief as to the other parties to the suit, and for the establishment and quieting of titles. Decree for plaintiff, fixing the rights and priorities of defendants and their individual stockholders, and the Oro Dell Canal Company and other defendants appeal. Modified and affirmed.

The Grand Ronde river, where involved in this suit, is a nonnavigable stream flowing from the west in a general easterly course through the valley of the same name. Of all the parties to the suit the plaintiff owns lands farthest down stream. The record does not disclose any riparian proprietor or appropriator of water below him. Asserting that he is the owner in fee simple and in possession of certain lands described in his complaint, through which the river runs in its ancient course now and from time immemorial and upon which for more than 40 years he has resided and farmed for crops of



various grains, grasses, alfalfa, sugar beets, garden products, orchard trees, and fruits, on December 22, 1906, he filed his amended complaint in this suit to enjoin the defendants from taking water out of the stream above him to the material diminution of his appropriation thereof alleged to have been made by him in June, 1865. The defendants include the city of La Grande, a municipal corporation organized and existing under an act of the Legislative Assembly of Oregon, seven private corporations here named and admitted by plaintiff to have been incorporated at dates as follows, to wit: The La Grande Irrigation Company, May 19, 1903; the Oro Dell Canal Company, February 19, 1872; the Irrigation Canal Company, October 4, 1883; the May Park Water Company, January 15, 1902; the May Park Water Ditch Company, May 10, 1902; the Nessly Ditch Company, February 28, 1898; and the L. Oldenburg, A. L. Richardson & J. J. Nessly Ditch Company, September —, 1897— besides the individually named persons, J. B. Stoddard, L. C. Pennell, J. S. Chandler, and N. K. West. It is stated in the amended complaint that the lands of plaintiff therein described are naturally arid, but when properly irrigated produce large and remunerative crops of the kinds mentioned. A similar allegation appears in each answer respecting the lands mentioned in such answer, and the testimony sustains the truth of the statement wherever it appears in any of the pleadings. The plaintiff further avers that during the month of June, 1865, he went upon the river at a point particularly described and adjacent to his land, and, to use the language of his pleading, "appropriated 500 cubic inches, miner's measurement, under 6-inch pressure of the waters of said Grand Ronde river, and, while the same was unappropriated by others, diverted said quantity and appropriation therefrom, by means of dams, ditches, and other means, to and upon his said premises and lands so occupied by him, for domestic, stock, and irrigation purposes, and has ever since said date openly, notoriously, adversely, and under claim of right and title so maintained said appropriation and diversion for the beneficial uses aforesaid." The plaintiff further avers, substantially, that although, when not interfered with, the river formerly and naturally flowed through and past his lands at the rate of 20,000 inches, miner's measurement, under 6-inch pressure, of late years during July, August, and September the stream has become so depleted in volume that even when undisturbed by upstream diversions it flows through his land at no greater rate than 5,000 inches, measured as above stated, and still during those months of each year he needs and requires for the purposes mentioned not less than the quantity of water originally appropriated. He then charges that for four years past all the defendants except the La Grande Irrigation Company

and the natural persons named, and during the irrigating season of 1906 all the defendants, without exception, by means of dams, pumps, ditches, and other appliances named, have so diverted the water of the river at points above him without returning it and allowing it to flow to his point of diversion that he is deprived of water under his appropriation to such an extent as to injure and dry up his crops, inflicting upon him great pecuniary loss, and that they threaten to, and unless restrained by the court's decree will, continue that course of conduct all to his irreparable damage. He prays for such a decree and that his title to his alleged appropriation be established and quieted.

During the hearing before the referee appointed to take and report the testimony it was agreed that the suit should be dismissed as to N. K. West. Among the orders appearing in the record is one sustaining demurrers of plaintiff to answers of L. C. Pennell and J. S. Chandler; but neither of such answers or any amended answer on behalf of either Pennell or Chandler appears in the record before us. No answer of the La Grande Irrigation Company has been sent to this court, although considerable testimony on behalf of it and Pennell and Chandler has been taken and reported. As pruned by motions and demurrers, the rulings of the court upon which are not questioned on appeal, the answers of the appealing defendant corporations are in legal effect fashioned after the same pattern. Each of such answers, after traversing the allegations of the amended complaint, alleges the purposes and objects of the corporate organization to be "the management and control and the conducting of the business of diverting waters from the Grand Ronde river and conducting and carrying the same by means of dams, flumes, and ditches to the lands owned and occupied by its stockholders hereinafter more particularly described, and dividing and distributing the same to its stockholders in certain proportions controlled by its directors in accordance with its rules and orders for irrigation purposes, stock water, and domestic use upon their lands." Each of such answers further states, in substance, that its stockholders and their predecessors in interest settled on the lands now owned and cultivated by the stockholders in 1862-1864 and afterwards acquired title thereto from the general government under its public land laws, and then goes on to state that the stockholders of the defendant answering and their predecessors in interest, those of the Nessly Ditch Company in 1862 to 1865, of the Irrigation Canal Company and May Park Water Ditch Company in 1864, and of the Oro Dell Canal Company in 1870, by means of dams, diverted water from the river at various points and conducted and used it upon their lands for stock water and domestic and irrigation needs so long as the dams and ditch-

es were kept up for that purpose, and afterwards they jointly built a dam in the river at a place specified so as to make one point of diversion serve them all, built a headgate, connected therewith a ditch running to said lands, and diverted through the same a specified number of inches of water, miner's measurement, under six-inch pressure, "since which time the said stockholders of this defendant and their predecessors in interest have used said dam and ditch as their exclusive and only diversion of the waters of said stream for use upon their lands." These answers further assert that since the building of the one dam and ditch for all in each instance the defendant and its stockholders and their predecessors in interest openly, notoriously, adversely, and under claim of right as against the plaintiff and the whole world have continued for more than 10 years prior to the commencement of this suit the same diversion of water; the whole thereof being necessary to the cultivation of those lands. It then sets out in detail the name of each of its stockholders, the number of shares of capital stock, and the acreage of land owned by each and the kind of crops grown thereon. Its prayer is that the plaintiff's complaint be dismissed and that its own right as stated be quieted and established as against all other parties to the suit.

The following allegation appears in each answer of the corporation defendants appealing except in the answer of the Nessly Ditch Company: "That all the waters diverted as herein alleged from the Grand Ronde river either by riparian or nonriparian appropriators were open public and unappropriated waters of said stream, and such appropriation was made by and with the knowledge and consent of riparian owners of land upon said stream at the point of diversion and at all points on said stream between said point of diversion and below the alleged riparian property of the plaintiff." The answer of J. B. Stoddard and the L. Oldenburg, A. L. Richardson & J. J. Nessly Ditch Company including the first further and separate answer is like that of the Oro Dell Canal Company, except that the Oldenburg, Richardson & Nessly Ditch Company disclaims any interest in the ditch or water used by Stoddard. Stoddard also alleges that for more than 10 years last past during irrigating seasons he has continuously used 100 inches of water, miner's measurement, openly, notoriously, exclusively, adversely, and under claim of right as against all the world including plaintiff, and that none of the water so used was ever returned to the river of all of which plaintiff had full knowledge, by reason whereof defendant Stoddard avers he is the owner of 100 inches of water. The reply to the answer of Stoddard denies the new matter thereof and alleges that the Oldenburg, Richardson & Nessly Ditch Company abandoned its appropriation

and diversion about 1905; that Stoddard did not succeed to its rights; but that, on the contrary, he claims to have appropriated water directly from the river within two years last past by reason of which, operating with the diversions of the other defendants, the plaintiff has been deprived of the use of water according to his rights, the same being the injury of which he complains. The new matter in the answer of the other appealing defendants was traversed by the replies. The May Park Water Company answered denying that it had diverted any water in diminution of the alleged appropriation of the plaintiff, but otherwise admitted all the allegations of the amended complaint. This defendant, May Park Water Company, also filed a cross-petition against its codefendants, but not against the plaintiff, which is in substance the same as the new matter in the answers of the appealing defendants to the amended complaint. The essence of its prayer was that its right to an appropriation of water amounting to 500 inches, miner's measurement, under a 6-inch pressure, be declared paramount since January 15, 1902, to the appropriation of the other defendants in excess of certain quantities much less in each case than they respectively claimed. No summons or order of court requiring the other defendants to answer this cross-petition appears in the record. It was answered, however, by general denials on behalf of Oro Dell Canal Company, May Park Water Ditch Company, and J. B. Stoddard. In addition to his denials, Stoddard alleged in answer to the cross-petition practically the same new matter which appears in his answer to the amended complaint, but no reply to it appears in the record. The remaining defendants made no answer to the cross-petition.

It is here set down, in passing, that in each answer of the appealing defendants to the amended complaint there is a statement that the new matter is alleged as a counterclaim for affirmative relief, and the settlement of the right of the defendant making the answer as to the water of the river against the claim of the plaintiff as well as against the adverse claims of the several defendants and to quiet the title of the defendant and its stockholders to the water appropriated by it. In none of such answers, however, is there any charge made that any other defendant has done any act interfering with or diminishing the appropriation claimed by the answering defendant. No order of the court or summons requiring the other defendants to plead to the new matter in such answers appears in the record. In brief, no issue is raised among the defendants except those predicated upon the cross-petition of the May Park Water Company and the answers to the same as hereinbefore noted. The circuit court found in substance that the plaintiff had made a valid appropriation of 265 inches of water out of

the Grand Ronde river, miner's measurement, under 6-inch pressure prior to any and all the defendants or any of their stockholders or predecessors and proceeded in detail to ascertain and fix the amount and order of priority not only of the claim of each defendant, both individual and corporate, but also of each stockholder in each private corporation defendant, and passed a decree accordingly, with costs and disbursements proportionately adjusted among the parties plaintiff and defendant. The Oro Dell Canal Company, May Park Water Ditch Company, Nessly Ditch Company, and J. B. Stoddard severally appealed from this decree, and each appealing defendant served its notice of appeal on every other party to the suit.

Geo. Cochran and T. H. Crawford (Crawford & Eakin, Cochran & Cochran, F. S. Ivanhoe, and Eugene Ashwill, on the brief), for appellants. C. H. Finn, for respondent.

BURNETT, J. (after stating the facts as above). [1] We have before us, as active parties on this appeal, the plaintiff and the defendants last above named. The other defendants, seemingly satisfied with the decision of the circuit court, have not questioned it here, but, having been warned by the notices of appeal served upon them to defend in this court the award of the court below respecting their claims, they must abide the decision on appeal.

[2, 3] It is plain that, although the plaintiff's land borders on the river, he is maintaining his suit as an appropriator, and not as a riparian proprietor. One of the distinctions between appropriation of water and use by a riparian proprietor is that the former contemplates tenancy in severalty, while the latter is essentially a tenancy in common with all other riparian proprietors on the same stream.

[4] For domestic use, including water, not only for his household, but also for such animals as are essential for the proper sustenance of his family, the upper riparian owner may take so much of the water of a natural stream as may be necessary for that purpose, although none may be left for the lower riparian owners.

[5] So far the use is grounded on actual necessity. But irrigation is not so essentially a vital requirement, and riparian use for that purpose is limited at all times by the condition that it must be so exercised as not to materially injure the rights of other riparian owners in the proportional use of the water of the same stream for the irrigation of their riparian lands.

[6] On the other hand, an appropriator, subject to rights in existence at the time his appropriation is made, may take all the water he can use reasonably and without waste for a beneficial project, although it may be the lion's share and none may be left for those who come afterwards. In other words,

a riparian owner, using water in that capacity, is in a sense always a tenant in common with other riparian owners on the same stream whose rights, at least for irrigation, he is bound not materially to injure by his riparian use of the water. The appropriator, however, is always a tenant in severalty owing no duty or respect to those endeavoring to use the water by title subsequent to his own.

[7] It is the established doctrine in this state that a settler upon public lands, which border upon a nonnavigable stream, may claim the use of water, either as a riparian owner or as an appropriator, but he cannot do both. The exercise of one right is in substance a waiver of the other. *Low v. Schaffer*, 24 Or. 239, 33 Pac. 678; *North Powder Milling Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223; *Brown v. Baker*, 39 Or. 66, 65 Pac. 799, 66 Pac. 193; *Davis v. Chamberlain*, 51 Or. 304, 98 Pac. 154. A reason for this is that one cannot at the same time hold title to the same thing both as a tenant in common and in severalty. Applying these principles to the complaint, we observe that the effort of the plaintiff is to have a fixed quantity of water segregated from the whole amount flowing in the river past his land and appropriated to his exclusive behest, thus destroying one of the essential characteristics of riparian user considered as a tenancy in common.

[8] [In the very nature of things, a court cannot fix in advance by its decree what quantity of water will be reasonable in the future for the use of a riparian proprietor claiming the duty of water in that character.] This conclusion is a necessary corollary to the case of *Jones v. Conn*, 39 Or. 30, 64 Pac. 855, 65 Pac. 1068, 54 L. R. A. 630, 87 Am. St. Rep. 634. [The essence of the controversy between the parties there, both of whom claimed as riparian proprietors, was whether the land on which the defendant was using the water was in fact riparian. The defendant, however, thinking to have settled the amount of water to which he was entitled as a riparian owner in the future, asked the court to decree to him the exclusive use of 2,675 inches of water regardless of the effect it might have on other proprietors. This court declined to grant him such relief claiming, as he did, as a riparian owner merely, but, on the contrary, granted an injunction against him to prevent him from acquiring the use of a fixed amount by prescription. The reason is that among riparian owners the contingencies of the future are so many and varied respecting the amount of rain or snow fall, the heat or humidity of summer, the alternation of crops, and the like, that it is quite impracticable, if not impossible, to determine in advance the question of the duty of water for each riparian owner. Besides, a decree of that kind would be a virtual partition of

the water from an estate in common to one in severalty, although there would be no rule whereby the estate of any single owner could be determined, owing to the unknown factors already noticed.

Claiming then, as he does, from the month of June, 1865, the right to use a fixed quantity of water upon his land without regard to its duty to others, the plaintiff assumes the character of an appropriator in this litigation and must be held to have waived his rights as a riparian proprietor, at least for the purposes of this suit, although the river in its natural course washes his land. The same reasoning applies to the answer of the defendant J. B. Stoddard and classes him also as an appropriator, although the land he owns abuts upon the natural channel of the river, for he claims the right to the exclusive use of 100 inches of water because, as he alleges, his predecessors diverted that amount of water upon that land in 1862. In legal effect, his affirmative answer makes him assume an attitude in the case similar to that of the plaintiff, viz., that of an appropriator. True enough he says that he requires that amount of water in the conduct of what he styles intensive farming, which is well enough to say as an appropriator, for even such a user of water is limited to what is reasonably necessary in the prosecution of a beneficial enterprise. His needs, however, furnish no standard of adjudication among riparian users unless the needs of others in the like situation are also taken into the account, and this feature is entirely wanting in his answer. The fact that one owns land bordering upon a stream does not inevitably confine him to use of the water merely as a riparian owner, neither does it prevent him from establishing his point of diversion on his own land.

[9] Primarily, any use of the water of a natural stream for a beneficial purpose is free to him who has an opportunity to take it without infringing upon the property rights of another. At least on the Pacific slope, the exigencies of mining and agriculture have established this principle since the earliest times. The general government acquiesced in its application since the first settlements under the American régime, and by the Act of Congress of July 26, 1866, c. 262, 14 Stat. 253 (U. S. Comp. St. 1901, p. 1437), and in the Act of March 3, 1877, c. 108, 19 Stat. 377, commonly known as the "desert land act," has enunciated the doctrine in statutory form.

[10] Concerning the mere diversion and use of water there is no difference between a nonriparian appropriator and a riparian user, provided the former has a lawful right of access for that purpose to the stream from which the diversion is made. The essential condition of appropriation in the first place on public lands was the consent or acquiescence of the then riparian owner,

the general government. The reason of the rule is not changed by the fact that the riparian owner is a private person provided the appropriator has his consent, or, what is equivalent, that the appropriator and the riparian owner are one and the same person. The deduction then is that if any one can lawfully gain access for that purpose to a nonnavigable stream, and water is there not subject to use by another, such a one may appropriate it for his own use. That a riparian owner may appropriate water, his point of diversion being on his own land, is taught by *Brown v. Baker*, 39 Or. 66, 65 Pac. 799, 66 Pac. 193; *Morgan v. Shaw*, 47 Or. 333, 83 Pac. 534.

[11] The plaintiff and the defendant Stoddard, although they are both riparian owners, are entitled to waive their rights as such and to claim as appropriators and are authorized to so frame their pleadings. The corporate appellants must perforce claim only as appropriators, for they do not profess to own any lands, either riparian or away from the river, and are avowedly conveying water to lands that are not now riparian and were never such even in the hands of the original grantees of the government. It follows that the plaintiff and these defendants appealing are before us in the character of appropriators, and not as riparian owners, and as such we must consider them.

[12] The question is consequently reduced to one of priorities in the first instance, for the fundamental principle of appropriation of water, as distinguished from riparian use, is that he who is prior in time is superior in right to the extent of his appropriation. *Speake v. Hamilton*, 21 Or. 3, 26 Pac. 855; *Britt v. Reed*, 42 Or. 76, 70 Pac. 1029.

It is necessary to this phase of the question to examine the proofs offered by the corporate appellants in connection with their traversed allegation respecting their corporate character which they propound as the scope of their authority in the premises. This allegation, common to all their answers in the nature of a cross-bill against the plaintiff, advances the theory that the corporate appellants are mere holding concerns sustaining only an ancillary or administrative relation to the successors of the original appropriators of water above the plaintiff's land. It was evidently framed for the purpose of enabling the corporate appellants to trace their alleged title by appropriation back to the original settlers and to prescribe under their acts in the use of the water.

[13] The doctrine has been laid down by this court, in *Oregon Construction Co. v. Allen Ditch Co.*, 41 Or. 209, 69 Pac. 455, 93 Am. St. Rep. 701, that, where individual appropriators do not surrender their rights to a corporation which is organized merely to facilitate distribution of the water among them, there exists such a privity of estate

as to enable it to defend in their behalf in litigation affecting their rights to the use of the water. The reason for this holding is found by analogy in the provision of our statute allowing a trustee of an express trust to sue without joining with him his cestuy que trust. L. O. L. § 29.

[14] But this does not dispense with the requirement that, if such are to be the objects and purposes of the company, they should be specified in their articles of incorporation. The powers of a corporation are defined and limited by its articles. Especially as against a stranger, it cannot go beyond them. *Oregon Railroad & Navigation Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. 409, 32 L. Ed. 887; *State v. Portland Gen. Elec. Co.*, 52 Or. 502, 95 Pac. 722, 98 Pac. 160.

[15] The articles of the Oro Dell Canal Company show that the business in which it proposed to engage was "the appropriation of the waters of the Grand Ronde river by a ditch or canal," which is described in general terms, "said water to be used for irrigation and such other purposes as may be deemed expedient and profitable by said corporation." The Irrigation Canal Company was incorporated by articles which declare that "the object of said company and the enterprise in which it purposes to engage is the taking of 5,000 inches of water out of Grand Ronde river in Union county, Or., by means of a canal or ditches for the purpose of irrigation." The Nessly Ditch Company declares that: "The purpose for which said corporation is formed and the business in which it proposes to engage is to construct, maintain and operate irrigating ditches; to buy, sell or rent real estate; to irrigate the same at any place within the state of Oregon, or to do any thing or act necessary to carry out the purposes and objects of this corporation." The articles of incorporation of the May Park Water Ditch Company, are not in evidence, and hence it is without proof of its controverted allegation concerning its corporate powers. These articles above quoted do not prove the character in which the corporate appellants appear on the record. They pose substantially as trustees or holding concerns; but their charters show them to be independent institutions operating in their own rights. If they had organized with the intention of usurping the possession of private ditch owners, their articles need not have been stronger. They certainly do not indicate any ancillary relation to those who took out water for private use in the early days in that country. As far as their characters are disclosed by the evidence, they stand before the court in their own independent rights, without obligation to any one not a party to the suit. Neither do any of the corporate appellants show any transfer to themselves either directly or by mesne conveyances from any original settler of any

water right or real estate to which such a right is appurtenant. As against the plaintiff, the evidence is quite consistent with the theory that these defendants either jumped the water rights and ditches of the original settlers or took possession of some abandoned works for their own use. Neither of these would give them priority over the plaintiff, for it would not amount to such a tacking as to relate back to any prior appropriation. The deduction is that, so far as priority over the plaintiff is concerned, none of the corporate appellants can claim before the date of its incorporation. Bearing in mind the dates on which they were severally incorporated, we see that none of them antedates the plaintiff's appropriation in 1865. As to the defendant Stoddard, who has owned since March 26, 1906, part of the Jacob Nessly homestead, the earliest date fixed by any witness for the use of water for irrigation on that holding, and then definite only as to the year, is stated by Mrs. Proebstel to be in 1868. Indeed, she says her father had water on the place several years before to water a small garden, using it when the season was dry and not using it when the season was wet; but this is not definite enough to overcome the direct testimony of the plaintiff and his witnesses to the effect that he made his appropriation in 1865.

[16] The corporate appellants contend that the plaintiff is estopped to complain of their several diversions of the water because he, as sometime president and manager of the defendant Irrigation Canal Company, enlarged the ditch of that company and increased the flow of water therein. It is not clear how any of these defendants except the Irrigation Canal Company could in any event plead that as an estoppel because that conduct did not make them change their position in any respect. But granting that it could be urged, and that it is well pleaded, in our judgment estoppel is not established by the evidence. Supposing the water of a stream to be the subject of appropriation, unless it is all included in the first taking, there may be successive appropriations as long as any water remains for such diversion, and the priorities will not be thus destroyed. It was consequently competent for the plaintiff, either as an individual or as a member of a corporation, after he had made the appropriation alleged in his complaint, to make another appropriation, either on the same land, or on other land without losing his priority or being estopped, if nothing else is shown. That is the condition of the affair as disclosed by the pleading and testimony. No estoppel or adverse user, or prescriptive right can arise under such circumstances until the appropriation of the first taker is sensibly diminished in quantity by the subsequent diversions. As long as there is enough water for all, no such hostile claim is initiated by a mere subsequent taking. *Bowman v. Bow-*

man, 35 Or. 279, 57 Pac. 546; Carson v. Hayes, 39 Or. 97, 65 Pac. 814; Britt v. Reed, 42 Or. 78, 70 Pac. 1029.

We turn now to the cross-petition of the defendant May Park Water Company, and the answers to it already noted. What has been already written here respecting the affirmative matter in the answers of the corporate appellants applies in principle to the cross-petition in question. In brief, the May Park Water Company assumes the role of a mere manager or trustee, while its articles do not authorize such ancillary relations, neither does it show any transfer to it of any of the property for which it defends. Like the corporate appellants, it alleges no interest in the water in its own right, and its charter does not give it the authority to act as a holding concern. It fails to prove its allegation of the capacity in which it is acting.

[17] We cannot approve the decree of the circuit court so far as it attempts to adjudicate the rights of individuals who happen to be stockholders in the several corporations named. These people were not parties to this suit. The court might have caused them to be made parties, but it did not, and their individual interests are not involved in the issues joined. When they come before the court in their own right either as plaintiffs or defendants in appropriate litigation, it will be time enough to determine their rights and liabilities.

[18] Aside from the cross-petition of the May Park Water Company, no issue was made between the defendants. In the absence of issues on the subject, the court cannot properly make a decree affecting the relations of the defendants to each other. Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 Pac. 472, 60 Am. St. Rep. 777; Whited v. Cavin, 55 Or. 98, 105 Pac. 396.

The result of the analysis is that the question is between the plaintiff and the defendants without reference to possible disputes among the latter, and that the plaintiff is prior in his appropriation to all of the appellants and, as we believe, from the evidence, to all the other defendants.

[19] It is next in order to consider the quantity of water in the use of which the plaintiff is to be protected. The pleadings are framed as to all parties on the basis of a continuous flow of water at a certain rate in miner's inches under a six-inch pressure. Some of the appellants urge that, because the plaintiff alleges that he is entitled to "500 cubic inches of water, miner's measurement, under six-inch pressure," his claim is too indefinite to be considered. We deem this objection hypercritical. By rejecting the word "cubic" as surplusage, the meaning is plain, and, as the defendants do not appear to have been misled, the allegation in that respect will be so considered.

It is quite probable that, if the waters of the Grand Ronde river were prudently ap-

plied under one intelligent and impartial management, there would be ample to accomplish most excellent results in that wide and fertile valley. The court, however, is bound by the case as stated in the pleadings. There are no data of either allegation or evidence whereby we can decree alternative use or a changing administration of the water to correspond with the change of crops. With the case-made as it is, we learn from the testimony that of all the settlers originally interested in the lands and water involved the plaintiff alone has maintained his holding from the beginning.

[20] It is fairly established that in June, 1865, he appropriated at least 265 inches of water, miner's measurement, under a six-inch pressure, for use upon his lands. This is the amount allowed him by the decree of the circuit court, and as he has not questioned it upon appeal, we will not disturb it or consider whether the testimony shows a greater quantity in his appropriation. Within the meaning of Seaward v. Pacific Live Stock Co., 49 Or. 157, 88 Pac. 963, he has kept up his appropriation to the present time. He may not have used it every week or month in the same quantity or in the same spot; but he has used generally the whole amount and for the most part could have used more. It is reasonable to conclude, under the circumstances, that in making his appropriation he had in mind the needs of the entire acreage of his holding, and he could use all his appropriation on one acre or spread it out over his whole farm as fast as he reduced it to cultivation. The true rule seems to be that, while one cannot appropriate water and do nothing with it, he is within his rights if he diligently does something useful with it, although it may not be the same thing continually.

Confining our decision, as we do, to the case-made and to the parties before us its effect is subject to the same limitation and will not be expanded beyond the question actually determined. New conditions as to the use of the water not only as to quantity but also as to the time of user may arise hereafter. In view of the greater demand for water as the country becomes more thickly settled and considering the factors of variable seasons, abundant or scant precipitation of moisture, mutations of crops, and the like, the complexity of the situation is likely to increase; but the difficulty is not so much in the principles applicable, as in the administration of a scheme which is as mobile as water itself. Use of water by any one in the legal sense is always qualified by the condition that it must be restricted to such quantity and time of employment only as may be reasonably necessary for the accomplishment of some useful purpose either existing at the time or fairly contemplated in the future. Simmons v. Winters, 21 Or. 35, 27 Pac. 7, 28 Am. St. Rep. 727; Hindman v. Rizer, 21 Or. 112, 27

Pac. 13; Mann v. Parker, 48 Or. 321, 86 Pac. 598.

Extravagant or wasteful application even to a useful project or any employment of water in a nonbeneficial enterprise is not included in the term use as contemplated by the law of waters. Then, too, when even an appropriator is not using the water it is available for the use of others. All these conditions may arise and be involved concerning the water in question in the future, and our decision is not designed to determine them in advance. It only governs the parties to this suit on the case made by the pleadings.

[21] The decree of the circuit court is modified so as to quiet the title of plaintiff as against all the defendants in his appropriation of June, 1885, for a constant flow at the rate of 265 inches, miner's measurement, under 6-inch pressure of the waters of the Grand Ronde river for use on his lands described in his amended complaint and to perpetually enjoin them from interfering with the same. The defendants will take nothing by their answers either against the plaintiff or each other. Each party will pay its or his own costs and disbursements in the circuit court, and the plaintiff will recover from the appellants his costs and disbursements incurred in this court.

BEAN, J., having heard this cause in the lower court, took no part at the trial or in the consideration hereof.

EAKIN, O. J. I concur in the result of this decision, but I cannot give my consent to the following statement: "Primarily, any use of the water of a natural stream for a beneficial purpose is free to him who has an opportunity to take it without infringing upon the property rights of another. \* \* \* Concerning the mere diversion and use of water there is no difference between a non-riparian appropriator and a riparian user, provided the former has a lawful right of access for that purpose to the stream from which the diversion is made. The essential condition of appropriation in the first place on public lands was the consent or acquiescence of the then riparian owner, the general government. The reason of the rule is not changed by the fact that the riparian owner is a private person provided the appropriator has his consent, or, what is equivalent, that the appropriator and the riparian owner are one and the same person. The deduction then is that if any one can lawfully gain access for that purpose to a nonnavigable stream, and water is there not subject to use by another, such a one may appropriate it for his own use"—the effect of which statement is to abolish or do away with riparian rights as heretofore recognized in this state.

# HAYTON et ux. v. SEATTLE BREWING & MALTING CO.

(Supreme Court of Washington. Dec. 16, 1911.)

## LANDLORD AND TENANT (§ 29\*)—LIABILITY FOR RENT—LEASE FOR SALOON—EFFECT OF PROHIBITION.

A lease for years provided that the lessee might conduct a saloon on the premises, in conformity with the ordinances of the city and the laws of the state then in force, or that may thereafter be enacted. Before the expiration of the lease, local option was carried in the city wherein the demised premises were situated. Held not to avoid the lease.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. § 29.\*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by William Hayton and wife against the Seattle Brewing & Malting Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Wm. A. Greene and Geo. McKay, for appellant. Thomas Smith and J. L. Corrigan, for respondents.

PARKER, J. This is an action to recover two months rent, claimed to be due to the plaintiffs from the defendant under a lease to it of a lot and building in Mt. Vernon. From a judgment in favor of the plaintiffs, the defendant has appealed.

The questions here presented arise upon appellant's affirmative defense, the demurrer thereto of the respondents, and the sustaining of that demurrer by the trial court. The affirmative defense thus excluded was, in substance, as follows: The term of the lease is five years, being from November 9, 1907, to November 9, 1912, at an agreed monthly rental of \$100. The only provision of the lease, relating to the use of the premises by appellant, is the following: "It is further understood and agreed that the said party of the second part may during the life of this lease carry on and conduct a retail saloon business in the building now on the north part of said lot four, provided that the conducting of said business is done in conformity with all ordinances of the city of Mt. Vernon, now in force or that may hereafter be enacted, as well as all laws of the state of Washington now in force or that may hereafter be enacted." Under the local option law of 1909, Rem. & Bal. Code, §§ 6292-6314, there was submitted to the electors of the city of Mt. Vernon, in November, 1910, the question of whether or not the sale of intoxicating liquors should be licensed in that city. Thereupon the electors voted against such licensing, thereby rendering the sale of intoxicating liquors unlawful in that city thereafter. The rent sued for accrued thereafter. Appellant abandoned the premises, and tendered possession thereof to re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

spondents, before the accruing of these rent installments sued upon.

It is contended that the trial court erred in holding that these facts did not constitute a defense to respondents' claim of rent due under the lease. It is argued that, the purpose for which the premises were leased becoming unlawful upon the result of the local option election being ascertained, the lease contract thereby ceased to be binding upon appellant. It seems to us that this argument is rested upon an erroneous view of the effect of the language of the lease, relating to the use of the premises by appellant. It is apparently assumed by counsel for appellant that the provisions of the lease above quoted restricts the use of the premises to saloon business. We think that provision does not have such an effect. It is only permissive in that respect, and clearly does not prevent appellant from using the premises for any lawful purpose. The decisions of the courts appear to be harmonious in support of the view that, under such circumstances as are disclosed by this defense, the lessee cannot regard the lease as terminated by the changed legal status of the liquor traffic, and thus avoid payment of the rent agreed upon by the terms of the lease. The following appear to be directly in point, involving leases where the use of the premises for saloon purposes was merely permissive, as in this lease. *Kerley v. Mayer*, 10 Misc. Rep. 718, 31 N. Y. Supp. 818, affirmed by the Court of Appeals in 155 N. Y. 636, 49 N. E. 1099; *O'Byrne v. Henley*, 161 Ala. 620, 50 South. 83, 23 L. R. A. (N. S.) 496; *San Antonio Brewing Ass'n v. Brents*, 39 Tex. Civ. App. 443, 88 S. W. 368. In the following cases the courts express the view that the lessee would be held liable for the payment of the rent under such circumstances as we have here, even though, by the terms of the lease, the use of the premises be restricted to the saloon business. *Goodrum Tobacco Co. v. Potts-Thompson Liquor Co.*, 133 Ga. 776, 66 S. E. 1081, 26 L. R. A. (N. S.) 498; *Houston Ice & Brewing Co. v. Keenan*, 99 Tex. 79, 88 S. W. 197; *Hecht v. Acme Coal Co.* (Wyoming) 113 Pac. 788. The last-cited case, decided in February, 1911, contains an exhaustive review of the law upon the subject.

Counsel for appellant rely upon *Heart v. East Tennessee Brewing Co.*, 121 Tenn. 69, 113 S. W. 364, 19 L. R. A. 964, 130 Am. St. Rep. 753. This is the only decision coming to our notice which seems to be not wholly in harmony with those above cited. It is not plain from the language of that decision just what the provisions of the lease were as to the use of the premises by the lessee, but it may be inferred from the language of the court that it regarded the lease as restricting the use of the premises to saloon purposes. If we are correct in this assumption, that de-

cision would not necessarily be out of harmony with an affirmance of this judgment, since we conclude that this lease did not so restrict the use of the premises, but that its provisions in that respect were merely permissive. That decision, however, does not seem to be in accord with the weight of authority upon this subject, even though it may be distinguishable from the case before us. The result reached by this court in *Oldfield v. Angeles Brewing & Malting Co.*, 62 Wash. 260, 113 Pac. 680, is in harmony with the result reached by the trial court in this case, though this exact question was not there involved. We are of the opinion that the learned trial court was not in error in declining to entertain appellant's affirmative defense.

The judgment is affirmed.

DUNBAR, C. J., and MOUNT, FULLERTON, and GOSE, JJ., concur.

#### TAFT v. RUTHERFORD et al.

(Supreme Court of Washington. Dec. 16, 1911.)

##### 1. BOUNDARIES (§ 53\*)—PRIVATE SURVEY—MISTAKE—LIABILITY OF SURVEYOR.

Where the owner of land, at the time of having it surveyed, notified the surveyor of the kind of building he was going to place on the lot, the surveyor is liable for all damages arising from a mistaken location of the building, caused by an erroneous survey.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 53.\*]

##### 2. BOUNDARIES (§ 53\*)—ERRONEOUS SURVEY—DAMAGES—DEFENSES.

Where a surveyor employed to determine the boundaries of a lot was informed that the owner intended to place a building thereon, the surveyor cannot, as a defense to an action for damages caused by an erroneous survey, set up that this survey was not guaranteed, and that for a higher price it was customary for surveyors to guarantee the accuracy of a survey.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 53.\*]

##### 3. BOUNDARIES (§ 53\*)—PRIVATE SURVEY—MISTAKE—ACTIONS—EVIDENCE.

In an action against a surveyor for a negligent error in ascertaining the boundaries of a lot, evidence held to show that due care was not used.

[Ed. Note.—For other cases, see *Boundaries*, Dec. Dig. § 53.\*]

Department 1. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by C. E. Taft against H. W. Rutherford and F. H. Whitworth, copartners. From a judgment for plaintiff, defendants appeal. Affirmed.

Arthur R. Rutherford, Austin E. Griffiths, and Paul Shaffrath, for appellants. S. A. Keenan, for respondent.

MOUNT, J. This case was tried to the court without a jury. The court entered

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



a judgment in favor of the plaintiff for \$1,267.50, on account of damages sustained by an erroneous survey of the plaintiff's lot by the defendants. The defendants have appealed.

It appears that the defendants are civil engineers. The plaintiff owned a certain lot in the city of Seattle, upon which lot he desired to construct an apartment house. He employed the defendants to survey the lot, and to give him the correct lot lines and street elevations. The defendants did survey the lot and set stakes upon the ground, and made a profile or plat, showing the location of the lot lines and the street elevations, and delivered the same to the plaintiff, who paid the fee charged therefor—\$12. There is some dispute in the evidence as to whether the defendants were informed of the character of the house which plaintiff desired to construct. The court found upon this question: "That at the time of the making of said contract the erection of a building on said ground was mentioned, and defendants then knew, or had sufficient information at that time to lead them to know, that said survey was desired to guide plaintiff in the erection of a building on said ground; (4) that plaintiff desired said survey and profile for the sole purpose of ascertaining the correct outlines of said property before erecting thereon an apartment house, as the defendants then knew." The plaintiff relied upon the survey as made, and constructed an apartment house on the lines, as fixed by defendants, upon the ground. After the building was about completed, the city of Seattle notified defendants that the front of the building was located about five feet in the street, and he was notified to remove the building. Plaintiff thereupon notified the defendants of this fact, and demanded that they move the building back onto the lot. Defendants refused to do so, and plaintiff moved the building at a cost of \$1,267.50. This action was brought to recover that sum and other damages. The judgment was entered for the reasonable cost of removal.

[1] Counsel for appellant seem to concede that a mistaken survey would involve the surveyor in liability for damages directly due to the mistake, such as the cost of a correct survey. But it is argued that the damages here claimed are special and beyond the power of the surveyor to limit. It is no doubt true that the owner may have in mind the construction of a cheap building, and so inform the surveyor at the time the survey is ordered, and afterwards change his mind and construct a large stone, steel, or other expensive building. In such case the surveyor might not be liable for the damages to the expensive building upon a mistaken location, caused by an erroneous survey, because the survey was not made in contemplation of

such building. But it seems clear, where the survey is made with reference to a particular building or use to which the lot is put, the surveyor would be liable for the damages naturally flowing from his error, because the parties had that use in contemplation. *Sedro Veneer Co. v. Kwapll*, 113 Pac. 1100; *Commissioner of Highways v. Beebe*, 55 Mich. 137, 20 N. W. 826. The building erected in this case was not an expensive building of its kind. While the character of the building was not discussed, it was stated to be an apartment house, and the building constructed appears to have been the ordinary kind of such houses.

[2] It is also argued that the trial court erred in striking a portion of the answer, to the effect that it was the custom to guarantee the accuracy of surveys by certificate, for which a larger fee was charged than in cases where the boundaries are ascertained without reference to the improvement of the lot, and that the survey made in this case was of the latter kind, and the smaller fee was charged; and also that the court erred in excluding evidence to the same effect. We think the court properly excluded such evidence. It was conceded upon the trial that the defendants were employed to make an accurate survey, whether they gave a certificate or not, or received a large or small fee. Whether they gave a certificate or not, or whether they received a large or small fee, would not change the liability so as to relieve them from negligence. The contract of employment was definite and certain, to the effect that they would make an accurate survey; and it was known that the survey was for the purpose of erecting an apartment house upon the lot. The custom of giving a certificate, for which a higher price was charged, would be wholly immaterial in such case. Such certificate might operate as an assurance of accuracy, and render the surveyor liable on account of a mistake or error to respond in damages for any building, however expensive, whether erected with or without knowledge of its character. But, where it is shown that the surveyor knows the character of the building for which the survey is made, the custom alleged would not relieve him from liability.

[3] It is argued that the evidence shows that the defendant used due care. It is admitted that a wrong survey was made. It was shown that the defendants, or the agent who actually did the work on the ground, overlooked the parking strip, or misread the figures upon the chain, and that in this way the mistake occurred. This was clearly not due care.

The judgment is affirmed.

DUNBAR, C. J., and PARKER, FULLERTON, and GOSE, JJ., concur.

KUEHL et al. v. SCOTT et al.  
(Supreme Court of Washington. Dec. 20, 1911.)

1. VENDOR AND PURCHASER (§ 34\*)—CONTRACT—RESCISSION—FRAUD.

Where complainants purchased a lot from defendants on their misrepresentation that a street on which it fronted, and which furnished the sole means of outlet therefrom, was 25 feet wide, when, in fact, the street was unopened, and was only 15 feet wide, such misrepresentation was sufficiently material to entitle plaintiffs to rescind the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 39; Dec. Dig. § 34.\*]

2. VENDOR AND PURCHASER (§ 118\*)—FRAUD—RIGHT TO RESCIND—DEFAULT.

Where a contract for the sale of real estate provided that on the vendee's default in payments the contract could be terminated "at the election of" the vendors, the vendees were entitled to rescind the contract for fraud, though in default as to the first semi-annual interest payment; no steps having been taken by the vendors to terminate the contract.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 118.\*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Action by Charlie Kuehl and another against F. M. Scott and another. Judgment for complainants, and defendants appeal. Affirmed.

Sheldon & Jones, for appellants. Brady & Rummens and T. B. McMartin, for respondents.

PARKER, J. This is an action for rescission of a land purchase contract and recovery of the amount paid upon the purchase price and the amount expended in improving the land. The plaintiffs rest their right of rescission upon alleged false representations made to them by the defendants as to the location of the north boundary line of the land, and as to the width of the street along that line. From a judgment in favor of the plaintiffs, the defendants have appealed.

[1] On December 1, 1909, appellants entered into a contract with respondents for the sale of a tract of land in Seattle, fronting 88 feet on the south side of North Seventieth street and extending south therefrom 150 feet. The agreed purchase price was \$1,300, of which \$200 was paid in cash, and the balance of \$1,100 was to be paid December 1, 1910, with 7 per cent. interest, payable semi-annually. The contract contained the usual forfeiture clause, by which all rights of respondents as purchasers under the contract should be forfeited, including all sums paid on the purchase price, upon the failure to make payments of principal or interest as therein agreed, "at the election of" appellants. Respondents claim that prior to entering into the contract, and as an inducement to their purchasing the land, appellants represented

and stated to them that Seventieth street, upon which the land fronted, was 25 feet wide, when, in fact, it is only 15 feet wide. This is the principal false representation involved, and the one upon which the learned trial court rested its decision in respondents' favor, as indicated by its oral decision. The court made no formal findings. The evidence shows that there is no outlet from the land, other than over Seventieth street; hence the width of that street materially affects the value and desirability of the land. This is particularly true when the width of that street is reduced to the very narrow width of 15 feet. At the time of the making of the contract, the street was not improved, so as to in any manner indicate its width, and respondents had then no means of readily ascertaining its true width, and had no reason to doubt the representations made to them by appellants. The evidence is not entirely free from conflict touching the nature of the representations as to the width of the street, but a careful review of the entire evidence convinces us that it preponderates in favor of respondents' contentions. We are of the opinion that these facts sustain respondents' claim of rescission of the contract, under our former holdings. *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55.

[2] It is contended in behalf of appellants that respondents were in default in the payment of interest at the time of the commencement of this action, and therefore are not in a position to claim rescission of the contract. In support of this contention counsel rely upon *Reddish v. Smith*, 10 Wash. 178, 38 Pac. 1003, 45 Am. St. Rep. 781, where the general rule is stated that "a party who is in default will not be allowed to rescind a contract." While that statement of the rule was applicable to that case, it is subject to some qualifications as applied to this case. That case involved an attempt to rescind, by the purchaser, after default in payments, and after an election by the seller to claim a forfeiture under the terms of the contract. It was in effect an attempt to rescind and reclaim the portion of the purchase money paid by the purchaser, after all his rights under the contract were at an end. There was in fact no longer any contract to rescind. In this case there may have been a technical default in payment of the first semiannual interest, though there are circumstances shown in the record rendering even that doubtful; but appellants had not then elected to claim a forfeiture. Indeed, they do not appear to have claimed a forfeiture even yet, so far as this record shows. It is manifest that the contract was in full force at the time respondents claimed rescission thereof, which was soon after the first semiannual interest became due. This action was commenced in September, 1910, some three months before the deferred pay-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment of \$1,100 on the principal became due. If respondents had the right to rescind because of the false representations of appellants at the time of entering into the contract, they surely were not required to make payments on the contract to keep their rescission right alive, providing they promptly sought rescission upon discovery of the falsity of the appellants' representations, which we think they did in this case. Had appellants sought a forfeiture of respondents' rights under the contract because of the default, before rescission was claimed by respondents, the rights of the parties to this controversy might be different, though we express no opinion as to what their rights would then be.

It is unnecessary to notice the other alleged false representations, since the one relating to the width of Seventieth street, we think, is sufficiently proven and of sufficient consequence to support the judgment. It is clear that there is no error in the amount of the judgment.

The judgment is affirmed.

DUNBAR, C. J., and MOUNT and GOSE, JJ., concur.

#### MALLETT v. SEATTLE, R. & S. RY. CO.

(Supreme Court of Washington. Dec. 16, 1911.)

#### 1. APPEAL AND ERROR (§ 866\*)—REVIEW—JUDGMENT OF NONSUIT.

In determining whether the trial court erred in denying a motion for nonsuit, the appellate court may only consider plaintiff's evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3467-3475; Dec. Dig. § 866.\*]

#### 2. STREET RAILROADS (§ 98\*)—INJURIES—CONTRIBUTORY NEGLIGENCE.

If one using a street car track knew, or in the exercise of ordinary care should have known, that a car was approaching in front or behind, he was bound to avoid the danger.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 98.\*]

#### 3. STREET RAILROADS (§ 98\*)—INJURIES—CONTRIBUTORY NEGLIGENCE—CARE REQUIRED.

One walking on a street car track in a city was not required to use the same degree of care as if upon a private way, or upon a steam railroad, not being a trespasser.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 204-208; Dec. Dig. § 98.\*]

#### 4. STREET RAILROADS (§ 117\*)—INJURIES—JURY QUESTION—CONTRIBUTORY NEGLIGENCE.

Plaintiff, when injured, was walking north on the westerly track of a street car company; it being the custom of pedestrians to use the tracks in going north from a certain street. The day was bright and the way dry. He had walked some 40 or 60 feet between the rails, or between the tracks, when he saw a car coming from the north, and crossed to

the easterly track, and after the car passed looked back, but saw no car coming upon that track, which was used only by north-bound cars. Plaintiff continued to walk north on the easterly track, and after he had gone about 30 or 40 feet he heard a shout and a bell, and was run over by a north-bound car before he could get off the track. The tracks were level and straight, so that a car could be seen to the south from the street near where plaintiff started about 900 feet, and north at least 300 feet. *Held*, that whether plaintiff should have seen the car in time to have gotten off the track was for the jury.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-257; Dec. Dig. § 117.\*]

#### 5. STREET RAILROADS (§ 93\*)—INJURIES—NEGLIGENCE—WARNING.

A motorman is required, in the exercise of ordinary care, to give a timely alarm to warn a pedestrian on the track of the approach of the car.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 195-200; Dec. Dig. § 93.\*]

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Richard Mallett against the Seattle, Renton & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Will H. Thompson and Morris B. Sachs, for appellant. Heber McHugh and John T. Casey, for respondent.

MOUNT, J. Action for personal injuries.

The plaintiff was struck by one of defendant's cars, running upon the easterly track of a double-track electric line on Rainier avenue, in the southerly part of Seattle. His left leg was broken, and he received other injuries. The case was tried to a jury. At the close of the plaintiff's evidence, a motion for a nonsuit was made and denied. At the close of all the evidence, the case was submitted to a jury, and a verdict was rendered for the plaintiff. The motion for new trial was made and denied, and judgment followed. This appeal is prosecuted by the defendant from that judgment.

Two assignments of error are made: (1) That the court erred in denying defendant's motion for a nonsuit; (2) that the court erred in overruling defendant's motion for a new trial.

[1] In considering the first assignment, we must take the evidence offered in behalf of the plaintiff as the facts in the case. It appears therefrom that the defendant maintains a double-track electric street railway upon Rainier avenue from south of Court street north. This avenue extends in a northerly and southerly direction. On the east side, the avenue was paved or covered with planking 16 feet in width, for street travel. There were no sidewalks for pedestrians upon either side of the avenue. This planking abutted up to the lower part of the ties of the easterly track of the street rail-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

way. The two tracks of the railway were some 12 inches, or possibly more, higher than the planking. Between the two tracks, the ground was uneven. On the easterly side of the tracks, the street was not improved or used. It was the custom of pedestrians living south of Court street to use the tracks for travel to the north. On the afternoon of August 4, 1909, the plaintiff intended to go from Court street to the post office, about a block north. He entered upon the westerly track of the railway. The day was clear and bright, and the way was dry. He traveled some 40 or 60 feet, either between the rails of the westerly track, or between the two tracks, when he saw a car coming toward him from the north. He thereupon crossed over to the easterly track. After this car passed, he looked back toward the south, but saw no car upon the easterly track. At that point the cars going south occupied the westerly track, and those going north occupied the easterly track. The tracks were level and straight, so that one could see a car from Court street south about 900 feet, and north 300 feet, possibly more. After plaintiff crossed over onto the easterly track, he proceeded to walk north on the track. When he had gone a short distance, probably 30 or 40 feet, he heard a shout and a bell, and turning to the right saw a north-bound car so close upon him that he did not have time to escape from the track. The car struck him, and threw him to the planked part of the street. He was rendered unconscious. The car was stopped, so that the rear platform of the car was opposite where he lay. There was evidence that the car which struck the plaintiff was running very fast. One witness put the speed at 30 miles per hour. This estimate, we think, was much exaggerated.

[2] Counsel for appellant argue that the street car track was of itself a danger signal, and that the plaintiff in using the same as a footpath was obliged to use his senses and keep out of the way of approaching cars. It is no doubt true that the plaintiff was obliged to use his senses, and if he knew, or in the exercise of ordinary care should have known, that a car was coming down upon him, either in front or from behind, it was his duty to avoid danger.

[3] The defendant was not a trespasser. He was rightfully in the street and upon the track. And, while he was required to use his senses and take notice of the fact that cars were in use upon the street railway tracks, he was not required to use the same degree of care as a man upon a private way, or upon a steam railway. *Chisholm v. Seattle Electric Co.*, 27 Wash. 237, 67 Pac. 601. In that case we said: " \* \* \* It is a well-established rule of law that a pedestrian is not charged with the negligence of street car operators, but that he is justified in basing his calculations and ordering his movements on the assumption that the

car will be operated, not only in conformity with local laws regulating it, but with the highest degree of care and a due regard for the safety of the traveling public, who are equally with it entitled to use of the streets." And in *Skinner v. Tacoma Railway & Power Co.*, 46 Wash. 122, 89 Pac. 488, we said: "If the motorman sees a clear track, and has no occasion to stop, and no reason to anticipate danger to another, it would not be negligence to maintain the usual rate of speed, even over a crossing. But if he sees, or ought to see, persons or vehicles thereon, not able to get out of his way readily, it would certainly be negligence not to have such control of his car as to be able to stop before reaching such crossing."

[4, 5] We think this rule applies in this case. The plaintiff, according to his testimony, was walking upon the street car track. He got out of the way of a car coming toward him in front. After that car passed by him, he looked down the track behind him, and saw no car coming. The car which a little later struck him was no doubt somewhere near the car which had just passed him. The question whether he should have seen this car depends, of course, upon the distance it was away, and was, we think, a question for the jury. But certainly, if the plaintiff was walking upon the track with his back to the on-coming car, he was in plain view of the motorman who must have seen him. No doubt the motorman had a right to suppose that the plaintiff would clear the way for the car before the car reached him; but it was the duty of the motorman to give some alarm, so as to call the attention of a man of ordinary senses upon the track to the fact that the car was approaching him. In other words, the motorman would not be justified in running down a pedestrian without some warning in time for the pedestrian to escape. Appellant relies upon *Fuhrart v. Seattle Electric Co.*, 118 Pac. 51, *Heilesen v. Seattle Electric Co.*, 56 Wash. 278, 105 Pac. 458, *Coats v. Seattle Electric Co.*, 39 Wash. 386, 81 Pac. 830, and other cases of that character. These were all crossing cases, where the injured parties placed themselves immediately in front of cars which were known, or should have been known, to be approaching. These cases are entirely different from this, because here, if the plaintiff's story is true, he was run down without warning given in time for escape, and without knowledge of the approach of the car. We think the questions of negligence of the defendant and of the plaintiff were for the jury.

Appellant argues upon the second assignment of error that the whole evidence shows that the plaintiff is not entitled to recover, and therefore the court should have granted a new trial. The evidence on behalf of the defendant tends to show that the plaintiff was returning from the post office, instead of going there; that he was traveling south,

instead of north; that he was walking upon the planked part of the street to the east of the east railway track, facing the on-coming car, in a place of perfect safety; that, just before the car reached him, he turned to his right and attempted to step with his left foot upon the track almost immediately in front of the car; that the bell was sounded, and the motorman and a passenger upon the car called loudly to him. The motor was reversed, but plaintiff, being so close to the car, was struck and injured when there was no opportunity to stop the car. There is ample evidence and circumstances in the record to show that the injury occurred in that way. If it did so occur, the defendant was not liable under the cases cited by appellant and noticed above. This is a case where the jury must discredit the whole of the evidence on one side or the other, in so far as it relates to the manner of the injury. If the truth is as related by witnesses for the defendant, plaintiff was clearly not entitled to recover. The question was one for the jury, and the jury having found for the plaintiff, and, the trial court having refused to exercise his discretion and grant a new trial, as he might have done, we feel that we are not justified in doing so.

The judgment is therefore affirmed.

DUNBAR, C. J., and PARKER, FULLERTON, and GOSE, JJ., concur.

### MORIN v. MORIN.

(Supreme Court of Washington. Dec. 20, 1911.)

#### 1. DIVORCE (§ 303\*) — CUSTODY OF MINOR CHILD—FITNESS OF FATHER.

On application by a divorced husband for modification of the decree so as to give him custody of a minor child, the mother having been committed to an insane asylum since the decree, evidence held to show his fitness to have custody, overcoming the presumption of unfitness arising from a denial to him of custody when the original decree was entered nine months before.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793-795; Dec. Dig. § 303.\*]

#### 2. DIVORCE (§ 303\*) — CUSTODY OF MINOR CHILD—FITNESS OF FATHER.

On a divorced wife becoming insane, the husband is entitled to custody of a minor child as against the wife's parents, to whom custody was temporarily awarded, unless he is unfit to have custody.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793-795; Dec. Dig. § 303.\*]

Department 1. Appeal from Superior Court, Kitsap County; John B. Yakey, Judge.

Action by Mabel J. Morin against Saul J. Morin. From an order refusing to modify an original decree, defendant appeals. Reversed, with instructions.

Kerr & McCord and W. L. Read, for appellant. Jas. W. Carr, for respondent.

PARKER, J. [1] This is a controversy over the custody of a child now about eight years old. The defendant, the father of the child, has appealed to this court from an order of the superior court for Kitsap county, denying his petition for the modification of the decree rendered by that court, May 20, 1910, in this case, divorcing the plaintiff from him, in so far as that decree deprived him of the custody of this child. The only portions of the divorce decree brought here by this record relate to the monthly allowance for support of the plaintiff and the child and to the custody of the child. It is apparent, however, from other parts of the record before us that the divorce was granted upon the ground of the cruelty of the defendant to the plaintiff. By the terms of the decree, the child was to remain the ward of the court until further order, and the court then placed it in the temporary custody of its grandparents, the father and mother of the plaintiff. This was done evidently upon the theory that the father was not a proper person to care for the child because of his acts of cruelty to the mother, and that the mother was not a proper person to have the custody of the child because of her then weakened mental condition. The placing of the child in the custody of the grandparents did not deprive the mother of its society, since she was then, and expected to continue, living with the grandparents, to whom the support money, both for her and the child, was by the decree directed to be paid. The decree gave the defendant the right to visit the child and to have the child visit him at reasonable times. Thereafter, in July, 1910, the plaintiff was adjudged insane by the superior court for Kitsap county, and committed to the Western Washington Hospital for the Insane, at Stellacoom. Thereafter defendant filed his petition for the custody of the child, and to be relieved from paying to the grandparents the allowance for its and the mother's support. The court then appointed James W. Carr, as guardian ad litem, to represent the plaintiff upon the hearing of the petition, and thereupon an answer to the petition was filed by him. On March 9, 1911, over nine months after the rendering of the original decree denying the defendant the custody of the child, the issues thus made came on for trial. We note the length of this period between the granting of the original decree and this hearing, because it is upon the conditions existing during this period that the rights of the defendant to the child largely depend. That is, he must show such changed conditions and meritorious qualifications on his part, after the date of the decree, to properly care for the child, as will overcome the presumption against him to the contrary from the decree at the time of its rendition.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The evidence produced upon the hearing has all been brought here by statement of facts, and from it the following appears: The defendant has a good home in a good residence district in the city of Seattle. This home consists of a well-equipped residence which, with the grounds and his shop on the back part thereof, is worth from \$12,000 to \$15,000, and is within a short distance of a public school. He has lived in this home for many years. It represents the accumulation of his frugality and industry as a mechanic and a manufacturer, in a small way, of a saw filing and setting device, which is his own invention. His wife lived at this home with him until the separation, when she went to the home of her parents in Kitsap county, and soon thereafter commenced this action for divorce. After the separation, he had a middle-aged woman at his home as housekeeper, who, as such, took care of his home for about six months. This woman testified to his good behavior and kindly disposition, especially to his kindly treatment of his child; it being there to visit the father for several days at one time during that period. She also testified that he was a liberal and good provider for the home. This housekeeper ceased to work for the defendant upon his niece coming to live with him, which was about the last of August, 1910. Thereupon his niece became his housekeeper, and has remained such ever since. She is a young woman about 20 years old. She is the oldest of a family of several children, and has had considerable experience in assisting in the care and raising of her younger brothers and sisters. It is very evident from the testimony of her neighbors, who are well acquainted with her, that she is a very competent housekeeper, and would be a suitable person to assist in the care of the child. The arrangement between her and the defendant seems to contemplate that she stay with him indefinitely. A nephew of the defendant also lives with him. These three live together as a family. This niece testifies that the defendant is of kindly disposition, and that he provides well for his home. Also that he spends his time at his home when not at his work. Two other women who live near the defendant, and who are evidently quite well acquainted with him and his niece, testify to his kindly disposition towards the members of his family, and also to the competency of his niece as a housekeeper and one suited to assist in the care of his child. Three men who are well acquainted with the defendant and of his habits generally, though not knowing much of his home life, testify that he is industrious and temperate, and of good reputation. All of this testimony touching the habits, disposition, and mode of life of the defendant relate to his conduct since the granting of the decree of divorce, when he was deprived of the custody of his child. It is plain from the whole testimony that he

loves his child very much, and that the child has an equal affection for him. At the time of the hearing, the mother was still in the hospital for the insane, and the child in the custody of its grandparents. During the taking of the testimony upon this hearing, counsel for the defendant attempted to show the suitability of the defendant to have the custody of his child, by showing his disposition and mode of life as it existed prior to the granting of the divorce; but, upon objection of the guardian ad litem for the plaintiff, the court declined to receive evidence so showing. There was no competent evidence offered in contradiction of these witnesses.

In order, then, to determine the defendant's right to the child at this time, we have the changed condition of the plaintiff, who is no longer in a condition that she can possibly have the comfort and society of her child, and the undisputed evidence of these witnesses, which, standing alone, clearly shows the fitness of the defendant to have the care and custody of his child. Were it not for the presumption arising against him from the decree of the divorce, in effect adjudging that he was not at that time a suitable person to have the custody of the child, there would now seem to be no question whatever as to his rights in that regard. It is not an easy matter to measure the weight of the presumption against the defendant as to his fitness to have the care of his child, arising from the decree adjudging him to be unfit at the time of its rendition. Of course, that is not a presumption which he could overcome by good conduct on his part for a short period of time following the entry of the decree; but it seems to us that his good conduct of the nature undisputably shown by this evidence, covering a continuous period of nine months following the entry of that decree, is sufficient to overcome the presumption arising against him from the decree at this time, giving to that decree every presumption it is entitled to as establishing his unfitness at the time of its rendition. We are not advised of the nature of the defendant's shortcomings at and prior to that time. At the instance of the guardian ad litem, the court closed the door to inquiry by defendant's counsel upon that question. Under such circumstances, we are not justified in presuming that plaintiff's faults were so serious that they have not become cured by this nine months of good conduct, at least sufficiently to call for a modification of the decree in that particular.

[2] The guardian ad litem seems to wage this contest, in some degree at least, upon the theory that these grandparents have some right to the custody of this child. This is wholly untenable. They were only given the custody of the child as the agent of the court, and even then only temporarily, with the full knowledge that the child might be taken from them at any time. The legal

right of the father to the custody of this child, since the mother is insane, and therefore cannot enjoy its society, is beyond question, unless the father is clearly unfit to have its custody. As was said in *Re Neff*, 20 Wash. 652, 655, 56 Pac. 383, 384: "He has the natural and legal right to the custody and control of the children, unless so completely unfit for such duties that the welfare of the children themselves imperatively demanded another disposition of their custody." In this case the grandparents have the custody of the child by authority of the order of the court, not because of any inherent right they possess to have such custody. *Lovell v. House of Good Shepherd*, 9 Wash. 419, 37 Pac. 660, 43 Am. St. Rep. 839; *Carey v. Hertel*, 37 Wash. 27, 79 Pac. 482. Of course it cannot be seriously contended that this is not an open question. It would be so, even though the decree of divorce had not disposed of the child temporarily. The possibility of changed conditions after such a decree necessarily leaves the custody of children an open question.

No one can read the testimony in this record, relating to the habits and disposition of this defendant during the nine months following the rendition of the divorce decree depriving him of the custody of this child, without concluding that he is suitable in every way to have its custody and rearing, unless it can be said such showing is overcome by the presumptions against him arising from the decree, holding that then he was not suitable to have the child's custody. We think that this showing so clearly overcomes that presumption that the learned trial court was in error in declining to modify the decree as prayed for. We do not mean a modification now made in conformity with these views shall close the question of his suitability to have the custody of the child any more than the decree of divorce closed the question as against him. Should the wife become cured of her present affliction, so that it becomes practical for her to enjoy the society of the child, it may be that her rights will then call for another change. Or, should the defendant become unsuitable, that may also call for another change. But, as conditions existed at the time of this hearing, with no one having an inherent legal right to the child other than defendant, and his suitability therefor being shown as we have indicated, we are of the opinion that he should be awarded the custody of the child, subject to such changes as subsequent events may dictate.

The order of the learned trial court is reversed, with directions to proceed in conformity with this opinion. The defendant will be relieved of the burden of paying allowance to the grandparents, except for the period the child remains in their custody.

In view of the circumstances of this case, the defendant will recover no costs upon this appeal, and will pay to the guardian ad litem the costs incurred by him upon this appeal, including an attorney's fee of \$50.

DUNBAR, C. J., and MOUNT, FULLERTON, and GOSE, JJ., concur.

MOHR et al. v. PIERCE COUNTY et al.  
(Supreme Court of Washington. Dec. 20, 1911.)

1. HIGHWAYS (§ 159\*)—OBSTRUCTIONS.

Where a street was dedicated to a county and used by the public for 18 years, until obstructed by a private individual, and a large sum of money had been expended on the street, the obstruction will be enjoined.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 430, 431, 435; Dec. Dig. § 159.\*]

2. APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

On petition for rehearing. Denied; former opinion in part withdrawn, and judgment affirmed.

For former opinion, see 118 Pac. 321.

PER CURIAM. A rehearing is asked in this case. It is said: "The court apparently bases its decision that the appellants are not now entitled to maintain this action because of an amendment to the previous law, which amendment was passed in 1909, and which amendment is: 'Provided, however, that the provision of this section was not applied to any highway, street, alley, or other public place dedicated as such in any plat whether the land included in said plat be within or without the limits of any incorporated city or town, nor to any lands conveyed by deed to the state or to any town, city, or county, for roads, streets, alleys, and other public places.' We apprehend that this court did not intend to say, as it apparently does say in its opinion, that the Legislature, by act of 1909, had authority to take away from our clients the title to any lands whatsoever. If we had any rights in that land, they existed long prior to the legislative act of 1909, and they are to be determined, not by the law as it stood in 1909, but as it was at the time we got the title to this land, which was in 1895."

Because of the public importance of the question and the conception on the part of appellants that we have misapplied the statute, we have decided to withdraw that part of our opinion which rests upon the statute of 1909 (Laws 1909, c. 90), reserving our judgment until such time as the construction of the statute is necessarily before us.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

But this conclusion does not work a reversal or warrant a rehearing. The reference to the 1909 statute, in our former opinion, may have been inadvertent. It was unnecessary, in any event. It was predicated upon the assumption that there was no title in appellants.

[1] The evidence in this case is conflicting. Upon the whole case the trial judge found that, in the year 1890, the street now claimed by appellants was cleared up, graded, and opened for public use, and that a large sum of money was expended thereon; that the road was dedicated to Pierce county, and that it was open for public use, and used by the public from the spring of 1890 until closed by plaintiffs, who constructed a fence across the road in the year 1908; and, further, that plaintiffs had no right, title, or interest in and to the street or public highway known as Lake Boulevard, which at the time of the trial was declared by the trial court to be a legally established highway of Pierce county; that the obstructions erected thereon by plaintiffs were maintained without any right; and that they should be enjoined from further obstructing said boulevard. There is evidence to sustain these findings.

[2] The court below believed the witnesses of the respondents, and rejected the testimony offered by the appellants. The evidence does not so preponderate one way or the other as to warrant our interference. In such cases it has been the uniform practice of this court to follow the judgment of the trial court.

Rehearing denied, and judgment affirmed.

#### VAN WINKLE v. MITCHUM et al.

(Supreme Court of Washington. Dec. 20, 1911.)

##### 1. CHATTEL MORTGAGES (§ 90\*)—RECORD—FILING.

Rem. & Bal. Code, § 3661, provides that every chattel mortgage within 10 days from execution shall be filed in the county auditor's office and indexed, and to remain on file for the inspection of the public. Section 3665 provides that a mortgage given to secure \$360 or more, exclusive of costs or attorney's fees, may be recorded and indexed with like force and effect as if the act had not been passed, and such mortgage or copy must be indexed as required by the act. *Held* that, where a chattel mortgage described in section 3665 is recorded, filed, and indexed, it is not essential that it be kept on file to constitute notice, as required with reference to mortgages filed under section 3661.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 90.\*]

##### 2. CHATTEL MORTGAGES (§ 190\*)—VALIDITY—POSSESSION.

An indemnity mortgage on a stock of goods which permits the mortgagor to remain in possession, and a parol agreement permits him to appropriate part of the proceeds of the

sale of the property to replenish the stock, and pay current expenses of the business, instead of applying all of the proceeds to the payment of the secured indebtedness, is not fraudulent as to other creditors, unless the mortgage was given to aid the debtor to defraud such other creditors.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 407-416; Dec. Dig. § 190.\*]

Department 1. Appeal from Superior Court, Lincoln County; C. H. Neal, Judge.

Action by L. E. Van Winkle, as receiver of the Gordon-Throop-Wolfe Company, against A. G. Mitchum and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. J. Hibschan, for appellant. Merritt, Oswald & Merritt, for respondents.

DUNBAR, C. J. The complaint, to which a demurrer was sustained, alleged, in substance, that Mitchum, Green & Adams, as copartners, were conducting a bank under the name of Bank of Harrington; that the insolvent corporation for which appellant was appointed receiver gave the said Bank of Harrington a chattel mortgage of all its personal property, which mortgage was afterwards recorded in the proper county, but that neither the original chattel mortgage nor a copy of it was left on file in the office of the county auditor; that the creditors named in the complaint as having presented their claims to the receiver knew nothing about the execution and delivery of the mortgage, and had no notice or knowledge regarding it; that afterwards the respondents instituted foreclosure proceedings by the summary methods provided by statute, and that the goods were sold under such procedure; that during the interval which elapsed between the execution of the mortgage and the sheriff's sale the insolvent corporation was in full possession of all the property described in the mortgage, which it is not necessary to describe here; that it used and sold the merchandise in its possession after a mortgage was given in the regular course of its business, purchasing other merchandise and commingling the same, etc.; that the creditors named sold to said corporation materials, goods, wares, and merchandise of the value of \$1,300, which claims were due and owing at the time the appellant was appointed receiver and at the time of the verification of the complaint, asked that the aforesaid mortgage and the attempted foreclosure thereof and sale thereunder be adjudged null and void and held for naught as against the plaintiff, and that he have judgment for the delivery to him of all property described in said mortgage; and that, if such delivery could not be made, he have judgment against the defendants for the full value thereof, together with costs. This action was brought by the receiver for the benefit of the creditors. This is a sufficient recital of the al-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



legations of the complaint for the purposes of the determination of this case.

There are two main contentions relied upon by the appellant, and only two that are discussed in the brief. A third argument is made, to the effect that the receiver is the proper person to attack the validity of the mortgage, but this proposition is confessed by the respondents, and it is not necessary to notice it here. The first proposition is that the chattel mortgage, although it may be recorded, must also be left on file in the office of the county auditor, or else a certified copy of it must be left on file there, in order to be notice to creditors; and that simply recording the chattel mortgage, without leaving it on file or leaving a certified copy there, does not constitute notice. The second is that, where the mortgagor of a stock of merchandise is allowed to remain in possession and to dispose of the goods in the ordinary course, appropriating the proceeds of the sale thereof without the knowledge and consent of the mortgagee, the mortgage is void as to creditors. On the first proposition it would be adding something to the statute to hold that the mortgage which had been recorded should be left on file after it was so recorded. Section 3661, Rem. & Bal. Code, provides: "Every such instrument [referring to chattel mortgages] within ten days from the time of the execution thereof shall be filed in the office of the county auditor of the county in which the mortgaged property is situated, and such auditor shall file all such instruments when presented for the purpose, upon the payment of the proper fees therefor, indorse thereon the time of reception, the number thereof, and shall enter in a suitable book to be provided by him at the expense of his county, with an alphabetical index thereto, used exclusively for that purpose, ruled into separate columns with appropriate heads, 'The time of filing,' 'Name of mortgagor,' 'Name of mortgagee,' 'Date of instrument,' 'Amount secured,' 'When due,' and 'Date of release.' An index to said book shall be kept in the manner required for indexing deeds to real estate. \* \* \* Such instrument shall remain on file for the inspection of the public." If this were the only section to construe, appellant's contention would undoubtedly be correct, the direction being definite and certain, and for the very good reason that, if the mortgage did not remain on file, there would be no notice whatever of what the mortgage contained, as there is no record of it. But section 3665 provides as follows: "A mortgage given to secure the sum of \$300 or more exclusive of interest, costs, and attorney's or counsel fees may be recorded and indexed with like force and effect as if this act had not been passed, but such a mortgage or a copy thereof must also be filed and indexed as required by this act." This has reference to another class of

mortgages with a method for giving notice distinct from the other. Here the method is by recording, and there is no mandatory provision that it shall remain on file after it is recorded, presumably for the reason that there is no necessity for it so to remain, for it would add nothing to the notice given by the record provided for. It is true that section 3665 provides that a copy thereof must also be filed and indexed as required by the act, but the solicitude of the statute in that regard is directed to the index, and, of course, it could not very well be indexed unless it was filed. But the statute not requiring it to be kept on file, as in section 3661, and, there being no benefit to flow from such a requirement, we are not inclined to interpolate the requirements into the statute by construction. Hence we hold that the statutory notice was complied with.

[2] On the second proposition it has been the law of this state since the announcement of the rule in *Ephraim v. Kelleher*, 4 Wash. 243, 29 Pac. 985, 18 L. R. A. 604, that an indemnity mortgage upon a stock of goods which permits the mortgagor to remain in possession and by parol agreement made at the time of its execution permits him to appropriate part of the proceeds of the sale of the property for the purpose of replenishing the stock and paying the current expenses of the business, instead of applying all the proceeds to the payment of the indebtedness for which the mortgage was given, is not fraudulent as to other creditors, unless the mortgage was given for the purpose of aiding the debtor to defraud such other creditors. This is an exhaustive opinion, reviewing the earlier territorial cases cited by the appellant in this case in support of its contention. The mercantile interests of the state have relied upon the law thus announced for nearly 20 years, and it would work a grave injustice to now modify or change the rule.

There being no fraud alleged and the principles involved in this case being identical with the principles involved in the case mentioned, the judgment is affirmed.

MOUNT, PARKER, FULLERTON, and GOSE, JJ., concur.

#### FARMERS' & MERCHANTS' BANK OF WENATCHEE v. LILLY.

(Supreme Court of Washington. Dec. 20, 1911.)

#### EXECUTORS AND ADMINISTRATORS (§ 437\*)—REJECTED CLAIMS—SUIT—TIME—LIMITATIONS.

Rem. & Bal. Code, § 1477, provides that when a claim is rejected the holder must bring suit against the executor or administrator within three months after the rejection or the claim is barred. Plaintiff presented a claim to defendant administrator April 2, 1907, after

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which it was withdrawn for correction and not returned to the administrator until December 27th following. The administrator, on January 2, 1908, marked the claim rejected, and returned it to plaintiff, saying that it was rejected because not presented in time. Plaintiff then endeavored to persuade the administrator that the first presentation was sufficient, and was informed that the administrator would take the question up with his attorneys, which he did, and, on January 20, 1908, wrote plaintiff, affirming his rejection. Thereafter suit was brought on the claim April 1, 1908, but the complaint was not filed until April 6, 1908. Held that, since an action is not begun so as to toll limitations until the complaint is filed, though it may be deemed commenced for other purposes by service of summons and complaint, the claim must be deemed to have been rejected on January 2, 1908, and the action was therefore barred.

[Ed. Note.—For other cases, see *Executors and Administrators*, Dec. Dig. § 437.\*]

Department 1. Appeal from Superior Court, Chelan County; John B. Yakey, Judge.

Action by the Farmers' & Merchants' Bank of Wenatchee against John C. Lilly, as administrator of Jacob M. Tompkins, deceased. Judgment for defendant, and plaintiff appeals. Affirmed.

Austin E. Griffiths and Ludington & Kemp, for appellant. Peters & Powell, for respondent.

MOUNT, J. This action was brought against the administrator of the estate of Jacob M. Tompkins, deceased, upon a claim against the estate. Two defenses were interposed: (1) That the claim was not presented within one year after notice to creditors; and (2) that the action was not brought within three months after the claim was rejected by the administrator. The trial court found in favor of the defendant upon both of these grounds, and dismissed the action. Plaintiff has appealed.

It appears that on December 19, 1906, letters of administration upon the estate of Jacob M. Tompkins, deceased, were issued to John O. Lilly. On December 20, 1906, the administrator caused a notice to creditors to be published, requiring all persons having claims against the estate to present such claims within one year from that date. On April 2, 1907, the plaintiff presented a verified claim, amounting to \$6,340.18, to the administrator. About a month later, and before the administrator had taken any action on the claim, Mr. W. A. Thompson, then an officer of the plaintiff bank, called attention to the fact that a mistake had been made in the claim, and that one item thereof was about \$40 more than it should be. He thereupon withdrew the claim for the purpose of making the correction. The claim was not returned to the administrator until December 27, 1907, about a week after the expiration of the time for presenting claims against the estate. The administra-

tor thereafter, on January 2, 1908, marked the claim rejected, and returned it to the plaintiff with the information that the claim was rejected, because it had not been presented within the year. Plaintiff then endeavored to persuade the administrator that the first presentation of the claim was sufficient, and was informed by the administrator that he would take the question up with his attorneys, which he did, and, on January 20, 1908, he wrote to the plaintiff, saying: Their position is the same as mine—that I cannot allow the claim." Thereafter, on April 1, 1908, this action was begun by the service of a summons and complaint, but the complaint was not filed until April 6, 1908, more than three months after the rejection of the claim on January 2.

We shall not consider the question whether the administrator properly or improperly rejected the claim, for our view upon that question becomes of no importance in view of our conclusion upon the question whether the action was barred by lapse of time. It is conceded that the claim was rejected and notice thereof given on January 2, 1908, and it is also conceded that the complaint was not filed until April 6, 1908. The statute provides, at section 1477, Rem. & Bal. Code: "When a claim is rejected by either the executor or administrator or the court, the holder must bring suit in the proper court against the executor or administrator within three months after the rejection. Otherwise the claims will be forever barred." See, also, section 164. This court has uniformly held "that an action is not deemed commenced so as to toll the statute of limitations until the complaint is filed, though it may be deemed commenced for other purposes by the service of summons and complaint." *Blalock v. Condon*, 51 Wash. 604, 99 Pac. 733, and cases there cited.

Appellant seeks to avoid this position by insisting that the final rejection of the claim was not made until January 20, 1908, because, after the rejection on January 2d, the administrator again took the question under consideration; and that plaintiffs were thereby misled. While it is true that the administrator did consider the question further after he had rejected the claim, this was done at the solicitation of the plaintiff, and there is no evidence that the administrator did not act with reasonable promptitude, or that he led the plaintiff to believe that the date of the first rejection should not stand as the date of final rejection. He said in his notification, on January 20th, that he had taken the claim up with his attorneys, and they say "Their position is the same as mine—that I cannot allow the claim." The plaintiff must have understood from this that the rejection of the claim was not changed, but was affirmed—nothing more; and that no extension of time was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

granted or intended. There was still more than two months time left within which plaintiff might bring its action. This was ample time. If the administrator had delayed a reconsideration of his ruling, so that there was not sufficient time within which to bring the action, we would be inclined to hold that plaintiff had been misled by his conduct. But we are satisfied that the delay was wholly the fault of the plaintiffs, and that by their own neglect the time passed.

The judgment is affirmed.

DUNBAR, C. J., and PARKER, FULLERTON, and GOSE, JJ., concur.

#### STATE v. WORKMAN.

(Supreme Court of Washington. Dec. 19, 1911.)

##### 1. RAPE (§ 51\*)—EVIDENCE—SUFFICIENCY.

The testimony of prosecutrix that she had intercourse with accused is sufficient to prove the offense, where it is plain from the whole of her testimony that she meant sexual intercourse, and comprehended what she was talking about.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 71-77; Dec. Dig. § 51.\*]

##### 2. RAPE (§ 54\*)—EVIDENCE—"CORROBORATION" OF FEMALE—SUFFICIENCY.

The testimony of a witness that accused admitted the doing of an act similar to that testified to by prosecutrix on a trial for statutory rape is sufficient to corroborate prosecutrix, within Rem. & Bal. Code, § 2443, requiring the testimony of prosecutrix to be supported by other evidence to justify a conviction; and the mere fact that the meaning of the language of the admission is disputed does not render the testimony insufficient; its meaning being for the jury.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 84; Dec. Dig. § 54.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1627.]

##### 3. RAPE (§ 40\*)—EVIDENCE—"CHARACTER" OF PROSECUTRIX—ADMISSIBILITY—"PREVIOUS CHASTE CHARACTER."

Under Rem. & Bal. Code, § 2436, punishing one who has sexual intercourse with any female child over 15 and under 18 years of age, and of previously chaste "character," the words "previously chaste character" mean only an actual physical condition, as distinguished from a chaste state of mind; and lack of chastity in prosecutrix cannot be proved, except by specific acts of unchastity; evidence of general reputation for lack of chastity being inadmissible.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 55-59; Dec. Dig. § 40.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1061-1063; vol. 6, pp. 5545-5546.]

##### 4. RAPE (§ 40\*)—EVIDENCE—CHARACTER OF PROSECUTRIX—ADMISSIBILITY.

Evidence of general reputation for unchastity of prosecutrix over 15 and under 18 years of age is admissible as affecting her credibility.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 55-59; Dec. Dig. § 40.\*]

##### 5. CRIMINAL LAW (§ 678\*)—EVIDENCE—ELECTION BY STATE.

Where, on a trial for statutory rape, the state proved three distinct offenses at different times and places, the state, at the request of ac-

cused, must elect on which act it will rely for a conviction.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1580-1583; Dec. Dig. § 678.\* Indictment and Information, Cent. Dig. §§ 425-437.]

Department 2. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

George W. Workman was convicted of statutory rape, and he appeals. Reversed and remanded.

A. G. McBride, for appellant. John F. Murphy and Crawford E. White, for the State.

ELLIS, J. Appeal from a judgment entered upon a verdict convicting the appellant of the crime of statutory rape.

[1] The refusal of the court to direct a verdict of acquittal upon appellant's motion after the state had rested is the first assignment of error. It is claimed that because the prosecuting witness testified that she had "intercourse" with the appellant that this was not sufficient to prove sexual intercourse. One authority (People v. Howard, 143 Cal. 318, 76 Pac. 1116) so holding is cited, but we are not inclined to follow so technical a rule. It is plain from the whole of her testimony that she meant sexual intercourse, and fully comprehended what she was talking about.

[2] It is also contended that there was not sufficient corroboration of the testimony of the prosecuting witness, as required by the statute. 1 Rem. & Bal. Code, § 2443. One witness testified to an admission of a similar act by the appellant with the prosecuting witness. If this admission was made, it was sufficient corroboration. State v. Jonas, 48 Wash. 183, 92 Pac. 899. While it is urged that the language used in the admission, by a very strained and unnatural construction, might mean something else, its use was undisputed, and it was for the jury to say whether there was any reasonable doubt as to its meaning.

[3, 4] The principal ground of defense was the claim that the prosecutrix was not of a "previously chaste character," as required by the statute (1 Rem. & Bal. Code, § 2436); she being over 15 and under 18 years of age. The court refused to admit evidence of her previous general reputation as to chastity, holding that there should be some evidence of previous specific acts of unchastity with other men before evidence as to her general reputation in that respect would be admissible. The obvious purpose of the statute is to protect females over 15 and under 18 years of age, even in case of actual consent. The words "previously chaste character," as used in the statute, must therefore be construed to mean an actual physical condition, as distinguished from a chaste state of mind, as shown by general conduct.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Evidence of a reputation for unchastity would tend to negative the latter, while evidence of specific acts would tend to negative the former. In cases where lack of consent is a material element of the crime, it has usually been held that evidence of prior reputation for unchastity is admissible only as tending to show probable consent. Obviously such evidence would not be admissible in cases of statutory rape, where consent is not material. "When the statute makes carnal knowledge of a female of previous chaste character under a specified age rape, chastity is presumed until the contrary is proved, and want of chastity in such cases must be shown by specific acts, and not by general reputation." 33 Cyc. p. 1482. Underhill on Criminal Evidence (2d Ed.) § 418; 10 Encyc. of Evidence, pp. 602, 603. Such evidence of general reputation for unchastity, however, would be admissible, not as a defense, but as going to the credibility of the prosecuting witness. *State v. Coella*, 3 Wash. 99, 28 Pac. 28; 33 Cyc. p. 1482.

Error is also predicated upon certain instructions given by the court. What we have said touching the admission and effect of evidence, however, disposes of the questions raised on instructions, and no good purpose would be served by reviewing them.

[5] The state's evidence tended to prove three distinct commissions of the offense, occurring at different times and places. At the close of the state's case, the appellant moved the court to require the prosecution to elect which one of these it would rely upon for a conviction. The court denied the motion. This ruling was excepted to, and is assigned as error. We think that, both on reason and authority, this assignment is well taken. In case of conviction, where the

evidence tends to show two separate commissions of the crime, unless there is an election, it would be impossible to know that either offense was proved to the satisfaction of all of the jurors, beyond a reasonable doubt. The verdict could not be conclusive on this question, since some of the jurors might believe that one of the offenses was so proved, and the other jurors wholly disbelieve it, but be just as firmly convinced that the other offense was so proved. The greater the number of offenses in evidence, the greater the possibility, or even probability, that all of the jurors may never have agreed as to the proof of any single one of them. The true rule would seem to be that, while evidence of separate commissions of the offense may be admitted as tending to prove the commission of the specific act relied upon, the proper course in such a case, after the evidence is in, is to require the state to elect which of such acts is relied upon for a conviction. *State v. Osborne*, 89 Wash. 548, 81 Pac. 1096; *State v. Sargent*, 62 Wash. 692, 114 Pac. 868.

We are constrained to hold that the refusal of the court to require an election by the state was prejudicial error. For this reason, the judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., and MORRIS and CROW, JJ., concur.

CHADWICK, J. Considering the history of the act upon which this case rests, I think evidence of general reputation for chastity should be received for all purposes, and to that extent I disagree with the reasoning of Judge ELLIS. I concur in the result.

**CULVER v. VAN VALKENBURGH et al.**  
(Supreme Court of Oregon. Jan. 9, 1912.)

**1. FRAUDS, STATUTE OF (§ 63\*)—LEASES—ASSIGNMENT—VALIDITY.**

Under L. O. L. §§ 804, 808, declaring that no interest in real estate, other than a lease for not more than one year, can be created or transferred, except in writing, an assignee of a leasehold for more than one year is not liable on the covenants of the lease, unless the assignment is in writing.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 97-104; Dec. Dig. § 63.\*]

**2. FRAUDS, STATUTE OF (§ 63\*)—LEASES—ASSIGNMENT—VALIDITY.**

An oral assignment of a leasehold for more than one year cannot be construed to create a tenancy from year to year so as to make the assignee liable for breach of the covenants of the lease.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 63.\*]

**3. FRAUDS, STATUTE OF (§ 129\*)—LEASES—ASSIGNMENT—VALIDITY.**

Part performance by an assignee of a leasehold for more than one year, holding under a parol assignment, does not take the case out of the statute of frauds (L. O. L. §§ 804, 808), so as to support an action for the assignee's breach of covenants of the lease.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 287-292; Dec. Dig. § 129.\*]

**4. FRAUDS, STATUTE OF (§ 63\*)—LEASES—ASSIGNMENT—VALIDITY.**

A new and independent parol agreement between a lessee for a term of years and a third person does not create a liability against the third person, under the statute of frauds (L. O. L. §§ 804, 808), for breach of covenants of the lease.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Dec. Dig. § 63.\*]

**5. TRIAL (§ 163\*)—MOTION FOR NONSUIT—SUFFICIENCY.**

A motion for nonsuit, because plaintiff "has not proved a sufficient case for submission to the jury," is sufficient, where the ground thereof is fully understood by counsel for plaintiff and the court, and where the defect in plaintiff's case is incurable.

[Ed. Note.—For other cases, see *Trial*, Dec. Dig. § 163.\*]

**6. JUDGMENT (§ 240\*)—REQUISITES—PARTIES.**

Under L. O. L. §§ 179, 180, defining a judgment as a final determination of the rights of the parties, and declaring that a judgment may be given for or against one or more of several plaintiffs or defendants, a joint judgment for two defendants is unobjectionable in form, though a nonsuit in favor of one defendant was by consent, and a nonsuit in favor of codefendant was contested.

[Ed. Note.—For other cases, see *Judgment*, Dec. Dig. § 240.\*]

Appeal from Circuit Court, Coos County; John S. Coke, Judge.

Action by S. J. Culver against M. Van Valkenburgh and another. From a judgment for defendants, plaintiff appeals. Affirmed.

On September 1, 1907, plaintiff executed to S. J. Huff a lease to certain lands for the term of five years, which contained mutual covenants, and Huff entered upon the premises thereunder. On April 1, 1908, he orally

assigned and transferred his interest in the premises under the lease to defendant M. Van Valkenburgh, who entered thereon and occupied the same until June 5, 1909, when she transferred them to one Lane, whereupon plaintiff commenced this action against her to recover damages in the sum of \$500 for breach of the terms of the lease. It is also alleged that the assignment of the lease was in writing, although the evidence is undisputed that it was oral. The execution of the lease and its assignment to defendants are denied by the answer, but defendant M. Van Valkenburgh admits that she entered into the possession of the premises under an agreement with Huff, and that she occupied the same thereunder from April, 1908, to June, 1909, and sets forth other defenses to the damages alleged. The case was tried before a jury, and at the close of plaintiff's evidence a judgment of nonsuit was granted on the motion of defendants, and plaintiff appeals.

A. M. Crawford (G. T. Treadgold, on the brief), for appellant. A. J. Sherwood (L. A. Liljeqvist, on the brief), for respondents.

EAKIN, C. J. (after stating the facts as above). But two of the assignments of error need be considered:

[1] (1) As to the effect of the oral transfer by Huff to defendant M. Van Valkenburgh of his leasehold interest in the premises. Tiffany on Landlord and Tenant (page 950) states that, for the purpose of enforcing the payment of rent, a person, other than the lessee, found in possession of the premises will be prima facie presumed to be in possession as assignee of the leasehold, which presumption may be rebutted by evidence that there was no actual assignment, or that he is a sublessee, in which latter case he is not liable to the landlord on the covenants of the original lease. His liability is upon the covenants of the sublease and to his lessor only. But, in order that one may be liable on the covenants as an assignee of the leasehold, there must be a legal assignment to him. It is not sufficient that he be in possession. Under the statute of this state (section 808, L. O. L.), no estate or interest in real property can be created or transferred, except it be in writing, signed, etc., which includes an assignment of a leasehold interest in lands for a term of more than one year.

[2, 3] The contention of plaintiff that the assignment being oral will be construed to be a tenancy from year to year can have no application to the liability of the defendant for damages for breach of the covenants of a written lease; nor does part performance take the case out of the statute of frauds, such relief being cognizable in equity for the purpose of obtaining specific performance, and has no application in an action for

damages for breach of covenant in a contract to which defendant is not a party. Some authorities hold that a parol agreement in relation to real estate is neither illegal nor void under the law, but is simply a weapon of defense which the party entitled thereto may use or not use for his own protection; but that statement of the law can have no application under our statute, which provides (section 808, L. O. L.) that an agreement for a "leasing for a longer period than one year is void if not in writing, signed," etc.; and section 804 is to the same effect as to the creation of or transfer of an interest in real property.

[4] Nor is plaintiff's case aided by the allegations of the answer, the strongest inference from which is not of an assignment of the leasehold, but a new and independent agreement with Huff. Therefore plaintiff failed to prove a case sufficient to be submitted to the jury.

[5] (2) Plaintiff also urges that the nonsuit was improperly granted, because the motion therefor was insufficient, in that it did not specify any sufficiently definite and specific reason for a nonsuit. The form of the motion is: The defendant moves for a judgment of nonsuit, "for the reason that the plaintiff has not proven a sufficient case against the defendant, M. Van Valkenburgh, to be submitted to the jury." This motion was submitted and considered at the hearing, without objection to its indefiniteness, and was sustained by the court. The ground of the motion relied upon by defendant was fully understood by counsel for plaintiff, as well as by the court, and the objection to it for insufficiency is raised here for the first time, and the objection is without merit. If the trial court had denied the motion, and defendants had appealed, the insufficiency of the form of the motion, as the basis of relief here, which was denied them in the lower court, could have been insisted upon, as held in *Ferguson v. Ingle*, 38 Or. 43, 62 Pac. 700. See, also, *Milton v. Denver*, etc., R. Co., 1 Colo. App. 307, 311, 29 Pac. 22. It is held, in *Fontana v. Pacific Can Co.*, 129 Cal. 51, 61 Pac. 580, that a motion for a nonsuit is sufficient, although the grounds thereof are not specifically stated, if the defects of plaintiff's case are incurable, even if they had been specifically pointed out. To the same effect is *Daley v. Russ*, 86 Cal. 114, 24 Pac. 887, and the defect in plaintiff's case here is incurable; the evidence disclosing that there was no assignment of the lease.

[6] The objection to the form of the judgment, namely, that it was a joint judgment in favor of both defendants, when the nonsuit in favor of John Van Valkenburgh was by consent of plaintiff, and that in favor of M. Van Valkenburgh was contested, is not well taken. We find that the form of the judg-

ment is unobjectionable, under sections 179 and 180, L. O. L., where it is contemplated that one judgment may dispose of the whole case, where it can consistently be done.

The judgment of the lower court is affirmed.

#### HAWKINS et al. v. DOE et al.

(Supreme Court of Oregon. Jan. 2, 1912.)

##### 1. PROCESS (§ 86\*)—PUBLICATION SERVICE—SPECIFIC PERFORMANCE.

Under L. O. L. § 399, authorizing service of summons by publication in suits concerning real property, and, under section 414, providing that a decree requiring a conveyance shall be equivalent to such conveyance on noncompliance with the decree, service of summons may be had by publication in a suit to specifically perform a contract to convey.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. § 100; Dec. Dig. § 86.\*]

##### 2. SPECIFIC PERFORMANCE (§ 121\*)—CONTRACT TO CONVEY—PROOF REQUIRED.

Where a contract to convey sought to be specifically performed rests wholly in parol, and the claimed promisor is dead, clear and satisfactory proof of the terms of the agreement and strict performance by the promisee should be required.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 392; Dec. Dig. § 121.\*]

##### 3. SPECIFIC PERFORMANCE (§ 121\*)—CONTRACT TO CONVEY—EVIDENCE—SUFFICIENCY.

In a suit to specifically perform a claimed oral contract by decedent to convey, evidence held insufficient to show such agreement.

[Ed. Note.—For other cases, see *Specific Performance*, Dec. Dig. § 121.\*]

##### 4. SPECIFIC PERFORMANCE (§ 121\*)—ORAL CONTRACT TO CONVEY—PROOF REQUIRED.

Where specific performance of an oral contract to convey land is sought on the ground of performance by the purchaser, the evidence of the terms of the contract should be clear and satisfactory.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 392; Dec. Dig. § 121.\*]

##### 5. SPECIFIC PERFORMANCE (§ 121\*)—ORAL CONTRACT TO CONVEY—EVIDENCE—SUFFICIENCY.

In a suit to specifically perform an oral contract to convey, evidence held insufficient to show that plaintiffs went into possession under the agreement.

[Ed. Note.—For other cases, see *Specific Performance*, Dec. Dig. § 121.\*]

##### 6. SPECIFIC PERFORMANCE (§ 8\*)—RIGHT TO RELIEF—JUDICIAL DISCRETION.

Specific performance rests in the sound discretion of the court.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 17, 18; Dec. Dig. § 8.\*]

Appeal from Circuit Court, Lane County; L. T. Harris, Judge.

Action by Delford S. Hawkins and another against John Doe and others. Judgment dismissing the suit, and plaintiffs appeal. Affirmed.

This is a suit to compel defendants to specifically perform an alleged oral con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tract to convey land. The complaint alleges, in substance, that on September 25, 1907, plaintiffs entered into an oral contract with A. J. Black, defendants' intestate, whereby they agreed to furnish him board and clothing, and allow him to live with them as long as he should live, to care for him in his last sickness, and to stay by him until his death; that he was 75 years of age, had no relation, and that it was necessary for him to have some one to care for him; that as a consideration of such services Black agreed to execute a deed to plaintiffs, which was to provide that they take and hold exclusive possession of the premises described in the complaint, and to have the proceeds therefrom as long as Black should live, and that at his death the whole interest should pass to plaintiffs, Black reserving a life interest in the premises for his own protection; that the premises were to be conveyed subject to the debts of Black; that plaintiffs fully performed their part of the agreement; that Black died on the 6th day of November, 1907; that he failed to execute the deed for the reason that he was stricken with paralysis, and thereafter, up to the time of his death, his condition was such that he was unable to do so; that L. E. Ward was appointed administrator of the estate, and in February, 1909, the county court made an order directing him to sell the property for the payment of debts, which amounted to about \$600; that plaintiffs had been informed by deceased that he had a nephew living in California, whose true name is unknown, and he is therefore, designated by the name of "John Doe, nephew and heir at law of A. J. Black." Plaintiffs pray for a decree requiring that the covenant be specifically performed; that they be declared the owners of the premises; and that, if the property shall have been sold by the administrator before final decree, they be declared to be the owners of the residue of the money received from such sale, after the debts and expenses of administration shall have been paid. There was service by publication against John Doe, who has not appeared, and personal service upon the administrator, who answered, denying the alleged agreement, and alleging that the premises had been sold at the administrator's sale and conveyed by a sufficient deed to the purchaser. The sale and conveyance are admitted in the reply. Upon the trial the court held that after the sale, there being no specific performance possible as to the land, plaintiffs' demand became a mere money demand, not cognizable in a court of equity, and upon that ground refused to find upon the principal fact—the alleged contract—and dismissed the suit. Plaintiffs appeal.

C. A. Wintermeier, for appellants. L. Bilyeu, G. F. Skipworth, and John M. Pipes, for respondents.

McBRIDE, J. (after stating the facts as above). [1] On behalf of defendants it is claimed that a suit for specific performance is purely in personam, and that the court acquired no jurisdiction by service of summons by publication. We cannot assent to this view of the law. Being to a great extent a federal question, the decisions of the federal courts furnish the safest guide in cases of this character. In *Boswell's Lessee v. Otis*, 9 How. 336, 348, 13 L. Ed. 164, Mr. Justice McLean says: "It is immaterial whether the proceeding against the property may be by attachment or bill in chancery. It must be substantially a proceeding in rem. A bill for the specific execution of a contract to convey real estate is not strictly a proceeding in rem in ordinary cases; but where such a procedure is authorized by statute, or publication, without personal service of process, it is substantially of that character." To the same effect are *Arndt v. Griggs*, 134 U. S. 316, 10 Sup. Ct. 557, 33 L. Ed. 918; *Adams v. Heckscher* (C. C.) 83 Fed. 281; *Single v. Scott* (C. C.) 55 Fed. 553. For decisions of the state courts to the same effect, see *Seculovich v. Morton*, 101 Cal. 673, 36 Pac. 387, 40 Am. St. Rep. 106; *Robinson v. Kind*, 23 Nev. 330, 47 Pac. 1, 977; *Corson v. Shoemaker*, 55 Minn. 336, 57 N. W. 134; *Burrall v. Eames*, 5 Wis. 260. In the latter case the court says: "A suit for specific performance, like that of foreclosure, is of a twofold character, partly in personam and partly in rem. The court may enforce the contract, either by operating upon the person to compel a conveyance, or may pass the title of the land by decree." It must be conceded that there must be statutory authority for such a proceeding, and such is the case in this state. By section 399, L. O. L., service of summons by publication is authorized "when the subject of the suit is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding the defendant from any lien or interest therein." Section 414 provides that "a decree requiring a party to make a conveyance, transfer, release, acquittance, or other like act within a period therein specified shall, if such party does not comply therewith, be deemed and taken to be equivalent thereto." These sections bring this case within the reasoning of the decisions heretofore cited. A contract to purchase land would be a hazardous proceeding, if the purchaser were required to search the civilized world and sue each heir in the place of his residence, in case of the vendor's death, before performance, and we cannot concede that the law requires such an absurd procedure.

[2] Conceding, without deciding, that the administrator's sale was an equitable conversion of the property, we are not satisfied

that plaintiffs have made a case sufficient to justify a decree under the pleadings. Where the contract rests wholly in parol and the alleged promisor is dead, courts should demand clear and satisfactory proof of the terms of the agreement, and its strict performance by the promisee. Such cases furnish abundant opportunity for the perpetration of those frauds which it was the object of the statute to prevent by requiring the contract to be reduced to writing.

[3] The evidence tends to show that deceased needed a home where he could have some one to care for him in his declining years, and that he had applied to several persons to look after him, saying that in return for such services he would give them the property at his death. One witness (Wiebke) testifies in substance: "He said he had a small tract of land, and didn't have any house on it, and he wanted to know if I would not take the place and let him come and stay with us and live with us, if he would give us the place at his death, provided if we got along all right. \* \* \* So he furnished the lumber and built the house on his place, and, when he came and stayed with us something over a month, I asked him one day if he thought we could get along all right, and he said he was perfectly satisfied, and he said any time that we had time we would go to town and make out the papers. At his death I was to have the place, providing I took care of him in his last illness." The "making out of the papers" was neglected, and finally this witness, by consent of Black, sold out his rights to one Stevens, who succeeded him in caring for deceased. Stevens testifies, in substance, that Black said he was willing to deal with him upon the same terms as he had promised Wiebke. "I was to get the place, and I was to take care of Mr. Black, and at his death the place was to be mine. \* \* \* He said, if he got sick or anything, \* \* \* he would send to town and have his lawyer come out and make out the papers." This witness stayed about a year and three months, and Black, although frequently requested, neglected to make out any writings, and the witness finally gave up the contract and moved away. He gives this reason for so doing: "I have got a place down below there on the river just the same as Mr. Wiebke, and I got tired running backwards and forwards, and considered that the best proposition was to go down on the other place, and I didn't have the papers for the other, and I didn't want to run any risk at all, so I thought I would take the other proposition, which I knew was a safe one." In relation to the Hawkins contract, William Forrester testifies that Black said to him: "He had a home at last; \* \* \* that he was going to give Mr. Hawkins the papers just as soon as he got settled down. \* \* \* As soon as they got things straightened around, he would make out the papers, and

they should have the place as long as he lived; that is, they could have the place after he was dead, as long as they took care of him while he was living." Later Black told Wiebke that he had the same agreement with Hawkins that he had had previously with him. Williams, who is a son of Mrs. Hawkins, testified that Black applied to him to take care of him, and said that, if he would do so, he would "make out the papers" that day, but would keep a life lease; that he declined, but recommended to Black Mr. and Mrs. Hawkins; and that Black afterwards told him that he was perfectly satisfied with them. The proposal, as Hawkins states it, is as follows: Black said: "If you will take care of me properly during my life, and see that I am properly buried, I shall turn that property over to you. It shall be yours. But, before we do that, I would like to know that I would be treated right or not, and I would like to stop with you and see if we get along all right or not for a couple of weeks. If we get along all right, we will make the bargain and agreement. If we don't, I will pay you what you are out, and that will end it." That he came the next Sunday and stayed all night, and the next day said it was all right, "and that he was willing and ready to make a bargain with us to take care of him. This was on September 30, 1907." After staying with plaintiffs for two weeks, they all moved to Black's place, and he said to plaintiffs: "Now, this is yours. All I want is just to be taken care of." Hawkins further testified: "He said he would make out writings that would be satisfactory to both parties, turning the property over to me; that he would want a life interest in it; that he would want to be sure that he wouldn't be beat out of a living while he did live. He simply wanted a life interest in the property, and, when he was dead, it was mine. 'It is yours,' he says, meaning me and my wife." Mrs. Hawkins' testimony is substantially the same as that of her husband. She testifies that, when they moved out to Black's place, he said: "This is yours. Everything here is yours. You don't need to consult me about nothing. All I want is care as long as I live and I feel that I will get it. \* \* \* We took perfect possession of the place." In answer to a question, on cross-examination, Mr. Hawkins testified: "He said when we got out there and were settled we would come back to town and make out the writings. Q. He wanted to protect himself? A. Yes; he said he would make out the deed."

The foregoing is practically the substance of the testimony as to the agreement, except that Mrs. Hawkins testifies that upon his deathbed she asked him if he was satisfied with his treatment, and he answered, "Yes." It will be noticed that the last answer above quoted is the only instance in which the word "deed" is used, and that seems rather a deduction of the witness as to the effect of the



conversation than an attempt to repeat Black's exact language. In the answer just preceding it, in narrating the same conversation, he gives it thus: "He said \* \* \* we would come back to town and make out the writings." And it is a significant fact that in all his conversations, as related in the testimony, he never used the word "deed." The witnesses all agree that he said "make out the writings," "make out the papers," "make out the agreement." We think the testimony does not indicate that he ever intended to make any conveyance which would tend to deprive him of the title or possession of his property during his lifetime. His intention was evidently to protect himself and hold the whip hand, so as to secure proper treatment, and if, when he felt death approaching, he thought he had received this, to make a will, bequeathing his property to plaintiffs. This is shown by the testimony of Wiebke, with whom he made an identical agreement, and by the testimony of Stevens, who succeeded Wiebke; the latter witness saying: "I was to get the place and I was to take care of Mr. Black and at his death the place was to be mine. Q. Was this to be in writing? A. Well, he said, if he got sick or anything, \* \* \* he would send to town and have his lawyer come out and make out the papers." It is evident that the arrangement was to be tentative, until he could see the very end. The plaintiffs testify that, after his two weeks residence with them in Eugene, he expressed himself perfectly satisfied, and ready to make the agreement. But, if this were true, why did he not then, when he was near a lawyer and notary, make the conveyance? Why delay until they had moved out to his farm, and thus necessitate a useless trip to Eugene? He may have been satisfied with the treatment he had received up to that time, but it remained for him yet to be satisfied that it would continue to the time of his death. In the tragedy of King Lear the great dramatist portrays the foolishness of an old man who in his lifetime strips himself of his possessions, and depends on the gratitude of his children for support in his declining years. The reports are full of such tragedies, wherein undutiful children, finding themselves possessed of a parent's means of support, forget the obligation of filial love and gratitude, and either drive the aged donor from them or make his life miserable with them. To the discredit of human nature, such instances are as frequent as the reverse; and, if this be so with children of the donor, how much more likely is it to be the case where the transaction is with strangers. Black was wise enough to wish to protect himself, and we do not think the evidence shows that he ever promised or intended to make a deed, but that he probably did intend, if at the close of his life the plaintiffs had not relaxed their efforts to make him comfortable, to remember them by

a will, and perhaps to leave them all his property; but this is not the case which the plaintiffs have presented by their pleadings.

[4] Where specific performance of an oral contract to convey land is sought to be enforced, on the ground of performance by the vendee, the evidence of the terms of the contract should be clear and satisfactory. 36 Cyc. 689. At common law, and in many of the states by statute, plaintiffs would not have been permitted, after the death of the alleged promisor, to testify as to the terms of the contract, and, while the rule has been relaxed in this state, there are many reasons why the testimony of interested parties under such circumstances should be closely scrutinized. It is so easy for self-interest to sway even the honest mind, so that it will give a different meaning to the language used, or construe rather than repeat actual conversations, that disinterested testimony is highly desirable, nay, almost indispensable, in cases of this kind. Our statute requires the judge presiding at jury trials to instruct them that evidence of the oral admission of a party should be viewed with caution (section 868, L. O. L.), and, if this is the rule as to admissions of parties living and able to explain their language and meaning, with how much greater force should it apply when the evidence is directed to the alleged declarations of one whose lips are sealed in death, and to establish a contract which the law requires to be in writing.

[5] The evidence of plaintiffs' possession is not clear or satisfactory. It is true that Hawkins says he went into possession and his wife says that they took "perfect possession of the premises," but the evidence indicates that their possession was that of tenants, until a final agreement should be consummated, rather than that of persons holding as purchasers. They admit that Black said that he wanted to retain a life estate for his own protection, but this would be a poor protection if plaintiffs had the possession and enjoyment. The reasonable inference which we draw from the statements of these interested witnesses is that Black intended to keep the property in his own hands so that he would be in a position to expel plaintiffs from it, in case they did not care for him in a satisfactory manner; that he expected them to use and keep the products of the farm without paying for them, except in the way of services to himself; that he intended to part with his right of possession seems almost incredible. To conclude, we think plaintiffs have not made a showing sufficient to justify us in decreeing a specific performance of this alleged contract.

[6] Specific performance can never be demanded as an absolute right, but rests in the sound discretion of the court to be granted or denied as the interests of justice may seem to require. 36 Cyc. 548, and cases there cited. In the case at bar we think it in the

interest of justice to leave the plaintiffs to pursue their remedy at law, which is certainly adequate to compensate them for any services they may have rendered or damages they may have suffered in the premises.

The decree of the circuit court is affirmed.

### SUN DIAL RANCH v. MAY LAND CO.

(Supreme Court of Oregon. Jan. 2, 1912.)

#### 1. NAVIGABLE WATERS (§ 36\*)—"HIGH-WATER MARK."

As determining the boundary between the land of a riparian owner and the public, the high-water mark of a river not affected by the tide is the point below which the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark on the soil a character distinct from that of the banks with respect to vegetation and the soil itself.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3289-3290.]

#### 2. NAVIGABLE WATERS (§ 36\*)—"HIGH-WATER MARK"—"BED OF RIVER"—"LOW-WATER MARK"—"BEACH"—"SHORE."

The margin of the bed of a river which lies between high and low water mark is called the "beach" or "shore," which is actually a part of the bed of the river, and, when the river is at its full flow, whether caused by the tide or by the natural increase of waters by rains, floods, and the like, filling its natural bed to its highest reach of flow, it marks its high-water, while its lessened range of flow by summer heats shows its low-water, mark.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 725, 726, 730; vol. 8, p. 7588; vol. 7, pp. 6248, 6495-6497; vol. 5, p. 4253.]

#### 3. NAVIGABLE WATERS (§ 36\*)—"RIVERS"—"BANK"—"HIGH-WATER MARK."

The bank of a river is that line or ridge of earth which contains the river, holding the natural direction of its course, and if at any time, either from rains or other cause, the river has overflowed for a time that line, it does not by such overflow change its banks within the rule fixing high-water mark as a boundary between a riparian owner and the public.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

For other definitions, see *Words and Phrases*, vol. 1, pp. 682-689; vol. 8, p. 7587.]

#### 4. NAVIGABLE WATERS (§ 44\*)—"ACCRETION."

Accretion is the imperceptible accumulation of land by natural causes, and the owner of the property to which the addition is made becomes the owner of such ground, as, where land is bounded by a stream of water which changes its course gradually by alluvial formation, the owner of the land holds the same boundary, including the accumulated soil (quoting 1 *Words and Phrases*, p. 99).

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 266-278; Dec. Dig. § 44.\*]

#### 5. NAVIGABLE WATERS (§ 36\*)—"MEANDERED STREAMS."

Where a stream is intended to be meandered by public surveys, the stream, and not the

actual meander line as run on the ground, is the true boundary of the riparian owner.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

#### 6. APPEAL AND ERROR (§ 1010\*)—"HIGH-WATER MARK"—FINDINGS.

The court, in ascertaining the high-water mark of a river to constitute a boundary, found that a bar was under water from two to four months during ordinary years; that the bar was barren sand and gravel from two to nine feet above low-water mark; that along the line of high-water mark a bank rose abruptly in most places; and that the high-water mark was apparent. The trial judge viewed the river. *Held*, that the establishment by the court of the high-water mark line was based on a consideration of all the circumstances, and would not be disturbed on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

#### 7. APPEAL AND ERROR (§ 1010\*)—"FINDINGS"—CONCLUSIVENESS.

Where a cause is tried by the trial court without a jury, the court on appeal can only examine the testimony to ascertain whether or not there is any competent evidence supporting the findings.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

#### 8. APPEAL AND ERROR (§ 1008\*)—"FINDINGS"—CONCLUSIVENESS.

The court on appeal, if trying a case de novo, must give peculiar weight to the findings of the trial judge trying the case without a jury, where his findings are based on evidence and on a view.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3969; Dec. Dig. § 1008.\*]

#### 9. VENDOR AND PURCHASER (§ 334\*)—"CONTRACTS"—ACTIONS.

An action by a purchaser of land for excessive payments, under a contract providing for a specified sum per acre the acreage to be ascertained by a survey, and the vendor to refund in case the survey showed a less quantity than estimated, is based on the contract, and involves the issue of the number of acres sold.

[Ed. Note.—For other cases, see *Vendor and Purchaser*, Cent. Dig. §§ 959-980; Dec. Dig. § 334.\*]

Appeal from Circuit Court, Multnomah County; Earl C. Bronaugh, Judge.

Action by the Sun Dial Ranch against the May Land Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This is an action upon a contract. The cause was tried by the court without the intervention of a jury. From a judgment in favor of plaintiff for \$8,671.93, defendant appeals. On February 7, 1907, negotiations were pending between plaintiff and defendant for the purchase of a certain tract of land owned by the latter in Multnomah county, Or., at the confluence of the Sandy and Columbia rivers, and fronting on the Columbia river, which is navigable at that point. Owing to the topography of the land and the impossibility of determining the number of acres owned by defendant without a survey, plaintiff and defendant entered

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

into an agreement in writing, the substance of which is as follows: "Whereas the May Land Company has agreed to sell, and the Sun Dial Ranch has agreed to purchase, certain lands in Multnomah county, Oregon, at \$55.00 per acre, the acreage to be determined by survey, and whereas the May Land Company, in pursuance of its agreement to sell, has furnished the Sun Dial Ranch with a survey of said land, made by Philo Holbrook, Jr., surveyor, which said survey shows ownership in the May Land Company of 1809.05 acres of land, and whereas the purchasers raise a question as to the ownership in the May Land Company of said number of acres: Now, therefore, in order to expedite the consummation of the contemplated transaction, that being the consideration moving from each party hereto to the other, the parties hereto agree that based upon the amount due under said survey at \$55.00 per acre, the deed to said 1809.05 acres shall be executed by the May Land Company; the cash payment agreed upon be made by the Sun Dial Ranch and the notes and mortgages for unpaid balance in accordance with the agreement executed, with the understanding that, if it shall be hereafter determined as surveyed, said company will refund to the Sun Dial Ranch at the rate of \$55.00 per acre for each acre less than 1809.05 to which it has not title; and if it shall be determined hereafter that said May Land Company is actually the owner of more than said 1809.05 acres, the Sun Dial Ranch will pay and agree to pay for any excess additionally at the rate of \$55.00 per acre. The determination above referred to, to be made within a reasonable time as per agreement hereto attached. [Signed] May Land Company, by E. May, President. Sun Dial Ranch, by H. O. Campbell, President." Thereafter, the parties being unable to agree in regard to the number of acres or the line upon the north of the land to which the survey should be made, plaintiff proceeded to fix and establish the line of ordinary high water of the Columbia river as it claimed the same existed at the time of the conveyance. The survey was made by Mr. R. S. Greenleaf, a civil engineer, and the line established by him, as described in the record by metes and bounds and shown on the maps in evidence, is called the "Greenleaf line." According to his measurements, the tract contained 1,658.08 acres, and, according to the line upon the north of said land as surveyed by Mr. Philo Holbrook, county surveyor of Multnomah county, which is also described in the record and shown on the maps in evidence, the tract contained 1,805.05 acres, making a difference of 146.97 acres, which latter amount plaintiff alleges to lie between the lines of ordinary high water and ordinary low water on the Columbia river, and belongs to the state of Oregon. Therefore the only issue upon the trial was as to the

location of the ordinary high-water mark on the Columbia river.

Upon the main issue the findings of the trial court were as follows:

"That the north boundary line of said tract owned by defendant at the time of said conveyance and intended to be purchased by the plaintiff, and conveyed by defendant, was and is the line of ordinary high water of the Columbia river, and that, in pursuance of said agreement so entered into at the time of said conveyance, plaintiff, by its surveyor, R. S. Greenleaf, proceeded to run, fix, and establish said north boundary line of said tract of land, and said line as so fixed by the said Greenleaf is described as follows, to wit: [Here follows the description of the Greenleaf line and survey.]

"That said line so fixed by said Greenleaf, as last above described, marks the ordinary high-water line of the Columbia river in front of said tract of land, excepting that there are two small parcels of land, aggregating  $8\frac{1}{2}$  acres, which are excluded by said Greenleaf, and which should not have been so excluded, but should be included within the boundaries of the land conveyed by defendant to plaintiff, and that at the time of said conveyance the tract of land so owned and conveyed by defendant contained 1666.58 acres, and no more, and that the space between said last-described line marking said line of ordinary high water and the line fronting on the Columbia river, as surveyed and claimed by the defendant at the date of said conveyances above mentioned, amounts to 138.47 acres, all of which now lies, and at the date of said conveyance lay, between the lines of ordinary high water and ordinary low water on the Columbia river.

"That this court, at the request of the parties herein, and pending the hearing herein, in company with counsel for said respective parties, personally visited said premises on or about the — day of October, 1908, at a time of ordinary low water in the Columbia river, and again about the — day of May, 1909, at the season of the spring freshets in the Columbia river and from the testimony herein, aided by said examination and inspection, the court finds that said line so surveyed by said Greenleaf, and as described in finding No. 4, marks the line of ordinary high-water mark, and the north boundary line of said tract as owned by said defendant at the time of said conveyance, excepting as to the two small parcels containing in the aggregate  $8\frac{1}{2}$  acres, as hereinabove found, and that said 138.47 acres lying north of said lines are covered by the waters of the Columbia river from two to four months of each recurring year and during the growing season of vegetation, and same is barren sand and gravel by reason thereof and wholly wrested from vegetation.

"That said sand bar, consisting of 138.47

acres, lies at an altitude varying from two to nine feet above the low-water mark of the Columbia river fronting thereon. That said sand bar is a permanent bar, consisting, for the most part, of hard, firm sand and gravel, varying but slightly from year to year in its general outline for many years past, but that the surface thereof changes with the recurring periods of overflow by the erosion of the surface and the depositing of sand and gravel thereon by the action of the floods and currents of the Columbia river during the spring and summer rises of said stream.

"That during the period of ordinary low water said sand bar extends considerably further north of the said Holbrook line before reaching the line of ordinary low water, and from a point about where the said Holbrook line runs, out to the ordinary low-water line, there is a marked difference between the character of said bar and the character of that part south of the Holbrook line, said outer portion of said bar being very soft, partaking of the nature of quicksand and mire.

"That immediately south of said Greenleaf line marking said line of ordinary high water the land rises in most places abruptly, forming a bank above which vegetation grows, and the dividing line between said land and sand bar is practically identical with the said Greenleaf line described in finding No. 4, and is apparent and discernible."

Alexander Bernstein, Otto J. Kraemer, and Will R. King (Bernstein & Cohen, on the brief), for appellant. E. E. Coovert (Coovert & Stapleton, on the brief), for respondent.

BEAN, J. (after stating the facts as above). At the conclusion of plaintiff's testimony, defendant moved for a nonsuit, and assigns as error the judgment of the court in overruling the same, contending upon this appeal: (1) That the findings of facts made by the trial court were not supported by any evidence; (2) that the findings of facts do not support the decree.

The Sandy river branches a short distance above its mouth; the western fork thereof forming the Little Sandy river. These, with the Columbia into which they flow, embrace an island of about 447 acres, and several small islands south of the Greenleaf line. For several years there has been a bar, opposite the large island in the Columbia, the area and elevation of which has been increased to a large extent by the alluvion brought down by the Sandy river and augmented by that washed by the waters of the Columbia. This bar is about 1,000 feet across from north to south at the widest part, tapering toward the mouth of the Little Sandy river, and being narrower and of very irregular shape at the outlet of the

Sandy. This bar, with some other small strips, constitute the basis of the controversy in this case. High water, which at times covers the bar and many low lands in the vicinity, is chiefly caused by the rise of the Columbia river, which is some 1,200 to 1,400 miles in length. The large watersheds of this river and its tributaries account for the rise of the water at different seasons of the year. In the regions drained by the Snake river, which is some 1,100 miles in length, and its tributaries flowing from the south, the spring seasons are early. Therefore the melting of the snow and ice, and the early rains, cause a rise in the Columbia which continues for some time, and, when partially abated, is often augmented later in the season by a similar drainage from the north. These conditions lengthen the period of high water in the Columbia, and in this respect this river differs from any other with which we are familiar. Assuming zero as an arbitrary standard fixed as nearly as possible at low-water mark opposite the point in controversy, the elevation of the land between the Holbrook meander line and Greenleaf line varies, commencing at Holbrook line and extending southerly across the widest part of the tract from 3.9 feet above zero to 9.8 feet as shown by the figures on map in evidence. At this place the extreme annual rise of the Columbia is about 22 feet, and the bar is covered with water from 9 to 15 feet every year. It is agreed that the tide does not affect this portion of the river.

The evidence tends to show that this tract, which is referred to in the testimony as a bar, has, since 1882, been nearly the same elevation, except for slight rises and falls. For years steamboats have endeavored to avoid this barrier. Along the Greenleaf line for the greatest part of the distance, there is a bank clearly outlined 10 or 12 feet high with distinct water marks on it, with vegetation above, and sand and gravel below, except for small deposits caused by back water in a few places. This formation could not possibly grow vegetation. The annual recurring spring rises of the Columbia river come over the bar during the months of March or April, and remain until the 1st or 15th of August. There is practically no vegetation on the same because of the nature of the soil, and because vegetation could not live under water. The bar is changing continually, and vegetation, if it could be started, would either be covered with fresh sand or washed away as the current might affect it.

The various estimates of the time the bar is covered with water are from four weeks to six months, and perhaps eight months of the year. Mr. R. S. Greenleaf, who surveyed the tract in 1907, indicates that along his line of survey the bank on one island is nearly vertical, on another, oval; that of the

large island gently sloping, being 50 or 60 feet horizontally, the line running with the vegetation at an elevation of about 9 feet. The large island is at an elevation of 25 feet above zero. There is a fall of six feet from the foot of the bank to the water's edge. A rise of five feet of water would cover the north half of the bar, and four feet more would cover the balance. There is a movement of gravel on the bar every year, and out beyond the four-foot line it is mostly quicksand which is unstable like the water itself and changes with every flood. Other witnesses state that the bar is used for pasture; that it has a willow growth, and is like the land up the river for three or four miles; that there is more vegetation on the island than on the bar; that it is not affected by the waters of the Sandy river, and estimate that other bottom land near is lower. Mr. Philo Holbrook, county surveyor, states that his line is one foot above water and in some places higher; that there are about 75 acres of land not taken in by his survey, which was made January 18, 1907; that he estimates his line to be 6 or 7 feet above zero. The trial judge visited the locus in quo, and made an investigation in October, 1908, before taking the testimony, and again in May, 1909. Elaborate maps showing the location and elevation of the premises and portions of the Columbia and Sandy rivers were introduced in evidence.

Counsel for plaintiff and defendant are in accord in their statements that the ordinary high-water mark on the Columbia river is the line of demarcation between the land which should be measured and the bed of the river. We need only to state the rules of law, as enunciated by this court and others, as the controversy in this case is largely as to the application of principles already adjudicated.

[1] Mr. Farnham, in his valuable work on Waters and Water Rights, digests the definitions of high-water mark given in several cases as follows: "With reference to rivers which are not affected by the tide, the meaning of the term is somewhat more difficult to determine. But the definition which best meets all requirements of the case and which has in effect been adopted by the weight of authority is that 'high-water mark' is the point below which the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil a character distinct from that of the banks with respect to vegetation as well as with respect to the soil itself. This definition applies both to navigable and to nonnavigable streams." 2 Farnham's Waters and Water Rights, § 417. Mr. Justice Thayer in *Johnson v. Knott*, 13 Or. 308, 310, 10 Pac. 418, 420, said: "The only matter to be decided in such a case is the location of the line indicating high-water mark, and that

involves a discrimination between the upland and the bank proper of the stream. The banks of a river serve, of course, to hold its waters within its bed, and the point to which the water usually rises, in an ordinary season of high water, I would regard as high-water mark, and that it constituted the true meander line. This line is easily observed by an examination of the banks of a river long after the water subsides, and an intelligent jury, when permitted to view the locality, will have no difficulty in detecting it." This line of high-water mark as a boundary between a riparian owner and the public should be determined by ascertaining where the presence and action of the water are so common and usual and so long continued in all ordinary years as to mark upon the soil of the bed a character distinct from that of the banks in respect to vegetation, as well as respects the nature of the soil itself. *Carpenter v. Board of Com'rs*, 58 Minn. 513, 522, 58 N. W. 295, 297. Mr. Justice Curtis in the case of *Howard v. Ingersoll*, 13 How. 426, 427, 14 L. Ed. 189, states: "That the banks of a river are those elevations of land which confine the waters when they rise out of the bed; and the bed is that soil so usually covered by water as to be distinguishable from the banks, by the character of the soil, or vegetation, or both, produced by the common presence and action of flowing water. But neither the line of ordinary high-water mark, nor of ordinary low-water mark, nor of a middle stage of water, can be assumed as the line dividing the bed from the banks. This line is to be found by examining the bed and banks, and ascertaining where the presence and action of water are so common and usual, and so long continued in all ordinary years, as to mark upon the soil of the bed a character distinct from that of the banks, in respect to vegetation, as well as in respect to the nature of the soil itself. Whether this line between the bed and the banks will be found above or below or at a middle stage of water must depend on the character of the stream. The height of a stream, during much the larger part of the year, may be above or below a middle point between this highest and least flow. Something must depend also upon the rapidity of the stream and other circumstances. But in all cases the bed of a river is a natural object, and is to be sought for, not merely by the application of any abstract rules, but as other natural objects are sought for and found, by the distinctive appearances they present; the banks being fast land, on which vegetation, appropriate to such land in the particular locality, grows wherever the bank is not too steep to permit such growth, and the bed being soil of a different character and having no vegetation, or only such as exists when commonly submerged in water." "A fresh water river, like a tidal river, is com-

posed of the alveus, or bed, and the water; but it has banks instead of shores. The banks are the elevations of land which confine the waters in their natural channel when they rise the highest, and do not overflow the banks." Gould on Waters, § 45. In the case of Land in New Orleans, Called the Batture, 17 Amer. State Papers, p. 91, there is deduced from the many authorities noted the conclusion said to be most rigorously exact, "that all is river, or river's bed, which is contained between the two banks, and the high-water line on them; and all is bank which embraces the waters in their ordinary full tide." This most valuable state paper contains further information to the effect that in the Roman or civil law the channel or hollow containing the river was distinguished as the bed and the bank, the river itself being water; thus alveus, aqua et ripa, the bed, water, and bank. All above high-water mark the Roman law considered as "ripa," bank, and all below as "alveus," or bed.

[2] This distinction appears in the English law, with this addition, that the bank or margin of the bed of the river, which lies between the high and low water marks, is called the "beach" or "shore." There is a difference between the banks of a river and the shores of the sea. The river bank is not subjacent to the river, as are the shores of the sea, which are daily occupied by its accesses in the tide flow. In our rivers, the beach or shore is the actual, as well as the nominal, bed of the river. When the river is at its full flow, be that by the daily flow of the tide, or by the natural increase of its waters, occasioned by rains, floods, and the like, filling its natural bed to its highest reach of flow, it thus marks its high-water, while its lessened range of flow by summer heats shows its low-water, mark. See Houck on Rivers, § 7.

[3] The bank may be rightly defined as that line or ridge of earth which contains the river, holding the natural direction of its course. But if at any time, either from rains or other cause, it has overflowed for a time that line, it does not by such overflow change its banks, for the reason that the overflow is for a time only, while the natural flow is more or less constant. Houck on Rivers, § 8.

[4] In 1 Words & Phrases, p. 99, we find this definition: "Accretion is the imperceptible accumulation of land by natural causes, and the owner of the property to which the addition is made becomes the owner of such ground, as where land is bounded by a stream of water which changes its course gradually by alluvial formation, the owner of the land still holds the same boundary, including the accumulated soil"—citing *Inhabitants of New Orleans v. U. S.*, 10 Pet. 662, 717, 9 L. Ed. 573.

[5] It is the law, as settled in this state,

that, where a stream is intended to be meandered by public surveys, the stream, and not the actual meander line as run on the ground, is the true boundary of the riparian owner. *Johnson v. Tomlinson*, 41 Or. 198, 200, 68 Pac. 406, citing *Minto v. Delaney*, 7 Or. 337; *Weiss v. Oregon Iron & Steel Co.*, 18 Or. 496, 11 Pac. 255; *French Live Stock Co. v. Springer*, 35 Or. 812, 58 Pac. 102. See, also, *Bowlby v. Shively*, 22 Or. 410, 30 Pac. 154, and *Taylor Sands Fishing Co. v. State Land Board*, 56 Or. 157, 161, 108 Pac. 126, wherein Mr. Chief Justice Moore defines high-water mark and quotes with approval from the case of *Fowler v. Wood*, 73 Kan. 511, 549, 85 Pac. 763, 776, 6 L. R. A. (N. S.) 162, 117 Am. St. Rep. 534: "It is not necessary to give a formation on the bed of a river a specific name in order that proprietary rights may attach to it. In many states lands totally or partially submerged are made the subject of grant by the sovereign in order that they may be reclaimed for useful purposes. Islands that arise from the beds of streams usually first present themselves as bars. \* \* \* Before it will support vegetation of any kind a bar may become valuable for fishing, for hunting, as a shooting park, for the harvest of ice, for pumping sand, and for many other well-recognized objects of human interest and industry. If further deposits of alluvion upon the borders would make it more valuable, no reason is apparent why the law of accretion should not apply."

[6] It is contended by counsel for defendant that the court was controlled solely by the question of vegetation in ascertaining the high-water mark or the line of demarcation between the land sold. But from the testimony as well as from the findings themselves we are unable to agree with counsel as to this claim. From the evidence, a portion of which has been set forth, the trial court evidently took into consideration, and in effect found: (1) That this bar is under water from two to four months; (2) that it is barren sand and gravel by reason thereof; (3) that it is wholly devoid of vegetation; (4) that it is from two to nine feet above low-water mark; (5) that it is a permanent bar consisting for the most part of hard, firm sand and gravel, varying slightly from year to year in its general outline, but the surface thereof changes with the recurring periods of overflow, by the erosion of the surface and the depositing of the sand, by the action of the floods and currents; (6) that along the line of high-water mark a bank rises abruptly in most places. The trial court also found that the dividing line or high-water mark is apparent and discernible, and considered the ordinary high-water mark on the bank, and the ordinary low-water mark, the depth of the water, and the rapidity of the stream. The trial judge had a good opportunity to apply the rule above quoted in *Howard v.*

Ingersoll, and to take into consideration all the circumstances and all the natural objects in seeking for and finding this line by the distinct appearances presented on the bank; and to examine the record which the river itself had made, according to the rule indicated in the case of *Houghton v. C., D. & M. R. Co.*, 47 Iowa, 370, 373. In order to ascertain this dividing line, it was necessary to take into consideration all the circumstances and natural conditions, and we think, from the evidence and the findings of fact made by the trial court, that this was done.

[7] The action was tried by the court without a jury, and we can only examine the testimony to ascertain whether or not there was any competent evidence tending to support the findings made by the trial judge. *Salem Traction Co. v. Anson*, 41 Or. 562, 570, 69 Pac. 675; *Glenn v. Dorsheimer*, 51 Fed. 404, 2 C. C. A. 309. The trial court reached the conclusion that the bar in question was below the high-water mark, and that it was not raised, by the deposit of alluvion, to the dignity of being an accretion to the mainland. We think there was competent evidence to support the findings, and that they should not be disturbed.

[8] Were we to try the case *de novo*, we should be compelled to remember that the trial court had a peculiar advantage in inspecting the premises at two different seasons of the year, and, as held in *Montgomery v. Shaver*, 40 Or. 244, 66 Pac. 923, this would lend a peculiar weight to the findings. The question asked in the instructions to the jury in *Paine Lumber Co. v. United States (C. C.)* 55 Fed. 854, 865, as follows: "Was it that character of land which by action of the water so permanently remaining upon it, when it reaches its high-water mark, would be deprived of its usefulness as land, and become simply what we all know to be the bed of a river?"—was answered by the trial court in the case at bar to the effect that the tract was so deprived of its usefulness as land, and was a part of the bed of the river. There was no error in overruling the motion for a nonsuit; and we cannot say that the lower court abused its discretion in denying the application for a new trial.

[9] It is suggested by counsel for defendant that, before plaintiff can recover on the warranty in its deed, there must be an eviction from the premises by the true owner, or the title must at least be brought in question by the true owner. This action, however, is based upon a contract set forth above, by which the parties stipulate as to the conditions upon which the defendant will make payment to plaintiff, and the latter asserts that these conditions have been fulfilled. The primary question which was determined by the trial court, according to these stipulations, was the number of acres

of land conveyed by defendant to plaintiff. We think the complaint states a cause of action.

It follows from these considerations that the judgment of the lower court should be affirmed, and it is ordered.

# STATE ex rel. SHERIDAN et al. v. MILLIS et al.

(Supreme Court of Oregon. Jan. 2, 1912.)

## 1. QUO WARRANTO (§ 83\*)—POWERS OF PROSECUTING ATTORNEY.

While all of the powers exercised by the Attorney General at common law still exist, the Legislature may distribute them among various officials, and the creation of the office of the Attorney General, after the enactment in 1862 of what is now L. O. L. §§ 363-377, which authorizes prosecuting attorneys to begin those actions provided for in the place of quo warranto, did not deprive the prosecuting attorneys of those powers, even though such powers at common law belong to the Attorney General.

[Ed. Note.—For other cases, see *Quo Warranto*, Dec. Dig. § 83.\*]

## 2. QUO WARRANTO (§ 83\*)—PROCEEDINGS—CONSENT OF STATE OFFICERS—PROSECUTING ATTORNEYS—STATUTES—"COMMENCE"—"PROSECUTE."

L. O. L. §§ 363-377, abolished the writ of quo warranto, and provided that the remedies obtainable under that proceeding might be obtained by an action at law in the name of the state by the prosecuting attorney. Subsequently, by L. O. L. § 2666, the office of Attorney General was created, and section 2670 makes it his duty to appear, prosecute, and defend for the state all suits or proceedings in the Supreme Court in which the state is a party or interested, to appear, prosecute, or defend any action in any court in which the state is a party or interested, and, when requested, to consult and advise with the district attorneys. *Held*, that it being the duty of the courts to reconcile, if possible, two apparently conflicting statutes, so that both may stand, the enactment of these later statutes did not deprive prosecuting attorneys of the exclusive right to commence those actions given in place of quo warranto; the word "commence" having rather a different significance from "prosecute," which may mean to prosecute an action to completion after it has been commenced by another.

[Ed. Note.—For other cases, see *Quo Warranto*, Dec. Dig. § 83.\*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1281; vol. 6, pp. 5734, 5735.]

## 3. QUO WARRANTO (§ 52\*)—PROCEEDINGS—DEMURRER—"JURISDICTION."

Where the action provided for in place of quo warranto was erroneously begun by the Attorney General, the defect could be taken advantage of by demurrer, for, while the court had jurisdiction over the defendants by their appearance, jurisdiction involves, not only authority over the person of defendant but authority over the subject matter, and the complaint showed that the action had not been commenced according to law.

[Ed. Note.—For other cases, see *Quo Warranto*, Dec. Dig. § 52.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3876-3885; vol. 8, pp. 7697, 7698.]

Appeal from Circuit Court, Coos County; L. T. Harris, Judge.

Action in the nature of quo warranto by the State, on the relation of T. R. Sheridan and others, against C. J. Millis and others. From a judgment sustaining a demurrer, relators appeal. Affirmed.

This action is brought under section 366, L. O. L. T. R. Sheridan and three others as relators, in the name of the state of Oregon, filed an amended complaint in the circuit court for Coos county, the opening paragraph of which is as follows: "The plaintiffs above named come by A. M. Crawford, Attorney General of the state of Oregon, who prosecutes this action on behalf of the state, and by E. B. Watson, attorney for plaintiffs, and file this amended complaint, and complain of the defendants, and for their cause of action allege the following facts." The substance of the pleading is that the relators, together with three others, were the duly elected, qualified, and acting directors of the Coos Bay, Roseburg & Eastern Railroad & Navigation Company, a private corporation formed for the purpose of operating a railroad between Marshfield and Myrtle Point. They charge that the defendants have unlawfully intruded into the office of director of said corporation and excluded the relators therefrom, and demand judgment that the defendants have no right or title to the office of director of the corporation, that they be excluded from participation in the directorate, and that the relators be declared to be such directors. The defendants demurred to this complaint because, among other things, first, "the above-entitled court has no jurisdiction of the person of the defendant or of the subject of this action \* \* \* for that it does not appear from said amended complaint that said action has been commenced and prosecuted by the prosecuting attorney of the Third prosecuting attorney district of the state of Oregon, the district where said cause is triable, or that the original or amended complaint has been signed by him; and, \* \* \* third, that said amended complaint does not state facts sufficient to constitute a cause of action."

A. M. Crawford and E. B. Watson, for appellants. Wm. D. Fenton and James E. Fenton (J. E. Foulds and A. J. Sherwood, on the brief), for respondents.

BURNETT, J. (after stating the facts as above). [1, 2] The substantial question presented for our consideration is whether a district attorney or the Attorney General shall commence an action of this kind. Chapter 5, tit. 5, L. O. L. §§ 363-377, both inclusive, was enacted in 1862. Section 363 says that "the writ of scire facias, the writ of quo warranto, and proceedings by information in the nature of quo warranto are abolished, and the remedies heretofore obtainable under those forms may be obtained by action at law in the mode prescribed in this chapter." After sections 364 and 365,

relating to actions against corporations either by direction of the Governor or by leave of court, section 366 appears as follows: "An action at law may be maintained in the name of the state, upon the information of the prosecuting attorney, or upon the relation of a private party against the person offending, in the following cases: (1) When any person shall usurp, intrude into or unlawfully hold, or exercise any public office, civil or military, or any franchise within this state, or any office in a corporation either public or private, created or formed by or under the authority of this state. \* \* \*" Section 368 of the chapter mentioned states that: "The actions provided for in this chapter shall be commenced and prosecuted by the prosecuting attorney of the district where the same are triable. \* \* \*" Section 369 reads thus: "When directed by the Governor, as prescribed in section 364, it shall be the duty of the prosecuting attorney to commence the action therein provided for accordingly. In all other actions provided for in this chapter it shall be the duty of the proper prosecuting attorney to commence such action, upon leave given where leave is required, in every case of public interest, whenever he has reason to believe that a cause of action exists and can be proven, and also for like reasons in every case of private interest only in which satisfactory security is given to the state to indemnify it against the costs and expenses that may be incurred thereby." In 1891 the legislative assembly enacted what is now section 2666, L. O. L. "There is hereby created the office of Attorney General of the state of Oregon." In 1901 that body prescribed the duties of the Attorney General in what is now section 2670, L. O. L. So far as litigation is concerned, the provisions of that section are here given: "The Attorney General, at the request of the Governor, Secretary of State, State Treasurer, superintendent of public instruction or any of the said parties, shall, upon the breach thereof, prosecute any official bond or contract in which the state is interested. \* \* \* He shall appear, prosecute or defend for the state all suits, causes, or proceedings in the Supreme Court in which the state is a party or interested; and he shall, when requested by any state board, or board of trustees, or by the Governor or Secretary of State or State Treasurer appear, prosecute, or defend any action, suit, matter, cause, or proceeding in any court in which the state is a party or interested; and he shall, when requested, consult and advise with the district attorneys in all matters pertaining to their official duties." It is the relators' contention, in effect, that although the district attorney, before the creation of the office of Attorney General, had authority, and it was his duty, to commence and prosecute the kind of actions in question, yet, when the Legislature in 1891 creat-



ed the office of Attorney General, that officer at once, by virtue of his office, was vested with exclusive power in such matters. They argue that the Attorney General has all the powers belonging to his office at common law, and cite many authorities to that effect. A careful examination, however, of all the citations shows merely that the powers exercised by an Attorney General at common law are preserved in some form at the present day. There is no efficacy in the mere words "Attorney General" to overcome the direct and express provisions of the statute conferring the power in question upon another officer. In the case of the *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 307, 8 Sup. Ct. 850, 868, 31 L. Ed. 747, Justice Field very aptly says: "I do not recognize the doctrine that the Attorney General takes any power by virtue of his office except what the Constitution and the laws confer. The powers of the officers of England are not vested in the executive officers of the United States government simply because they are called by similar names. It is the theory, and, I may add, the glory, of our institutions that they are founded upon law, and that no one can exercise any authority over the rights and interests of others except pursuant to and in the manner authorized by law."

To sustain the contention of the relators would require us to hold that the act creating the office of Attorney General repeals by implication the provisions of the chapter just noted requiring actions of this kind to be commenced and prosecuted by the district attorney. In the language of Justice McBride in the *State ex rel. v. Malheur County Court*, 54 Or. 255, 101 Pac. 907, 103 Pac. 446, "a repeal by implication only arises when both statutes cannot be reconciled with each other by any reasonable interpretation, or where there is a clear intent shown by the terms of the latter act that it shall supersede the other. \* \* \* Repeals by implication are not favored, and repugnancy between two statutes should be clear before a court is justified in holding that a later statute impliedly repeals an earlier one." It is our duty, therefore, if possible, to reconcile these two statutes so that both may stand. Bearing in mind, then, that under the requirements of section 368, L. O. L., in the very words themselves, it is stated that the actions of the kind in question shall be commenced and prosecuted by the prosecuting attorney of the district where the same are triable, and that under section 369, L. O. L., it is the duty of the proper prosecuting attorney to commence such action whenever he has reason to believe that a cause of action exists and can be proved, we turn to the provisions of section 2670, describing the duties of the Attorney General. In respect to actions, his functions are summed up in the injunction that he shall appear, prosecute,

or defend in an action in which the state is a party or interested. The word "commence" in respect to actions is not used in that section, and his only authority to begin an action is found in the words "appear" or "prosecute." Construing together, for the purposes of this case, the sections describing the duties of the two officers, we find that the Attorney General may with all consistency to the duties of the district attorney appear or prosecute or defend an action. In common practice it often happens that an attorney may appear in a case and prosecute it to completion long after it has been commenced by some other attorney. While, in its broadest sense, the term "prosecute" might include the commencement of an action, yet, when, as in this case, the institution of the action is expressly intrusted to another officer, the Attorney General may well prosecute a case that has been inaugurated by the district attorney, and is not necessarily empowered to begin the action himself. That it was not the intention of the legislative assembly to abridge the powers or circumscribe the duties of the district attorneys in respect to the Attorney General is indicated by the clause in section 2670, L. O. L., requiring the Attorney General to consult and advise with the district attorneys in all matters pertaining to their official duties. The idea of supersession is not couched in such language. All those powers exercised by the Attorney General at common law exist at the present day, yet it was competent for the legislative assembly to distribute them among different officers to be exercised. This we think the legislative assembly has done in the matter under consideration by giving to the district attorney the authority to commence actions of the kind in question as well as the performance of various other duties, such as signing an indictment, appearing before a grand jury, and the like. We conclude, therefore, that the district attorney, and not the Attorney General, was the only person having authority to commence the action in question.

[3] It remains to be determined whether the question was properly raised by demurrer to the amended complaint. The earliest case on this point is the case of *State v. Chadwick and Brown*, 10 Or. 423. In that suit the state sought to require the defendants as Secretary of State and State Treasurer to account for and pay over money claimed to have been received by them, and not accounted for. The complaint was signed by, "J. M. Thompson, Attorney for the Plaintiff," he not being a district attorney, but only a private practitioner. The defendants moved to strike the complaint from the files, for the reasons that it was not signed by the district attorney, that the suit was brought without authority, and that the complaint was not properly verified. The court overruled the motion, and they put in a demurrer to the complaint

on the same grounds, which was also overruled. They then answered to the merits. On appeal this court declined to determine whether or not the proper district attorney alone can appear for and represent the state in judicial proceedings, and held that the question was not presented by the record. It said, however, that "the objections made by appellant in the court below and which were passed upon there were that the complaint was not signed by the proper district attorney and that the suit was unauthorized, but these objections were preliminary in their nature and were waived by filing the answer." In the present case, however, this question is squarely presented by the demurrer, and the condition of waiver does not appear. This will distinguish it from the case of *State v. Chadwick*.

In the later case of *State ex rel. v. Cook*, 39 Or. 377, 65 Pac. 89, the question was more directly presented. That was a case of quo warranto to determine the title to the office of road supervisor. The complaint was signed by private counsel only; but, before the case was brought on for hearing, the district attorney had his appearance noted on the journal. After reviewing the authorities, Justice Wolverton laid down the rule in these terms: "But unless there is some showing either by appropriate allegations or by the official signature indicating that the act has been commenced and is being prosecuted by the state officer, the complaint cannot be held sufficient." In *People v. Oakland Water Front Co.*, 118 Cal. 234, 50 Pac. 305, Justice Beatty held that the proper practice would have been followed if the defendant had moved in the district court to dismiss the information upon the ground, among others, that the Attorney General had no authority or power to institute or prosecute proceedings in the name or on behalf of the people of the state. Although the question was not raised in this way in the district court, the Supreme Court held it to be a jurisdictional question, and proceeded to determine the matter in the Supreme Court. True enough, the court in that case held that, under the California practice, the Attorney General had authority to commence the action, but the principle applicable in this case is that the question of his authority is one of jurisdiction, which can be urged by demurrer as in the case at bar.

The matter of jurisdiction involves two elements: First, jurisdiction over the person of the defendant; and, second, jurisdiction over the subject-matter or the right to try the particular case presented to the court. Here by their general appearance the defendants have submitted their persons to the jurisdiction of the court, but the court has no power to try the case presented; it being defective for want of proper authority of the

officer undertaking to commence it. In other words, the condition and situation disclosed by the complaint are not those in which the power of the court may be called into action. The rights of a citizen may not be called in question except in the manner provided by law. Many cases might be cited illustrative of the principle that it must appear in some way in the initial pleading that a case of the kind in question has been commenced by the authority of the proper officer, but these two will suffice. *Mowry v. Whitney*, 14 Wall. 434, 20 L. Ed. 858; *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93. The relators seem to concede this principle by enlisting the services of the Attorney General, but the question here is whether he was the proper officer. If there were no other provisions in the statute except those of section 2670, L. O. L., describing the duties of the Attorney General, it would be possibly correct to say that he could commence the action by virtue of his common-law powers; but the Legislature, as we have already shown, has seen fit to invest the district attorney with the common-law power relating to the question involved. Hence we decide that the action is not properly commenced, and that the demurrer was rightly sustained.

The decision of the court below is affirmed.

#### MATTHEWS v. MATTHEWS.

(Supreme Court of Oregon. Jan. 9, 1912.)

##### 1. DIVORCE (§ 812\*)—CUSTODY OF CHILDREN OF PARTIES—DISCRETION OF COURT.

Under L. O. L. § 513, empowering the court granting a divorce, to provide for the care of minor children of the marriage as it may deem just, in view of their age and sex, the exercise of the court's discretion in granting a husband a divorce on the ground of the wife's cruel treatment, and finding that the wife is a woman of good moral character, who has been guilty of indiscreet conduct which age and experience will correct, and in awarding to the wife a girl four years old, will not be disturbed on appeal.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 806; Dec. Dig. § 312.\*]

##### 2. APPEAL AND ERROR (§ 894\*)—REVIEW—TRIAL DE NOVO—RECORD.

Where, in a divorce case, the evidence is not brought up on appeal, the court cannot review that part of the decree awarding custody of a four year old daughter to the wife, or the finding that, though she was guilty of cruelty entitling the husband to divorce, she was only indiscreet, and was of good moral character and proper to have the custody of the daughter.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3637-3644; Dec. Dig. § 894.\*]

##### 3. DIVORCE (§ 303\*)—CUSTODY OF MINOR CHILDREN—JURISDICTION OF COURT.

A provision in a decree of divorce which awards the custody of a minor child to one of the parties is merely tentative, and the other party may apply for a modification of the pro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

vision on a showing that it is not for the best interests of the child that it be permitted to remain in such custody.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 793-795; Dec. Dig. § 303.\*]

Appeal from Circuit Court, Multnomah County; C. U. Gantenbein and John B. Cleland, Judges.

Suit by M. E. Matthews against L. F. Matthews. From a decree granting insufficient relief to defendant, filing a cross-complaint, he appeals. Affirmed.

This is a suit for divorce; the alleged grounds being cruel and inhuman treatment. Defendant answered, denying the allegations of the complaint, and by cross-complaint claimed a divorce from plaintiff: (1) On the ground of adultery with one Monroe Purvine. (2) On the ground of cruel and inhuman treatment. The court denied plaintiff's prayer for a divorce, and decreed one to defendant upon the second ground set up in the cross-complaint, but gave the custody of the minor child to plaintiff.

The findings material to this appeal are as follows:

"(2) That plaintiff did not commit adultery with Monroe Purvine at his house in Polk county, Oregon, between the 27th day of December, 1909, and the 8th day of April, 1910, or at any other time."

"(3) That the defendant treated plaintiff in a kind and affectionate manner during all their married life, but the plaintiff treated defendant in a cruel and inhuman manner and in a cold and indifferent manner, and became of a quarrelsome and scolding disposition, and frequently complained and quarreled with defendant about matters of no moment or importance, and associated with one Monroe Purvine, and allowed said Purvine to pay attention to her, against the will and without the consent of the defendant; and plaintiff expressed by words and actions her dislike of the defendant, and allowed said Purvine to treat her in the most affectionate manner, and to embrace her and kiss her; and that plaintiff told defendant that she thought more of said Purvine than she did of defendant; and that the defendant attempted to induce plaintiff to cease her attentions to and associations with the said Purvine, but the plaintiff refused so to do, and in the hearing of defendant plaintiff asked the said Purvine if he would wait for her one year; and that said treatment of the defendant by the plaintiff was cruel and inhuman, and caused defendant great mental and physical suffering and anguish, and rendered defendant's life burdensome, so that defendant could not endure said treatment by the plaintiff any longer."

"(5) That, aside from the cruel treatment of the defendant by the plaintiff, and plaintiff's indiscretions in her conduct with said

Purvine, plaintiff is not of a bad or immoral character, but is of a good and moral character, and is a proper person and competent and qualified to have the care, custody, and control of said minor child, Lucille Matthews, and plaintiff has a good home with her mother, Mrs. Gilmore, at St. Johns, in the county of Multnomah, Or., where she is able to care for, maintain, and educate the said minor child in the manner befitting its and her station in life."

Defendant appeals from that portion of the decree giving the custody of the child to plaintiff. The evidence was not brought up; the defendant relying wholly upon the transcript to reverse the decree.

Thos. Brown (Carson & Brown, on the brief), for appellant. John A. Jeffrey (Chas. E. Lenon, on the brief), for respondent.

McBRIDE, J. (after stating the facts as above). [1] There is no inflexible rule which controls the discretion of the court in providing for the custody of a minor child in cases of this character. Subdivision 1, § 513, L. O. L., provides that the court shall have power to further decree "for the future care and custody of the minor children of the marriage, as it may deem just and proper, having due regard to the age and sex of such children, and unless otherwise manifestly improper, giving the preference to the party not in fault."

There have been few appeals to this court from adjudications in such cases. Three are cited by counsel for appellant, and these we will now consider.

In Jackson v. Jackson, 8 Or. 402, the Supreme Court had the testimony before it, upon which it decided that the mother was not a woman of good moral character, and that the father was a suitable person to have the custody of the child. In this case the court below had given the custody of the infant to the maternal grandfather, and not to the mother. In respect to this part of the decree, the court say: "This, however, is virtually placing it under her control, as she also resides with him. As between the father and grandfather of a child, the former certainly has a better right to its care and custody, unless he is manifestly an improper person to take charge of it, which does not appear to be so in this case."

In Lambert v. Lambert, 16 Or. 485, 19 Pac. 459, the father of the minor obtained the divorce, and the court gave the custody of the child to the mother. The evidence was before the court on appeal, and was considered by them, and upon that evidence they gave the custody of the child, not to the father, but to J. H. Lambert, the grandfather. The court, after considering the evidence, say: "The testimony shows that the appellant is engaged in business, and much

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

better able to support the child than the respondent, and its age and sex favor his being given such preference. We are of the opinion, in the absence of a finding and proof, that it would have been improper to award the care and custody of the child to the appellant; the circuit court was not justified in giving the respondent the preference in that regard." There seems to be a hiatus between the premise laid down by the court, namely, that the father was entitled to the custody of the minor, and the final conclusion reached, that the custody should be given to the grandfather. The fact seems to be that the court did what courts usually do in these cases—gave the custody of the child to the person most likely to look after its welfare. It is true that the court incidentally mentions the fact that no finding had been made that the father was an improper person to be intrusted with the care of the infant, but, as we shall presently show, such finding would have had no controlling influence, if it had been made.

*Barnes v. Long*, 54 Or. 548, 104 Pac. 296, 25 L. R. A. (N. S.) 172, was a habeas corpus proceeding, brought by the father of a minor against its maternal grandmother. The mother had been given the custody of the child in divorce proceedings, and subsequently died. The grandmother, without any order of the court, attempted to retain its custody as against the father. The court held that, in the absence of any showing that the father was an improper person to care for the child, he was entitled to its custody. The case does not seem to be in point here.

If we take the findings here as importing absolute verity, it appears that the plaintiff is not an adulteress, and that she is a woman of good moral character, who has been guilty of certain indiscreet conduct which age and experience will, no doubt, correct. The trial judge had the parties before him and heard the testimony, and, in the absence of these, we must conclude that he found correctly. If defendant had desired an affirmative finding as to his qualifications to care for the child, he, no doubt, could have obtained it by a request to that effect. It appears that the child is a little girl under four years of age, and the court, no doubt, concluded, and perhaps correctly, that she would, for the present, be better off in the care of her mother than anywhere else, and we are not disposed to reverse his decree.

[2] In addition to what has already been said, we do not feel that, as a matter of law, we have any jurisdiction to pass on the matter on this appeal. Suits in equity are tried *de novo* in this court. While the findings of the lower court in an equity case may be, to some extent, advisory, in cases where the testimony is conflicting, and where the circuit judge had an opportunity of hearing and seeing the witnesses and thereby judging of their credibility; yet, when brought here on

appeal, unaccompanied by the testimony, they present nothing from which this court can find any fact or base any conclusion of law. Upon appeal in such cases, this court must make its own findings, and this it cannot do in the absence of testimony. The reason for this is plain. A court may make a wrong finding, or one not justified by the testimony, and yet render a correct and righteous decree. In this case the court found that the plaintiff was not immoral, but that she had been indiscreet. It might be that with the testimony before us we would conclude that she was both or neither. We are not concerned with the findings of the lower court, but with the facts produced before it on the trial, and these are not before us.

Following this view, it has been many times held by this court, that an appeal, which brings up only the decree and findings of the lower court, presents only one question for review here, namely, the sufficiency of the pleadings.

*Howe v. Patterson*, 5 Or. 353, is a case where the transcript contained only the pleadings and the decree and findings of fact, without any evidence accompanying it. This court, in affirming the decree of the lower court, say: "The Civil Code (section 533) provides that 'upon an appeal from a judgment, the same shall only be reviewed as to questions of law appearing upon the transcript; but upon an appeal from a decree given in any court, the suit shall be tried anew upon the transcript and evidence accompanying it.' This evidently means that it shall be tried over again on the facts, as well as the law, and this cannot be done in the absence of the testimony. \* \* \*

It is insisted, by appellant's counsel that, the judge, on the hearing of this cause in the court below, having found certain conclusions of fact, and having inserted them in his decree, they are conclusive upon the parties on appeal. To this proposition we cannot assent. An appeal from a judgment, in an action at law, as provided for in our Code, is in the nature of a writ of error at common law, because it expressly provides that 'a judgment can only be reviewed as to questions of law appearing upon the transcript.' Thus it will be seen that on appeals in actions at law issues of fact cannot be reviewed by this court. But, as it is provided that, on an appeal from a decree in a suit in equity, 'the same shall be tried anew upon the transcript and evidence,' it is obvious that where testimony was taken in the court below it must be brought here, so this court may try the cause anew, as well upon the facts as upon the law."

In *Wyatt v. Wyatt*, 31 Or. 531, 49 Pac. 855, the case of *Howe v. Patterson* is quoted and expressly approved; Moore, C. J., saying: "It would be impossible to modify the findings of fact without having before us

the evidence upon which they are predicated, or to correct conclusions of law not properly deducible therefrom. \* \* \* This being so, the only question before us for consideration is, Does the complaint state facts sufficient to support the decree?" See, also, *Morrison's Estate*, 48 Or. 612, 87 Pac. 1043.

[3] In many instances, these orders are merely tentative, and in this case, if it should transpire that plaintiff has proved unfaithful to the trust committed to her, or that her conduct is such that it is not for the best interest of the child to permit her to longer retain its custody, defendant has always an adequate remedy by applying to the court for a modification of this portion of its decree.

For the reasons heretofore assigned, the decree of the circuit court will be affirmed.

### JOHNSON v. WHITE et al.

(Supreme Court of Oregon. Jan. 9, 1912.)

#### 1. MORTGAGES (§ 427\*)—FORECLOSURE—PARTIES—OWNER OF EQUITY OF REDEMPTION.

The owner of the equity of redemption is a necessary party to an action to foreclose a mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1272-1287; Dec. Dig. § 427.\*]

#### 2. MORTGAGES (§ 434\*)—FORECLOSURE—PARTIES.

A grantee of the mortgaged premises after the execution of the mortgage was properly made a defendant in foreclosure proceedings.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1272-1287; Dec. Dig. § 434.\*]

#### 3. PARTIES (§ 96\*)—MISJOINDER—ASKING AFFIRMATIVE RELIEF.

Any impropriety in joining one as a defendant in a mortgage foreclosure proceeding was waived by his answer, asking for affirmative relief.

[Ed. Note.—For other cases, see *Parties*, Cent. Dig. §§ 167-177; Dec. Dig. § 96.\*]

#### 4. MORTGAGES (§ 454\*)—FORECLOSURE—DEFENSES.

The answer, in proceedings to foreclose a mortgage, executed July 3, 1904, alleged that on a date after the execution of the mortgage the sheriff sold the mortgaged premises to defendant for delinquent taxes assessed for the year 1904, and executed a tax deed to him, which was duly recorded, and that defendant is the fee-simple owner of the land. *Held*, that the answer merely set up a claim for taxes subsequent to the date of the mortgage, and did not allege a title paramount to the mortgagor, making inapplicable a contention that in foreclosure the court could not determine an alleged title paramount to the mortgagor's title.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1319-1328; Dec. Dig. § 454.\*]

#### 5. TAXATION (§ 788\*)—TAX DEED—EVIDENCE.

While B. & C. Comp. § 3127, makes a tax deed prima facie evidence of the regularity of the tax proceedings, including the sale, such prima facie case may be overcome by proof.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1559-1569; Dec. Dig. § 788.\*]

#### 6. TAXATION (§ 734\*)—TAX SALE—RETURN OF SALE.

Under B. & C. Comp. § 3118, providing that the warrant for collection of delinquent taxes must be executed and returned as an execution against property, a tax deed was void, where it appeared that an unsigned memorandum of sale was made in the sheriff's office, which merely recited the sale to defendant of 80 acres in the section described, and the amount received.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1470-1473; Dec. Dig. § 734.\*]

Appeal from Circuit Court, Multnomah County; John B. Cleland, Judge.

Action by Mary E. Johnson against Charles A. White, George Wetherby, and others. From a decree for plaintiff, defendant Wetherby appeals. Affirmed.

See, also, 112 Pac. 1083.

This is a suit to foreclose a mortgage on the N.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$  of section 12, township 1 S., range 4 E., W. M., executed by defendant Arthur Stipe to plaintiff on July 3, 1904, to secure a note for \$465. From a decree in favor of plaintiff, defendant appeals.

Plaintiff alleges, in addition to the usual form as to the mortgage, that defendant George Wetherby purchased the mortgaged premises at a tax sale for the taxes of 1904, amounting to \$5.08, and for those of 1907, amounting to \$5.40; that each of the defendants have or claim to have some right to, interest in, or lien upon, said mortgaged premises, but the same, if any exist, are subsequent in time and inferior in right to the lien of plaintiff's said mortgage; that plaintiff tendered to Wetherby the sum of \$20, the amount of the taxes, interest, and penalties, and deposited the same in court for that purpose.

Defendant Wetherby answered separately, affirmatively alleging that on the 26th of December, 1905, the sheriff of Multnomah county, Or., duly sold to this defendant the real estate described in plaintiff's mortgage for delinquent taxes assessed thereon for the year 1904, amounting to \$5.08, and issued a certificate therefor; that on the 29th day of December, 1908, said sheriff executed a tax deed of said real property to this defendant, which was duly recorded; that defendant is the owner in fee simple of the land, and prays that he be declared such owner, and entitled to the possession thereof.

Plaintiff demurred to the new matter in the answer, and upon the same being overruled replied, denying the issuance of any valid certificate of sale for such taxes, or the execution of any valid deed to said property by the sheriff, and alleging that the same were void for the reason, among others, that the sheriff failed to make a return of the sale of said property for the year 1904, as required by law. Therefore the certificate and deed executed thereon were wholly void.

Upon trial the circuit court found, in part, that the certificate and tax deed were void on account of the failure of the sheriff to make such return. The note and mortgage of plaintiff were admitted.

George Wetherby, pro se. George P. Lent, for respondent.

BEAN, J. (after stating the facts as above). Upon this appeal defendant Wetherby contends that plaintiff was not authorized to make him a party to the suit. The tax deed, upon its face, shows defendant to be a grantee, and to have an interest in the mortgaged property.

[1, 2] The owner of the equity of redemption is frequently a grantee, either directly or remotely, from the mortgagor, and such grantee, as long as he retains an interest in the premises, is a necessary party to foreclosure; and no decree can be effective against him, unless he is joined. 9 Enc. of Pleading and Practice, 305. All persons interested in the mortgaged premises should be made parties; otherwise they would be entitled to redeem. *Landon v. Townshend*, 112 N. Y. 93, 19 N. E. 424, 8 Am. St. Rep. 712; *Watts v. Julian*, 122 Ind. 124, 23 N. E. 698. The complaint, however, shows that defendant Wetherby claims to be a grantee of the premises subsequent to the giving of the mortgage, which complies with the rule in 9 Enc. of Pleading and Practice, 377; *Mann v. State*, 116 Ind. 383, 19 N. E. 181; *Hoes v. Boyer*, 108 Ind. 494, 9 N. E. 427.

Section 3108, B. & C. Comp., provides that: "All taxes which may hereafter be lawfully imposed or levied upon real property shall be and they are hereby declared to be a lien on such property from and including the day on which the warrant authorizing the collection of such taxes is issued until they should be paid, or until the title shall rest in the purchaser upon sale for such taxes. \* \* \*"

[3] Section 423, L. O. L., relating to the foreclosure of liens upon real property, requires that any one having a lien subsequent to the plaintiff upon the same property shall be made a defendant in the suit, and any person having a prior lien may be made defendant at the option of the plaintiff, or by order of the court, when deemed necessary. If it be conceded that this defendant was not regularly made a party to the suit, he waived this point by pleading for affirmative relief.

Plaintiff contends that the facts in defendant Wetherby's answer were not sufficient to support any title of defendant to the land, for the reason that said defendant did not allege that there was any tax levied upon the property for the year 1904, or any warrant issued for the collection thereof, or any return of sale by the sheriff; and that the sep-

arate answer of said defendant amounts to no more than a legal conclusion. Neither is there any allegation of ownership of the property at the time of the assessment. The facts usually contained in such certificate of sale and tax deed are not set out in the answer.

[4, 5] It is contended by defendant Wetherby that in a suit to foreclose a mortgage the court has no jurisdiction to determine an alleged title, paramount to that of the mortgagor, when set up by a defendant. It is sufficient in regard to this contention to refer to the answer of defendant, which, we think, does not set up a title paramount to the mortgagor, and which is a mere claim for taxes subsequent to the date of plaintiff's mortgage (*Middleton v. Moore*, 43 Or. 357, 73 Pac. 16), and does not come within the rule enunciated in *Gennes v. Peterson*, 54 Or. 378, 103 Pac. 515. By section 3127, B. & C. Comp., a sheriff's tax deed is made prima facie evidence of the regularity of the tax proceedings, including the sale. This, however, may be overcome by proof to the contrary. *Brentano v. Brentano*, 41 Or. 15, 19, 67 Pac. 922.

[6] A careful examination of the evidence herein leads us to believe that the finding of the trial court, to the effect that the tax deed of defendant was void, is correct. It is shown by the evidence that an unsigned memorandum was made in the sheriff's office of the sale of 80 acres in the section described to this defendant, and the amount the same sold for. Section 3118, B. & C. Comp., then in force, provides that a warrant for a collection of delinquent taxes must be executed and returned in like manner as an execution against property. The requisite steps to be taken under this statute are plainly set out by Mr. Justice Eakin, in *Ayers v. Lund*, 49 Or. 303, 89 Pac. 806, 124 Am. St. Rep. 1046, and we need only to refer to the same.

The decree of the lower court is therefore affirmed.

#### Ex parte AH PAH.

(Supreme Court of Nevada. Dec. 30, 1911.)

#### 1. STATUTES (§ 118\*)—TITLE—SUFFICIENCY.

St. 1911, c. 133, §§ 217, 218, making it unlawful to keep a house of ill fame within 800 yards of a schoolhouse, etc., is not unconstitutional, under Const. art. 4, § 17, as embracing matter not covered by the title, "An act concerning public schools and repealing certain acts relating thereto."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 158-160; Dec. Dig. § 118.\*]

#### 2. CONSTITUTIONAL LAW (§ 93\*)—VESTED RIGHTS—HOUSES OF ILL FAME.

St. 1911, c. 133, §§ 217, 218, prohibiting the keeping of houses of ill fame within 800 yards of schools, etc., is not unconstitutional, as interfering with vested rights, as against one conducting such place in accordance with an

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ordinance of the city, adopted pursuant to previous legislative authority.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 93.\*]

**3. STATUTES (§ 258\*)—BAWDYHOUSES—STATUTES—REPEAL.**

Crimes & punishment act, effective January 1, 1912, prohibiting the keeping of a house of ill fame within 400 yards of a school, etc., did not, until January 1, 1912, supersede St. 1911, c. 133, §§ 217, 218, enacted the same day as the other act, and fixing an 800-yard limit.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 339; Dec. Dig. § 258.\*]

**4. STATUTES (§ 258\*)—TIME OF TAKING EFFECT—LEGISLATIVE POWER.**

In the absence of constitutional restriction, the Legislature is free to fix in each act the time it is to take effect.

[Ed. Note.—For other cases, see Statutes, Dec. Dig. § 258.\*]

**5. STATUTES (§ 225\*)—CONSTRUCTION—CONFLICTING PROVISIONS.**

Separate acts covering the same subject-matter should be so construed, if possible, as to allow both to stand, where the language is consistent and plain.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 802, 809; Dec. Dig. § 225.\*]

Application by Ah Pah for a writ of habeas corpus. Writ denied, and prisoner remanded.

James T. Boyd, A. N. Salisbury, and W. D. Jones, for petitioner. Cleveland H. Baker, Atty. Gen., and James R. Judge, Deputy Atty. Gen., for respondent.

**SWEENEY, C. J.** The petitioner, Ah Pah, was convicted, on the 26th day of May, 1911, in the justice's court in Reno, Nev., for keeping a house of ill fame within 800 yards of a certain designated schoolhouse, situated in the city of Reno, and sentenced to pay a fine of \$50, or, in the event he failed to pay said fine, to serve 25 days in the county jail. Failing to pay the fine, petitioner was arrested and taken into legal custody, and now seeks the aid of this court, through habeas corpus proceedings, to relieve him of the judgment, because, as maintained, the section of the law under which he was convicted (St. 1911, c. 133) is unconstitutional and void.

It is urged in support of petitioner's contention that the sections in question are unconstitutional upon several grounds, which we will review in the order they are raised.

[1] First, it is contended that the sections are unconstitutional, for the reason that the title of the act in question is in conflict with section 17, art. 4, of the Constitution of Nevada, which provides: "Each law enacted by the Legislature shall embrace but one subject, and matters properly connected therewith, which subject shall be briefly expressed in the title; and no law shall be revised or amended by reference to its title only; but, in such case, the act as revised,

or section as amended, shall be re-enacted and published at length."

Practically this same constitutional phase was recently before this court for consideration in the case of State ex rel. John Sparks et al. v. State Bank & Trust Company et al., 31 Nev. 456, 103 Pac. 407, 105 Pac. 567, and this court, in passing upon the question, used this language, which, we believe, analogously reasoning, disposes of this point contrary to the petitioner's contention: "It is claimed that this act is in violation of section 17, art. 4, of our state Constitution, in that the subject of the act is not expressed in the title; that the statute is invalid, because it embraces more than one subject; that the provisions of section 10 [St. 1907, c. 119] are in violation of section 20, art. 4, of the Constitution, which forbids the passage by the Legislature of local or special laws regulating the practice of courts of justice; that, because the action is brought in the name of the state, on the relation of the bank commissioners, there is no proper party plaintiff; that section 10 of the statute is void, in that it attempts to delegate to an executive board judicial functions, in violation of section 1, art. 3, of the Constitution; and that this section of the act denies appellants equal protection of the laws, and is therefore in conflict with section 1 of the fourteenth amendment of the Constitution of the United States. The main principles controlling these questions have been well-nigh settled by this and other courts. That section 17, art. 4, of the Constitution, providing that 'each law enacted by the Legislature shall embrace but one subject and matters properly connected therewith,' is mandatory must be conceded. In regard to this objection, we need only determine whether this action and the decree of the district court relate to matters germane to the subject expressed in the title of the act, or to what is properly connected therewith. It appears to be admitted that, if the title had simply specified that the act was one regulating or relating to banking, the statute might be sustained, although it is urged, in another division of the brief, that the act is void, because it relates to more than one subject. If it does so relate, the part properly connected with the title would not be void, while the remainder might be open to rejection. If the different provisions of this statute could be deemed sufficiently connected under a title simply designating it as 'An act relating to banking,' we see no reason why they may not be considered so with a title which designates one or more of the matters to which the others are properly connected. Under the language of the Constitution, no necessity appears for requiring separate acts, or even separate

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

designations in the title, for all the different provisions in this statute."

The title of the act under consideration reads as follows: "An Act concerning public schools, and repealing certain acts relating thereto." Sections 217 and 218, under which petitioner was convicted, read as follows:

"Sec. 217. It shall be unlawful for any owner or agent of any owner, or any person, to keep any house of ill-fame, or to let or rent to any person whomsoever, for any length of time whatever, to be kept or used as a house of ill-fame, or resort for the purpose of prostitution, any house, room, or structure situated within eight hundred yards of any schoolhouse or schoolroom used by any public or common school in the state of Nevada, or within eight hundred yards of any church edifice, building, or structure, erected and used for devotional services or religious worship in the state of Nevada.

"Sec. 218. Any person violating the provisions of section 217 of this act shall be deemed guilty of a misdemeanor, and on conviction shall be fined not less than twenty-five dollars nor more than three hundred dollars, or to be imprisoned in the county jail not less than five nor more than sixty days, or by both fine and imprisonment, in the discretion of the court."

The title of the act in question, we believe, sufficiently expresses the subject of the act, and is sufficiently general in its scope to make it illegal to conduct houses of ill fame within 800 yards of a schoolhouse, and broad enough to avoid the constitutional inhibition invoked. *State ex rel. John Sparks et al. v. State Bank & Trust Company et al.*, 31 Nev. 456-475, 103 Pac. 407, 105 Pac. 567; *State v. Gibson*, 30 Nev. 353, 96 Pac. 1057; *Bell v. District Court*, 28 Nev. 280, 81 Pac. 875, 1 L. R. A. (N. S.) 843, 118 Am. St. Rep. 854; *State v. Ah Sam*, 15 Nev. 27, 37 Am. Rep. 454; *State v. Commissioners*, 22 Nev. 399, 41 Pac. 145; *Ex parte Livingstone*, 20 Nev. 287, 21 Pac. 322; *State v. Commissioners Humboldt County*, 21 Nev. 235, 29 Pac. 974; *People v. Bank of San Luis Obispo*, 154 Cal. 194, 97 Pac. 307; *People v. Superior Court*, 100 Cal. 105, 34 Pac. 492; *Abeel v. Clark*, 84 Cal. 226, 24 Pac. 383; *Ex parte Liddell*, 93 Cal. 633, 29 Pac. 251; *Wardle v. Townsend*, 75 Mich. 385, 42 N. W. 950, 4 L. R. A. 511; *Carter County v. Sinton*, 120 U. S. 517, 7 Sup. Ct. 650, 30 L. Ed. 701; 1 L. R. A. (see note with cases appended) p. 362; *Cooley's Constitutional Limitations*, 141-150.

[2] It is next contended by counsel for petitioner that the law under which petitioner was convicted is void for the reason: "That the justice court of Reno township, county of Washoe, state of Nevada, acted wholly without jurisdiction in passing judgment upon the petitioner, and in sentencing and ordering petitioner to be kept in custody

of the said C. P. Ferrell, as sheriff of the county of Washoe, state of Nevada, for the reason that, by virtue of a certain act of the Legislature of the state of Nevada, approved March 16, 1903 [St. 1903, c. 102], entitled 'An act to incorporate the town of Reno, and to establish a city government therefor,' as amended by a certain act of the Legislature of the state of Nevada, approved March 13, 1905 [St. 1905, c. 71], entitled 'An act to amend the title of, and to amend an act entitled "An act to incorporate the town of Reno, and to establish a city government therefor," approved March 16, 1903,' the state of Nevada has and had, prior to the passing of the act under which petitioner was sentenced and committed, as aforesaid, delegated the right to regulate the location of houses of prostitution within the corporate limits of the city of Reno, and the right to regulate all such matters as are referred to in the complaint herein to the city of Reno; and for the reason that it appears that the city of Reno, and the city counsel of the said city of Reno, acting under and by authority of the acts of the Legislature of the state of Nevada, hereinbefore referred to, have exercised the authority and power so delegated to the said city of Reno by the act of the Legislature conferring such power and authority on the city of Reno, above referred to, in adopting City Ordinance No. 95 of the city of Reno, entitled 'An ordinance regulating the conduct and maintenance of houses of ill-fame and places of prostitution, and other matters relating thereto, prohibiting prostitution and lewdness, and fixing penalties for the violation thereof, adopted September 1, 1908,' a copy of which said ordinance is contained in the transcript of testimony and proceedings attached to the petition herein, and marked 'Exhibit C,' and that by reason thereof petitioner became vested with certain rights which the Legislature had no authority to divest or disturb."

After a careful review of the law and the authorities bearing upon this constitutional objection interposed by petitioner, we believe, contrary to petitioner's contention in this respect, that the doctrine is overwhelmingly maintained that the legislative departments of our government can never divest the government itself of the inherent right at all times under the police power vested in it under the Constitutions, both federal and state, of enacting any legislation which it may deem wise and just for the betterment and preservation of the public health, safety, and morals. *Wallace v. Mayor of Reno*, 27 Nev. 71-87, 73 Pac. 528, 63 L. R. A. 337, 103 Am. St. Rep. 747; *New Orleans Coal Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; *State v. Murphy*, 130 Mo. 10, 31 S. W. 594, 31 L. R. A. 798, affirmed 170 U. S. 78, 18 Sup. Ct. 78, 18 Sup. Ct. 505, 42 L. Ed. 955; *Carthage v.*



Garner, 209 Mo. 688, 108 S. W. 521; People v. Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893; Chicago, M. & St. P. R. R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118; State v. Winterrowd (Ind.) 91 N. E. 956, 30 L. R. A. (N. S.) 886; Beer Co. v. Massachusetts, 97 U. S. 25, 24 L. Ed. 989; Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036; Barbier v. Connolly, 113 U. S. 27, 5 Sup. Ct. 357, 28 L. Ed. 923; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; Budd v. New York, 143 U. S. 517, 12 Sup. Ct. 468, 36 L. Ed. 247; N. O. Gas L. Co. v. Drainage Commission of N. O., 197 U. S. 453, 25 Sup. Ct. 471, 49 L. Ed. 831; Berlin v. Gorham, 34 N. H. 266; Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197; Yarmouth v. N. Yarmouth, 34 Me. 411, 56 Am. Dec. 666; Mobile v. Watson, 116 U. S. 489, 6 Sup. Ct. 398, 29 L. Ed. 620.

Judge Dillon, in his admirable work on Municipal Corporations, very properly expresses the law on this subject as follows: "Although a franchise or privilege to use the city streets is, when accepted and acted upon, a contract which cannot be impaired, as well as a vested property right which cannot be taken, except by the power of eminent domain, these franchises and privileges are not exempt from the exercise of the police power of the state, either operating directly by legislative enactment, or by delegation to the municipality. It is a general rule that the *right to exercise the police power cannot be alienated, surrendered, or abridged*, either by the Legislature or by the municipality acting under legislative authority, by any grant, contract, or delegation, because it constitutes the exercise of a governmental function, without which the state would become powerless to protect the public welfare. Hence, when a franchise or privilege is granted to use the city streets for a public service, the grantee accepts the right upon the *implied condition that it shall be held subject* to the reasonable and necessary exercise of the *police powers* of the state, operating either through legislative enactment or municipal action."

The Supreme Court of the United States, speaking through Chief Justice Fuller, in the case of New York & New England Railroad Company v. Bristol, 151 U. S. 556, 567, 14 Sup. Ct. 437, 440 (38 L. Ed. 269), voicing the principle which we contend to be the law, contrary to the doctrine announced by the petitioner, says: "It is likewise thoroughly established in this court that the inhibition of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or of the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-

protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury."

The Supreme Court of the United States again speaking, through the late Justice Harlan, in the case of New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516, while commenting on the opinion previously decided by that august tribunal in the famous Slaughterhouse cases, 16 Wall. 36, 21 L. Ed. 394, said and quoted: "The decision was that the state, under her power to protect the public health, could abate the nuisance created by the company's business, notwithstanding its works had been established within the general locality designated in its charter; and consequently the Legislature could, at its discretion, amend the charter of Hyde Park, and remove the restriction upon its authority to abate nuisances, or invest it with power to regulate or prohibit business necessarily injurious to the public health."

\* \* \* So far from the court saying that the state could not make a valid contract in reference to any matter whatever within the reach of the police power, according to its largest definition, its language was: 'While we are not prepared to say that the Legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by contract, limit the exercise of those powers to the prejudice of the general welfare. They are the *public health* and the *public morals*. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime.' Pages 750, 751. \* \* \* The principle upon which the decisions in Beer Co. v. Massachusetts, Fertilizing Co. v. Hyde Park, Stone v. Mississippi [101 U. S. 814, 25 L. Ed. 1079], and Butchers' Union Co. v. Crescent City Live Stock Landing Co. [111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585], rest is that one Legislature cannot so limit the discretion of its successors that they may not enact such laws as are necessary to protect the public health or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases that statutory authority, given by the state to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecu-

tion, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others."

[3] We come now to a consideration of the point as to whether or not the new crimes and punishment act, which goes into effect January 1, 1912, containing the 400-yard limit, supersedes the school law, which contains the 800-yard limit. The new crimes and punishment act, which goes into effect January 1, 1912, deals directly with the general police laws and acts which are *malum prohibitum*, and contains a provision which places a limit of 400 yards to schoolhouses within which houses of ill fame may be conducted. Revised Laws of Nevada, § 6510. In 1887 (St. 1887, c. 81) the Legislature of this state enacted a general law regarding houses of ill fame, which provided that they shall not be kept within 400 yards of a schoolhouse. It appears that the law under which petitioner was convicted and the new crimes and punishment act were both passed by the Legislature on the 15th day of March, 1911. The enrolled bills, when properly authenticated, are deemed conclusive evidence as to the existence of their valid enactment, and their contents, which, when questioned, should always be examined, disclose this to be the fact. *State ex rel. Coffin v. Howell*, 26 Nev. 93, 64 Pac. 466; *State v. Swift*, 10 Nev. 176, 21 Am. Rep. 721; *State v. Rogers*, 10 Nev. 250, 21 Am. Rep. 738; *State v. Glenn*, 18 Nev. 34, 1 Pac. 186; *State v. Nye*, 23 Nev. 99, 42 Pac. 866; *State v. Beck*, 25 Nev. 68, 56 Pac. 1008; *Am. & Eng. Ency. of Law*, vol. 26 (2d Ed.) pp. 554, 555, 556; 36 Cyc. 966, 967.

In consequence, in so far as the legislative intent proper is concerned, to which we must look and be guided in construing statutes, we have that body enacting two measures covering the same subject-matter on the same date, but, providing in the school law that the limit shall be 800 yards, and designating that the bill shall go into effect at the time of its passage (Revised Laws of Nevada, § 3457); whereas, the crimes and punishment act, which is a statute in futuro, contains a provision which designates January 1, 1912, as the fixed time at which the said crimes and punishment act shall go into effect, and which, among other provisions, provides that the limit shall be reduced at this specified future date to 400 yards, as previously established, and repeals all acts in conflict therewith. 36 Cyc. 1106, 1147-1150.

[4] The Legislature, in the absence of constitutional restrictions, is free to fix in each act the time it is to take effect, and an examination of our Constitution reveals no such prohibition. *Matter of Kenna*, 91 Hun, 173, 86 N. Y. Supp. 280; *Thomas v. Scott*,

23 La. Ann. 689; *Price v. Hopkins*, 13 Mich. 318; *Honeycutt v. St. Louis*, 40 Mo. App. 674; *Penn. Co. v. State*, 142 Ind. 423, 41 N. E. 937; 36 Cyc. 1192, 1193; *Am. & Eng. Ency. of Law*, vol. 36, pp. 563-565.

[5] Courts, in construing the legislative intent where acts cover the same subject-matter, should so construe the acts, where it is possible, as to allow both to stand, where the language is consistent, plain, and unambiguous, and the legislative intent clear. *Flack v. Rogers*, 10 Nev. 319; *Frost v. Wenle*, 157 U. S. 46, 15 Sup. Ct. 532, 39 L. Ed. 614; 36 Cyc. 1077, 1147. A careful review of the statute of these two laws in question, dealing with the same subject-matter, we believe compels us to hold the law regarding the limit of 800 yards, as fixed in the school law, as valid from the time of its enactment to January 1, 1912. In consequence of which the conviction of the petitioner was valid. On and after January 1, 1912, however, the limit of 400 yards, fixed in the crimes and punishment act (section 6510, Revised Laws of Nevada), will be the law in this respect until altered or repealed by future legislative enactment. *State v. Lee*, 28 Nev. 380, 82 Pac. 229.

As to the policy, wisdom, or expediency of changing the limit within which houses of ill fame may be located from schoolhouses, it is a matter solely within the power of the Legislature, and when validly enacted is not subject to judicial alteration or repeal. *Ritter v. Douglass*, 32 Nev. 400, 109 Pac. 444.

For the foregoing reasons, the application of the petitioner for the writ is denied, and he is forthwith remanded to the custody of the sheriff of Washoe county until the judgment under which he was convicted is satisfied. It is so ordered.

TALBOT and NORCROSS, JJ., concur.

HENNINGSEN v. TONOPAH & G. R. CO.  
(No. 1,823.)

(Supreme Court of Nevada. Dec. 30, 1911.)

On petition for rehearing. Denied.

For former opinion, see 111 Pac. 86.

PER CURIAM. The petition for rehearing in the within entitled case is herewith denied.

NORCROSS, J. (dissenting). This case presents a number of serious and difficult questions of law. As some doubt exists in my mind as to the correctness of the decision rendered, I favor a rehearing, and for that reason dissent from the order denying the same.

**POTOSI ZINC MINING CO. et al. v. MAHONEY et al.**

(Supreme Court of Nevada. Jan. 5, 1912.)

**APPEAL AND ERROR (§ 805\*)—AFFIRMANCE—ABANDONMENT OF APPEAL.**

That appellant has failed for more than six months to file briefs, or to appear and argue the case on a motion to dismiss or on the merits after notice of the hearing, and has made no request to submit the cause without argument or brief, warrants an inference of abandonment of the appeal, which was from the judgment roll alone, so that the judgment is properly affirmed; no glaring defects appearing on the face of the judgment roll.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3174, 3175; Dec. Dig. § 305.\*]

Appeal from District Court, Clark County; George S. Brown, Judge.

Action by the Potosi Zinc Mining Company and others against J. J. Mahoney and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Haas, Garrett & Dunnigan and W. R. Thomas, for appellants. Cheney, Downer, Price & Hawkins, Gray, Barker, Bowen, Allen, Van Dyke & Jutten, Flint, Gray & Barker, and Richard Busted, for respondents.

**PER CURIAM.** This is an appeal from the judgment roll alone.

Since the filing of the record on appeal in this court about six months ago, the plaintiffs have not filed any briefs on appeal, and have failed to appear and argue the case on the motion to dismiss, or the merits, at the time set for the hearing after postponement, and after notice of the motion and hearing. No request has been made for the submission of the case without argument or brief. Under the circumstances, it may be inferred that the appeal has been abandoned; and, as no glaring defects appear on the face of the judgment roll, the judgment is affirmed under the following cases: *Linville v. Clark*, 30 Nev. 113, 93 Pac. 231; *State v. Myatt*, 10 Nev. 166; *Gardner v. Gardner*, 23 Nev. 214, 45 Pac. 139; *Finlayson v. Montgomery*, 14 Nev. 397; *Fulton v. Day*, 8 Nev. 82; *Goodhue v. Shedd*, 17 Nev. 141, 30 Pac. 695; *Mathewson v. Boyle*, 20 Nev. 88, 16 Pac. 434.

**COHEN v. CLARK.**

(Supreme Court of Montana. Nov. 20, 1911.)

**1. APPEAL AND ERROR (§ 171\*)—CHANGE OF POSITION ON APPEAL—THEORY OF CAUSE.**

Where a defendant treated the plaintiff's claim for services as constituting but a single cause of action in the lower court, by a motion to the court to require plaintiff to state and number his cause of action for services separately from other causes of action alleged, he is bound by his theory of the cause as disclosed therein, and cannot be heard to insist on appeal that the plaintiff has undertaken to state several causes of action in one count.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1053; Dec. Dig. § 171.\*]

**2. ACTION (§ 53\*)—JOINDER OF CAUSES—CAUSES ARISING OUT OF SAME CONTRACT.**

Where several claims payable at different times arise out of the same contract, suit may be brought as each liability accrues; but, if suit is not brought until more than one has become due, all must be sued for in one action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-623; Dec. Dig. § 53.\*]

**3. ACTION (§ 53\*)—SPLITTING SINGLE CAUSE.**

A plaintiff may not split a single cause of action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 549-623; Dec. Dig. § 53.\*]

**4. ACTION (§ 1\*)—"CAUSE OF ACTION."**

A "cause of action" is the right which a party has to institute a judicial proceeding, and consists of a union of plaintiff's primary right and an infringement of it by the defendant.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1015-1019; vol. 8, p. 7598.]

**5. ACTION (§ 38\*)—SINGLE OR SEPARATE CAUSES—COMPLAINT.**

Where a plaintiff pleads several contracts and a breach of each, several causes of action are stated; but, where he pleads but a single contract with a breach in one or more particulars, a single cause of action is stated, and, while one count in the complaint is sufficient to state them, it is immaterial how the complaint is paragraphed.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 549; Dec. Dig. § 38.\*]

**6. PLEADING (§ 406\*)—OBJECTIONS TO COMPLAINT—WAIVER BY FAILURE TO OBJECT.**

Under Rev. Codes, § 6539, which provides that objections to a complaint, other than that it does not state a cause of action or that the court has no jurisdiction, are waived by a failure to object by a demurrer or answer, though a special demurrer was interposed to a complaint, where it did not point out the fact of indefiniteness, objection on that ground must be deemed waived.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359; Dec. Dig. § 406.\*]

**7. PLEADING (§ 368\*)—COMPLAINT—SUFFICIENCY—MOTION TO SEPARATE.**

A complaint is sufficient as against a motion to separate, where it does not appear affirmatively from its face that it states more than one cause of action, each well pleaded.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1194-1198; Dec. Dig. § 368.\*]

**8. PLEADING (§ 317\*)—BILL OF PARTICULARS.**

Where, in an action for wages and expenses incurred, the court made an order requiring the plaintiff to show cause why he should not file a bill of particulars, an affidavit, setting up a delivery to defendant of the original bills for expenses incurred, and that he had in his deposition, theretofore given at the instance of the defendant, stated the items of his account so far as his information enabled him to do so, shows an account stated in which case a bill of particulars is unnecessary, and is a sufficient excuse.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 954-962; Dec. Dig. § 317.\*]

**9. APPEAL AND ERROR (§ 960\*)—REVIEW—DISCRETIONARY POWER—BILL OF PARTICULARS.**

The granting of a motion for a more specific bill of particulars is in the sound discretion of the trial court, and, where there is no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

manifest abuse of that discretion, error cannot be predicated on a ruling thereon.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3825-3834; Dec. Dig. § 960.\*]

**10. TRIAL (§ 91\*)—RECEPTION OF EVIDENCE—MOTION TO STRIKE OUT.**

Where a witness answered a question put to him by counsel without objection, a motion to strike out the answer, made thereafter, was properly denied.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 242-244; Dec. Dig. § 91.\*]

**11. WITNESSES (§ 255\*)—EXAMINATION—PRIVATE MEMORANDA—REFRESHING MEMORY.**

Under Rev. Codes, § 8020, providing the conditions under which a witness may refresh his memory from notes, plaintiff, in an action for wages and expenses incurred, properly referred to a memorandum book to refresh his recollection, while testifying as a witness in his own behalf.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 874-890; Dec. Dig. § 255.\*]

**12. EVIDENCE (§ 174\*)—BEST AND SECONDARY—COPIES.**

Under Rev. Codes, §§ 7872-7941, which lay down the rules of evidence, copies of the records of a hotel keeper obtained by cross-interrogatory upon the taking of the deposition of such hotel keeper, though he testified in his deposition that they were correct copies, are not the best evidence and are not admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 561-564, 566-569; Dec. Dig. § 174.\*]

**13. DEPOSITIONS (§ 64\*)—EXAMINATION OF WITNESS—RESPONSIVENESS—DOCUMENTS.**

Where, in an action for wages and expenses incurred, the defendant applied to take the deposition of a hotel keeper, and plaintiff propounded a cross-interrogatory requiring such deponent to attach to his deposition certain records which he might have in his possession or could procure, copies of such records attached to such deposition were not responsive to the question and were properly excluded.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 133-141; Dec. Dig. § 64.\*]

**14. APPEAL AND ERROR (§ 1002\*)—DECISIONS REVIEWABLE—FINDING OF JURY—DISPUTED QUESTIONS OF FACT.**

Where, in an action for wages and expenses incurred, the evidence as to the making of a contract is contradicted, the weight of such evidence is for the jury, and their finding thereon is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by A. E. Cohen against C. W. Clark. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

Geo F. Shelton, Peter Breen, M. P. Gilchrist, and Chas. A. Ruggles, for appellant. William Meyer, for respondent.

**HOLLOWAY, J.** This action was brought to recover \$2,730 for work and labor performed and expenses incurred by plaintiff

for defendant between January 23, 1901, and October 23, 1902. Plaintiff recovered judgment, and the defendant appealed therefrom and from the order denying him a new trial.

1. The complaint consists of 11 paragraphs, exclusive of the prayer. In paragraph 1 plaintiff alleges that between January 23, 1901, and April 1, 1901, at defendant's special instance and request he performed work and labor for defendant at Helena. Each of the next four paragraphs is similar in terms, except as to the period covered and the place of employment; the several periods of time, beginning with the first, constituting the entire time from January 23, 1901, to October 23, 1902. In paragraph 6 it is alleged that the services were performed by plaintiff for defendant at the agreed price of \$150 per month. In paragraph 7 plaintiff alleges that in February and March, 1901, at defendant's special instance and request he incurred expense to the amount of \$80. Paragraph 8 is similar, except that the amount expended is stated to be \$50, and the time April, 1901. Paragraph 9 is likewise similar to paragraph 7, except that the amount given is \$290, and the time August, September, and October, 1902. In paragraph 10 it is alleged that the several sums were expended upon the express promise of defendant to repay the same. Paragraph 11 charges that no part of the sums due for wages or for money expended has been paid, except the sum of \$840. The prayer is for the balance with interest. The defendant moved the court to require the plaintiff to separately state and number his cause of action for services, his cause of action for \$80, his cause of action for \$50, and his cause of action for \$290. This motion was denied.

[1] In this court defendant insists that plaintiff has undertaken to state eight separate causes of action in one count, that his claim for services in each of the first five paragraphs of the complaint constitutes a separate cause of action, and that his claim for each separate amount expended likewise constitutes a cause of action; but this position is inconsistent with the position taken in the trial court. In his motion to separate, defendant treated the plaintiff's claim for compensation for all the services mentioned as constituting but a single cause of action, and this appears again in his bill of exceptions, and he cannot be heard to change his position here. He is bound by his theory of the case as disclosed in the trial court. *Dempster v. Oregon Short Line Ry. Co.*, 37 Mont. 335, 96 Pac. 717; *Galvin v. O'Gorman*, 40 Mont. 391, 106 Pac. 887.

Does it appear from the complaint that plaintiff's claim for each separate amount expended constitutes a cause of action, or in fact does it appear that the entire com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

plaint undertakes to state more than one cause of action?

[2] It is an elementary rule of law that: "Where several claims, payable at different times, arise out of the same contract, suit may be brought as each liability accrues; but if suit is not brought until more than one has become due, all must be sued for under one action." 1 Southerland's Code Pleading, Practice & Forms, § 220. Several breaches of a single contract may constitute but one cause of action, and, if the several acts pleaded do make up but a single cause of action, one count in the complaint is sufficient to state them.

[3] Under equally well-recognized rules of pleading, a plaintiff is prohibited from splitting a single cause of action. 1 Ency. Pl. & Pr. 148. But just what constitutes a single cause of action is frequently difficult to determine. At common law the question was easily settled, for the form of the action determined its character. Under the Codes, forms of actions are abolished, and the facts constituting plaintiff's complaint must be stated, and the construction put upon a pleading must now determine whether it states one cause of action only or more than one.

[4] "A 'cause of action' is the right which a party has to institute a judicial proceeding" (Dillon v. Great Northern Ry. Co., 38 Mont. 485, 100 Pac. 960), and consists of a union of the plaintiff's primary right and an infringement of it by the defendant. 1 Ency. Pl. & Pr., 116.

[5] Manifestly then, if plaintiff pleads several contracts and a breach of each, he states several causes of action; but, if he pleads but a single contract and a breach of it in one or more particulars, he states but a single cause of action, and it is immaterial how the complaint is paragraphed. Nelson v. Henriksen, 31 Utah, 191, 87 Pac. 267.

[6] Under our liberal rules of construction it may well be said that this complaint charges one contract for wages and expenses, and a breach by defendant in refusing to pay. The complaint is indefinite, in that it does not state when the value of the services was agreed upon, or when defendant promised to repay the expense money. But the complaint was not attacked upon that ground. A special demurrer was interposed, but it did not point out this defect, and the objection now suggested is deemed waived. Section 6539, Rev. Codes.

[7] But it is not material here to determine whether the complaint seeks to state more than one cause of action. It is sufficient, for the purposes of this appeal, that it does not appear affirmatively from the face of the complaint that it states more than one; for it is a well-recognized rule of law that, to warrant the trial court granting a motion to separate, the complaint must

affirmatively show two or more causes of action, each well pleaded. 5 Ency. Pl. & Pr. 335. So far as disclosed by this record, the order of the trial court overruling defendant's motion was fully justified.

[8] 2. Some time before trial defendant moved the court to require plaintiff to furnish a bill of particulars. The plaintiff attempted to comply, but failed to satisfy the defendant, who moved that a more particular itemization be required. In response to this motion the court made an alternative order that plaintiff comply or show by affidavit his reason for not doing so. Plaintiff thereupon filed his affidavit setting forth that he had theretofore delivered to defendant the original bills for expenses incurred, and had in his deposition, theretofore given at the instance of defendant, stated the items of his account so far as his information enabled him to do so. Upon the trial of the cause, counsel for defendant objected to the introduction of any evidence by plaintiff, on the ground that the bill of particulars had not been furnished or sufficient excused offered. The objection was overruled, and error is predicated upon the ruling. The ruling was clearly correct. The question was determined by this court in Martin v. Heinze, 31 Mont. 68, 77 Pac. 427.

[9] Furthermore: "The granting or refusing of an order for a more specific bill is a matter addressed to the sound discretion of the trial court under all of the facts and circumstances of the case" (31 Cyc. 582), and, in the absence of a manifest abuse of that discretion, this court will not interfere in any event.

[10] 3. After plaintiff had answered a question propounded by his counsel, defendant moved that the answer be stricken out. The motion was denied, and properly so. A party may not sit by until a question has been answered and take chances that the answer will be favorable to him, and then move to strike it out if unfavorable. This rule has been repeated so often by this court that it would seem useless for counsel longer to persist in the practice, with any hope of relief here. Frederick v. Hale, 42 Mont. 153, 112 Pac. 70; Martin v. Corscadden, 34 Mont. 308, 86 Pac. 33; Poindexter & Orr Live St. Co. v. Oregon Short Line Ry. Co., 33 Mont. 338, 83 Pac. 886.

[11] 4. Objection was made to the use of a memorandum book by plaintiff to refresh his recollection while testifying in his own behalf. The order overruling the objection was correct. The witness brought himself well within the rule announced in section 8020 of the Revised Codes. Kipp v. Silverman, 25 Mont. 296, 64 Pac. 884.

[12, 13] 5. The deposition of Charles J. Willis, assistant manager of the Holland House, New York City, was taken on application of defendant. The following cross-interrogatory was propounded to the wit-

nness: "Q. If you have in your possession at the present time, or can procure, any record, showing the whereabouts of Mr. Chas. W. Clark during the months of March and April, inclusive, kindly attach said records to this deposition." In answer the witness testified that he had examined the books kept by the hotel in its usual course of business, and that he attached copies of entries in the hotel register, ledger, and reference book. Upon objection of counsel for plaintiff these copies were excluded from the jury. The copies were not the best evidence, and their production by the witness was not responsive to the question. The question called for the original entries, and, whether reasonable or otherwise, could not be met by the production of copies. For instance: If the page of the hotel register which purported to contain an original entry made by the defendant had been produced, plaintiff might have been prepared to prove that the entry was not in defendant's handwriting, while a copy of the entry would be useless. However this may be, the evidence offered was not the best evidence and was not admissible. Sections 7872-7941, Rev. Codes. It was not responsive to the question and was properly excluded.

[14] 6. The plaintiff testified to the contract he made with defendant under which he rendered the services and incurred the expense, and as to the different items of service and expense so far as he was able to give them. He was positive in his statement as to the terms of the contract, the length of time he was employed, and the amounts expended by him. Whether this evidence was entitled to great or little weight was for the jury to determine. We are unable to understand upon what theory the jury entirely disregarded the testimony of the witness Willis, for the defendant, who testified that the defendant was in New York City continuously from March 25 to June 6, 1901. The witness appeared to be disinterested. He gave his testimony by deposition, and his evidence bears every mark of sincerity and reliability; but, so long as we have the jury system, the jury's findings upon disputed questions of fact must be conclusive. The members of this court cannot substitute their judgment for the judgment of the men chosen to determine such questions.

7. Counsel for appellant insist that the evidence is insufficient to sustain the verdict, and in this connection they contend that the trial court struck out portions of plaintiff's testimony, and that such portions were not thereafter supplied; but the record does not bear out this theory. The court sustained an objection to a question asked plaintiff by his counsel, and counsel for defendant then moved the court to strike out all testimony given by plaintiff with reference to his em-

ployment by defendant. The record fails to show any ruling upon the motion, but does disclose the following remark made by the presiding judge: "If he is in a position to prove it now, it is all the same." This does not show that the motion was sustained. Upon the whole, we think there is sufficient evidence to go to the jury, and the jury having found for plaintiff, and the trial court having refused a new trial after an opportunity to review the proceedings, we do not feel justified in interfering.

We have examined all the errors assigned, but the others do not require separate consideration.

The judgment and order are affirmed.  
Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

## PELICAN v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Supreme Court of Montana. Dec. 8, 1911.)

### 1. INSURANCE (§ 646\*)—ACTION ON POLICY—PRIMA FACIE CASE—GOOD HEALTH—BURDEN OF PROOF.

An application for a life policy provided that it should not take effect until the first premium had been paid, during insured's good health, and unless the policy should be issued during insured's good health, except in case a binding receipt should be issued as subsequently provided. It was admitted that the first premium had been paid and retained, and a copy of the application attached to the policy recited that a binding receipt had been issued by defendant's solicitor on completion of the medical examination. *Held*, that plaintiff, in order to establish a prima facie case, need not prove that insured was in good health at the time the policy was issued; the burden of proving that the policy was delivered when insured was not in good health being on the defendant, as provided by Rev. Codes, § 7972.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1650-1658; Dec. Dig. § 646.\*]

### 2. WITNESSES (§ 269\*)—CROSS-EXAMINATION—SCOPE.

Where, in an action on a life policy, plaintiff had not testified on direct examination as to the state of insured's health when the policy was delivered, defendant was not entitled to introduce the proofs of death as a part of her cross-examination; such proofs being material only to show that, when the application was signed, insured was probably suffering from tuberculosis, and that his statement that he was in good health was untrue.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 949-954; Dec. Dig. § 269.\*]

### 3. INSURANCE (§ 268\*)—LIFE POLICY—"WARRANTY"—EFFECT OF BREACH.

In general, a "warranty" must be a part of the contract, made so by express agreement of the parties on the face of the policy, being in the nature of a condition precedent which must be strictly complied with or literally fulfilled to entitle the assured to recover on the policy; its falsity barring a recovery, regardless of the actual materiality to the risk, because of the express stipulation that the state-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ment was warranted to be true and thus made material.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 588, 589; Dec. Dig. § 268.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7396-7405, 7833.]

**4. INSURANCE (§ 256\*)—"REPRESENTATION"—"WARRANTY."**

A representation is not strictly a part of the contract of insurance, or of the essence thereof, but is something collateral or preliminary, in the nature of an inducement, so that its falsity, unlike a false warranty, will not vitiate the contract or avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by agreement of the parties; it being sufficient if the representations are substantially true, though not strictly or literally so. A misrepresentation renders the policy void on the ground of fraud, while noncompliance with a warranty operates as an express breach of the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 540, 549; Dec. Dig. § 256.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6108-6110.]

**5. INSURANCE (§ 256\*)—REPRESENTATIONS—FRAUD.**

Where statements in an application for a life policy are mere representations, their effect becomes a matter of fair dealing on the part of insured, and, if it appears that the questions put to him called for information founded on his knowledge or belief, a misstatement or omission to answer will not avoid the policy, unless the answer is knowingly and willfully made with intent to deceive.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 540, 549; Dec. Dig. § 256.\*]

**6. INSURANCE (§ 291\*)—APPLICATION—REPRESENTATIONS—FRAUD.**

An application for a policy provided that all statements made by the insured should, in the absence of fraud, be deemed representations and not warranties, and that no such statement of the insured should avoid or be used in defense to a claim under the policy, unless contained in the written application, etc. It also recited that all of the answers to the medical examiner were true and were offered as inducements to the issue of the policy. *Held*, that answers to questions in the application as to insured's prior health history were representations and not warranties, and the falsity thereof would not avoid the policy unless fraudulent, under Rev. Codes, § 5043, providing that the language of the policy must be construed most strongly against insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. § 291.\*]

**7. INSURANCE (§ 646\*)—MISREPRESENTATIONS—BURDEN OF PROOF.**

Where defendant refused to pay a policy because of alleged misrepresentations concerning insured's health, the burden was upon it to show not only that the representations were untrue, but that they were made with intent to conceal the condition of insured's health, and that defendant would not have issued the policy but for the fraud so practiced on it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1650-1658; Dec. Dig. § 646.\*]

**8. INSURANCE (§ 668\*)—REPRESENTATIONS—FRAUD—STATUTES—QUESTION FOR JURY.**

Rev. Codes, § 5570, provides that each party to a contract of insurance must communicate to the other, in good faith, all the facts within his knowledge which are, and which he

believes to be, material to the contract, and which the other has no means of ascertaining, and as to which he makes no warranty. *Held* that, if insured intentionally conceals or makes false representations as to material facts with intent to deceive the insurer, he is guilty of actual fraud, which at the option of the insurer, avoids the policy; the question of fraud being for the jury, as provided by section 4980, and the inquiry being whether the representations are true, and, if untrue, whether they were intended to mislead, and, if so, whether the adverse party accepted them as true, acted on them, and was prejudiced.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1732-1770; Dec. Dig. § 668.\*]

**9. INSURANCE (§ 261\*)—FALSE REPRESENTATIONS—CONCEALMENT OF MATERIAL FACT.**

Concealment by insured of a fact material to the risk is equivalent to a false representation that the fact does not exist.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 550, 554, 556; Dec. Dig. § 261.\*]

**10. INSURANCE (§ 668\*)—MISREPRESENTATIONS—FRAUD—QUESTION FOR JURY.**

In an action on a life policy, evidence *held* to require submission to the jury of the question whether insured fraudulently misrepresented the prior state of his health, and whether he had undergone a surgical operation, etc.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1732-1770; Dec. Dig. § 668.\*]

**11. TRIAL (§ 233\*)—INSTRUCTION—REQUEST TO CHARGE—THEORY OF CAUSE.**

Where instructions refused, if given, would have emphasized conflicting theories embodied in the charge of the court, and were not correct statements of the law applicable to the issues presented by the pleadings and evidence, they were properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 527-530; Dec. Dig. § 233.\*]

**12. TRIAL (§ 261\*)—REQUEST TO CHARGE.**

Where, in an action on a policy, a request to charge was correct in so far as it defined a surgical operation, but was erroneous in assuming that the answers of insured were warranties, and not representations, it was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 660, 671, 675; Dec. Dig. § 261.\*]

**13. APPEAL AND ERROR (§ 215\*)—PRESENTATION IN LOWER COURT OF GROUNDS OF REVIEW—INSTRUCTIONS.**

Where the court submitted the question whether certain acts of a physician constituted a surgical operation within the terms of a policy, as a question of fact, without defining the meaning of the term "surgical operation," defendant's counsel, not having objected to the instruction as given, and having failed to submit an instruction embodying the definition and otherwise correct in point of law, would not be entitled to object thereto on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.\* Trial, Cent. Dig. §§ 683, 685, 695.]

**14. TRIAL (§ 337\*)—INSTRUCTIONS—VERDICT.**

Where the instructions were inharmonious, in that some of them were not appropriate to the issues presented by the pleadings, but on either theory there was a conflict in the evidence, so that the jury could have resolved the issues either way, a verdict for plaintiff was not contrary to the instructions and was therefore not against law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 790; Dec. Dig. § 337.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**15. EVIDENCE (§ 471\*)—CONCLUSION OF WITNESSES—SURGICAL OPERATION.**

On an issue whether insured had suffered a surgical operation prior to his application for insurance, it was improper to permit physicians to testify that the aspiration of insured's chest was a minor surgical operation; they being only entitled to testify as to what was done.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2140-2185; Dec. Dig. § 471.\* Witnesses, Cent. Dig. §§ 833-836, 988.]

**16. INSURANCE (§ 668\*)—REPRESENTATIONS—GOOD FAITH—QUESTIONS FOR JURY.**

Where insured represented that he had not suffered a surgical operation prior to making his application, and there was no controversy in the evidence that he had sustained an aspiration of his chest prior to that time, the court should have instructed as a matter of law that such treatment was a surgical operation and left it to the jury to determine insured's good faith.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1732-1770; Dec. Dig. § 668.\*]

Appeal from District Court, Silver Bow County; Jeremiah J. Lynch, Judge.

Action by Jennie Pelican against the Mutual Life Insurance Company of New York. Judgment for plaintiff, and defendant appeals. Affirmed.

Action on a policy of insurance. The Mutual Life Insurance Company of New York, the defendant, on October 9, 1908, issued to Henry Pelican, in Butte, Mont., a policy of insurance on his life for \$1,000, designating the plaintiff herein, his surviving wife, the beneficiary; the consideration being the payment of an annual premium of \$25.24. One of the conditions of the policy was the following: "This policy and the application therefor, a copy of which is indorsed hereon or attached hereto, constitute the entire contract between the parties hereto. All statements made by the insured shall, in the absence of fraud, be deemed representations and not warranties, and no such statement of the insured shall avoid or be used in defense to a claim under this policy unless contained in the written application herefor, copy of which is indorsed hereon or attached hereto."

The application contains this recital: "This application is made to the Mutual Life Insurance Company of New York. All the following statements and answers, and all those that I make to the company's medical examiner, in continuation of this application, are true, and are offered to the company as an inducement to issue the proposed policy, which I hereby agree to accept and which shall not take effect unless and until the first premium shall have been paid, during my continuance in good health, and unless also the policy shall have been issued during my continuance in good health; except in case a binding receipt shall have been issued as hereinafter provided."

During the course of his examination, Pelican was questioned as to the condition of

his health then and theretofore. The questions and answers thereto were, among others, the following, omitting immaterial matters: "Q. 3 (a). What illnesses, diseases, or accidents have you had since childhood? A. Name of disease: Influenza. Number of attacks: One. Date of each: Aug. 26, '08. Duration: Two weeks. Severity: Moderate. Q. 3 (b). Have you stated in answer to question 3 (a) all such illnesses, diseases, or accidents? A. Yes. Q. 4. State every physician whom you have consulted in the past five years. A. Name of Physician: Dr. Matthews. Address: Butte, Mont. When consulted: Aug. 26, '08. Nature of complaint: Give full details above under Q. 3 (a). A. Influenza as above. \* \* \* Q. 6 (a). Are you now in good health? A. Yes. \* \* \* Q. 8. Have you undergone a surgical operation? A. No. \* \* \* Q. 12 (a). Have you gained or lost weight in the past year? A. No. \* \* \* Q. 19 (a). Has any member of your household suffered from tuberculosis or consumption during the past year? A. No."

The complaint is in the ordinary form, alleging the execution and delivery of the policy upon payment of the stipulated premium, the death of the assured on July 29, 1909, the furnishing of due proof to the defendant, and its refusal to pay the amount stipulated for in the policy, or any part thereof. The defendant admits, substantially, all the allegations of the complaint. It then alleges as an affirmative defense that, when Pelican made application for the policy, he was examined by defendant's medical examiner; that his answers to the several questions quoted in the foregoing statement and incorporated in the application were wholly untrue; that they were known to him to be untrue; that defendant believed them to be true and relied upon the truth of them; that it would not otherwise have accepted the application or issued the policy; and that, because of said untrue statements and misrepresentations so made, the policy never became binding as a contract of insurance. Upon these allegations there was issue by reply. The jury found for the plaintiff for the full amount of the policy, with interest from December 17, 1910. From the judgment entered thereon, and from an order denying its motion for a new trial, the defendant has appealed.

Mattison & Cavanaugh and H. G. & S. H. McIntire, for appellant. M. F. Canning, for respondent.

BRANTLY, C. J. (after stating the facts as above). [1] 1. Plaintiff, being sworn, testified that she was the surviving wife of Henry Pelican, the beneficiary named in the policy, and that no part of the sum stipulated for therein had been paid. Her counsel then introduced the policy and rested. Thereupon counsel for defendant moved for a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



nonsuit on the ground that plaintiff had failed to show that Pelican was in good health at the time the policy was delivered. The motion was overruled. Defendant assigns error. Counsel argue that, since in the application Pelican agreed that the contract should not become effective unless the first premium was paid and the policy was issued during his "continuance in good health," it had not become a binding contract in the absence of evidence showing that he was in good health at the date of its issuance. The ruling was proper. It stood admitted by the answer that the first premium had been paid and retained by the defendant. Under this condition of the case, the plaintiff was entitled to judgment, in the absence of evidence tending to establish the fraud upon which alone the defendant relied to avoid the contract. Therefore the burden was upon the defendant. Revised Codes, § 7972. Furthermore, if any evidence had been necessary to make out a prima facie case, the application, a copy of which was attached to the policy, recites that the binding receipt had been given by the solicitor of the defendant upon a completion of the medical examination.

[2] 2. During the cross-examination of the plaintiff, counsel for defendant had her identify the papers containing the proof of death furnished by her to defendant, and then offered them in evidence for the purpose of showing the cause of the death. They were excluded. There was no issue in the pleadings as to the cause of death. If material for any purpose, the evidence tended to show that, at the time the application was signed, Pelican was probably suffering from tuberculosis, and therefore that his statement that he was in good health was not true. The inquiry in this regard appertained to defendant's affirmative defense, and, since the plaintiff had not given testimony on this subject, it was not within the right of counsel to cross-examine her with reference to it. *Borden v. Lynch*, 34 Mont. 503, 87 Pac. 609.

3. The next contention is that the court erred in overruling defendant's motion for a directed verdict. Counsel's theory of the case is that the statements contained in the application touching the condition of Pelican's health were warranties, and that, since they were conclusively shown to be untrue, the result was that the policy was avoided. The assumption by counsel is erroneous.

[3] The general rule is that a warranty must be a part and parcel of the contract—made so by express agreement of the parties upon the face of the policy. It is in the nature of a condition precedent and must be strictly complied with or literally fulfilled, to entitle the assured to recover on the policy. It need not be actually material to the risk; its falsity will bar recovery because by the express stipulation the statement is warranted to be true, and thus is made material.

*Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467, 2 South. 125, 59 Am. Rep. 816; *Collins v. Metropolitan Life Ins. Co.*, 32 Mont. 329, 80 Pac. 609, 1092, 108 Am. St. Rep. 578.

[4] "A representation is not, strictly speaking, a part of the contract of insurance, or of the essence of it, but rather something collateral or preliminary, and in the nature of an inducement to it. A false representation, unlike a false warranty, will not operate to vitiate the contract, or avoid the policy, unless it relates to a fact actually material, or clearly intended to be made material by the agreement of the parties. It is sufficient if representations be substantially true. They need not be strictly, or literally, so. A misrepresentation renders the policy void on the ground of fraud, while a noncompliance with a warranty operates as an express breach of the contract." *Alabama Gold Life Ins. Co. v. Johnston*, supra.

[5] When, therefore, the statements are mere representations, the transaction becomes a matter of fair dealing on the part of the insured; and, if it appears from the application that the questions put to the applicant call for information founded upon his knowledge or belief, a misstatement or omission to answer will not avoid the policy, unless the answer is made knowingly and willfully with intent to deceive. *Mutual Life Ins. Ass'n v. March*, 118 Ill. App. 261; *Globe Mutual Life Ins. Co. v. Wagner*, 188 Ill. 133, 58 N. E. 970, 52 L. R. A. 649, 80 Am. St. Rep. 169; *Moulou v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447; *Ames v. Manhattan Life Ins. Co.*, 40 App. Div. 465, 58 N. Y. Supp. 244; *Horn v. Amicable Life Ins. Co.*, 64 Barb. (N. Y.) 81; *Equitable Life Assur. Soc. v. McElroy*, 83 Fed. 681, 28 C. C. A. 365; *Caruthers v. Kansas Life Ins. Co. (C. C.)* 108 Fed. 487; *Henn v. Metropolitan Life Ins. Co.*, 67 N. J. Law, 310, 51 Atl. 689; 25 Cyc. 800; 3 Cooley's Briefs on the Law of Insurance, 1956.

[6] It is true that in the application there is found the statement that the answers made to the medical examiner were true and were made to the company "as an inducement to issue the proposed policy." Yet it appears, from the condition quoted above from the policy itself, that in the absence of fraud these statements were to be "deemed as representations and not warranties." Of course, if they were warranties, they would bring this case within the rule stated in *Collins v. Metropolitan Life Ins. Co.* and *Alabama Gold Life Ins. Co. v. Johnston*, supra, which is recognized by the courts generally. Here the policy was prepared by the defendant. The language contained in it is its language. The rule of construction applicable is that, if, after resort to all other rules, there still remains any uncertainty as to the intention of the parties, the language of the contract must be interpreted most

strongly against the party who caused the uncertainty to exist. Rev. Codes, § 5043; *Bickford v. Kirwin*, 30 Mont. 7, 75 Pac. 518; *Blankenship v. Decker*, 34 Mont. 300, 85 Pac. 1035. In this class of cases, the defendant, being the promisor, is presumed to be such party. While, under the provision of the policy referred to, we think it is clear that the intention was that the statements of Pelican were to be taken as representations and not warranties, yet, so far as this intention may be considered as involved in any uncertainty, the doubt must be resolved in favor of the plaintiff.

Under the rule deducible from the authorities cited supra, the recital in the application in this case, in view of the condition stated in the policy, means nothing more than this: That upon the payment of the first premium it became a contract binding upon the defendant, unless the latter could show that it was induced to issue it by actual fraud practiced upon it by Pelican, in failing to answer fully and fairly each question propounded to him, according to his best information and belief. That this was the character of answers required is apparent from the nature of the questions propounded, dealing, as they did, so far as the condition of his health then was and theretofore had been, with matters about which a layman is not presumed to be acquainted.

[7] This being so, the burden was upon defendant to show, not only that the representations were untrue, but were made with the intent to conceal the condition of Pelican's health, and that defendant would not have issued the policy but for the fraud thus practiced upon it.

[8] "Each party to a contract of insurance must communicate to the other, in good faith, all the facts within his knowledge which are, or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty." Rev. Codes, § 5570. Therefore, if the insured intentionally conceals facts which are material, or makes false representations with reference to them, intending to mislead the insurer, he is guilty of actual fraud, which, at the option of the latter, avoids the policy. Such a fraud, however, is always a question of fact for the jury (Rev. Codes, § 4980), and, unless the condition of the evidence is such that only one inference may be drawn from it, the court may not direct a verdict. The inquiry is: First, as to the truth of the representations; second, if untrue, whether they were intended to mislead; third, whether the adverse party accepted them as true and acted upon them; and, fourth, was he prejudiced? *Power Bro. v. Turner*, 37 Mont. 521, 97 Pac. 950.

[9] The concealment of a material fact is equivalent to a false representation that it does not exist. *Id.*

[10] The evidence tends to show that Pelican died of pulmonary tuberculosis, attended by chronic pleurisy and chronic pleuro-pericarditis. Two physicians, Drs. Horst and Anderson, who performed an autopsy upon the body, testified that the condition of the lungs and pleura bore evidence that the disease had been of long standing, and that they were of the opinion that such had been the case. Both, however, stated that a person may contract tuberculosis and die of it within a few weeks, but expressed the opinion that in such case the disease would be acute in form and not attended by the chronic pleuritic condition found in the body of Pelican. Dr. Matthews testified that he had been called to attend Pelican and visited him on the 10th, 11th and 12th of September, 1908, and perhaps on other occasions immediately prior to these days, but of which fact he had no record. Pelican was then, according to his statement, in an emaciated condition, suffering from pulmonary tubercular pleurisy. The witness was of the opinion at that time that Pelican would not thereafter be able to work at his occupation, that of a miner. On September 12th the witness aspirated Pelican's chest, removing therefrom about two quarts of fluid. The witness stated that this was a minor surgical operation. Though he deemed the patient's condition serious, he did not disclose it to him or his family, further than to tell the plaintiff that he was a very sick man. Subsequent to September 12, and prior to October 9, 1908, he treated the patient at his office and saw him in the office of another physician. At this time he was emaciated, short of breath, and coughed badly. Dr. Hammond, the defendant's examining physician, who had acted in that capacity for 25 years, stated that on the date of the application he made the examination of Pelican particularly with the purpose of ascertaining whether there were any indications of pulmonary tuberculosis, and found no trace of it whatsoever. Dr. Sullivan testified that he visited Pelican once in the spring of 1909; that he made a thorough subjective and objective examination and found him suffering from influenza; that, though he made examination of Pelican's chest, he found none of the conditions testified to by Dr. Matthews as present in September, 1906; but that such conditions might have existed without the knowledge either of the attending physician or of the patient himself. The mother and sister of Pelican were present when Dr. Matthews aspirated Pelican's chest on September 12th. Both stated that in reply to an inquiry by the plaintiff, as to the illness from which her husband was suffering, made in the hearing of her husband, Dr. Matthews informed her that it was influenza, but "did not amount to anything." The witness Snow, who accompanied the doctor on that visit, stated that Dr. Matthews fully informed

Pelican as to the character of the disease. Dr. Matthews himself said, however, that he did not make any statement either to Pelican or to plaintiff as to the nature of the disease, and did not remember whether he told the plaintiff that it was influenza. He stated to plaintiff, he said, that the condition was serious, and that Pelican would probably not be able to work again. As to the treatment given by Dr. Matthews, Dr. Sullivan stated that he did not consider the use of the aspirating instrument a surgical operation, and that any physician could use it; its use requiring no special skill. The evidence as to the loss of weight by Pelican is very meager. He began to work in one of the mines in Butte in the spring of 1908. He ceased work on August 28th because of the illness for which he was treated by Dr. Matthews. He returned to work on October 5th and continued until October 22d, when he again quit because he was not feeling well. The superintendent stated that he was not, upon his return to work in October, looking as stout as when he had quit in August, but that he did full work thereafter until he finally quit towards the end of the month. This statement, together with the testimony of Drs. Matthews and Hammond as to the prior and subsequent condition of his health, is all the evidence reflecting in any way upon the truth of his answer to the inquiry on this subject.

It will be observed from this summary that the evidence left in doubt the truth of the answers of Pelican to the several questions, as well as his good faith in making them. If he was suffering from tuberculosis on September 12, 1908, and died in an advanced stage of the disease in July, 1909, the ordinary layman might suspect that he was afflicted with it at the date of his application. Yet the testimony of Dr. Hammond tends to show that he was entirely free from it at that time, and the fact that the doctor found him insurable indicates that he was then in good health. Therefore the truth or falsity of his answers to questions 3 (a), 3 (b), 4, 6 (a), 12 (a), and 19 (a), which all reflected upon the condition of his health, depended upon the proper inferences to be drawn from the evidence. There was evidence tending to show that, when Dr. Matthews visited him, he informed him that he was suffering from influenza. Even though he was then suffering from pleuritic tuberculosis, nevertheless, being a layman, he could not himself be expected to have a better knowledge of diseases or of the condition of his health, than had Dr. Hammond who about a month later made a careful examination to ascertain if the disease was present. Hence, also, the inference of his good or bad faith in making these several answers was to be drawn from conflicting evidence. Whether he had in fact gained or lost weight during the past year depended upon the statement of the mine superintend-

ent, which might or might not, in view of the condition of his health shown by the evidence of Dr. Hammond, on October 9th, four days after he had returned to his usual employment, furnish a basis for the inference that his answer on this point was untrue. With reference to the treatment given him by Dr. Matthews on September 12th, since the doctors who testified differed as to whether it was a surgical operation, it is not surprising that he answered as he did. We shall refer to this feature of the case again, when we come to consider the instructions. At this time it is sufficient to say that, though the treatment may be conceded to have been a minor surgical operation, as stated by Dr. Matthews, the bad faith of Pelican in answering as he did was not, in view of the fact that he was a layman, a necessary inference. It was peculiarly within the province of the jury to determine whether, upon the whole of the evidence as to any of his answers, Pelican was guilty of fraud within the rule stated above. The apparent haste with which he proceeded to have his life insured after his illness in 1908, the short time that he was at work thereafter, and the condition of his body as described by the physicians who performed the autopsy, some nine months later, might well be regarded as sufficient to create a suspicion that his statements were intentionally untrue. Nevertheless, the court properly refused to take the case from the jury. *Globe Insurance Co. v. Wagner*, supra; *Moulou v. Insurance Co.*, 101 U. S. 708, 25 L. Ed. 1077; *Smith v. Metropolitan Life Ins. Co.*, 183 Pa. 504, 38 Atl. 1038; *Alabama Gold Life Ins. Co. v. Johnston*, supra; *Henn v. Metropolitan Life Ins. Co.*, supra.

[11] 4. Error is assigned upon the refusal of the court to give several instructions requested by the defendant. Each of them was formulated upon the theory of counsel for defendant that the answers of Pelican quoted in the statement were warranties, and that the verdict should be for the defendant, if any of them were found to be untrue. Concerning the instructions given, it may be observed that some of them were formulated in accordance with the theory of counsel for defendant, while others proceeded upon the opposing theory. They were conflicting and inharmonious. The case was therefore not submitted to the jury upon any definite theory. No complaint is made of this fault. The instructions refused would, if given, have emphasized the conflicting theories embodied in the charge, and, since they were not correct statements of the law applicable to the issues presented by the pleadings and the evidence, they were properly refused.

Counsel for defendant requested the following instruction, which was refused: "You are further instructed that, in his said application for the policy of insurance sued on herein, said Pelican answered 'No' to the question,

'Have you undergone any surgical operation?' A 'surgical operation,' within the meaning of that term as used in said application of said Henry Pelican, is such an operation by means of the hands or use of instruments having for its object the cure of a local disease; so if you believe from the evidence that a surgical operation as above defined was had upon the body of the said Henry Pelican to relieve him from the effects and to cure him of pleurisy, and that such operation was had within the period of one year before the 9th day of October, 1908, the date of said application, then your verdict should be for the defendant." The court, however, did give the following: "(11) You are further instructed that, in his said application for the policy of insurance sued on herein, said Henry Pelican answered 'No' to the question 'Have you undergone any surgical operation?' If you find from a preponderance of the evidence that the deceased underwent a surgical operation before making said application for insurance, then your verdict should be for the defendant." The expression "surgical operation" is not mentioned elsewhere in the instructions.

At the time of settlement, counsel for defendant reserved their exception to the refusal of their request, on the ground that, "there being a conflict in the evidence, as to the term 'surgical operation,' the court should have defined the term in its instructions to the jury." Error is assigned in this behalf.

[12] For present purposes it may be assumed that the definition embodied in the instruction was correct; yet, the instruction being as a whole erroneous, in that it assumed that the answers of Pelican were warranties and not representations, it was properly refused. The view of counsel evidently was that it was within the province of the jury to determine from the evidence as to what was done at the time and the opinions of Drs. Matthews and Sullivan, whether Dr. Matthews' treatment was a surgical operation within the recognized meaning of that expression, and that therefore a definition of it, as used in the application, should have been submitted. This view may have been correct upon the theory upon which the trial was had; but, even so, counsel are not in position to complain, because they failed to prepare and submit an instruction embodying the definition and at the same time otherwise correct in point of law. [13] In the instruction given, the court submitted the question to the jury as one of fact, without defining the meaning of the expression; but counsel did not object to it as given, and therefore cannot now complain of the omission. Though the instruction is erroneous because it also omits any direction to the jury to find on the question of good faith on the part of Pelican in answering the particular question involv-

ed, and authorized a verdict for defendant if the answer was found to be untrue, this is an infirmity from which the defendant suffered no prejudice because the error was in its favor.

[14] 5. The contention is made that the verdict is against law. As we have already pointed out, the instructions were inharmonious, in that some of them—as is true of instruction 11, supra—were not appropriate to the issues presented by the pleadings. Nevertheless, upon either theory of the case there was a conflict in the evidence, and, since the jury might have resolved the issues either way, the verdict is not contrary to the instructions, and is therefore not against law.

[15, 16] The opinions of the physicians upon the character of the treatment given Pelican by Dr. Matthews were not competent. The witnesses should have been permitted to state the facts only as to what was done. And, since there was no controversy in the evidence in this connection, the court should have told the jury, as a matter of law, that the treatment was a surgical operation, and left it to them to determine Pelican's good faith. The theory of counsel for defendant was that these opinions were competent evidence. This being so, and the case having been submitted to the jury upon counsel's own theory as to this feature of it, the defendant is not in position to complain.

The judgment and order are affirmed.  
Affirmed.

SMITH and HOLLOWAY, JJ., concur.

#### FIRST NAT. BANK OF IOWA CITY, IOWA, v. SMITH.

(Supreme Court of Montana. Dec. 8, 1911.)  
CORPORATIONS (§ 518\*)—ACTIONS—ISSUES—  
PROOF OF CORPORATE EXISTENCE—NECESSITY.

A general denial in an action by a corporation alleged to be organized under the laws of the United States raises no issue as to the corporation's capacity to sue, and the failure of the corporation to prove its corporate existence does not justify a judgment for defendant.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2086; Dec. Dig. § 518.\*]

Appeal from District Court, Ravalli County; Henry L. Myers, Judge.

Action by the First National Bank of Iowa City, Iowa, against E. E. Smith. From a judgment for defendant and from an order denying a new trial, plaintiff appeals. Reversed and remanded.

This action was brought by the First National Bank of Iowa City against E. E. Smith to recover the principal and interest on a promissory note, executed and delivered by the defendant to the Providence Jewelry

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Company, and by it indorsed to the plaintiff. The complaint alleges that the plaintiff was and is a corporation organized under the laws of the United States. The answer consists of a general denial of the allegations of the complaint and an affirmative defense. At the conclusion of plaintiff's testimony, the court directed a verdict for defendant because of the failure of the plaintiff to prove its corporate existence. From the judgment entered on the verdict, and from an order denying it a new trial, the plaintiff appealed.

James D. Taylor and G. C. Arnest, for appellant. C. S. Wagner, for respondent.

HOLLOWAY, J. (after stating the facts as above). A similar question was determined by this court in *O'Donnell v. City of Butte*, 44 Mont. —, 119 Pac. 281 (decided on November 11), and upon the authority of that case we hold that the general denial in defendant's answer does not raise an issue upon the question of plaintiff's capacity to sue, and that the trial court erred in directing a verdict. The judgment and order are reversed, and the cause is remanded for a new trial.

Reversed and remanded.

BRANTLY, C. J., and SMITH, J., concur.

# POORE et al. v. KAUFMAN.

(Supreme Court of Montana. Nov. 24, 1911.)

## 1. MINES AND MINERALS (§ 23\*)—ASSESSMENT WORK—PERFORMANCE DURING TRIAL OF ADVERSE CLAIM.

Under Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), requiring the doing of a certain amount of work each year on a mining claim until a patent has been issued therefor, the duty to perform such work continues until payment of the purchase price to the government, and neither the pendency of proceedings for a patent before the land office, nor of an adverse suit for the possession of the land in the state courts, will excuse the nonperformance of the work.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 51-59; Dec. Dig. § 23.\*]

## 2. MINES AND MINERALS (§ 41\*)—ASSERTION OF ADVERSE CLAIMS—STATUTORY LIMITATIONS.

Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429), provides that, if no adverse claim shall have been filed at the expiration of the 60 days provided therein for publication of the notice, it shall be assumed that the applicant is entitled to a patent on the payment of the proper sum, and that no adverse claim exists. *Held*, that the statute applies to existing claims, but not to those initiated subsequent to the limitation period; and the right of persons to relocate a mining claim upon failure of the original locator to do his representation work accruing after such limitation has run, being a right which cannot be an-

ticipated, is not such an existing claim as was contemplated by the statute.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 116-119; Dec. Dig. § 41.\*]

## 3. MINES AND MINERALS (§ 41\*)—ASSERTION OF ADVERSE CLAIMS—CLAIMS ARISING AFTER PUBLICATION OF NOTICE OF APPLICATION—JURISDICTION.

Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429), providing that, after the expiration of the period provided therein for publication of notice of application for a patent to mineral lands, no objection from third parties to the issuance of a patent shall be held sufficient, except it be shown that the applicant has failed to comply with the terms of the statute, contemplates only the right of any person to come into the land office as a kind of *amicus curiae* and protest or object to the issuance of a patent, and gives no right to assert an adverse claim, so that it cannot be said to provide an exclusive tribunal for the hearing of adverse claims arising after the period of publication, and thereby to prevent the assertion of such claims in the state courts.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 116-119; Dec. Dig. § 41.\*]

## 4. MINES AND MINERALS (§ 41\*)—ASSERTION OF ADVERSE CLAIM—ACTIONS—JURISDICTION.

Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), provides the amount of representation work necessary to be done to hold possession of a mining claim after its location and for the relocation of such claim by other parties, in case the necessary work is not performed. Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429), provides the steps necessary to be taken to secure a patent from the government. *Held*, while questions arising under section 2325 are properly submitted to the Land Department for determination, as they involve only a decision as to whether the necessary steps have been taken, questions raised under section 2324 involve adverse claims of individuals, over which the Land Department has no jurisdiction, so that, where parties assert a right to a claim as relocators, after a failure of the original locator to do the necessary work thereon in a particular year, after the period of his publication of notice of application for a patent, the action was properly commenced in a state court.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 116-119; Dec. Dig. § 41.\*]

## 5. MINES AND MINERALS (§ 41\*)—ASSERTION OF ADVERSE CLAIM—ACTIONS—JURISDICTION.

Where persons asserting a right to a mining claim as relocators, after a failure of the original locator to do the necessary representation work for a year, several years after the period of publication of his notice of application for a patent, they were, if their claim was true, entitled to peaceable possession of the ground and to a patent, upon following up their claim and complying with the law thereafter; and their right is property, so that, under article 3, § 6, of the Constitution, which secures the right to bring an action for an injury to property, or to prevent such an injury, an action to quiet title to such a claim, and for an injunction to restrain the original locator from proceeding with patent proceedings, was properly brought in a state court.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 116-119; Dec. Dig. § 41.\*]

Appeal from District Court, Silver Bow County; John B. McClerman, Judge.

Action by J. A. Poore and others against Louis Kaufman. From a judgment for plaintiffs, defendant appeals. Affirmed.

Jesse B. Roote and A. C. McDaniel, for appellant. Chas. Mattison, M. J. Cavanaugh, and J. A. Poore, for respondents.

**HOLLOWAY, J.** On March 1, 1899, the defendant, Kaufman, made application to the local land office for a patent to his Little Spring quartz lode mining claim. During the period of publication, an adverse claim, by Thornton and others, was presented and allowed, and suit commenced within 30 days (in May, 1899). Proceedings in the court were carried on for several years. On January 7, 1910, this court rendered its final decision (*Thornton v. Kaufman*, 40 Mont. 282, 106 Pac. 361, 135 Am. St. Rep. 618); on February 4th the remittitur issued, but was not filed in the district court until December 3, 1910. On January 24, 1911, this action was commenced. In the complaint the plaintiffs set forth the foregoing history, and allege that defendant, Kaufman, failed to do any annual representation work during 1903, 1904, or 1909; that, on January 8, 1910, they relocated the ground as the Fair Trial quartz lode mining claim; and that they have ever since been in the peaceful possession of the same. They allege that the patent proceedings are still pending in the local land office; that Kaufman has not presented to the local land office a copy of the judgment in *Thornton v. Kaufman*, or paid to the land office the purchase price of the ground, or received a receiver's receipt, but that he is about to proceed to secure a patent to the ground in controversy. The prayer is that the plaintiffs' title be quieted as against Kaufman, and for an injunction, restraining him from prosecuting the patent proceedings. A temporary injunction was issued. Thereafter, on February 16, 1911, defendant appeared and presented a demurrer to the complaint and a motion to dissolve the temporary injunction. On February 25th the demurrer and motion were overruled, and this appeal is prosecuted from the order of the court, refusing to dissolve the injunction.

But a single question is presented for our determination, viz.: Has the district court of Silver Bow county jurisdiction to hear and determine the questions raised by the complaint? Appellant insists that these questions are exclusively for the determination of the Land Department, and this assertion is predicated upon the failure of these plaintiffs to adverse Kaufman's application for patent. However, a reference to the facts stated above discloses that plaintiffs' right to or interest in the property was not initiated until more than 10 years after the period of publication of Kaufman's notice of application for patent expired. During the period

of publication, therefore, these plaintiffs did not have any right upon which to base an adverse claim. They could not anticipate that such right would thereafter arise, and even if they could such contemplated right would not give them standing as adverse claimants. In *Enterprise Mining Co. v. Rico-Aspen Min. Co.*, 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96, the court said: "The obvious contemplation of the law in respect to these adverse proceedings is that there shall be a present, tangible and certain right, and not a mere possibility." If, then, it is only a present, certain and tangible right which justifies an adverse claim, under section 2325, United States Revised Statutes (U. S. Comp. St. 1901, p. 1429), clearly these plaintiffs could not bring themselves within the provisions of the law applicable to adverse claimants.

[1] That neither the pendency of the proceedings for patent before the land office, nor the adverse suit by Thornton and others, relieved Kaufman from the necessity of doing the annual representation work upon his Little Spring claim is settled beyond controversy. The duty to perform such work continued until payment of the purchase price is made to the government (2 *Lindley on Mines* [2d Ed.] § 632; 1 *Snyder on Mines*, § 493; *South End Min. Co. v. Tinney*, 22 Nev. 19, 35 Pac. 89; section 2324, U. S. Rev. Stat. [U. S. Comp. St. 1901, p. 1426]); and failure to perform such work subjects the claim to relocation. *Black v. Elkhorn Min. Co.*, 163 U. S. 445, 16 Sup. Ct. 1101, 41 L. Ed. 221.

It is alleged in the complaint, and for the purposes of this appeal will be treated as true, that Kaufman did not do any representation work at all during 1909. Under such circumstances, the ground was open to relocation, and plaintiffs, having relocated it by complying with the law, acquired the right to the peaceable possession of the ground, and to patent, if they follow up their claim by complying with the law hereafter.

[2] Appellant bases his claim that this action will not lie upon the following provision of section 2325, supra: "If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists." Clearly this section refers to a present, tangible claim, existing at some time during the 60-day period of publication. In the case of *P. Wolenberg*, 29 Land Dec. Dept. Int. 302, Secretary Hitchcock said: "The assumption, declared in section 2325 of the Revised Statutes, that no adverse claim exists in those instances where no adverse claim is filed in the local land office during the period of publication relates to the time of the expiration of the

period of publication and to adverse claims which might have been made known at the local office before that time. It has nothing to do with adverse claims which are initiated subsequent to that time, and which could not, therefore, have been made known at the local office during the period of publication." As to such existing claim, an adverse must be filed in the land office, or the claim is waived. *Hamilton v. Southern Nevada Gold, etc., Min. Co. (C. C.)* 33 Fed. 562; *Lily Mining Co. v. Kellogg*, 27 Utah, 111, 74 Pac. 518; 27 Cyc. 607.

[3] But what shall be said with reference to the adverse claim which arises after the period of publication has expired? It is then too late to present to the land office an adverse claim. Counsel for appellant suggest that the only remedy available to such adverse claimant is by protest to the Land Department against the issuance of patent to the original applicant, under the last clause of section 2325, supra, which reads: "And thereafter no objection from third parties to issuance of a patent shall be held sufficient, except it be shown that the applicant has failed to comply with the terms of this chapter." A very able dissertation upon the meaning of that clause is found in *Wight v. Dubois (C. C.)* 21 Fed. 693, wherein Judge Brewer said: "I think all that it covers is the right to anybody to come in and enter his protest or objection; in other words, to say to the officers of the government that the applicant has not complied with the terms of the statute, and to insist that there shall be an examination by such officers to see if the terms have in fact been complied with. He does not appear as a party asserting his own rights; but, if we may, so to speak, parallel these proceedings with those in a court, such an objector appears as an *amicus curiæ*—a friend of the court—to suggest that there has been error, and that the proceedings be stayed until further examination can be had. Such a protest does not bring the protestant into court for the assertion of his own title or rights; does not revivify rights lost by a failure to adverse. True, if the protest or objection is sustained, the proceedings will be set aside, new ones must be commenced, and then the objector may be in a position to assert his rights; but, if the protest or objection be not sustained, the objector, like an *amicus curiæ*, has nothing more to say in the matter. In other words, the right to protest is not the right to contest. The latter is lost by the failure to adverse. The former remains open to every one—holders of adverse claims, as well as others. But the protest is only to the officers of the government, challenges only the applicant's claims, and in no manner brings up for consideration any claims of the protestant. Such a protest can be made only before the Land Department, and, if there rejected, the protestant has no fur-

ther standing to be heard anywhere. The protest cannot be made the basis of any litigation in the courts, for the courts are only open to those who have rights to assert; they sit for the determination of controversies. They do not, at the instance of strangers, review the regularity of proceedings between parties who are competent to determine such regularity, and who do not themselves invite any judicial determination." That this construction of the statute is correct is manifest from a review of the several paragraphs of chapter 6 (sections 2318-2352, Rev. Stat. U. S. [U. S. Comp. St. 1901, pp. 1423-1442]).

[4] If the Land Department had jurisdiction over conflicting claims between private individuals, and the machinery for determining such claims, there would never have been any occasion for referring adverse claims to the courts for adjudication. It is only because the Land Department cannot determine such claims that the aid of the courts is invoked. The Land Department has held uniformly that questions arising over the failure of an entryman to do the annual representation work, or the relocation of his claim by another for his failure to do such work, involve matters of conflicting rights between rival claimants with which the Land Department does not concern itself; but such questions are for the determination of the courts. In the case of *P. Wolenberg*, supra, the Secretary of the Interior further said: "The annual expenditure of \$100, in labor or improvements, required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts, and not to the Land Department. In this respect, the requirement made by section 2324 is essentially different from that made by section 2325, which makes the expenditure of \$500, in labor or improvements, a condition to the issuance of patent, and therefore a matter between the applicant for patent and the government, the determination of which is committed to the Land Department." To the same effect are *The Marburg Lode Mining Claim*, 30 Land Dec. Dept. Int. 202; *Cleveland v. Eureka G. M. & M. Co.*, 31 Land Dec. Dept. Int. 69.

In *Barklage v. Russell*, 29 Land Dec. Dept. Int. 401, there was an attempt made to follow out the suggestion of appellant, in this instance, by protesting to the government against the issuance of patent. The protestant there alleged that the patent applicant had failed to do the annual representation work, and that he (protestant) had relocated the ground; but the protest was summarily dismissed, and Secretary Hitchcock said: "The allegations of the protest amount to nothing more nor less than the assertion of a claim adverse to that of the entryman, Russell, and arising subsequent to the period

of publication of the notice of the application for patent. The Land Department has nothing to do with questions as to the performance of annual expenditure upon mining claims, nor of alleged relocations thereof by reason of failure to perform such expenditure, arising under section 2324 of the Revised Statutes. These questions are solely matters between rival or adverse claimants to mineral lands and go only to the right of possession of the land involved. The determination of that right, between such claimants, however, or whenever the adverse claim may be alleged to have had its origin, is committed by the mining laws to the courts alone."

[5] It appears, therefore, that a protest to the Land Department, based upon the allegations of plaintiffs' complaint herein, would not receive any consideration whatever. If the Land Department will not hear the plaintiffs, and the courts have no jurisdiction to hear them as appellant contends, they are remediless. But this cannot be. If their allegations are true, they have a valid, subsisting mining claim. Such a claim is property in the highest sense of the term, subject to be sold, mortgaged, and inherited, without infringing the paramount title of the government. *Cobban v. Meagher*, 42 Mont. 399, 113 Pac. 290; *Manuel v. Wulff*, 152 U. S. 505, 14 Sup. Ct. 651, 38 L. Ed. 532. According to the allegations of this complaint, plaintiffs' property will be injured by Kaufman's proceeding to secure patent to the same ground; and the courts of this state are open to afford a remedy for such injury, or to prevent it in a proper case. Article 3, § 6, Montana Constitution.

Our conclusion is that, if an adverse claim is in existence at any time during the 60-day period of publication, it must be presented to the land office, or it is waived. If such adverse claim does not arise until after the period of publication has expired, the claimant may invoke the aid of the court, in the first instance, to quiet his title as against the patent applicant. This is the holding in *Gillis v. Downey*, 85 Fed. 483, 29 C. C. A. 236, approved in 2 *Lindley on Mines*, §§ 696 and 731, and is, we think, clearly correct.

Some reliance is placed by appellant upon the decision of this court in *Murray v. Polglase*, 23 Mont. 401, 59 Pac. 439. So far as the decision in that case is concerned, it does not go further than to hold that these plaintiffs would not have been heard to intervene in the adverse suit of *Thornton v. Kaufman*, for the reason that they had not presented an adverse claim to the local land office. In the course of the opinion, this court, after determining that the interveners in that action had no standing in court, by way of suggestion, said: "If they have any right to the ground in controversy, they \* \* \* must be relegated to the

land office, where they may be permitted to show that the parties who may succeed herein have not complied with the law"—and in support of this is cited *Lindley on Mines* (1st Ed.) § 758, where the same suggestion is to be found. The decision in *Murray v. Polglase* was rendered in 1899. In the second edition of *Lindley on Mines*, issued in 1903, the author adds to the suggestion above the following: "Or the relocater may pursue his remedy in the courts, regardless of the pendency of patent proceeding"—citing *Gillis v. Downey*, supra. But, as shown by the decided cases, the Land Department has now finally adopted the policy that it will not consider a protest, based upon such grounds as plaintiffs here present, so that the suggestion made in *Murray v. Polglase* is now of no force.

The order of the district court is affirmed. Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

#### BYRNES v. BUTTE BREWING CO.

(Supreme Court of Montana. Dec. 23, 1911.)

1. NEGLIGENCE (§ 121\*)—BURDEN OF PROOF. A plaintiff suing for a personal injury negligently inflicted has the burden of proving defendant's negligence.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 224-228; Dec. Dig. § 121.\*]

2. MUNICIPAL CORPORATIONS (§ 706\*)—NEGLECTED USE OF STREET—EVIDENCE.

In an action for injuries to a child alleged to have been run over by defendant's wagon in a street, evidence held to warrant a finding that the child was not injured by the wagon.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

3. INFANTS (§ 115\*)—ACTIONS—APPEAL—QUESTIONS REVIEWABLE.

An infant plaintiff, represented in an action at law as required by Rev. Codes, § 6481, by a guardian ad litem appointed as provided by section 6482, may not complain on appeal of errors occurring at the trial not affecting his substantial rights, where experienced counsel failed to make objections and save exceptions, and where there is no evidence of fraud or collusion on the part of counsel.

[Ed. Note.—For other cases, see *Infants*, Cent. Dig. § 329; Dec. Dig. § 115.\*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

Action by Thomas V. Byrnes, by Thomas Byrnes, his guardian ad litem, against the Butte Brewing Company. From a judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

Maury & Templeman and J. O. Davies, for appellant. Kirk, Bourquin & Kirk, for respondent.

SMITH, J. The complaint charges that the plaintiff, a boy about four years of age,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



was injured by being run over by a beer wagon belonging to the defendant corporation, driven by Michael Walsh, its employé. Quoting: "The said Michael Walsh, then and there, at said time and place, without heeding in what manner the team was traveling upon the street, and without having in his hands the reins with which to guide said team, and without observing a proper or any lookout ahead, did thereby negligently and carelessly suffer and permit the said team to approach and run down the plaintiff and the wagon to pass over the plaintiff, and said team and wagon did then and there collide with, strike, and bruise and run over the plaintiff." Defendant had a verdict, upon which judgment was entered. Plaintiff appeals from the judgment, and also from an order refusing to grant a new trial. The record is barren of objections and exceptions.

[1, 2] 1. The testimony is conflicting. Indeed, some of the plaintiff's witnesses contradict themselves and each other, and the testimony of certain of defendant's witnesses is irreconcilable. Two witnesses for the plaintiff testified that they saw the wagon run over the boy, and one of defendant's witnesses declared that she also saw the wheels pass over him. On the other hand, the driver and one Bennetts, who was with him on the seat of the wagon, declared that they did not see the boy at all until they heard a woman scream, and then, looking back, they observed him in the act of arising to his feet, 12 or 15 feet behind the wagon "out three or four feet from the wagon." The horses were "barely moving." The wagon with its contents weighed over three thousand pounds. There was testimony to justify the conclusion that the child was but slightly injured. Walsh and Bennetts testified that they felt no jar or anything to indicate that the wagon had passed over any body or other substance. The burden of proof was on the plaintiff. Under these circumstances we think the jury was warranted in concluding that the child was not run over by the wagon. Discarding the testimony that he was run over, there is not anything in the record to indicate how he received whatever injuries he sustained on the day in question. At the moment when the scream was heard by Walsh and Bennetts, the former was saying to the latter, "Watch the horses make the turn themselves," and appellant's counsel argue that this bit of testimony indicates that Walsh was negligent as a matter of law. There is testimony to the effect, however, that at the time of making the remark he was driving with "tight reins," and the horses had not yet reached the place where the turn was to be made.

[3] 2. Other assignments of error, based upon alleged erroneous admissions of evidence and erroneous instructions, are argued in the brief. Plaintiff's counsel contend that

the rights of a minor cannot be waived by failure of his counsel to make objections and save exceptions during the course of the trial, and therefore they must be permitted, for the first time, in this court, to point out errors alleged to have been committed in the court below. They quote from 22 Cyc. p. 663, to the effect that a guardian ad litem or next friend can make no concessions, or waive or admit away any substantial rights of the infant, or consent to anything which may be prejudicial to him. They also cite the following cases: *Taylor v. Rowland*, 28 Tex. 293, where the court reversed a judgment for damages sustained by reason of the breach of a parol agreement for the conveyance of land, on a point not made in the trial court; it appearing that one of the defendants was a minor whose general guardian had not been made a party; neither had a guardian ad litem been appointed, although no exception on this ground had been taken in the court below.

In *Boerum v. Schenck*, 41 N. Y. 182, the Court of Appeals discovered that by inadvertence an error in figures had crept into the decree of the court below, to the prejudice of the infant defendant. Mr. Justice Woodruff, speaking for the court, said: "I am aware that no such objection to the decree was raised on this appeal; the amount involved in this correction is not large. No doubt, the far greater importance of the main question has caused that error to be overlooked. But the defendant is an infant and ought not to be permitted to suffer in a court of equity by any purely technical omission, when the court clearly sees that an error has occurred to her prejudice."

*Barnard v. Barnard*, 119 Ill. 92, 8 N. E. 320, was a bill in equity against a widow for assignment of dower and partition. The complainant was a minor. The trial court found, on the testimony of the widow alone, that the sum of \$1,200, alleged to have been loaned by her to her husband in his lifetime, was a charge upon the realty sought to be partitioned. The Supreme Court said: "This is supported by the testimony of the claimant and widow of the deceased, alone. She was clearly an incompetent witness for this purpose. \* \* \* The complainant being a minor, the question of the incompetency of the testimony has not been waived. \* \* \* Nor is any satisfactory reason shown why this claim was not probated against the estate. Not having pursued her remedy in the county court within a reasonable time, she is deemed to have waived it."

*Glade Coal Mining Co. v. Harris*, 65 W. Va. 152, 63 S. E. 873, was an action to enforce the specific execution of an option contract. The court said: "What shall we do with the decree against the infant defendants? [The plaintiff is] clearly not entitled to a decree against them. \* \* \* We do not find that the question now for decision has heretofore been directly decided by this

court, but in other jurisdictions it has, and held that the rule that it is the duty of the courts to protect the interests of infant litigants applies to an appellate court into which the case is brought as well as to the trial court, and hence that on appeal the infant will be given the benefit of every defense of which he could have availed himself, or which might have been interposed for him in the trial court, and that where the record shows error, as to a minor defendant, the judgment will be reversed, though there is no appeal on his part, it being the duty of the chancellor, as the guardian of infants, to protect their rights."

*Spradlin v. Stanley's Adm'r*, 124 Ky. 701, 99 S. W. 965, was a proceeding by an administrator and others for the settlement of an estate and a sale of so much of the real property as might be necessary to pay debts. The widow and children of deceased were made parties, and from a judgment allowing claims and approving a sale of real estate they appealed. The children were represented by a guardian ad litem. The sale was confirmed without objection. The objection made in the appellate court for the first time was that the claims were not properly verified. The Court of Appeals said: "A party who is sui juris cannot stand by and permit judgment to be entered without objection and for the first time make the objection on appeal. But as to infants a different principle applies. They cannot waive any of their rights by mere failure to object. An erroneous judgment against an infant, where his condition appears in the record, must be reversed on appeal."

*Jespersen v. Mech*, 213 Ill. 488, 72 N. E. 1114, was a suit in partition. The court held that in that particular case the incompetency of testimony as against infant parties could not be waived by their counsel.

*Barrett v. Moise*, 61 S. C. 569, 39 S. E. 755, was also an action in partition. The court said: "Still, as the rights of a minor are involved, we will not decline to consider the case without regard to any fault in the manner in which the exceptions have been taken; for a minor has the right to insist upon his strict legal rights, and, if the plaintiff has been deprived of her interest in the land in question by want of compliance with the strict requirements of the law, she should be protected."

In *Kester v. Hill*, 46 W. Va. 744, 34 S. E. 798, the court said: "The plaintiffs, being infants, could admit nothing, and the report being again before the court for consideration for the purpose, among others, of settling the accounts of the guardian, it could, in the exercise of a sound discretion, receive and entertain further exceptions to the report."

That this court has not failed to protect the rights of infant parties in equity suits is evidence by the decisions in *Power v. Lenoir*, 22 Mont. 169, 56 Pac. 106, and *Davidson v. Wampler*, 29 Mont. 61, 74 Pac. 82.

Our Code (section 6481, Rev. Codes) provides that when an infant is a party, he must appear either by his general guardian or by a guardian ad litem appointed by the court in which the action is pending. Section 6482, Revised Codes, provides how a guardian ad litem shall be appointed.

It will be noted that all of the cases cited by the appellant were either suits in equity or probate proceedings. It will also be noted that the objections urged in every instance went to substantial rights of the infant which the court was in a situation to protect. The courts in these cases were not dealing with mere details of practice, but in every case the fundamental rights of the infant had been neglected.

The Supreme Court of the United States, in *Kingsbury v. Buckner*, 134 U. S. 650, 10 Sup. Ct. 638, 33 L. Ed. 1047, said: "It is undoubtedly the rule that a next friend or guardian ad litem cannot, by admissions or stipulation, surrender the rights of the infant. The court whose duty it is to protect the interests of the infant, should see to it that they are not bargained away by those assuming, or appointed, to represent him. But this rule does not prevent a guardian ad litem from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved."

In *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249, *Rarick v. Vandevier*, 11 Colo. App. 116, 52 Pac. 743, *Successions of Byrne*, 38 La. Ann. 518, and *McMillan v. Hunnicutt*, 109 Ga. 699, 35 S. E. 102, it was held that a guardian ad litem may consent to orders made during the course of a trial which do not affect the substantial rights of the infant, even in equity.

But not any of these cases is exactly analogous to the one at bar. Here we have an infant plaintiff, the actor, appearing by his duly appointed guardian ad litem, and represented by able and experienced counsel, in an action at law, complaining of certain alleged errors occurring during the course of the trial, not any one of which can be said, on mere inspection of the record, to have certainly affected his substantial rights. We are unable to find in the books a case in which a like contention was advanced, and the industry of counsel has not furnished any. There are, however, some expressions of courts and law writers bearing upon the subject:

The Supreme Court of Washington in *Kromer v. Friday*, 10 Wash. 621, 39 Pac. 229, 32 L. R. A. 671, said: "In the absence of fraud or collusion, minors properly represented are bound as fully as if they had been majors and personally cited."

The Supreme Court of the United States in *Kingsbury v. Buckner*, supra, said: "The infant, by his *prochein ami*, having prosecuted an appeal to the Supreme Court of Illinois from the original decree rendered in the

suit brought by him, and having appeared by guardian ad litem to the appeal of Buckner and wife, is as much bound by the action of that court, in respect to mere errors of law, not involving jurisdiction, as if he had been an adult when the appeal was taken. In *Gregory v. Molesworth*, 3 Atk. 626, Lord Hardwicke said that 'it is right to follow the rule of law, where it is held an infant is as much bound by a judgment in his own action as if of full age; and this is general, unless gross laches, or fraud and collusion, appear in the prochein ami; then the infant might open it by a new bill.' So in *Lord Brook v. Lord Hertford*, 2 P. Wms. 518, 519: 'An infant, when plaintiff, is as much bound, and as little prejudiced, as one of full age.'

The Supreme Court of Iowa in *Harris v. Bigley*, 136 Iowa, 307, 111 N. W. 432, held, in effect, that a decree against infants would not be set aside for newly discovered evidence, merely because the guardian ad litem did not put in evidence facts which were then patent, though if the guardian had colluded with the plaintiff to suppress facts, or was so grossly negligent that his failure to know and produce the evidence amounted to a fraud, the relief would be granted.

Mr. Herman in his *Estoppel & Res Judicata*, vol. 1, p. 178, § 164, says: "Representation in courts of justice is a necessity of civilized society, and the acts or neglects of the representative must in some degree be binding upon the party represented. And persons under disability at the time of a judicial proceeding to which they are parties, represented by their guardians and agents, are bound upon the knowledge of such guardians or agents."

There is, of course, no evidence of fraud or collusion in this case. The same counsel who represented the plaintiff in the district court also appear for him here. Cases may perhaps arise, even at law, where the substantial rights of an infant party have been so far neglected by his counsel that he has palpably been deprived of a fair and impartial trial and an appellate tribunal should interfere to protect him; but this is not one of them. The questions sought to be raised are, to say the least, debatable. If the rule contended for by appellant's counsel had application to an action like the instant one, a reversible, though technical, error might be allowed to go unchallenged at the trial for the express purpose of working a reversal on appeal, and there would be no end to the litigation, unless the trial court, assuming charge of the plaintiff's case, could succeed in giving him an errorless trial.

The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J., concur.

## IN re COLBERT'S ESTATE.

KOLBOW et al. v. STATE et al.

(Supreme Court of Montana. Nov. 28, 1911.)

### 1. EXECUTORS AND ADMINISTRATORS (§ 66\*)—INVENTORY—PROPERTY INCLUDED—RIGHTS OF HEIRS.

Though the right of an heir to take vests at once on the death of the intestate, yet the property goes as provided by Rev. Codes, § 4819, into the control of the district court and the possession of the administrator for the purpose of administration, and, as required by section 7493, the administrator must take possession as soon as he is appointed and return to the court an inventory and appraisal of the property coming into his hands.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 315; Dec. Dig. § 68.\*]

### 2. DESCENT AND DISTRIBUTION (§ 6\*)—RIGHT TO INHERIT—STATUTORY REGULATION.

The right to inherit rests in public policy, and is dependent on the will of the Legislature, except as restricted by the Constitution.

[Ed. Note.—For other cases, see *Descent and Distribution*, Dec. Dig. § 6.\*]

### 3. ALIENS (§ 9\*)—RIGHT TO INHERIT.

An alien may not inherit lands or take by law except by grace of the state where the land is situated, and the Legislature conferring the right on an alien to inherit may impose any condition it pleases, even after the right has vested and before it has actually reached the hands of the alien, so long as it does not deny due process of law.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 21-29; Dec. Dig. § 9.\*]

### 4. ALIENS (§ 9\*)—RIGHT TO INHERIT.

Const. art. 3, § 25, providing that aliens shall have the same right as citizens to inherit property, merely places aliens on the same footing as citizens in granting the right to inherit, but does not limit the power of the Legislature to impose on the right to inherit conditions such as are prescribed by Rev. Codes, § 4835, authorizing aliens to take by succession, but providing that no nonresident foreigner can so take unless he appears and claims the succession within five years after decedent's death, for the statute is merely one of limitations not affecting the right conferred.

[Ed. Note.—For other cases, see *Aliens*, Cent. Dig. §§ 21-29; Dec. Dig. § 9.\*]

### 5. LIMITATION OF ACTIONS (§ 6\*)—NATURE OF STATUTES.

Statutes of limitations are statutes of repose, and the Legislature may make them applicable even to vested rights, provided only it accords a citizen a reasonable time in which a right may be enforced.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 16-31; Dec. Dig. § 6.\*]

### 6. CONSTITUTIONAL LAW (§ 207\*)—PRIVILEGES AND IMMUNITIES OF CITIZENS.

An alien who has never been a resident of any of the states may not invoke the guaranty given by Const. U. S. art. 4, § 2, providing that citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 625-648; Dec. Dig. § 207.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**7. CONSTITUTIONAL LAW (§ 208\*)—LIMITATION OF ACTIONS (§ 4\*)—DISCRIMINATIONS BETWEEN FOREIGNERS AND CITIZENS—CLASS LEGISLATION.**

The Legislature in the enactment of a statute of limitations may lawfully discriminate between citizens of the different states, and Rev. Codes, § 4835, authorizing aliens to take by succession, but providing that no nonresident foreigner can so take unless he appears and claims such succession within five years after decedent's death, being a statute of limitations, is not invalid because it discriminates between foreigners and citizens.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 649-677; Dec. Dig. § 208;\* Limitation of Actions, Cent. Dig. §§ 10, 11; Dec. Dig. § 4.\*]

Appeal from District Court, Silver Bow County; John B. McClernan, Judge.

In the matter of the settlement of the estate of Charles Colbert, deceased, in which Johann Kolbow and others filed a complaint alleging that they were the heirs of the deceased, and the state through the Attorney General answered, controverting the rights of the petitioners, and Jay Cross Busch and others also filed an answer. From a judgment dismissing the complaint of petitioners, they appeal. Affirmed.

C. M. Parr and Frank A. Lentz, for appellants. Albert J. Galen, C. F. Kelley, and Carl J. Christian, for respondents.

BRANTLY, C. J. Charles Colbert died intestate in Silver Bow county on February 14, 1901. He left an estate, consisting of real and personal property, of an estimated value of \$45,000. Of this total \$4,000 was money on deposit. The real estate is described as "about sixteen acres of land, being portions of survey Nos. 996 A, B, and C, Emery Placer, and Survey No. 1702, Otisko Lode, excepting portions of the surface, which do not belong to the estate." The estate has been in process of administration by the district court of Silver Bow county, and has not yet been closed. So far as was ascertainable at the time of his death, the deceased left no known heirs, either in the direct or collateral line, and as yet no one has established a right to the succession. On April 27, 1909, Johann Kolbow and 34 other persons, residents of the German empire, filed their complaint under the provisions of sections 7670 and 7671, Revised Codes, alleging that the true name of the deceased was Frederick Carl Kolbow; that they are his heirs and entitled to the succession, and praying that the court ascertain and declare their rights. The state of Montana appeared through the Attorney General and answered, controverting the alleged rights of the petitioners, upon the assumption that, the intestate having died without heirs, the property belonging to his estate has escheated to the state of Montana. It is also alleged that the petitioners are and always have been foreigners residing in

Germany, and that they are barred from asserting any claim of right to succeed to the estate by the provisions of section 4835, Rev. Codes. Jay Cross Busch and other persons also filed an answer. They put in issue all the allegations of the complaint, and allege that the claims of plaintiffs are barred by the provisions of the statute. They then aver that they are the sole surviving heirs of the deceased, and ask that their rights as such be determined, and that the estate be distributed to them. This answer also alleges other matters which are not now pertinent. The plaintiffs replied, joining issues on both answers. Thereafter, on April 26, 1910, in order to avoid the expense of producing evidence, counsel representing all the parties entered into a stipulation, by the terms of which they agreed to submit to the court for decision in advance of the trial the question, among others not now important, whether the claims of plaintiffs are barred by the provisions of the statute, supra, each party reserving the right to appeal from the judgment rendered on this decision. The court held in favor of the defendants, and rendered and entered judgment dismissing the complaint. The plaintiffs have appealed from the judgment and an order denying their motion for a new trial.

It is argued that the court erred in sustaining the contention of defendants, for that the limitation prescribed by the section of the statute, supra, is repugnant to section 25, art. 3, of the state Constitution. The statute declares: "Sec. 4835. Resident aliens may take in all cases by succession as citizens; and no person capable of succeeding under the provisions of this title is precluded from such succession by reason of the alienage of any relative; but no nonresident foreigner can take by succession, unless he appears and claims such succession within five years after the death of the decedent to whom he claims succession." The section of the Constitution is as follows: "Aliens and denizens shall have the same right as citizens to acquire, purchase, possess, enjoy, convey, transmit and inherit mines and mining property, and milling, reduction, concentrating and other works, and real property necessary for or connected with the business of mining and treating ores and minerals: Provided, that nothing herein contained shall be construed to infringe upon the authority of the United States to provide for the sale or disposition of its mineral and other public lands."

In their brief counsel for appellants state their position as follows: "Aliens are put upon the same footing as citizens of this state as to the inheritance of mines and mining property. The heirs at law of the deceased intestate became vested with the constitutional right of inheritance immediately upon the death of the deceased, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

this right is not based upon conditions, and legislative bodies cannot take away this right granted by the Constitution. The alien upon inheriting mines and mining property need not make a residence within the state; he need not sell his estate; he need not take actual possession of it; his right becomes an absolute fee; and he can do with it as he will." They then proceed to argue that, since the right to take the inheritance vests at once upon the death of the intestate, the Legislature in enacting section 4835, supra, has in effect destroyed the right, or has imposed a condition which is prohibited by the provision of the Constitution.

[1] That the right of the heir to take vests at once upon the death of the intestate cannot be doubted. This we believe is the rule everywhere. It has been expressly recognized by the Legislature; but the property, the subject of the inheritance in whatever form it may be, goes into the control of the district court and the possession of the administrator for the purposes of administration. Rev. Codes, § 4819. It becomes the duty of the administrator to take possession as soon as he is appointed, and to make and return to the court an inventory and appraisal of all property which comes into his hands. Section 7493. The purpose of these provisions and others found in the Codes touching the administration and distribution of estates is to have judicially determined and discharged the claims of creditors, to which are postponed all other claims, and then to have ascertained those who are entitled to the residue of the estate, if any, and secure distribution to them.

[2] The right to inherit, resting as it does in public policy, is dependent entirely upon the will of the Legislature, except in so far as its power is restricted by constitutional provisions. Therefore no one has the natural right to be the future heir of a living person. 14 Cyc. 25.

[3] So an alien or foreigner may not inherit lands or take by law, except by grace of the state where the land is situated. *Blight's Lessee v. Rochester*, 7 Wheat. 535, 5 L. Ed. 516; *Orr v. Hodgson*, 4 Wheat. 453, 4 L. Ed. 613; *Jackson v. Filtz Simmons*, 10 Wend. (N. Y.) 9, 24 Am. Dec. 198; *Norris v. Hoyt*, 18 Cal. 217; *McClenaghan v. McClenaghan*, 1 Strob. Eq. (S. C.) 296, 47 Am. Dec. 532; *Yeaker's Heirs v. Yeaker's Heirs*, 4 Metc. (Ky.) 33, 81 Am. Dec. 530; *Furenes v. Mickelson*, 86 Iowa, 508, 53 N. W. 416; *King v. Ware*, 53 Iowa, 97, 4 N. W. 858; *Andrews v. Spear*, 48 Tex. 567. The Legislature may, therefore, in conferring the right upon non-resident foreigners, which it has done by conferring the right upon citizens to take by inheritance, impose any condition or burden it pleases, even after the right has vested and before it has actually reached the hands of the heir, so long as it does not deny due process of law. *Gelsthorpe v. Furnell*, 20 Mont. 299, 51 Pac. 267, 39 L. R. A. 170.

[4] The provision of the Constitution, supra, goes no further than to put aliens and denizens on the same footing as citizens in granting the right to inherit. In other words, since citizens have the right, aliens and denizens also have it. The provision is not a limitation upon the power of the Legislature to impose upon it the condition prescribed in section 4835 of the statute, supra, or any other condition which it may deem necessary to prescribe in order that estates may be properly administered and distributed. This provision is a statute of limitations which does not affect in any way the right conferred. It deals with the remedy only, and, being remedial in its nature, is not in any wise repugnant to the provision of the Constitution.

The Constitution of California contains a provision granting to foreigners of the white race eligible to become citizens of the United States under the naturalization laws the same right to inherit as native-born citizens possess. Section 672 of the Civil Code provides: "If the nonresident alien takes by succession he must appear and claim the property within five years from the time of succession or be barred." In considering these provisions, the Supreme Court of that state, in *Estate of Billings*, 65 Cal. 594, 4 Pac. 639, said: "It is contended that under the section of the Constitution above quoted [Const. art. 1, § 17] the whole of the estate of the deceased vested in the heirs who were residents of the state at the time of his death, to the exclusion of those who were not then residing in the state. It is true that such would have been the effect of the constitutional provision, had there been no legislation, operative at the time of the death of the intestate, extending the right of succession or inheritance to nonresident alien heirs. The Constitution did not inhibit such legislation. It was so held in *People v. Rogers*, 13 Cal. 159, under the Constitution of 1849, in which was a section (section 17, art. 1) similar, as far as this question is concerned, to the one referred to and quoted above from the present Constitution. We see no violation of the Constitution in the sections of the Civil Code above quoted, extending the right of inheritance to nonresident aliens."

[5] Statutes of limitations are statutes of repose. Their object is to suppress fraudulent and stale claims which it is sought to enforce after the lapse of time, during which witnesses have died or removed and the evidence touching the transaction has faded from memory or has been destroyed. That it is within the power of the Legislature to enact them cannot now be questioned, and they are in all cases to which they apply honorable and legitimate defenses. *Anacanda Min. Co. v. Salle*, 16 Mont. 8, 39 Pac. 909, 50 Am. St. Rep. 472; 1 Wood on Limitations, § 4. The Legislature may make them applicable even to vested rights, pro-

vided only it accords to the citizen a reasonable time in which his right may be enforced. 1 Wood on Limitations, § 12; Gutterman v. Wishon, 21 Mont. 400, 54 Pac. 566; De Moss v. Newton, 31 Ind. 219.

[6] But it is said that the statute discriminates between resident foreigners and citizens, and is therefore class legislation. By this we understand that counsel mean that it is repugnant to section 2 of article 4 of the Constitution of the United States, which provides that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states." This contention is without merit. Assuming that it may be invoked by foreigners residing in other states of the Union, it has no reference to foreigners who have never been residents of any one of the states.

[7] Furthermore, the Legislature in the enactment of such statutes may lawfully discriminate between citizens of the different states. Such a discrimination is made by section 6458 of the Revised Codes, which provides that, when a cause of action accrues against a person who is at that time a nonresident of the state, the action to enforce it may be commenced against him within the term provided by the section applicable to that character of case, after he returns to the state, and that if, after the cause of action accrues, he departs from the state, the time of his absence is not to be computed as a part of the time limited for the commencement of the action. Similar provisions are found in the statutes of other states, yet they are held not repugnant to this provision. Chemung Canal Bank v. Lowery, 93 U. S. 72, 23 L. Ed. 806; Meek v. Meek, 45 Iowa, 294; Hawse v. Burgmire, 4 Colo. 813.

The judgment and order are affirmed.  
Affirmed.

SMITH and HOLLOWAY, JJ., concur.

#### JENKINS v. NORTHERN PAC. RY. CO.

(Supreme Court of Montana. Dec. 8, 1911.)

#### 1. CARRIERS (§ 316\*)—INJURIES TO PERSON ON DEPOT PLATFORM—NEGLIGENCE—PRESUMPTIONS—"INFERENCE."

A passenger of another railroad company required to pass over the depot platform of defendant railroad company was injured by stepping into an uncovered water hole in the platform. The defendant was in the exclusive control of the platform and water holes used for watering its trains, an extra number of which had been watered during the day before the accident. The weather was cold, and the employes were busy and had frequent occasion to uncover the holes and no other person had any authority to open them. The employes opening the holes were instructed not to leave them uncovered. *Held* that, though negligence will not be presumed, an inference within Rev. Codes, §§ 7956, 7957, 7959, declaring that an "inference" is one kind of indirect evidence, and

a deduction which the jury makes from the facts proved and must be founded on a fact legally proved and on such a deduction from that fact as is warranted by a consideration of the usual propensities, that the employes omitted to recover the hole was justified, authorizing a recovery against the latter company.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 316.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3579; vol. 8, p. 7687.]

#### 2. DAMAGES (§ 158\*)—PERSONAL INJURIES—PLEADING—EVIDENCE—"BODY."

A complaint in an action for personal injuries, which alleges that plaintiff was injured and bruised on her right ankle, leg, hip, and body, is, in the absence of a special demurrer or demand for a bill of particulars, sufficient to authorize evidence of an internal injury, the word "body" comprehending all portions of the body, inside and outside, and advising defendant that plaintiff would prove injuries to portions of her body other than her ankle, leg, and hip.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 441-446; Dec. Dig. § 158.\*]

For other definitions, see Words and Phrases, vol. 1, p. 819.]

Appeal from District Court, Yellowstone County; Frank Henry, Judge.

Action by Margaret Jenkins against the Northern Pacific Railway Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

W. M. Johnston, Gunn & Rasch, E. M. Hall, and W. W. Patterson, for appellant. Thad S. Smith and Hathhorn & Brown, for respondent.

SMITH, J. Action to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant. Appeals from a judgment on verdict for the plaintiff, and from an order denying a new trial.

The complaint alleges that the defendant corporation "operated a line of railroad in and through the city of Billings, and in connection therewith maintained and operated a passenger station, platform, and side tracks in said city for the purpose of accommodating passengers using said line of railway and persons traveling to and from the city of Billings by railroad." This allegation is admitted by the answer. The testimony shows that on January 7, 1910, plaintiff left her home in Sheridan, Wyo., on train No. 41 of the Chicago, Burlington & Quincy Railroad, and arrived at Billings at 9 o'clock at night. The train stopped on the third track south of and nearly opposite the defendant's depot in Billings and all the passengers got off. The night was dark and the platform was dark. While going along the track platform on her way to the defendant's depot she fell into an open water hole in the platform and was severely injured. She did not see the water hole when she stepped into it. There was no rail or other protection around

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

it, and no person about the train to show her to the depot. The water holes were used for watering trains, and each had an iron cover to close it when not in use. There had been a blockade on defendant's line, which was relieved on the day in question. The first train from the West reached Billings at 3:10 that afternoon, "and then a continual string of trains from that time on until 1 o'clock the next morning, going both ways—plenty of cars to water." H. Y. Brown, defendant's car foreman, testified: "I was there to see that things went right. I did not see any water hole open there that night. I could not watch all of them—12 or 13 of them—and I could not watch each one. I was there to see that these holes as much as I could were kept closed. If left open it was wrong, and I was there to correct anything that was wrong. Eighteen or twenty trains came in from 3 o'clock until midnight on the afternoon and evening of January 7." Swanson, an employé of the defendant company who was on duty that night, testified: "I didn't see any of these water holes in the platform open that night because the man [men] that opens these and waters the coaches have special orders not to leave none of these holes open, and if you do and it is known to any one you will get discharged. The chances are they were open. I didn't see none. I couldn't say whether they were or not. We see them open every day. I seen them take a hose off and put the cover on."

[1] 1. Plaintiff's counsel contend that it was the duty of the defendant to exercise ordinary care to keep its premises, over which the Chicago, Burlington & Quincy passengers were required to pass to and from trains, reasonably safe for their passage, and this is conceded by counsel for the defendant. But the latter argue that the defendant cannot be charged with a violation of such duty in this case unless the cover of the water hole was shown to have been removed by it, or by some one for whose conduct it was responsible; or that it knew the hole was open; or that, in the absence of actual notice, the hole had been uncovered a sufficient length of time to charge it with constructive notice. If the plaintiff, however, made a prima facie showing that the cover was removed by some servant of the defendant, then it becomes unnecessary to consider the questions of notice and lapse of time.

It is contended that there is not any evidence to show who removed the cover, and that it may have been done by some one not in privity with the defendant. We think this latter consideration may be disregarded. There is not any evidence or even a suggestion that an outsider ever opened one of the water holes. To do so would have been a trespass which is not to be presumed. The argument on this point is founded in mere

conjecture, which is not permissible. While it is also true that negligence is not to be presumed, still, we think, there is testimony sufficient to warrant the conclusion that the hole in question was left uncovered by some employé of the defendant. Let it be borne in mind that the depot grounds belonged to the defendant, and that it, through its employes, was in the exclusive management and control of the platform and water holes and constantly using the latter. There was no defect in the platform or appurtenances—no breaking thereof; no unnatural, uncommon, or extraordinary situation is disclosed. On the contrary, the physical condition of the water hole—that is, the condition of being open—was in strict accord with the plan of its construction and use. We think the railroad company, in the absence of evidence to the contrary, may fairly be presumed to be responsible for a condition of its property which is in entire harmony with the notion of recent use by one of its servants for an ordinary and legitimate purpose. The record shows that a blockade had just been broken and many trains were passing, some or all of which required to be watered. Many were watered. The weather was cold, and it may also be deduced, we think, from the testimony, that the defendant's employes were extraordinarily busy on account of the passage of so many trains. Brown testified that there were so many water holes that he could not watch all of them, although he was there for the purpose of seeing that the holes were kept closed "as much as he could." It is not the injury, but the manner and circumstances of the injury, that justify the inference of negligence. Defendant's employes had frequent occasion to uncover the holes, and no other person had any authority to open them. It appears from Swanson's testimony that to some one or more of the employes was delegated the duty of opening and closing the holes, but not any of them were produced as witnesses, nor was any explanation offered of their absence from the trial. Inference is one kind of indirect evidence. Rev. Codes, § 7956. An inference is a deduction which the reason of the jury makes from the facts proved without an express direction of the law to that effect. Rev. Codes, § 7957. "An inference must be founded (1) on a fact legally proved; and (2) on such a deduction from that fact as is warranted by a consideration of the usual propensities \* \* \* of men." Rev. Codes, § 7959. We think it not an unwarranted inference from the proven facts in this case that the employes of the defendant company who were charged with the duty of watering trains, in the hurry and disorder incident to the arrival and departure of so many trains, on the cold day in question, omitted to recover the water hole into which the plaintiff fell. If this inference be a reasonable one, which we think it is, and no other reason-

able inference can be drawn from the evidence, then the jury was justified in founding a verdict upon it.

The Supreme Judicial Court of Massachusetts, in *Smith v. Boston Gaslight Co.*, 129 Mass. 318, where the trial court told the jury "that there was evidence enough of want of proper care on the part of the defendant to make it responsible on the ground that it was bound to conduct its gas in a proper manner; and that the fact that the gas escaped was prima facie evidence of some neglect on the part of the defendant," in affirming the judgment said: "The escape of gas from a defective pipe into the room occupied by the plaintiff, with no explanation of the cause other than was offered, was some evidence of negligence. The pipes were made to contain the gas and conduct it safely, and it was the defendant's duty to see that they were constructed in a proper form and of proper material; and that they were laid in the ground at a proper depth and in a suitable manner and kept in proper repair for that purpose. The construction and care of the works were exclusively in the hands of the defendant, and no cause independently of some negligence on its part is shown to have produced the effect."

[2] 2. Plaintiff alleged in her complaint that she was "injured and bruised upon her right ankle, leg, hip, and body." She was allowed to prove, over objection, that she had suffered an injury to her uterus. We find no error in this. The word "body" comprehends all portions of the body, inside and outside, and the general term employed advised the defendant that she would prove injuries to portions of her body other than her ankle, leg, and hip. The indefinite and uncertain allegation of the pleading might have been taken advantage of before answering, but the point raised for the first time at the trial came too late. A general allegation of bodily injury is sufficient to warrant a trial court in receiving evidence of any injury to the person, in the absence of a special demurrer or demand for a bill of particulars. *Gordon v. Northern Pacific Ry. Co.*, 39 Mont. 571, 104 Pac. 679.

The judgment and order are affirmed.  
Affirmed.

BRANTLY, C. J., and HOLLOWAY, J.,  
concur.

#### UNITED MISSOURI RIVER POWER CO. v. WISCONSIN BRIDGE & IRON CO.

(Supreme Court of Montana. Dec. 23, 1911.)

#### 1. CORPORATIONS (§ 646\*)—FOREIGN CORPORATIONS—AGENT FOR SERVICE—REVOCATION OF AUTHORITY.

Laws 1901, p. 150, § 1, requires every foreign corporation to file a certificate that it has

consented to be sued in the courts of this state upon all causes of action against it arising herein, and that service of process may be made upon some person whose name and residence is designated in such certificate, and provides that such service upon the agent shall be valid on the corporation; and section 2, now Rev. Codes, § 4414, requires the designation of an agent for service of process to remain in force until the filing in the same office of a written revocation thereof. *Held* that, construing the statutes in view of Laws 1893, p. 91, repealing Comp. St. 1887, div. 5, § 443, and of Laws 1893, p. 98, § 10, that a foreign corporation may revoke the authority of its statutory agent to receive service, even after a cause of action has accrued against it.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 2514, 2515; Dec. Dig. § 646.\*]

#### 2. STATUTES (§ 190\*)—CONSTRUCTION—UNAMBIGUOUS STATUTES.

An unambiguous statute should not be interpreted, but should be enforced according to its clear language.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 269; Dec. Dig. § 190.\*]

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Action by the United Missouri River Power Company against the Wisconsin Bridge & Iron Company. From an order quashing a service of summons, plaintiff appeals. Affirmed.

Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for appellant. Walsh & Nolan and T. J. Walsh, for respondent.

SMITH, J. In September, 1905, the defendant, a Wisconsin corporation, entered into a contract with the predecessor in interest of the plaintiff, a New Jersey corporation, for the construction of the steelwork and superstructure of a dam across the Missouri river at Hauserlake, Mont. On April 14, 1908, the dam broke and gave way. On February 23, 1894, the defendant appointed T. H. Kleinschmidt as its statutory agent for the service of process in Montana. This appointment ostensibly continued in force until April 21, 1908, when a certificate of revocation thereof was filed in the office of the Secretary of State and a duplicate certificate in the office of the county clerk and recorder of Lewis and Clark county. On April 13, 1910, plaintiff began this action to recover the sum of \$3,590.246.28 damages alleged to have been sustained by reason of the breaking of the dam. Service of summons was made on Kleinschmidt. The district court of Lewis and Clark county, upon proof being made by affidavit of the revocation of Kleinschmidt's appointment as agent, as aforesaid, and also of the fact that since the completion of work under the contract the defendant has done no business in the state, entered an order quashing the service of summons. From that order plaintiff has appealed.

[1] Quoting from the brief of counsel for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



the appellant: "The question presented by this appeal is the force of sections 1 and 2 of Senate Bill 46, Laws 1901, page 151." Section 1 of the act of 1901, supra, reads, in part, as follows: "Such (foreign) corporation \* \* \* shall \* \* \* also file, \* \* \* a certificate \* \* \* that said corporation has consented to be sued in the courts of this state, upon all causes of action arising against it in this state, and that service of process may be made upon some person \* \* \* whose name and place of business shall be designated in such certificate. And such service, when so made upon such agent shall be valid service on the corporation. \* \* \*" Section 2 of the act is now section 4414, Rev. Codes, and reads, in part, as follows: "\* \* \* Such designation shall remain in force until the filing in the same offices of a written revocation thereof. \* \* \*"

It is argued in behalf of the appellant that if a foreign corporation, after liability incurred, may revoke the authority of its agent to receive service of process, before an action can be commenced, and the injured party thereby "forced, at great expense to go to some other state and possibly to an unfriendly community to litigate a claim which arose in his own state and out of business done under rights acquired under his own state's statutes, the statute is inoperative and of no effect, and such a construction would be contrary to the rule which requires that statutes shall be so construed as to make them operative and effective if possible." It is also contended that the intent of the Legislature that there shall be some person upon whom service of process may be had in suits concerning the corporation's business and transactions in this state is clear. A very elaborate and exhaustive brief has been filed in support of the rules of statutory construction for which counsel contend, but the entire argument is based upon the premise that the statute is uncertain and ambiguous in its terms and therefore the subject of construction by the courts.

[2] We think the law in question is plain, certain, and unambiguous. Such a statute requires no interpretation beyond the bare reading of the words of the lawmaking body. *Osterholm v. Boston, etc., Min. Co.*, 40 Mont. 508, 107 Pac. 499. The Legislature is presumed to have meant precisely what the words employed commonly import; that is, that the authority of a statutory agent to receive service of process may be recalled and revoked, and after such revocation the agency no longer exists. The question of the wisdom of such legislation is not for the courts to determine.

But we are not without other light to guide us in determining the legislative intention. The Legislature of 1893 (see Ses-

sion Laws, 1893, p. 91) passed an act providing: "Before any foreign corporation shall begin to carry on business in this state, it shall, by its certificate \* \* \* designate an agent \* \* \* upon whom service of summons and other process may be made. \* \* \* Service upon such agent shall be sufficient to give jurisdiction over such corporation to any of the courts of this state." The act repealed, in terms, chapter 24 of the Compiled Statutes of 1887, which provided (section 443): "Such designation shall remain in full force until the filing in the same offices of a written revocation thereof. \* \* \*" The same legislative assembly (see Laws 1893, p. 93) passed an act to provide for the incorporation of companies to do the business of accident insurance on the assessment plan, in which it was expressly provided (see section 10) that the appointment of an attorney upon whom all process might be served should be accompanied by a written agreement "that the authority shall continue in force so long as any liability remains outstanding against the corporation in this state." It is readily seen, therefore, that, when the lawmakers intended to embody in a measure such terms as we are asked to read into section 2 of Senate Bill 46 (1901), supra, they found apt words to express such intention.

Counsel have not raised the question whether the order of the district court is one from which an appeal will lie, and we have, therefore, not considered the question.

The order is affirmed.

Affirmed.

BRANTLY, C. J., and HOLLOWAY, J.,  
concur.

STATE ex rel. ZYLSTRA et al. v. CLAUSEN,  
State Auditor.

(Supreme Court of Washington. Dec. 20,  
1911.)

# 1. SCHOOLS AND SCHOOL DISTRICTS (§ 90\*)— LIMITATION OF INDEBTEDNESS.

The indebtedness of a consolidated school district within the constitutional limitation to 5 per cent. of the value of the taxable property must be measured by the value of the taxable property within the district and the amount of the debts of the districts composing the consolidation, since, under Rem. & Bal. Code, § 4446, each of such districts retains its corporate existence to pay its prior indebtedness and is subject to taxation therefor as a separate entity, and, where the indebtedness of some of the districts at the time of the consolidation exceeded 2 per cent. of the taxable property therein, an indebtedness of the consolidated district in excess of 3 per cent. of the taxable property therein was in excess of the constitutional limitation.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 209, 211-213; Dec. Dig. § 90.\*]

## 2. MANDAMUS (§ 103\*)—COMPELLING ACCEPTANCE OF SCHOOL DISTRICT BONDS.

Where the bonds of a school district created an indebtedness in excess of the constitutional limitation and the state became the highest bidder for the bonds, mandamus did not lie to compel the State Auditor to accept and pay for so much of the bonds as the district could lawfully issue.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 103.\*]

Department 1. Mandamus by the State, on the relation of Riekle Zylstra and others, as Directors of Consolidated School District No. 201 of Island County, against C. W. Clausen, as State Auditor, to compel the Auditor to accept bonds of the district, and to issue his warrant in payment thereof. Writ denied.

James Zylstra, for appellant. W. V. Tanner and R. E. Campbell, for respondent.

FULLERTON, J. On August 13, 1910, pursuant to the statutes authorizing the consolidation of school districts, consolidated school district No. 201 of Island county was duly organized by the consolidation of former school districts Nos. 3, 6, 7, and 15. On June 21, 1911, an election was held in the consolidated district whereat it was determined to issue negotiable coupon bonds in the sum of \$11,000 for the purpose of building and equipping a school building for the use of the consolidated district. Thereafter the bonds were executed and duly offered for sale, when the state of Washington, acting through its officers authorized to invest the irreducible school fund, became the highest bidder for the same. The bid of the state was accepted, and the bonds tendered to the State Auditor on behalf of the state. The Auditor submitted them to the Attorney General for an opinion as to their regularity and validity, and acting on his advice, refused to accept or draw a warrant for the same on the ground that the issue was illegal. This is a proceeding in mandamus to compel the Auditor to accept the bonds, and issue his warrant in payment thereof.

The record discloses that, if the bonds tendered the Auditor were issued, their issuance would create an indebtedness on behalf of the consolidated district slightly in excess of 3 per centum of the taxable property therein as shown by the last assessment for state and county purposes. It appears, also, that districts Nos. 6 and 7 had an indebtedness at the time of their consolidation exceeding 2 per centum of the taxable property therein as shown by the last assessment for state and county purposes. As each member of the consolidated district retains its corporate existence for the purpose of paying its prior indebtedness, and is subject to taxation therefor as a separate entity (Rem. & Bal. Code, § 4446), it is plain that the issuance of the bond in

question will create an indebtedness over this portion of the consolidated district exceeding the constitutional limitation of 5 per centum. It is for this reason that the Auditor was advised to refuse to accept the bonds.

[1] The relators argue that the consolidation of several school districts is the creation of a new entity in no wise affected by the entities of which it is composed, and that its limitation of indebtedness is to be measured by the assessed value of the taxable property within its boundaries, regardless of the amount of indebtedness the entities of which it is composed had formerly incurred for like purposes. But this contention seems to us untenable. It is manifest that the Constitution intended to limit the amount of indebtedness any particular territory could incur for school purposes to 5 per centum of the value of the taxable property therein, to be ascertained by the last assessment for state and county purposes previous to the incurring of the indebtedness. To hold with the relator's contention would be to do away with the limitation entirely, as the Legislature by providing for successive reincorporations of the same territory could create a new limitation whenever the existing limitation should be reached.

[2] The relator contends, further, that the bonds are void only for the excess over and above the limitations of 5 per centum of the taxable property affected, and that the Auditor ought to be compelled to accept and pay for so much of them as the district could lawfully issue. But we think this contention likewise untenable. It may be that, had the state purchased the bonds and the district had sought to avoid them by showing that they were issued in excess of the constitutional limitation, we would on equitable principles allow the contention only for the excess of the issue. But, where the attack is made in advance of the issue, another question is presented. No principles of estoppel, good faith, or good morals enter into it. The question is one of law simply, and, since the attempted issue is contrary to law, the state should not be compelled to accept any part of it.

The writ will be denied.

DUNBAR, C. J., and PARKER, MOUNT, and GOSE, JJ., concur.

## In re CITY OF SEATTLE.

(Supreme Court of Washington. Dec. 16, 1911.)

## 1. MUNICIPAL CORPORATIONS (§ 454\*)—PUBLIC IMPROVEMENTS—PROCEEDINGS—ADMISSION OF EVIDENCE.

In proceedings to assess property for the improvement of a street by erecting a bridge,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

evidence was not admissible of the contemplated erection of a bridge at another street, on the question of benefits, not being a part of the improvement in question.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 454.\*]

**2. NAVIGABLE WATERS (§ 20\*)—BRIDGES—CONSENT OF FEDERAL AUTHORITIES.**

Act Cong. March 3, 1899, c. 425, § 9, 30 Stat. 1151 (U. S. Comp. St. 1901, p. 3540), provides that it shall not be lawful to construct a bridge, etc., over any canal or navigable river of the United States until the consent of Congress thereto shall have been obtained, and until the plans have been approved by the Chief of Engineers and by the Secretary of War, provided that such structures may be built under authority of the state Legislature across rivers, the navigable portions of which lie wholly within the state, "provided the location and plans thereof are approved by the Chief of Engineers and by the Secretary of War before construction is commenced." *Held*, that a bridge could be built across navigable parts of a stream lying wholly within a single state, if authorized by the state or a subdivision thereof, and the location and plans of the bridge were first approved by the Chief of Engineers and Secretary of War; a special act of Congress consenting to the erection of the bridge not being required by Act Cong. March 23, 1906, c. 1180, 34 Stat. 84 (U. S. Comp. St. Supp. 1909, p. 1855), or otherwise.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73-99; Dec. Dig. § 20.\*]

**3. NAVIGABLE WATERS (§ 20\*)—ERECTION OF BRIDGES.**

A condition, attached to the approval by the Secretary of War of the erection of a bridge by a city over a canal under the jurisdiction of the federal government, to the effect that the bridge should be removed or rebuilt when the work of constructing the canal might render such action necessary, did not contemplate that the Secretary of War might, subsequently, arbitrarily order the bridge removed and prohibit the erection of another in its place, but that the city might afterwards elect to rebuild at the same place if its plans for rebuilding were approved by the Secretary of War.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 73-99; Dec. Dig. § 20.\*]

**4. MUNICIPAL CORPORATIONS (§ 425\*)—PUBLIC IMPROVEMENTS—PROPERTY ASSESSABLE—RAILROAD RIGHT OF WAY.**

The right of way of a railroad company which ran upon a public street should not be assessed for erection of a bridge over a canal crossing the street; the railroad company having a mere easement in the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1031-1034; Dec. Dig. § 425.\*]

Department 2. Appeal from Superior Court, King County; R. B. Albertson, Judge.

In the matter of the City of Seattle. From an order confirming an assessment levied for the improvement of Westlake and Fremont Avenues, an appeal was taken. Affirmed.

Carkeek & McDonald and Victor McPlace, for appellant. Scott Calhoun and William B. Allison, for respondent.

CROW, J. This is an appeal from an order confirming an assessment levied for the

improvement of Fremont and Westlake avenues in the city of Seattle. Westlake avenue is one of the principal thoroughfares of Seattle, and extends for a considerable distance in a northerly direction immediately west of Lake Union, with its northern terminus at the United States government ship canal. Fremont avenue, another thoroughfare and practically a continuation of Westlake, extends from the north side of the canal in a northerly direction. The improvement involved the grading of Fremont and Westlake avenues and also the widening of a portion of the latter. The city, by ordinance No. 22,817, enacted December 27, 1909, granted to the Northern Pacific Railway Company a perpetual right of way, 30 feet in width, over the easterly side of Westlake avenue. On October 29, 1902, the Acting Secretary of War approved a map of location and plans for a bridge across the canal connecting Fremont and Westlake avenues, and delivered to the city the following written permit: "Whereas, by section 9 of an act of Congress approved March 3, 1899, entitled 'An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes,' it is provided that bridges, dams, dikes, or causeways may be built under authority of the Legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced; and whereas, the board of public works of the city of Seattle, Washington, having authority of the Legislature of the state of Washington to construct a bridge across the Lake Washington Ship Canal right of way at Fremont in said state, has submitted a map of the location and plans of the same, which have been approved by the Chief of Engineers: Now, therefore, this is to certify that the map of location and plans of said bridge, which are hereto attached, are hereby approved by the Secretary of War, subject to the following conditions: (1) That the engineer officer of the United States army, in charge of the district within which the bridge is to be built, may supervise its construction, in order that said plans shall be complied with. (2) That said bridge shall give a clear opening in the direction of the axis of the canal not less than seventeen and one-half (17½) feet wide. (3) That said bridge shall be removed or rebuilt whenever the work of constructing the canal may render such action necessary." Attached to this permit is a map designated: "Plan showing location of proposed bridge across an arm of Lake Union near Fremont, Seattle, Washington, accompanying application of the city of Seattle under date of April 1, 1902." The

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rép'r indexes

bridge was built and continued in use for several years. On September 17, 1906, notice to remove it and other bridges in aid of the construction of the canal, together with suggestions to be considered by the city of Seattle in adopting plans for rebuilding, was transmitted to the chairman of the board of public works, by H. M. Chittenden, major of the corps of engineers of the United States army by letter of that date in which he in part said: "The provisional authority granted by the Secretary of War on April 29, 1902, for construction of a crossing at Fremont avenue, contains the following: 'That said bridge shall be removed or rebuilt whenever the work of constructing the canal may render such action necessary.' \* \* \* The time has now arrived when it is necessary for the government to take advantage of its rights under the deed of right of way, and the conditions in permits granted since the date of condemnation proceedings, and to require the removal of the bridges above referred to. Application for permission to erect new structures, if accompanied by the necessary maps and plans, will be entertained, and to assist in the preparation of such plans the following conditions, approved by the Chief of Engineers United States Army, are specified, which it will be necessary for the structures to conform to. \* \* \* " Then follows a detailed statement of required conditions. Thereafter ordinance No. 17,629 of the city was approved, which provided for the laying off, extending, and establishing Westlake avenue from the south line of Mercer street to the south line of the Lake Washington Canal, and of Fremont avenue from the north line of the Lake Washington Canal to Ewing street, for changing and establishing the grades thereof, for condemning, taking, and damaging necessary property, for grading approaches, and for an assessment on property benefited. Ordinance No. 22,458, "providing for the improvement of Westlake avenue from Mercer street to Fremont avenue, and of Fremont avenue from the intersection of Westlake avenue north, Nickerson street, and Fourth avenue north (at the canal) northward across the government canal \* \* \* by grading and filling said avenues to the elevation established by ordinance No. 17,629, \* \* \* " was approved on March 1, 1910. This ordinance with much detail directed the improvement, created a local improvement district, provided that the cost and expense should be defrayed by assessments on property within the district, and also provided: "That the plans and specifications of the bridge or roadway upon that portion of the avenue crossing the government canal shall be of such plan and design and of such width and of such character as the United States engineers may require and permit; \* \* \* that the Northern Pacific Railway Company shall pay into the city treasury to the credit of the local improvement district herein

created the sum of thirty thousand dollars (\$30,000) in accordance with the terms and provisions of ordinance No. 22,817; and provided further, that the Northern Pacific Railway Company shall also pay into the city treasury to the credit of the local improvement district herein created, a sum of money equal to one-fifth (1/5) of the total cost of said improvement in accordance with the provisions of ordinance No. 22,819. \* \* \*

The ordinance mentioned, No. 22,817, was passed December 27, 1909, and granted to the Northern Pacific Railway Company the franchise above mentioned, subject to an acceptance of its conditions within 90 days by the railway company. It was duly accepted on February 25, 1910, by resolution of the board of trustees of the railway company duly adopted, and thereafter certified to and filed with the city of Seattle on March 5, 1910. The special assessment of which complaint is made by numerous property owners within the district, the appellants herein, was thereafter levied. By the roll much heavier assessments were cast upon property in the immediate neighborhood of Fremont and Westlake avenues near the canal than elsewhere in the district. In making these heavier assessments the commissioners considered benefits which would accrue to property in that locality, by reason of the contemplated erection of a bridge over the canal on the line of these avenues, which would become a portion of an important thoroughfare between the northerly and southerly portions of the city. The evidence shows the existence of Stone avenue, another thoroughfare several blocks east of Fremont avenue, which also runs in a northerly direction from a westerly arm of Lake Union. On October 6, 1910, the Acting Secretary of War issued a permit to the city for the construction of a temporary bridge across the canal at Stone avenue. Attached to this permit is a plat entitled, "Location of proposed trestle bridge across Lake Union from Westlake avenue to Stone way." It is manifest that the bridge here contemplated at Stone avenue or Stone way is to be for temporary use only. Appellants, however, contend a permanent bridge is contemplated, and on the trial insisted the commissioners should have considered the probability of its construction and benefits in casting the assessment.

[1] Without discussion we suggest our conclusion that all evidence relative to any contemplated bridge, either temporary or permanent, at Stone avenue, was immaterial, and that the only question relative to any bridge, to be considered on this hearing, is the probability of a bridge on the line of Westlake and Fremont avenues, a necessary and essential part of the improvement under consideration.

Appellants contend the assessment is inequitable, unjust, and not cast in accordance

with benefits bestowed, as the commissioners considered supposed benefits that may inure by reason of a contemplated bridge at Fremont and Westlake avenues; that there has been no proof that the federal government by any special act of Congress has authorized, or that it will authorize, the construction of a bridge at that point; that the city is without power in the absence of such authority; and that no bridge may ever be constructed. In support of this contention they argue that the original ordinance No. 17,692 fails to mention any proposed bridge; that, without any bridge, property in the immediate vicinity of Fremont avenue will be damaged and not benefited; that the city has not officially provided for any bridge at Fremont avenue; that it has provided for one at Stone avenue which appellants contend is the logical place for a permanent bridge; and that the imaginary benefits considered by the commissioners as resulting from a bridge at Fremont avenue do not exist and cannot be the basis of an assessment.

The questions to be considered are whether the city has any right to locate and erect the bridge, whether its erection is contemplated and probable, and whether the benefits it will confer were properly considered by the commissioners in casting the assessment. The Lake Washington Ship Canal is a navigable waterway lying entirely within the limits of the state of Washington and the city of Seattle. In *Escanaba Co. v. Chicago*, 107 U. S. 678, 687, 2 Sup. Ct. 185, 193 (27 L. Ed. 442), the Supreme Court of the United States said: "Bridges over navigable streams, which are entirely within the limits of a state, and of the latter class (local). \* \* \* The local authority can better appreciate their necessity, and can better direct the manner in which they shall be used and regulated, than a government at a distance. It is therefore a matter of good sense and practical wisdom to leave their control and management with the states; Congress having the power at all times to interfere and supersede their authority whenever they act arbitrarily and to the injury of commerce."

[2] For many years Congress has by its enactments reserved to the United States government the right to direct changes in, or the removal of, bridges and other structures erected over navigable waters lying wholly within a state, and has conferred upon the Secretary of War the power to enforce such control. The policy of the government has been, not to determine upon the locality of such bridges, but to reserve to itself the right to approve locations selected and plans proposed by the state authorities, so that navigation and commerce shall not be unnecessarily hindered, impaired, or destroyed. In *Lake Shore & Michigan Railway v. Ohio*, 165 U. S. 365, 17 Sup. Ct. 357, 41 L. Ed. 747, the court, in discussing the

act of Congress of September 19, 1890, c. 907, 26 Stat. 426, said: "The contention is that the statute in question manifests the purpose of Congress to deprive the several states of all authority to control and regulate any and every structure over all navigable streams, although they be wholly situated within their territory. That full power resides in the states as to the erection of bridges and other works in navigable streams wholly within their jurisdiction, in the absence of the exercise by Congress of authority to the contrary, is conclusively determined. \* \* \* The mere delegation to the Secretary of the right to determine whether a structure authorized by law has been so built as to impede commerce, and to direct, when reasonably necessary, its modification so as to remove such impediment, does not confer upon that officer power to give original authority to build bridges, nor does it presuppose that Congress conceived that it was lodging in the Secretary power to that end. \* \* \* The mere delegation of power to direct a change in lawful structures so as to cause them not to interfere with commerce cannot be construed as conferring on the officer named the right to determine when and where a bridge may be built."

Appellants cite section 9 of the subsequent act of March 3, 1899, 30 Stats. at L. 1151, 6 Fed Stats. Ann. 805 (U. S. Comp. St. 1901, p. 3540), which reads as follows: "That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War; provided, that such structures may be built under authority of the Legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. \* \* \*"

This section was enacted after the dates of the decisions above cited, and the proviso it contains recognizes the right of the Legislature of any state to authorize the construction of bridges across navigable waters which lie wholly within the limits of the state, more clearly and distinctly than it was recognized in the act of September 19, 1890, *supra*. In 1902, in *Cummings v. Chicago*, 188 U. S. 410, 23 Sup. Ct. 472, 47 L. Ed. 525, the Supreme Court of the United States, speaking through Mr. Justice Harlan, after quoting from *Lake Shore & Michigan Railway v. Ohio*, *supra*, the identical excerpt which we have above quoted, in speaking of the later act of March 3, 1899,

said: "Whether Congress may, against or without the expressed will of a state, give affirmative authority to private parties to erect structures in such waters, it is not necessary to this case to decide. It is only necessary to say that the act of 1899 does not manifest the purpose of Congress to go to that extent under the power to regulate foreign and interstate commerce, and thereby to supersede the original authority of the states."

In the recent case of *Hubbard v. Fort*, 188 Fed. 987, the United States Circuit Court for New Jersey, after commenting on the later act of March 3, 1899, said: "Among the changes effected by the act of 1899 was to require the affirmative authorization by Congress to create any obstruction to the navigable waters of the United States, except that bridges, dams, dikes, and causeways in or across waters the navigable portions of which lie wholly within the limits of a single state was permitted if authorized by state legislation and the location and plans of such structure were approved by the Chief of Engineers and of the Secretary of War." As to the policy of the United States government on this question, see the following additional cases: *Wilson v. Blackbird Creek Co.*, 2 Pet. 245, 7 L. Ed. 412; *Withers v. Buckley*, 20 How. 84, 15 L. Ed. 816; *Cardwell v. American Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. 423, 28 L. Ed. 959; *Montgomery v. Portland*, 190 U. S. 89, 23 Sup. Ct. 735, 47 L. Ed. 965; 27 Opinions of Attys. Gen. U. S. 284.

Appellants cite the act of Congress of March 23, 1906, c. 1130, 34 Stats. at L. 84 (U. S. Comp. St. Supp. 1909, p. 1355), and contend that by reason thereof it will be necessary to obtain permission from the national government by special act of Congress before any bridge can be constructed by the city at Freemont and Westlake avenues. The statute cited has no application to the construction of bridges across navigable waters which lie wholly within the limits of a single state. Authority for building the bridge now under consideration is found in the act of March 3, 1899, *supra*. The method of procedure which has been adopted by, and has obtained in, the War Department of the United States under these several acts of Congress, is disclosed by the various reports of the Chief of Engineers of the United States army. For instance, in part 1 of his annual report for 1910, at page 1019, under the subject of "Bridging Navigable Waters of the United States," he says: "Plans and maps of locations of the following bridges proposed to be erected under the authority of special acts of Congress have been examined with a view to protection of the interests of navigation and have been approved by the Secretary of War, as provided by the acts, and the local engineer officers have been furnished copies of the instruments of approval and drawings show-

ing the plans and locations and charged with the supervision of the construction of the bridges, so far as necessary to see that they are built in accordance with the approved plans." Following this statement appears a list of some 34 bridges about to be constructed under special acts of Congress. At page 1023 he further says: "Under the provisions of section 9 of the river and harbor act approved March 3, 1899, bridges may be built over navigable waters entirely within the limits of any state, under authority of legislative enactments of such state, when the plans and locations of the structures are approved by the Secretary of War. Plans and maps of locations of the following bridges proposed to be erected under these provisions have been examined with a view to protection of the interests of navigation and have been approved by the Secretary of War, and the local engineer officers have been furnished copies of the drawings and instruments of approval and charged with the supervision of construction of the bridges, so far as necessary, to see that they are built in accordance with the approved plans." Then follows a list of more than 100 bridges about to be erected under state authority, without any special acts of Congress; some of them being within the limits of this state. The locations and plans of all these bridges were selected and adopted under state authority, and were afterwards approved as reported by the Chief of Engineers of the United States army acting for and on behalf of the Secretary of War.

In further illustration of the national policy, reference may be made to public document No. 953 of the House of Representatives of the First Session of the Sixtieth Congress, a letter transmitted to the speaker on May 20, 1908, by the Acting Secretary of War, which includes a report of Maj. H. M. Chittenden relative to the canal. At page 12 Maj. Chittenden, under the subject "Structures over the Canal," said: "The question of bridges over the canal, as well as that of proper structures for carrying wires, water pipes, sewers, etc., under the canal, has been carefully considered, and the local public has been given to understand what will be required in these respects. Under date of May 11, 1907, the Secretary of War ordered the removal of existing bridges over the canal within a specified time. Applications for permission to erect new structures were authorized, and when these applications are presented they will be allowed under the following conditions: Bridges must be draw or lift bridges of permanent character—steel or masonry. The clear width of opening must be at least 150 feet, measured perpendicular to the line of the channel. Foundations must be carried well below the limit of probable dredging. The clearance under all bridges, except those at the head of Salmon Bay, must be 30 feet above high water. At the head of Salmon Bay 20 feet will be

admitted, on account of the difficulty of providing approaches with a greater height. Bridges must be equipped with efficient machinery for operating them quickly. Telegraph or other wires carried overhead must clear the channel by 200 feet. Sewers, water pipes, conduits for wires, etc., carried under the channel, must be at least 36 feet below mean low water."

Compliance with these conditions will enable the city to reconstruct the bridge. From authorities cited and the history of congressional legislation, it is manifest that the national policy as to navigable waters lying wholly within a state has at all times been that the state or its authorized representatives shall in the first instance select locations and adopt plans for bridges, but that prior to actual construction, and for the protection of navigation, such locations and plans shall be approved by the Secretary of War. In pursuance of the act of March 3, 1899, and in harmony therewith, the Legislature of this state enacted chapter 153, Session Laws of 1909 (Rem. & Bal. Code, §§ 7868, 7869). A prior statute relative to bridges (Laws 1889-90, p. 54 [Rem. & Bal. Code, §§ 7862-7867]) also provided for the protection of navigation.

[3] The records in this cause show that the original bridge over the canal at Fremont avenue was constructed at a point selected by and in accordance with plans adopted by the city of Seattle and afterwards approved by the Secretary of War, with the understanding, as shown by the permit of the Secretary of War, "that said bridge shall be removed or rebuilt when the work of constructing the canal may render such action necessary." This condition did not contemplate that the Secretary of War might thereafter arbitrarily order the bridge removed and prohibit the erection of another in its place, but did contemplate that the city at its election might rebuild at the same point, provided it adopted plans for rebuilding, which the Secretary of War would approve. H. M. Chittenden, major of the corps of engineers of the United States army, in recognition of this right, not only advised the city board of public works of the necessity of removing the old bridge in aid of the canal development, but also advised them of particular specifications which the chief of engineers of the United States army, acting for the Secretary of War, would require in plans for a new bridge to be thereafter constructed at the same point; his manifest intention being to aid the city in its adoption of plans for a new bridge, and thereby facilitate its labors. It is not to be presumed that the Chief of Engineers or the Secretary of War will arbitrarily refuse to approve any plans whatever. The only duty imposed upon them is to see that no unnecessary interference with navigation is caused by the new bridge when erected. Property rights and business interests of the city of

Seattle are to be protected and conserved, as well as the interests of navigation. Large portions of the city lie on either side of the canal. It is absolutely necessary that means be provided for the public to cross and recross. There must be at least one bridge, and possibly several, across the canal. The record satisfies us that a bridge will be erected at Fremont avenue, that it will comply in every respect with federal and state requirements, and that it will be approved by the Chief of Engineers and Secretary of War. The grades of Fremont and Westlake avenues are to be raised to an extent sufficient to afford proper approaches for such a bridge. The grades thus adopted and constructed would be useless for any other purpose. There can be no question but that a bridge must be constructed as an essential part of the improvement, that it will materially benefit adjacent and abutting property, and that such resulting benefits were properly considered by the commissioners in casting the assessment.

In *Dickson v. City of Racine*, 65 Wis. 306, 27 N. W. 58, the court, speaking of benefits to be conferred by a bridge constructed across a stream on the line of a street improvement, said: "We are, however, of the opinion that in assessing benefits the commissioners and jury would be justified in taking into consideration the benefits which would accrue to the lots from the expectation that a bridge would be constructed across the river, at the end of the street, within a reasonable time. The reason for opening the street was to make an approach to a bridge, the construction of which was contemplated by the city in the near future. It would seem absurd to say that such fact should have no effect in estimating benefits. The opening of this street in question rendered it practicable for the city to construct a bridge, at the end of it, across the river, and without this street no such bridge could have been constructed which would have been of any public use. The opening of the street rendered it practicable to build a bridge at that place across the river, which would be a great public convenience; and, it appearing also that it was almost a public necessity to have a bridge at that place, it would seem reasonable that such fact would tend to enhance the value of the property in the vicinity of such new street, and it was for the jury to determine whether that fact did or would enhance the value of the plaintiff's lots. This view of the case was entertained by the Supreme Court of Ohio in the case of *Chamberlain v. Cleveland*, 34 Ohio St. 551-568."

[4] In preparing the roll the commissioners did not assess the right of way of the Northern Pacific Railway Company, which appellants now argue was benefited and should have been assessed. They insist the trial court erred in not requiring the commissioners to prepare a new roll and assess it.

The right of way is entirely within the limits of Westlake avenue. If it should be abandoned by the railway company, the property on which it is located would continue a public street, and would not be subject to assessment. Appellants, in support of their contention, cite *Northern Pacific Railway Co. v. Seattle*, 46 Wash. 874, 91 Pac. 244, 12 L. R. A. (N. S.) 121, 123 Am. St. Rep. 955. There the assessment was upon private property abutting the street, and the assessment was sustained because the real estate was benefited, and could not be relieved from liability to assessment by reason of its having been devoted to a use not benefited by the improvement. The theory upon which that case was decided is disclosed by the following language used in the opinion: "Although the appellant may not hold the fee-simple title, there is no reasonable or immediate probability that it will abandon the land. Its use will doubtless be perpetual. Appellant is, therefore, for all practical purposes, the substantial owner. The fee subject to its use and easement is of but little value, if any. Except for appellant's occupancy, no suggestion would be made that the land was not benefited by the improvement, or that it would not be subject to the assessment. The particular use of the land cannot affect its liability to assessment. Abutting property cannot be relieved from the burden of a street assessment simply because its owner has seen fit to devote it to a use which may not be specially benefited by the local improvement. The benefit is presumed to inure, *not to such present use, but to the property itself*, affecting its value. \* \* \* It is also elementary that the whole theory of special assessment is based on the doctrine that the property against which it is levied derives some special benefit from the local improvement."

Were the use which the Northern Pacific Railway Company will make of Westlake avenue to be discontinued, we could not hold the street divested of such use to be benefited and assessable. The principles announced in the later case of *Seattle v. Seattle Electric Co.*, 48 Wash. 599, 94 Pac. 194, 15 L. R. A. (N. S.) 486, are applicable here. Speaking of the franchise of the Seattle Electric Company, we then said: "The respondent's right in the street is in no sense a lot, block, tract, or parcel of land. It does not own the fee of the street over which its tracks are laid and its cars operated, nor does it have dominion or control over that portion of the street. On the contrary, the fee of the street rests in the abutting property holders, to whom it will revert when the interests of the public therein cease from any cause, and dominion and control over it is vested in the public authorities in whom it will remain as long as the street retains its public character. The respondent's rights

therein are such and only such as these public authorities have conferred, and are, roughly speaking, the right to construct and maintain for a limited time a railway track on a fixed portion of the street, and the right to operate cars on such track for the purpose of carrying passengers and freight for hire. This does not constitute either a lot, block, tract, or parcel of land; nor does it constitute an interest in land as that term is ordinarily understood. It is an easement only, and as such is not assessable under a power to assess lots, blocks, tracts, and parcels of land."

From statements above made it appears that the city in granting the franchise imposed conditions upon the railway company which would compel it to make a substantial cash contribution towards defraying the expense of this improvement. Manifestly it did so in contemplation of the fact that the right of way and franchise in the street could not be assessed. We find no merit in appellants' objection.

The judgment is affirmed.

CHADWICK, MOUNT, ELLIS, and MORRIS, JJ., concur.

#### SCANDINAVIAN AMERICAN BANK v. JOHNSTON.

(Supreme Court of Washington. Dec. 29, 1911.)

En Banc. On rehearing. Former opinion adhered to.

For former opinion, see 115 Pac. 102.

PER CURIAM. On respondent's petition and appellant's answer thereto, a rehearing en banc has been granted in this action. After such rehearing, the majority of this court conclude the opinion heretofore filed herein (115 Pac. 102) should be sustained.

It is therefore ordered that the judgment of the superior court be reversed, and that the cause be remanded, with instructions to enter judgment in favor of the plaintiff in accordance with the prayer of the complaint.

#### KATZ v. HATHAWAY et ux.

(Supreme Court of Washington. Dec. 26, 1911.)

SPECIFIC PERFORMANCE (§ 92\*)—DEFAULT—FORFEITURE—FAILURE TO DECLARE—EFFECT.

Where a contract to convey land provided for payment of price in installments, but contained no provision that time should be of the essence of the contract, and though the purchaser did not pay the final installment when due, the vendor took no steps to declare the contract forfeited until after the purchaser's assignee had made tender of the balance due and demanded a deed, when the vendor could not have conveyed a clear title as he had con-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



tracted to do, by reason of an undischarged mortgage on the property, the vendee's default was no defense to the assignee's suit to compel performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 233-244; Dec. Dig. § 92.\*]

Department 1. Appeal from Superior Court, Clarke County; John R. Mitchell, Judge.

Action by Alma D. Katz against O. B. Hathaway and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

A. E. Clarke and Miller, Cross & Wilkinson, for appellants. Thos. O'Day, L. H. Tarpley, and R. H. Back, for respondent.

MOUNT, J. This action was brought by the plaintiff to enforce specific performance of a contract. Upon the trial of the case to the court without a jury, a decree was entered substantially as prayed for in the complaint. The defendants Hathaway and wife have appealed. The contract sued upon is as follows: "Articles of agreement, made and entered into by and between O. B. Hathaway and Dolla Hathaway, husband and wife, of Clarke county, state of Washington, the parties of the first part, and C. D. Charles, trustee of the county of Multnomah, state of Oregon, the party of the second part, witnesseth: That said parties of the first part hereby covenant and agree that if the party of the second part shall first make the payments and perform the covenants herein-after mentioned on his part to be made and performed, the said parties of the first part will convey and assure to the party of the second part, in fee simple, clear of all incumbrances whatever, by a general warranty deed, the following described real property situated, lying and being in the county of Clarke and state of Washington, to wit: (Then follows a description of 469 acres of land.) And the said party of the second part hereby covenants and agrees to pay to said parties of the first part the sum of thirty-five thousand (\$35,000) dollars in the manner following: \$20 no 1-100ths (twenty dollars) cash in hand paid, the receipt whereof is hereby acknowledged by said parties of the first part; \$5,000 no 1-100ths (five thousand dollars) on or before the 1st day of September, 1906; and the balance of \$20,980 no 1-100ths (twenty-nine thousand nine hundred eighty dollars) on or before the 1st day of January, 1908. It is mutually agreed that all the covenants and agreements herein contained shall extend to and be obligatory upon the heirs, executors, administrators and assigns of the respective parties. It is mutually agreed, also, that if the tract first hereinbefore described contains less than 400 acres, a corresponding deduction of \$75.00 per acre shall be made from the full purchase price aforesaid. In witness

whereof the parties to these presents have hereunto set their hands and seals this 18th day of June, 1906." This agreement was duly signed by all the parties to it, and was acknowledged and delivered, and was recorded in the record of deeds for Clarke county, Washington, where the land is situated. It is conceded that the first two payments were made as they became due. It is also admitted that there was a mortgage of \$2,000 upon the premises at the time the contract was made, which mortgage has not yet been satisfied. It is also admitted that the plaintiff is the successor in interest of C. D. Charles, trustee, with whom the contract was made, and that the final payment was not made when it became due; but in October, 1908, plaintiffs requested a deed which was refused, and in February, 1909, plaintiff made a formal tender of the balance due with interest, and demanded the deed in compliance with the terms of the contract, which defendants refused. Defendants made no offer to return the purchase money paid, and did nothing to put the plaintiff in default. Mr. Hathaway testified that in April, 1908, some four month after the date fixed in the contract for final payment of the balance due, he was willing to comply with the contract, but made no offer to do so. In fact, after the final payment became due, neither party seems to have made any move until about the time the tender was made as above stated. This action was begun in March, 1909. The defendants in their answer to the complaint alleged that time was of the essence of the contract, and that the payments made were to be forfeited in case final payment was not made as agreed; but by mutual mistake these provisions were omitted, and the prayer was for a revision of the contract in this respect. This defense, however, was abandoned at the trial, and the defense relied upon here now is that, after the first two payments were made, the contract was abandoned by all the parties to it and their assigns.

It appears from the evidence in the case that, before the second payment of \$5,000 became due, the contract was assigned by C. D. Charles, trustee, to the Oregon, Washington & Idaho Finance Company, a corporation. This corporation borrowed \$8,000 of certain citizens residing at Vancouver, Wash., near where the land was located. This contract and others of the same nature were deposited with a trustee as security for the repayment of the loan. \$5,000 of the money so borrowed was paid upon this contract, and the remainder of the \$8,000 was used to pay debts of the corporation. The \$8,000 note was not paid when it matured, and some of the persons who had participated in the loan thought the corporation would not be able to repay the loan. But no demand was made for their money until July,

1908. Soon after demand was made, the note was paid with interest. Before this time, however, Mr. Hathaway consulted some of those persons to find out what he should do to remove the cloud from his title, and was advised to bring a suit for that purpose. But this was not done, and no tender or deed or offer to perform was made by the defendants so as to put the plaintiff in default. While it is true that the corporation named did not have sufficient money to meet these obligations, it is clearly established that it had credit, and that its stockholders stood ready at any time to advance money to meet all its obligations, and that as soon as a demand was made for the amount due on the \$8,000 note for which this contract was held as security, the money was forthcoming.

It is said that the property has largely increased in value since the date of the contract. Some of the witnesses placed the value at the time of the trial at \$40,000, and others as high as \$200,000. It is apparent that the property has at all times been worth as much as or more than the price fixed in the contract. We are satisfied that there has been no abandonment of the contract by the plaintiff or the corporation from which he obtained it. It is true that the final payment was not made when it became due, and no offer to pay was made for several months thereafter, but no demand for payment or offer to convey the title was made by defendants so as to put the plaintiff in default. In the case of *Reese v. Westfield*, 56 Wash. 415, 105 Pac. 837, 28 L. R. A. (N. S.) 956, we said: "If the case of *Stein v. Waddell* and the succeeding cases to which we have referred have been hitherto misunderstood, we desire now, for the sake of certainty, to lay down the rule that, where land is sold under a time contract calling for payment by installments, and every installment has been paid except the last one, the vendor may, if he act with reasonable promptness, declare a forfeiture, unless by the terms of the contract he has agreed to perform some act necessary to the complete performance of his agreement, as, for instance, the giving of an abstract or the tender of a deed, in which event his power to forfeit depends upon his offer and ability to perform; for, as this court has said, his duty to render performance depends upon, and is concurrent with, the duty of the vendee to meet the final payment."

In *Tacoma Water Supply Co. v. Dumermith*, 51 Wash. 609, 99 Pac. 741, we said: "After the respondents acquired their deed from the state, their obligation to convey and the obligation on the part of the purchaser to pay the purchase price became mutual, concurrent, and dependent, and neither party could thereafter put the other in default or claim a forfeiture without first tendering performance on his part; and this, whether the contract contained a forfeiture

clause or not. *Mudgett v. Clay*, 5 Wash. 103, 31 Pac. 424; *Underwood v. Tew*, 7 Wash. 297, 34 Pac. 1100; *Stein v. Waddell*, 37 Wash. 634, 80 Pac. 184; *Melick v. Cross*, 62 N. J. Eq. 545, 51 Atl. 16; 2 *Warvelle, Vendors*, p. 824. Under the above authorities, the respondents could only claim a forfeiture and put the appellant in default by tendering a deed and demanding payment of the purchase price. \* \* \* The contract in this case contained no forfeiture clause. Five thousand twenty dollars, a substantial sum, had been paid on the purchase price of the land. It would seem equitable that some notice should be given to the vendee by the vendor before he would be permitted to forfeit the contract and keep the land and money too, when there was no provision in the contract that time was of the essence of it. The contract provided that the vendor would "convey and assure to the party of the second part in fee simple, clear of all incumbrances whatever," the real property. It appears that the property was at that time and ever since has been incumbered by a mortgage. The defendants therefore have not been in position to tender the deed they had agreed to give.

It is argued by appellants that, "where a vendee delays in completing a contract in order that he may speculate upon the chances of business proving to be an advantageous bargain, or that through rise in value or other changes of circumstances his gain may be assured, and then when he is thus certain it will be a fortunate speculation, offers to perform and sues to compel a conveyance by the vendor, a court of equity will refuse to grant him the remedy even though he may have at an earlier day paid a part of the purchase price." This is not an inflexible rule. It applies, of course, where the equities of the case demand its application, and where the vendor himself has not been at fault. But if the vendor, by agreement or inaction acquiesces in delay, or is attempting himself to take advantage of the same circumstances, it is plain the rule would not apply. In *Connor v. Clapp*, 42 Wash. 642, 85 Pac. 842, we said: "The respondents complain that the property has increased in value, and that the appellant is only seeking to take advantage of said increase. Undoubtedly this circumstance is a source of much litigation; but we might well ask, Are not the respondents prompted by the same motive in their defense? Had the value of this property decreased below the amount due on the bond for a deed, would the respondents be now resisting specific performance?" Mr. Hathaway testified that he was perfectly willing to comply with the contract after the date when the last payment became due, but a few months later when the value began to increase rapidly he was not willing to do so. In short, when he might have repudiated the contract simply because the payment was

not made on time he neglected to do so, but after values began to increase he refused to perform. The reason is obvious.

It is also argued that the contract is void because it was assigned to a corporation not authorized to do business in this state, and because the plaintiff is not the real party in interest and therefore not entitled to maintain this action. There is no showing upon the record to justify either of these contentions.

We are satisfied from the whole record the judgment should be affirmed. It is so ordered.

DUNBAR, C. J., and PARKER and FULLERTON, JJ., concur.

# RUCKER BROS., Inc., et al. v. CITY OF EVERETT et al.

(Supreme Court of Washington. Dec. 26, 1911.)

## MUNICIPAL CORPORATIONS (§§ 488, 489\*)—LOCAL IMPROVEMENTS—ASSESSMENTS—OBJECTIONS—WAIVER.

Under Rem. & Bal. Code, § 7582, authorizing objections to local improvement assessments, and under section 7583, making an assessment conclusive upon parties not appealing, with certain exceptions, plaintiffs having failed to object to an assessment before the council, and having failed to appeal from a confirmation of the assessment, waived an objection that the assessment exceeds the 50 per cent. limit prescribed by the city charter.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.\*]

Department 1. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by Rucker Bros., Incorporated, and others against the City of Everett and others. Judgment dismissing the suit, and plaintiffs appeal. Affirmed.

Coleman, Fogarty & Anderson, for appellants. Benj. W. Sherwood and Ralph C. Bell, for respondents.

PARKER, J. This action was commenced by summons and complaint in the superior court for Snohomish county, seeking a decree annulling a local improvement assessment which had theretofore been made and confirmed by the city council of the city of Everett. From a judgment dismissing the action, the plaintiffs have appealed to this court.

The facts shown by the record before us which we regard as determinative of the rights of the parties are not controverted, and may be summarized as follows: In the spring of 1908, the authorities of the city instituted proceedings looking to the improvements of certain streets therein at the expense of the property to be benefited.

These proceedings resulted in the creation of a local improvement district, the construction of the improvement, the assessment of the cost thereof against the property benefited, and the confirmation of that assessment by the city council. None of the property owners objected to the assessment prior to or when it was before the council for confirmation; nor did any of the property owners appeal to the superior court from the confirmation by the council. The cost of the improvement was considerably more than 50 per cent. of the total assessed valuation of the lots and lands contained in the assessment district, as that valuation appeared upon the assessment rolls of the county, made for general taxation. No petition of the property owners was filed with the city authorities, giving their consent to an assessment to pay the costs of the improvement in an amount exceeding 50 per cent. of the value of the property of the district, as fixed by its assessment for general taxation. The improvement was authorized by an ordinance of the city council, passed by a two-thirds vote of all the members thereof.

No contention is made here requiring our notice, save that, in the making of the assessment in a total sum exceeding 50 per cent. of the assessed value of the property for general taxation, the city council exceeded its jurisdiction to the extent that the assessment is not rendered valid by its confirmation, notwithstanding that no objections were then made thereto, nor any appeal taken therefrom to the superior court. No other irregularity in the proceedings, nor any want of notice to the property owners provided by ordinance or charter, is claimed by appellants. Neither is it claimed that there is any want of due process of law in the notice so provided for, giving the property owner a hearing upon the confirmation of the assessment. Neither is it contended that the property is not benefited to the amount of the assessment.

Everett being a city of the first class, and having power under the state Constitution to frame and adopt its own charter, has therein provided, in subdivision 2, § 138, relating to the power of local assessment, as follows: "The city council shall have full authority to consider all matters in relation to such proposed improvement, and may authorize the same by ordinance or refuse it in its discretion; provided, that unless the petition for said improvement shall be signed by three-fourths of the property to be assessed therefor and specifies a greater percentage than fifty per cent., the city council, or board of public works shall not have authority to further proceed in the matter of such improvement whenever the cost of any such improvement or work ordered to be done by the city council and chargeable as a lien against the property specially benefited with-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in such assessment district shall exceed fifty per cent. of the total assessed valuation of the lots or parcels of land contained in such assessment district as the same appears upon the last annual assessment roll, made for the levying of taxes for municipal purposes, in which case such improvement shall not be granted unless the same be so modified that the cost thereof shall not exceed such fifty per cent. of the aforesaid valuation. Said limit of fifty per cent., however, may be extended when any improvement shall be petitioned for by the owners of three-fourths of the property to be assessed for said proposed improvement, and when such petition specifies not to exceed a certain higher percentage." This subdivision also gives the council the power to construct local improvements at the cost of the property benefited thereby, without petition of the property owner, with this restriction: "Provided, that unless a petition as hereinbefore prescribed be presented, such improvement shall not be ordered except by ordinance passed by the affirmative vote of two-thirds of all the members of the city council." The charter also provides for notice to property owners of a hearing before the council, when the roll is before it for confirmation. No question is raised, however, touching the regularity of this step in the proceedings, as we have already noticed.

We are now confronted with the question, What is the effect of the confirmation of this assessment upon the rights of appellants for which they are here contending? Was that confirmation a final adjudication, as against the contentions which the appellants are here making; or is the power of the council so circumscribed by the charter provisions above quoted that we must hold the assessment beyond the 50 per cent. limit to involve a question of jurisdiction, which cannot be foreclosed against the property owners by the confirmation of the assessment? There is language in the charter which, at least inferentially, indicates that, in order to avail themselves of this infirmity in the assessment, the property owners must object to the assessment upon the hearing before the council. However that may be, there are certain provisions of our statute law, providing for the confirmation of assessments for local improvements by the council, and for a review of such confirmation in the courts at the instance of the property owners, which seem to fully answer our inquiry. Section 7532, Rem. & Bal. Code, relating to local improvement assessments by cities of the first class, provides: "Whenever any assessment roll for local improvements shall have been prepared as provided by law, charter or ordinance of any city of the first class, and such assessment roll shall have been confirmed by the council or legislative body of such city, after due and proper notice to the property owner, as provided by law, charter or ordinance, so that said owners of property may have a rea-

sonable opportunity to object to or protest against any assessment, the regularity, and correctness of the proceedings to order said improvement, and the regularity, validity and correctness of said assessment cannot in any manner be contested or questioned in any proceeding whatsoever by any person not filing written objections to such roll, prior to the same being confirmed, as aforesaid, and at such time or times as may be prescribed by charter or ordinance. Upon any objections being filed as aforesaid, the council or other legislative body, at the time set for hearing objections to the confirmation of said roll, or at such time as said hearing may be adjourned to, shall have power to correct, revise, change or modify such roll, or any part thereof, and to set aside such roll and order that said assessment be made de novo, as to such body shall appear equitable and just, and shall confirm the same, as corrected, by resolution or ordinance, in conformity with the charter of such city. All objections shall state clearly the grounds of objection, and objections to such assessment roll or to the assessment proceedings not made before such council, or other legislative body, as aforesaid, shall be conclusively presumed to have been waived." Section 7533, Rem. & Bal. Code, declares the effect of the confirmation by the council as follows: "The action of the council or other legislative body, hereinbefore mentioned in confirming such assessment roll shall be conclusive in all things upon all parties not appealing therefrom in the manner and within the time hereinbefore mentioned, and no proceeding of any kind shall be commenced or prosecuted for the purpose of defeating or contesting any such assessment, or the sale of any property to pay such assessment or the foreclosure of any lien herein provided for: Provided, this section shall not be construed as prohibiting the bringing of injunction proceedings to prevent the sale of any real estate upon the grounds: (1) That the property about to be sold does not appear upon the assessment roll, and (2) that said assessment has been paid." Then follow provisions enabling the property owners to have the confirmation reviewed in the courts by direct appeal from the action of the council. All of these statutory provisions were in existence when the city of Everett framed and adopted its charter, under which this improvement and assessment were made. This may account for the lack of specific language in the charter, declaring the effect of the confirmation of the assessment roll by the council. It will be noticed that by the express terms of section 7532 the "regularity, validity, and correctness" of the assessment are to be challenged only as therein provided, and by the express terms of section 7533 the assessment becomes "conclusive in all things upon all parties not appealing therefrom," except in the two particulars mentioned, with which we are not here concerned. It seems to us

that this language is amply comprehensive to render unavailing, after confirmation and failure to appeal therefrom, an objection upon the ground that the assessment exceeds the 50 per cent. charter limit. This objection, in its last analysis, is only an objection to the amount of the assessment, and does not go to the power of the city to make the improvement and to assess the property to some extent to pay the cost thereof. These statutory provisions are fully as comprehensive as those of the same character found in the reassessment law of 1893, p. 228, § 5 (section 7898, Rem. & Bal. Code), which this court has repeatedly held preclude a review of the assessment, save by objections thereto before the council and appeal therefrom to the courts. Among the early expressions of this court so holding is one, found in *Tumwater v. Pix*, 18 Wash. 153, 51 Pac. 353, as follows: "No reason is suggested why respondent did not appear and make his objection before the town council. That body had jurisdiction of the subject-matter, and was clothed with power to arrive at a correct determination. It was the tribunal appointed by the law for the correction of any mistakes or irregularities. Parties interested cannot be permitted to disregard the opportunities so afforded for a hearing, and to select a forum of their own choosing. They must make their objections seasonably, before the tribunal which the law appoints for that purpose, and, failing to do so, cannot thereafter be heard to complain." This view has been adhered to in the following decisions: *New Whatcom v. Bellingham Bay Imp. Co.*, 18 Wash. 181, 51 Pac. 366; *Northwestern, etc., Bank v. Spokane*, 18 Wash. 456, 51 Pac. 1070; *Annie Wright Seminary v. Tacoma*, 23 Wash. 109, 62 Pac. 444; *McNamee v. Tacoma*, 24 Wash. 591, 64 Pac. 791; *Young v. Tacoma*, 31 Wash. 153, 71 Pac. 742; *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277; *Alexander v. Tacoma*, 35 Wash. 366, 77 Pac. 636.

Now let us assume, for argument's sake, that none of the objections to the assessments involved in these cases were of so serious a nature as that made against this assessment. Whatever may be said of this excessive assessment, the requirement that it shall not exceed 50 per cent. of the assessed valuation of the property for general taxation exists only because it is contained in the charter. There is no constitutional limit of this nature to local assessment taxation. Hence the lawmaking power could have left the amount entirely without limit of this nature, or could have fixed any limit deemed expedient. The same power—that is, the charter or statute making power—could provide that the question of the amount of the assessment shall become conclusive against the property owners, upon the decision of the city council confirming the assessment, when such deci-

sion is rendered upon notice to the property owners, amounting to due process of law. A requirement of the law to be observed in levying a tax by taxing officers, which requirement could have been dispensed with by the law in the first instance, can become conclusive, as to its observance, against the property owner by the law awarding him a hearing thereon. That is what has been done by these statutes, which declare the effect of the decision upon such hearing in such comprehensive language as to render finally adjudicated against appellants the objections now made against this assessment. This is, in substance, the theory upon which tax deeds may be made conclusive evidence of the observance of requirements in the tax proceeding which the lawmaking power might have dispensed with in advance. Black on Tax Title (2d Ed.) § 452. These charter and statutory provisions, in effect, say that the assessment should not exceed 50 per cent. of the assessed value of the property for general taxation, but, if the assessment be not objected to on that account upon the confirmation hearing, such objection is thereafter foreclosed, and the validity of the assessment rendered conclusive against the property owner. These provisions leave the property owner in no worse situation than as if they had left the power of assessment unlimited in the first instance; hence, while they give this right to the property owner, they also provide a method by which it may be lost for want of objection on his part.

In *Ferry v. Tacoma*, 34 Wash. 652, 76 Pac. 277, there is language used, relied upon by counsel for appellants, which might be construed to mean that this court was of the opinion that under no circumstance could an assessment exceeding the 50 per cent. limit be upheld, even after confirmation. That language, however, was only used as indicating the general nature of the charter provision. We find no holding in that case that such an objection would avail the property owner, other than by making it before the council, upon confirmation of the assessment, and appealing therefrom to the courts. That case did not call for a discussion of the question here involved. We are of the opinion that appellants cannot now urge against this assessment their claim that it exceeds the 50 per cent. limit prescribed by the charter, since they did not make that objection before the council; nor did they appeal from the council's action, confirming the assessment, to the courts. That right has been lost to them by a notice and proceeding which constituted due process of law.

The judgment is affirmed.

DUNBAR, C. J., and MOUNT, GOSE, and FUELLERTON, JJ., concur.

**WILES v. NORTHERN PAC. RY. CO.**

(Supreme Court of Washington. Dec. 21, 1911.)

**1. APPEAL AND ERROR (§ 1001\*)—REVIEW—VERDICT—CONCLUSIVENESS.**

A verdict based upon proper instructions, and sustained by substantial evidence, is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928-3934; Dec. Dig. § 1001.\*]

**2. TRIAL (§ 41\*)—SEPARATION OF WITNESSES—JUDICIAL DISCRETION.**

The trial court did not abuse its discretion in granting plaintiff's request for a separation of defendant's witnesses at the close of plaintiff's evidence, where the court indicated that, if defendant had made a similar request as to plaintiff's witnesses, it would have been granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 101-105; Dec. Dig. § 41.\*]

**3. TRIAL (§ 139\*)—PROVINCE OF JURY—SUFFICIENCY OF EVIDENCE.**

A motion by defendant for a verdict at the close of all the evidence for insufficiency of evidence to sustain a verdict for plaintiff is properly overruled, where there is competent and substantial evidence to sustain plaintiff's cause; its credibility and sufficiency being for the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

**4. TRIAL (§ 296\*)—INSTRUCTIONS—ERROR CURED BY OTHER INSTRUCTIONS.**

In an action against a railroad company for ejecting an intoxicated passenger, instructions that in estimating any damages awarded him the jury could consider the humiliation, etc., to him, and that, if defendant wrongfully ejected plaintiff, he was not limited in his recovery to the actual money lost by him, but could recover for humiliation, etc., were not prejudicially erroneous as authorizing recovery if plaintiff was rightfully ejected, where other instructions precluded recovery if he was rightfully ejected, except as to damages unnecessarily inflicted.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 296.\*]

**5. NEW TRIAL (§§ 104, 150\*)—APPLICATION—SUFFICIENCY—NEWLY DISCOVERED EVIDENCE—DILIGENCE.**

A railway company sued for ejecting a passenger was properly denied a new trial on hearsay grounds that two absent witnesses would give certain testimony, where their affidavits were not produced, nor even the affidavits of those who told counsel the persons would so testify, and where the evidence was merely cumulative.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 218-220, 306-310; Dec. Dig. §§ 104, 150.\*]

**6. APPEAL AND ERROR (§ 925\*)—REVIEW—PRESUMPTIONS.**

On appeal, prejudice of the trial judge cannot be presumed on mere innuendo based on language used by the trial judge in a ruling.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 925.\*]

**7. NEW TRIAL (§ 140\*)—MISCONDUCT OF JURORS—BURDEN OF PROOF.**

The burden is on movant for a new trial to show misconduct of jurors.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 284-289; Dec. Dig. § 140.\*]

**8. NEW TRIAL (§ 52\*)—MISCONDUCT OF JURORS—QUOTIENT VERDICTS.**

That a verdict was reached by the quotient method does not show misconduct of the jurors warranting a new trial, unless they agreed in advance to be bound by it.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 101-105; Dec. Dig. § 52.\*]

**9. NEW TRIAL (§ 143\*)—MISCONDUCT OF JURORS—EVIDENCE.**

While under the Washington statute a juror may impeach his own verdict contrary to the usual rule, the evidence must be complete and certain.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 290-296; Dec. Dig. § 143.\*]

**10. CARRIERS (§ 382\*)—PASSENGERS—EJECTION—DAMAGES—EXCESSIVENESS.**

Five hundred twenty-three dollars and ninety-three cents was an excessive recovery as to the excess over \$300 for personal injury to a railway passenger in ejecting him from a train, where his physical suffering was slight, he did not consult a physician, and his actual loss did not exceed \$200.

[Ed. Note.—For other cases, see Carriers, Dec. Dig. § 382.\*]

Department 2. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by Evan Wiles against the Northern Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed conditionally.

C. H. Winders, for appellant. M. J. McGuinness and Robert McMurchie, for respondent.

ELLIS, J. Action to recover damages for an alleged wrongful ejection of respondent from a passenger train of appellant on December 1, 1909. The jury returned a verdict in respondent's favor for \$523.93. Appellant's motion for new trial was overruled, and a judgment for that amount was entered against the appellant. From that judgment this appeal was prosecuted.

[1] It is conceded that the respondent was a passenger on the train in question, and had paid his fare in full for carriage from Snohomish to Maltby, and that he was ejected from the train by the conductor and brakeman before the train had reached Maltby. By a careful examination of the evidence, we are satisfied that on every other material question of fact there was a substantial, and in the main a sharp, conflict in the evidence. If, therefore, the case was submitted to the jury upon proper instructions, the verdict is conclusive of the facts. It was practically admitted by counsel in argument that there was such conflict in the evidence as to require its submission to the jury, but it is urged that the appellant did not have a fair trial for reasons as follows: (1) Error of the court placing appellant's witnesses under the rule of exclusion after respondent's evidence in chief was in; (2) error in denying appellant's challenge to the sufficiency of the evidence; (3) error in giving certain instruc-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tions and in refusing to give others request; (4) error in overruling appellant's motion for a new trial.

[2] 1. Counsel contends that the trial court abused its discretion in permitting attorney for respondent in the presence of the jury to demand that "the railroad's witnesses be excluded." The record, however, shows that the request was not couched in these or other objectionable terms. It was as follows: "At this time the plaintiff asks that the witnesses for the defendant be put under the rule." The request was granted, and, upon counsel for appellant objecting to the order, the court stated: "I have made it my universal custom to enforce the rule whenever asked." The court's remark indicated to the jury that, if the same request had been made as to respondent's witnesses, it would have been granted. The placing of witnesses under the rule is a matter within the discretion of the trial court. 21 Ency. of Pl. & Pr. p. 983. While it is doubtless the better practice not to enforce the rule except on reasonable application, we cannot say, in view of the reason given by the court, that there was such an abuse of discretion as could have been prejudicial to the appellant.

[3] 2. When all of the evidence was in, the appellant challenged its sufficiency to sustain any verdict for respondent. The rule on such a motion is the same as that upon a motion for nonsuit. Where there is competent and substantial evidence to sustain the plaintiff's cause, its credibility and sufficiency are for the jury. The motion was properly denied. *Spokane & Idaho L. Co. v. Loy*, 21 Wash. 501-514, 58 Pac. 672, 60 Pac. 1119; *Brookman v. State Ins. Co. of Oregon*, 18 Wash. 308, 51 Pac. 395; *Rinear v. Skinner*, 20 Wash. 541, 56 Pac. 24; 38 Cyc. p. 1565 et seq.

[4] 3. The evidence was sharply conflicting as to whether or not the respondent was offensively drunk, and as to whether prior to the ejection he used profane and obscene language; thus forfeiting his rights as a passenger. It was also in direct conflict as to whether he was ejected in a swamp where the water came up to the railroad track, so that he either fell or was thrown into water about six feet deep, or whether the expulsion took place at a point known as Fiddler's Bluff, where the ground was dry. The appellant urged that the instructions contain fatal error as to the elements of damage in view of this evidence. Since the instructions must be construed together in order to determine their reasonable effect, we quote from those applicable to this phase of the case rather fully, lettering them for convenience, as follows:

(a) "While the railroad company has a right to eject intoxicated, boisterous, or disorderly persons from its train, such ejection must be done in a reasonable manner, at a proper time and place, and considering his

condition, without exposing him to harm or imperiling his life, and, if you should find from the evidence in this case that at the point where the plaintiff was ejected from the train of the defendant, if he was ejected, the ground was submerged with flood waters, and that plaintiff was thrown by defendant into water approximately six feet in depth, then I instruct you that the plaintiff, whether wrongfully ejected or not, is entitled to recover whatever damages he may have sustained by reason of having been thrown into the water, if he was thrown into the water, by the agents of the defendant."

(b) "You are further instructed that if you find, under the instructions heretofore given you, that the plaintiff was guilty of such disorderly and lawless behavior, upon the car in which he was traveling, as to justify the conductor in ejecting him, and that he was ejected at a place, although away from a station, where he could reasonably take care of himself, that then the defendant company would not be liable to him for any injuries that he sustained at any subsequent time endeavoring to reach his point of destination or in attempting to return to Snohomish."

(c) "The instructions given to the jury are and constitute one connected body and series, and should be so regarded and treated by the jury; that is to say, you should apply them as a whole to the facts—that is, consider all of the instructions together as they may relate to the facts as shown by the evidence."

(d) "If you should find, under the evidence and the rules of law given to you, that the plaintiff is entitled to recover, it will be your duty to assess the amount of damages which, in your judgment, he should recover. In estimating this amount you may take into consideration any expenses actually incurred, the loss of time occasioned by the immediate effect of the injuries, and the physical and mental suffering caused by the injuries. You may, in this respect, consider what, if any, compensation shall be allowed to the plaintiff for the humiliation, shame and disgrace from having been ejected from the train of the defendant if such was done."

(e) "The court instructs the jury that if they find from the evidence that the defendant carrier was guilty of wrongfully ejecting the plaintiff from its train of cars that the plaintiff is not limited in his recovery to the actual money lost by him by reason of such ejection but he may recover damages for the humiliation and mental suffering which such ejection may have caused him."

The appellant contends that the last two of the instructions above quoted authorized the jury to allow compensation for respondent's humiliation, shame, and disgrace even if he was rightfully ejected from the train. We cannot so read them in connection with the context. The first quoted instruction, "a," by a fair interpretation, limits the re-

covery in case of rightful ejection to whatever damages he sustained by reason of having been thrown into the water. This is especially apparent when read in connection with instruction lettered "b," which plainly eliminates every injury consequent upon a rightful ejection, saving only by implication such as may have been unnecessarily inflicted at the time. The last quoted instruction, "e," refers only to a wrongful ejection, and cannot by any reasonable construction be applied to anything else. Instruction "d" is manifestly intended to cover the matter of damages generally without segregation as to rightful or wrongful ejection. It closes with faulty language in not limiting recovery for humiliation to a wrongful ejection only, but it was not reasonably calculated to mislead the jury in view of the two instructions, "a" and "e," which separately stated correctly the elements of damages in case of rightful and wrongful ejection, eliminating the element of humiliation in the one case and including it in the other. Moreover, in instruction "c" the court warned the jury-men against laying stress upon isolated instructions, and cautioned them to consider all of the instructions together as they may relate to the facts. This court has often held that, though segregated instructions or parts of instructions when standing alone may not correctly state the law as applied to the evidence, they will not be held ground for reversal where the instructions taken as a whole do correctly apply the law to the evidence. *Seattle Gas, etc., Co. v. Seattle*, 6 Wash. 101, 32 Pac. 1058; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111; *Wolf v. Hemrich Bros. Brewing Co.*, 28 Wash. 187, 68 Pac. 440. In *Cheichi v. Northern Pac. R. Co.*, 118 Pac. 916, decided November 25, 1911, the appellant here as respondent there successfully invoked this rule where the language complained of if read alone was positively erroneous as applied to the evidence. In other instructions given the court fairly rang the changes, repeating again and again that a railway company "has a right," and "it is its duty towards the public," and "it is a duty which the law imposes," and "a duty owing to the other passengers" to expel a disorderly passenger, and even to eject him in anticipation of disorder without waiting for any overt act. The jury was told not to weigh with too great nicety the degree of force applied, and that, if the plaintiff was conducting himself in a disorderly manner, the conductor had the right to eject him at any reasonably safe place using only such force as was reasonably necessary. In view of these instructions and those quoted, it is manifest that the error complained of could not have been prejudicial. We have examined the instructions requested by the appellant the refusal to give which is assigned as error. We find that one of them was actually given by the

court (see quoted instruction "b"), and the others so far as correct were amply covered by the instructions given.

[5] 4. The affidavit of counsel for appellant in support of the motion for new trial states, on hearsay in each instance, that two women who were in the car will testify to the respondent's having used boisterous language before his expulsion, and that he was ejected at Fiddler's Bluff. Their affidavits were not produced, nor even the affidavits of the persons who told counsel the women would so testify. There was no sufficient showing of diligence to secure this evidence at the trial, and, in any event, the proffered evidence would be merely cumulative.

[6] The affidavits also advert to what seems to have been a rather earnest argument between court and counsel on appellant's challenge to the evidence. The record shows that this was not in the presence of the jury, but it is argued that certain language used by the court indicates prejudice which in some manner may have reached the jury. We can assume nothing of this kind on mere innuendo or suspicion of counsel. No such bias is discernable either in the court's instructions or in his rulings on admission of evidence. If we seriously entertain a showing of this kind, we would spend much of our time trying courts rather than causes.

[7-8] The affidavits of two jurors were produced, one stating generally that the verdict was arrived at by chance and lot without any specification as to what was done, the other stating "that said verdict was arrived at by lot and chance, and that the several sums of money were voted by said jury, and then, by process of division of the several sums so put down by the said members of the jury by the mathematical process the said sum of \$523.93, the said verdict, was arrived at." There was no statement that the jurors had agreed in advance to abide by the result. Such an agreement is the very essence of the misconduct charged. The burden of showing all the essential elements of the misconduct charged was upon the appellant. This court has often held that the taking of a quotient is not in itself misconduct unless it appears that the jury had agreed in advance to be bound by it, even though the verdict returned be exactly or nearly the amount of the quotient. *Stanley v. Stanley*, 32 Wash. 489, 73 Pac. 596; *Conover v. Neher-Ross Co.*, 33 Wash. 172, 80 Pac. 251, 107 Am. St. Rep. 841; *Bell v. Butler*, 34 Wash. 131, 75 Pac. 130; *Watson v. Reed*, 15 Wash. 440, 46 Pac. 647, 55 Am. St. Rep. 899.

[9] In most jurisdictions a juror will not be permitted to impeach his own verdict, and, while it is permitted by statute in this state, such an impeachment must be complete and conveyed in no uncertain terms.

[10] It is also contended that the judgment is excessive, and under the evidence we think this contention well founded. Respondent's



testimony shows that as a result of being thrown into the water and the exposure thereafter he suffered from rheumatism for about two months. It is manifest, however, that his indisposition was slight. He did not deem it necessary to consult a physician, but did take some medicine and a number of Turkish baths. He testified that his actual expenses were about \$25, and that when at work he had been earning about \$4 a day. His loss of time and actual expenses could not much exceed \$200. It seems plain that the jury was influenced by passion or prejudice. Under the evidence, we think that \$300 would be an ample recovery.

The cause is remanded, with direction to vacate the judgment on return of the remittitur, and, if respondent within 20 days in writing remit from the verdict the sum of \$223.93, the court shall enter judgment for \$300. Otherwise a new trial shall be granted.

The appellant will recover its costs in this court.

DUNBAR, C. J., and CROW and CHADWICK, JJ., concur.

#### TITUS v. TITUS.

(Supreme Court of Washington. Dec. 22, 1911.)

##### 1. EVIDENCE (§ 397\*)—PAROL EVIDENCE AFFECTING WRITING—ADMISSIBILITY.

Parol evidence is inadmissible to vary, contradict, or explain the terms of a written contract, subject to exceptions, including one which permits parol evidence to explain interlineations and material alterations, made before its execution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1758-1765; Dec. Dig. § 397.\*]

##### 2. HUSBAND AND WIFE (§ 279\*)—SEPARATION AGREEMENT—CONSTRUCTION.

A separation agreement, requiring the husband to pay to the wife \$75 monthly for 40 months for the support, maintenance, and education of his children, on condition that they be kept in school and continue their education during that period, entitled her to the full sum, though the children graduated from their respective colleges before expiration of the period.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1054, 1056-1060; Dec. Dig. § 279.\*]

Department 2. Appeal from Superior Court, Whitman County; Thomas Neill, Judge.

Action by Ellen Titus against F. L. Titus. Judgment for plaintiff, and defendant appeals. Affirmed.

Merritt, Oswald & Merritt, for appellant. John M. Gleason and Joseph F. Morton, for respondent.

MORRIS, J. On June 21, 1904, the parties hereto were husband and wife. Differences having arisen between them on account of

which they sought to sever all conjugal relations, they entered into a contract in settlement of all their property rights. They had two children, Stanley H., then 20 years of age, and Marguerite E., then 18 years of age, who were then attending school at Washington, D. C. These children were to be left in the custody of the mother, and it was desired to provide for their education and maintenance. For this purpose a stipulation was inserted in the contract as follows: "It is further stipulated and agreed that said party of the first part shall pay to said party of the second part the sum of \$75 on the 1st day of August, 1904, and on the 1st day of each succeeding month thereafter for a period of three years and four months, to be used for the support, maintenance, and education of Stanley H. Titus and Marguerite E. Titus, said sum to be paid upon the condition that said children be kept in school and continue their education during said period, and in the event of either of said children failing to continue their attendance at school said payment shall become, after such discontinuance, \$37.50 per month, and in the event that both of said children should discontinue their attendance at school said payment shall cease." As originally prepared, the contract provided these payments should commence on the 1st day of October, 1904, and continue for three years. Respondent objected to signing the contract as thus reading, contending that the agreement between herself and appellant was that she should receive \$3,000, while the contract as prepared only provided for a payment of \$2,700. Appellant, on being interrogated by his attorney as to this understanding, replied, "Give it to her," and accordingly, to save drawing up a new contract, it was thought sufficient to effect the change by crossing out the word "October" and inserting the word "August," and interlining after the words "three years" the words "and four months," as a payment of \$75 per month for three years and four months would aggregate the sum of \$3,000. The children continued in school until their graduation in June, 1907. Appellant continued his payments of \$75 per month until he had paid \$2,700, when he ceased. Respondent subsequently brought this action to recover the balance of \$300, and having so recovered appellant brings the judgment here for review.

[1] The defense was that the contract only provided for the monthly payments while the children were attending school, and that, having finished their attendance, appellant was thereby absolved from making further payments; respondent's contention being that the contract called for a payment of \$3,000, provided the children remained in school until their education was completed. The main contention of error is that evidence of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indexes

the conversation as to the purpose and effect of the contract was inadmissible. Ordinarily such a contention would be well founded, as it is now too late to deny the rule that parol evidence is not admissible to vary, contradict, or explain the terms of a written contract. Such rule, however, has its limitations and exceptions, as well established as the rule itself, and one of these exceptions is that parol evidence is admissible to explain interlineations and material alterations in a written contract when made prior to its execution. *Lassing v. James*, 107 Cal. 348, 40 Pac. 534; *Crawford v. Brady*, 35 Ga. 184; *Bowe v. Dotterer*, 80 Ga. 50, 4 S. E. 253; *Johnson v. Pollock*, 58 Ill. 181; *Neil v. Case*, 25 Kan. 510, 37 Am. Rep. 259; *Bernstein v. Ricks*, 20 La. Ann. 409. It was therefore not error to admit evidence of the purpose of the alteration of "October" to "August," and the interlineation and addition of the words "and four months."

[2] It would avail appellant nothing if such rule were not applicable here, as the interpretation of the contract, when plain and unambiguous, being a question of law for the determination of the court, the same result would follow, as this contract, when carefully read, can have but one meaning. Its evident purpose and consideration was the education of these two children. For that purpose \$3,000 was to be paid to respondent at the rate of \$75 per month. The only limitation upon this payment was the "children failing to continue their attendance at school," as it is expressed in one instance; in the other, the "children should discontinue their attendance at school." These words of limitation must be read in the light of the evident purpose and consideration of the contract to provide an education for the children, and to continue to so provide until that education was finished. The limitation or proviso was evidently intended to take effect in case the mother should withdraw the children from school before their education as then planned should be finished. The money was for the benefit of the children, to be spent in their education and maintenance while at school. Should the mother fall in carrying out this consideration as then planned, she could not have this money to devote to her own use. A child's education does not fall, neither does it discontinue, when that education is finished and completed, so far as attendance at school is a part of that education. When this boy and girl graduated from their respective colleges, their education was finished, within the meaning of the contract, and the mother was entitled to the money the father agreed to pay for that purpose. There had been neither failure nor discontinuance which he had sought to guard against in the contract. It would be folly to assert that the meaning of the contract was that the mother was to continue the

children at school until December 1st following their graduation, in order to be entitled to the \$3,000. The father knew as well as did the mother that the school year would end not later than June, and that in June, 1907, the education of these children, provided they were kept in school and maintained their standing, would be fully completed; and he must be held to have contracted to pay the \$3,000 with knowledge of such fact. So that, whatever construction be placed upon the contract as to its ambiguity, the result is the same, and appellant has no just cause for complaint.

Judgment affirmed.

DUNBAR, C. J., and CHADWICK, ELLIS, and CROW, JJ., concur.

#### FARWELL et al. v. BRISSON et al.

(Supreme Court of Washington. Dec. 20, 1911.)

#### 1. WATERS AND WATER COURSES (§ 15\*)—WATER RIGHTS—ADVERSE USER.

That defendant during his occupancy of lands and for more than 10 years before the commencement of the suit has under claim of right and in good faith diverted and used for irrigation and domestic purposes all the waters flowing in a stream at the point of intake as used by him during the irrigation period when water has been low in the stream, and that such diversion has at all times been continuous, open, and notorious and adverse to plaintiffs, shows acquisition by defendant of rights by adverse user.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 7; Dec. Dig. § 15.\*]

#### 2. WATERS AND WATER COURSES (§ 33\*)—WATER RIGHTS—ADJUDICATION.

A finding that plaintiffs have received at all times a reasonable portion of the water of the stream is an adjudication of the riparian rights between the parties, and that defendants have not interfered with plaintiffs' rights.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

#### 3. WATERS AND WATER COURSES (§ 33\*)—WATER RIGHTS—DETERMINATION.

In determining irrigation water rights, the court was not necessarily bound to apportion a certain amount of water per acre, since such rights were based upon reasonable use.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 23-26; Dec. Dig. § 33.\*]

Department 1. Appeal from Superior Court, Chelan County; Wm. A. Grimshaw, Judge.

Action by George H. Farwell and others against George Brissson and others. Decree for defendants, and plaintiffs appeal. Affirmed.

John E. Porter and Henry Crass, for appellants. W. O. Parr, Parr & Hubbard, and Reeves, Crollard & Reeves, for respondents.

MOUNT, J. Plaintiffs brought this action for the purpose of determining the rights of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

riparian claimants to the waters of a certain creek known in the record as Canyon No. 2 creek. All persons owning lands along this creek were made parties. Certain parties appeared and contested the claims of the plaintiffs. Upon a trial of the cause the court concluded that the use of the waters of the creek "by the above-named defendants as riparian owners has not been unreasonable nor in excess of their reasonable rights as such riparian owners, and that plaintiffs have received at all times a reasonable proportion of the waters of said stream." A decree was accordingly entered in favor of defendants. The plaintiffs have appealed.

[1] Several assignments of error are made, but the only contention of the plaintiffs is that the court erred in not apportioning the water of the creek to the riparian owners according to the number of acres of land riparian to the stream. It appears that this creek rises in the mountains in Chelan county, and flows in an easterly direction about 12 miles to the Columbia river. The stream is a small one, and, except in the early spring when the snows are melting, the water does not have a continuous flow upon the surface of its bed, but in places sinks and again rises to the surface in its progress. The foothills on each side of the stream rise rather abruptly. The stream is small and narrow, and the lands upon its banks are known as "bench lands." The lands of the respective parties to the suit are located along the stream from its source toward its mouth, in the following order: (1) Defendants Martin's land; (2) defendants Tanner's land; (3) defendants Brisson's land; (4) plaintiffs Farwell's and Underwood's land; (5) defendants Dorman's land (the Dormans made default); (6) plaintiff Farwell's land. It appears that in the year 1906 the plaintiff Farwell brought an action against these same defendants and others, claiming 40 inches of water from said creek, and seeking to enjoin the defendants in that action from interfering with his use of that amount of water. In that action the court denied his claim to 40 inches, but found that he was entitled to 9 inches of water, and entered a decree accordingly. No appeal was prosecuted, and the judgment became final. The appellant Farwell in this action is apparently claiming an additional amount of water by reason of his alleged riparian rights. On the trial the court in this case found as follows: "That the defendant Brisson at all times since his occupancy of the lands now held by him in section 13, township 22 north, of range 19, and for more than 10 years prior to the commencement of this action, has claimed the right to, and has in good faith diverted and used for irrigation and domestic purposes, all the waters flowing in said stream at the point of intake as used by him during the irrigation period when water has been low

in said stream. That as disclosed by the evidence, at such times when he would be using all the surface flow in said creek by diversion at his intake, there would be about twice as much water flowing in the creek bed a short space below his point of diversion as would be flowing therein at the point of such diversion, so that Brisson's use of the water during such periods allowed him approximately one-third of the total flow of said creek above the point of diversion of plaintiffs Farwell. That such diversion by defendant Brisson, has at all times been continuous, open, notorious, and under claim of right adversely to the plaintiffs and to all the world, and has been made at times when the plaintiffs were desirous of irrigating their said lands, and were demanding said waters for use in the irrigation thereof. That said use by defendant Brisson was by diversion at a point on said stream which is above the lands, or any of the lands, of plaintiffs, and such use deprived said plaintiffs of water which would otherwise have flowed down to the lands of plaintiffs and been there applied to irrigation, stock, and domestic use. That as between the defendants Brisson and the owners and occupants of the tract known herein as the 'Underwood tract,' the diversion and use by said defendants Brisson has been in all things and at all times under the same claim of right for the same length of time and with the same effect as to deprivation of water for use upon the said Underwood tract as is set forth in finding fifteen, first above." The evidence is sufficient to sustain these findings. It is apparent, therefore, that, whatever riparian rights the appellants may have had at one time in the water which had been continuously used by the defendant Brisson, such right has been lost by adverse user for the statutory time (Mason v. Yearwood, 58 Wash. 276, 108 Pac. 608, 30 L. R. A. [N. S.] 1158), even though there was no adjudication of such rights in the former action.

[2] It is clear, however, that the riparian rights of plaintiffs were adjudicated in this action, for the court concluded that "plaintiffs have received at all times a reasonable portion of the water of said stream." This was clearly an adjudication of the riparian rights, and also that defendants had not interfered with the plaintiffs' rights.

[3] The court was not necessarily bound to apportion a certain amount of water per acre of land in order to determine the riparian rights, for such rights are based upon reasonable use. 30 Am. & Eng. Ency. Law (2d Ed.) p. 356.

Judgment affirmed.

DUNBAR, C. J., and PARKER, FULLERTON, and GOSE, JJ., concur.

**BALDWIN v. MILLS.**

(Supreme Court of Washington. Dec. 20, 1911.)

**1. ATTORNEY AND CLIENT (§ 141\*)—COMPENSATION—REASONABLE FEES.**

A charge of \$375 for making up the issues in a simple ejectment suit is not a reasonable charge.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 141.\*]

**2. ATTORNEY AND CLIENT (§ 141\*)—COMPENSATION—REASONABLE FEES.**

A charge by an attorney of \$75 for writing a few letters concerning the price of a jack is not a reasonable fee.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 141.\*]

**3. ATTORNEY AND CLIENT (§ 141\*)—COMPENSATION—REASONABLE FEES.**

A charge of \$200 a year for general legal services, so mystical and indefinite that they cannot be itemized, is not a reasonable fee.

[Ed. Note.—For other cases, see Attorney and Client, Dec. Dig. § 141.\*]

Department 2. Appeal from Superior Court, Asotin County; Chester F. Miller, Judge.

Action by O. H. Baldwin against E. F. Mills. Judgment for plaintiff. Defendant appeals. Reversed, and new trial ordered.

Fred E. Helwig and Fred E. Butler, for appellant. Elmer E. Halsey and Ben F. Tweedy, for respondent.

**MORRIS, J.** The appellant in this appeal seeks a review of a judgment against him for attorney fees in the sum of \$1,377. No findings of fact were made by the trial court, except in so far as the court incorporated in the judgment a general finding "that the allegations in the complaint are true; that all the charges made against the defendants are reasonable," except one for \$75, which is reduced to \$25. To this judgment general and special exceptions were taken, and the question now before us is the sufficiency of the evidence to sustain the judgment. Having read the evidence, we are of the opinion that the exception to its sufficiency is well taken, and that the fees allowed by the court are excessive. Two of the cases in which a fee of \$50 each was charged and allowed were cases in the justice court, one for wages and the other on an account, in both of which appellant was defendant. Another was for representing appellant in three criminal cases in the same court, in one of which appellant was charged with a nuisance for throwing a dead horse into a river; appellant subsequently taking the horse from the river and burying it upon learning of his violation of the law. Fifty dollars was charged for appearing in this defense. The other two were also before the justice, in which appellant appeared as complaining witness, in charges of assault and battery, having his tenant arrested in one case and the wife and

daughter of the tenant in another. One hundred and fifty dollars was charged and allowed for appearing on behalf of the state in these two instances. In the nuisance case appellant was convicted and appealed to the superior court, where he was acquitted, and was charged \$150 in that court. Respondent sat by the side of appellant while he was offering final proof on some land he had taken up, for which \$50 was charged. He also appeared for appellant and filed a demurrer in an action brought by another attorney for the recovery of fees for which he charged \$75. This charge the court below reduced to \$25. He brought an action in ejectment against a tenant, which had proceeded as far as making up the issues, when he withdrew, charging \$375. Appellant had purchased a jack, and sought to obtain a reduction in the price to be paid on account of some alleged faults in the animal. Respondent was employed and wrote some letters and obtained a reduction in the price. How much we are unable to say. Respondent says he spent some time in this matter, but cannot say how many letters he wrote. Appellant says he wrote two. A charge of \$75 was made for this service. A general charge of \$750 is made for advice during the years 1907, 1908, 1909, and part of 1910. Respondent is unable to give any definite testimony as to the character of this advice, further than to say that appellant kept running into his office and taking up his time with a lot of immaterial matters that he cannot now recall. To use his own language, these matters were "all myths and nothing to them," and yet to strengthen his case he says he had to spend a great deal of his time in the Supreme Court library at Lewiston, Idaho, where he then resided, looking up the law on these myths. He also testifies to spending much time and making extensive briefs in preparing for trial in the other cases referred to. From the nature of the legal questions involved in those matters, we fail to appreciate the necessity for extensive briefing.

[1, 2, 3] It may be that there are cases triable before a justice of the peace where a fee of \$50 would not be excessive, or representing the complaining witness upon a charge of assault and battery in the same court might make a charge of \$50 reasonable; but from what we can gather from the record as to the cases here involved in that court the charges were excessive and exorbitant. Neither can we agree that to charge \$375 to make up the issues in a simple ejectment suit is a reasonable fee. Nor to charge \$75 for writing a few letters concerning the price of a jack. Nor \$200 a year for general legal services so mystical and indefinite that they cannot be itemized. Inasmuch as a new trial is to be ordered, we refrain from further comment upon the evidence, except to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

say that it does not sustain the judgment. Neither do we offer suggestion as to whether \$420 which respondent admits receiving from appellant is a sufficient recompense for his labors.

The judgment, being excessive and not sustained by the evidence, is reversed, and a new trial ordered.

DUNBAR, C. J., and CHADWICK, ELLIS, and CROW, JJ., concur.

# ALLEN v. GRANGER et al.

(Supreme Court of Washington. Jan. 4, 1912.)

CORPORATIONS (§ 82\*)—SUBSCRIPTION CONTRACT—CONSTRUCTION BY PARTIES.

Plaintiff purchased stock in defendant company and gave his note therefor, due in eight months, the money to be used for the purchase, development, irrigation, and sale of land, and the company agreed to pay him one-half of the net profits derived from sale of such lands, payment thereof to be made immediately on the receipt of the selling price, provided the plaintiff "shall be entitled to \* \* \* the net profits derived by such company only from the development of the one project." Before the note was due, land was purchased, and, without having been developed, was sold at a profit, by consent of the parties, and plaintiff's share thereof was paid to him, and thereafter the company purchased another tract of land, in payment for which plaintiff's renewal note was indorsed to the seller, and this land, without having been developed, was also sold at a profit. *Held*, in an action to recover a share of profits on the sale of the second tract of land, that, in view of the construction placed upon it by the parties, the contract provided for profits only from the first sale; and hence that plaintiff could not recover.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 82.\*]

Department 1. Appeal from Superior Court, Lincoln County; C. H. Neal, Judge.

Action by W. E. Allen against H. H. Granger and others. Judgment for plaintiff as to the amount of a tender, and for defendants on the cause of action, and plaintiff appeals. *Affirmed*.

A. H. Kenyon, for appellant. Merritt, Oswald & Merritt, for respondents.

MOUNT, J. This action was brought by the plaintiff to recover one-half of the profits derived from the purchase and sale of two tracts of land by the defendants. The defendants conceded that plaintiff was entitled to one-half of the net profits of the purchase and sale of the first tract of land, but denied that he was entitled to such profits on the second tract. The case was tried to the court without a jury, and findings and a judgment were entered in favor of the defendants. The plaintiff has appealed.

It appears that all of the parties to the action were stockholders in a corporation known as the Granger Under Current Water Motor Company. The defendants solicited

the plaintiff to purchase stock in that company, which he did on October 15, 1909, under the terms of a written contract which, omitting the immaterial portions, is as follows: "That for and in consideration of the purchase of five thousand shares of treasury stock of said Granger Under Current Water Motor Company by said W. E. Allen, and the payment to said company of five thousand dollars (\$5,000) for such stock, the said first parties agree to pay to said W. E. Allen, as hereinafter specified, a sum of money equal to one-half of all the net profits derived by said company from the use of said amount of five thousand dollars (\$5,000) in the purchase of lands and the development of the same through the construction and installation of one Granger Under Current Water Motor; such lands to be developed as an irrigation project. And it is further agreed between the parties hereto that said Granger Under Current Water Motor Company shall use said five thousand dollars (\$5,000) paid to said company by said W. E. Allen for the purpose of the purchase of land suitable for irrigation by one Granger Under Current Water Motor. The construction and installation of such motor, the perfection of such lands for sale and the necessary expenses of such purchase, development, perfection and sale, and that such lands shall be so improved and sold by said company within such reasonable time as said company can procure lands, construct and install such motor, prepare the land for sale and dispose of the same. Further it is agreed between the parties hereto that the said payment by said H. H. Granger, F. V. Granger and R. M. Dye, of an amount equal to one-half of all the net profits derived by said Granger Under Current Water Motor Company through the use of the said five thousand dollars (\$5,000) for the purchase of lands and development and sale of the same, as one project, as above specified shall be made immediately upon the receipt of the selling price of such lands by said company. Provided, that said W. E. Allen shall be entitled to such extraordinary apportionment of the net profits derived by said company, only from the development of the one project hereinbefore described, and provided that there shall be deducted the amount of the net profits of such company to which the five hundred shares of treasury stock already sold by said company are regularly entitled before the payment of profits to said W. E. Allen."

The plaintiff thereupon gave his note for \$5,000, due in eight months, to the company in payment of the stock. He was thereupon elected an officer of the company. At the time the note was given, it was the intention of the company to purchase and irrigate a tract of land and sell it out in par-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cels prior to the time the note matured. A short time after the contract was entered into, the company used the note in the purchase of the tract of land, known in the record as the Clark tract, for an agreed price of \$2,500. Thereafter some preliminary steps were taken towards irrigating the land, but before any of these improvements had been made the company, by consent of all the parties, sold the tract for \$7,500, and thereby made a net profit of \$4,752.35. The plaintiff's note was not then due, and was not paid. Shortly after this sale, the company purchased another tract of land, known in the record as the Anderson tract, and paid therefor something over \$11,000. At the time of this transaction, the plaintiff took up his note to the company, and in lieu thereof executed a new note for the same amount, which was indorsed by the company and delivered to Mr. Anderson in part payment of the land last purchased. The company held this land for a short time, but, before anything was done toward irrigating it, sold the same for \$20,000, making a net profit of about \$8,824. The plaintiff thereupon demanded payment of his profit upon the "first project," and \$1,964.80 was paid to him. He afterwards demanded one-half of the profits of both sales. This was refused, and he brought this action, claiming that he was entitled to one-half of the profits upon both sales, for the reason that the first venture was not carried out, and that the second was merely a substitution for the first. After the action was brought, the defendants tendered to the plaintiff the balance of the profits admitted to be due upon the sale of the first property purchased.

The controlling question in this case is the proper meaning of the contract. The contract provides that the money paid by the plaintiff shall be used for the purchase, development, and sale of land; that the defendants shall pay one-half of the net profits derived from the sale of such lands as "one project." Payment shall be made immediately upon the receipt of the selling price: "Provided the said W. E. Allen shall be entitled to \* \* \* the net profits derived by said company, only from the development of the one project;" that is, the sale of lands first purchased by the company. The defendants conceded this, and the trial court so construed the contract and entered a judgment in his favor for the amount of the tender, with costs against the plaintiff. We think the trial court was clearly right. It is true that the contract also provides for the use of the money "in the purchase of lands and the development of the same through the construction and installation of one Granger Under Current Water Motor; such lands to be developed as an irrigation project." But it is conceded that neither of these tracts was so developed, or developed at all. They

were both sold at large profits, by consent of all the parties, before any development was done thereon. The parties treated each tract as developed, and sold the same without the development contemplated by the contract. Before the plaintiff began his action, he wrote a letter to Mr. Granger, demanding \$1,700, and in that letter said: "Now, this is asking considerable, but it is the only way out of it, for if he starts action in order to protect himself, I will have to start action to collect one-half the net profits on the first deal according to our written agreement." Thus showing that up to that time the plaintiff treated the first purchase and sale as the "first deal" or the "first project," under the contract upon which he was entitled to one-half of the net profits. If the plaintiff's construction of the contract is to be adopted, to the effect that the first purchase and sale was not the "one project," because the land was not developed as an irrigation project, but was nevertheless sold, still he cannot recover in this action, because neither of the projects was so developed. The company simply purchased one tract of land and sold it at a profit. It then purchased another tract and sold that also at a profit. Neither tract was developed as an irrigation project. Plaintiff is now insisting, however, that he is entitled to his profits upon both of these tracts, because he elects to treat them as one developed project. In short, the plaintiff is not consistent in his position. He must either treat the first sale as a completed project, or admit that the company has not yet purchased and developed and sold the tract upon which his profits may be based. We think both parties have treated the first purchase and sale as a completed project, and that plaintiff's profits are based upon that transaction.

The judgment is therefore affirmed.

DUNBAR, C. J., and PARKER and GOSE, JJ., concur.

#### HAYES v. GASTON.

(Supreme Court of Washington. Dec. 20, 1911.)

LIFE ESTATES (§ 28\*)—FAILURE OF LIFE TENANT TO PAY TAXES—ACTION BY ADMINISTRATOR.

The complaint of an administrator with the will annexed, alleging nonpayment of taxes against land for several years since creation by the will of an estate for life therein, and consequent jeopardizing of and waste to the estate in remainder, and praying for sale of the life estate for payment of such liens, states no cause of action, the remainderman being not only a necessary party to such an action, but the only one who can maintain it, under the allegations of the complaint, neither the administrator, nor any one whom he rightfully represents, having paid the taxes.

[Ed. Note.—For other cases, see Life Estates, Dec. Dig. § 28.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

Department 2. Appeal from Superior Court, Walla Walla County; Thos. H. Brents, Judge.

Action by D. P. Hayes, administrator with the will annexed of Hannah Gaston, deceased, against John Gaston. Judgment for defendant. Plaintiff appeals. Affirmed.

Sharpstein & Sharpstein, for appellant. Rader & Barker, for respondent.

MORRIS, J. Hannah Gaston died in 1886, leaving an estate in Walla Walla and a last will and testament whereby, so far as the same is here material, a life estate was created in her husband, John Gaston, in the north half of two certain lots. The executor was then directed to sell the remaining estate, and the money to be derived from such sale was bequeathed to certain relatives. The executor subsequently died, and appellant was appointed administrator with the will annexed. No taxes have been paid on this lot since 1906, and certain local improvement assessments have also been levied against it, which are likewise unpaid. The appellant brought this suit setting forth the above facts, and, after alleging the rental value of the lot as "about \$300 per annum" and the neglect and refusal of respondent to pay these taxes and assessments, and the consequent jeopardizing, depreciation, and waste to the estate in remainder, prayed for the appointment of a receiver of the life estate of John Gaston, to collect the rents, sell the life estate, and apply the proceeds in payment of these various liens, and for judgment against the life tenant in the sum of \$7,200 (the amount of the liens, we assume), less the amount derived from rentals and the sale of the lot. John Gaston made no appearance in the court below. The court, however, held that the complaint failed to show a right of action in appellant, and dismissed the action, and this appeal follows. Both parties appear in this court.

Many questions are discussed in the briefs which we will not attempt to discuss; it appearing to us that they are not material to the only point involved in the appeal—the sufficiency of the complaint. Upon this point we sustain the ruling of the lower court. The action is purely one on behalf of the remainder in this estate. It is either for the benefit of the remainderman to have the life estate sold for the payment of these taxes, or else it is against his interest. In either event, he is a necessary party to the action, and, under the allegations of the complaint, the only one who can maintain this action. Conceding the law to be that it is the duty of the life tenant to pay the current taxes when the estate is sufficient for that purpose, and that, when any other party on his default is compelled to pay such taxes to protect his own interests, he has a remedy over

for the recovery of the amount so paid, such does not appear to be the case here. Neither the administrator nor any other person whom the administrator rightfully represents has paid these taxes. It will also be admitted that the neglect or refusal of the life tenant to pay the current taxes constitutes waste as against the remainderman, and subjects the estate in remainder to a forfeiture in payment of the tax lien. But this jeopardizing of the estate in remainder does not of itself give any right of action to the administrator. Such right of action rests in the one whose estate is being endangered and who will suffer because of the loss and waste. There are cases holding that where, under some peculiar authority conferred by the will, the executor has paid taxes or interest or incumbrances upon the estate, he could recover as against the life tenant whose duty it was to make such payment. But that is not this case.

We do not think it necessary to discuss the matter further.

The judgment is sustained.

DUNBAR, C. J., and CHADWICK, ELLIS, and CROW, JJ., concur.

#### CRITLER v. JACOBSON & LINDSTROM.

(Supreme Court of Washington. Dec. 20, 1911.)

#### 1. APPEAL AND ERROR (§ 1005\*)—REVIEW—CONFLICTING EVIDENCE.

The verdict, being on conflicting evidence, and the trial court having refused to interfere with it, cannot be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3948-3954; Dec. Dig. § 1005.\*]

#### 2. VENUE (§ 68\*)—CHANGE OF VENUE—RESIDENCE OF DEFENDANTS—CONCLUSIVENESS OF AFFIDAVITS AND OTHER PROOF.

Plaintiff may challenge the truth of defendants' claimed place of residence, where they apply for change of venue under Rem. & Bal. Code, §§ 207-209, on the ground that they are residents of another county than that where the action was brought; nothing in such sections making defendants' affidavits, or other evidence, as to place of residence, conclusive.

[Ed. Note.—For other cases, see Venue, Cent. Dig. § 121; Dec. Dig. § 68.\*]

#### 3. APPEAL AND ERROR (§ 684\*)—REVIEW—FINDINGS OF FACTS—ABSENCE OF EVIDENCE.

The decision of the trial court against defendants on the issue of residence, on their application for change of venue on the ground that they were residents of another county than that in which the action was brought, cannot be reviewed; the evidence on such issue not being brought up by statement of fact or bill of exceptions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2887-2890; Dec. Dig. § 684.\*]

Department 1. Appeal from Superior Court, Yakima County; El. B. Preble, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Action by George Critler against Jacobson & Lindstrom, copartners. Judgment for plaintiff. Defendants appeal. Affirmed.

E. E. Wager and Lee C. Delle, for appellants. H. J. Snively, for respondent.

**PARKER, J.** This is an action to recover compensation for work performed by the plaintiff in the construction of the roadbed of the Chicago, Milwaukee & Puget Sound Railway. The defendants had contracted to construct a portion of the roadbed, and the plaintiff claims that he performed the work for which he claims compensation, at the request of the defendants, upon the portion of the road covered by their contract. A trial before the court and a jury resulted in verdict and judgment in favor of the plaintiff, from which the defendants have appealed.

[1] The principal contention of counsel for appellants is that the evidence was not sufficient to justify the verdict and judgment. A careful reading of the record convinces us that there was ample evidence to support the verdict, both as to the fact of the work being done by respondent at the request of appellants, and as to the amount of the balance due therefor, which are the questions of fact involved. Upon these questions the evidence was in serious conflict. It was such as to prevent our interference with the verdict of the jury, especially in view of learned trial court's refusal to do so; he having seen and heard the several witnesses testify. We deem it unnecessary to review the evidence here.

[2] It is contended that the trial court erred in denying appellant's motion for a change of venue upon the ground that the action had been commenced in the wrong county. The place of residence of the defendants became an issue of fact which the trial court decided against their contention. Learned counsel for appellants seem to proceed upon the theory that when an application for change of venue under sections 207-209, Rem. & Bal. Code, is made on the ground that the defendant is a resident of some other county than the one where the action is brought, the plaintiff cannot challenge the truth of the defendant's claimed place of residence. We cannot believe this to be the law. There is nothing in any of these sections making the affidavits or other evidence offered by the defendant as to his place of residence conclusive on that question. That being so, of course such showing may be controverted by the plaintiff. Counsel for appellants call our attention to the following: State ex rel. Cummings v. Superior Court, 5 Wash. 518, 32 Pac. 457, 771; State ex rel. Allen v. Superior Court, 9 Wash. 668, 38 Pac. 206; Smith v. Allen, 18 Wash. 1, 50 Pac. 733, 39 L. R. A. 82, 63

Am. St. Rep. 864. In none of these cases was there any dispute as to the residence of the defendant being in a county other than the one where the action was brought. This question is quite unlike the right to a change of venue on account of the prejudice of a trial judge, under a statute making the affidavit of the party asking the change conclusive upon that question.

[3] The evidence upon which the learned trial court decided this application has not been brought here by statement of fact or bill of exceptions, so we are not able to review that decision.

The judgment is affirmed.

**DUNBAR, C. J., and MOUNT, GOSE, and FULLERTON, JJ., concur.**

#### FIRST NAT. BANK OF SNOHOMISH v. SULLIVAN et al.

(Supreme Court of Washington. Dec. 26, 1911.)

#### BILLS AND NOTES (§ 163\*)—"NEGOTIABLE INSTRUMENT"—NEGOTIABLE CHARACTER.

Rem. & Bal. Code, § 3392, declares that an instrument, to be negotiable, must contain an unconditional promise to pay a sum certain in money, must be payable on demand or at a fixed or determinable future time, and must be payable to order or to bearer. Section 3394 declares that an unqualified order to pay is unconditional, though coupled with an indication of a particular fund out of which reimbursement is to be made or a particular account to be debited with the amount or a statement of a particular transaction which gives rise to the instrument, but that an order or promise to pay only out of a particular fund is not unconditional. *Held* that, where a note was payable on demand, it was not rendered nonnegotiable because it contained a statement that it was given to take up the freight and rehandling of a certain car, the proceeds from resale of such car to apply on the note, there being nothing therein making payment dependent on the sufficiency of the proceeds of the resale of the material on the car or preventing a demand for full payment independent of such proceeds at any time; the test being whether the general credit of the maker accompanies the instrument.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 390-392; Dec. Dig. § 163.\*

For other definitions, see Words and Phrases, vol. 5, pp. 4767-4770; vol. 8, p. 7731.]

Department 2. Appeal from Superior Court, Snohomish County; W. W. Black, Judge.

Action by the First National Bank of Snohomish against J. E. Sullivan and others. Judgment for plaintiff, and defendants appeal. Affirmed.

G. W. Hinman, for appellants. Coleman, Fogarty & Anderson, for respondent.

**ELLIS, J.** The respondent, as indorsee and holder, sued the appellants, as makers,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



of a promissory note, which, with the indorsements thereon, was as follows:

"\$400.00 Snohomish, Wash., Apr. 25, 1908.

"On demand, after date, for value received I (we) promise to pay to the order of Springfield Shingle Co., at the First National Bank in the city of Snohomish, the sum of four hundred no-100 dollars with interest thereon at the rate of 8 per cent. per annum from date until paid. The interest shall be paid at the expiration of every —, and if default be made in the payment of any installment of interest when the same shall become due, then the whole of this note, both principal and interest, shall forthwith become due and payable without demand. Both principal and interest payable in United States gold coin of the present standard of weight and fineness. If suit shall be commenced for the recovery of any amount due upon this note, I agree to pay a counsel fee of — per cent. upon the amount which may be found due, and the whole of the judgment in such suit including attorney's fees and costs of suit, shall bear interest at the rate of — per cent. per annum from its date until paid, and it may be so provided in said judgment.

"The maker and all indorsers hereof, and each and every party to this note severally waive presentation and demand for payment, protest and notice of protest, and notice of nonpayment of this note.

"This note is given to take up the freight and rehandling of N. P. Car 43607 and proceeds from resale of said car shall apply on this note No. 22438."

"Sullivan Bros.,

"By H. W. Sullivan.

"H. J. Sullivan.

Indorsed: Springfield Shingle Co., by H. E. Gampp, Sec'y. Paid on Acc't Nov. 17, 1908, \$200.00. Interest paid to Dec. 25, 1908, \$19.68."

The answer admitted the execution of the note, the payment of the amounts indorsed thereon, denied that there was any balance due, and set up an affirmative defense in the nature of a counterclaim to the effect that, prior to the making of the note, the appellants sold to the Springfield Shingle Company, payee, certain shingles under an agreement that they were to receive from that company 62½ cents for every 100 pounds of underweight, and were to pay to the shingle company a like amount per hundred for overweights. There was a further allegation that the underweights exceeded the overweights by \$537.34, which amount has never been paid by the Springfield Shingle Company to the appellants. The cause was tried to the court without a jury. The court, holding that the note was negotiable, refused to admit evidence in support of the counterclaim, and upon sufficient findings of fact and conclusions of law entered judgment in

favor of the respondent. From that judgment this appeal was prosecuted.

The only question presented for our consideration is that of the negotiability or non-negotiability of the note. The first section of the negotiable instruments act (Laws 1899, p. 340, § 1; 2 Rem. & Bal. Code, § 3392), defining such instruments, contains the following: "An instrument to be negotiable must conform to the following requirements: (1) It must be in writing and signed by the maker or drawer; (2) must contain an unconditional promise or order to pay a sum certain in money; (3) must be payable on demand, or at a fixed or determinable future time; (4) must be payable to order or to bearer. \* \* \* " The note here in question obviously conforms to this definition, unless it is made conditional as to amount or uncertain as to time by the following sentence: "This note is given to take up the freight and rehandling of N. P. car 43607 and proceeds from resale of said car shall apply on this note." It is clear that the note, exclusive of this sentence, is not obnoxious to the definition in either of these particulars. It was payable on demand, thus falling within the very terms of the statutory definition as to time of payment. Giving to the words of the above quoted sentence their natural and ordinary significance, it cannot be held to make the note payable otherwise than on demand. They do not stipulate either expressly or by any implication, necessary or otherwise, that the note shall be payable only out of the proceeds of the resale of the car of shingles. Nor do they make the payment contingent upon or subject to a resale. There is no provision that demand shall be postponed to a resale. This note like every other written instrument must be construed as a whole so as to give effect to every part of it if possible. This can only be done by holding the whole amount due and payable on demand, and that the proceeds of the sale of the shingles in case of a resale before demand shall be applied on the amount, but, in case of resale after demand, the proceeds shall go to reimburse pro tanto the makers of the note. This gives effect to every word in the note, and makes it an absolute promise to pay on demand with the designation of a fund to reimburse the maker for such payment. Any other construction would be to ignore the words "on demand," and arbitrarily substitute in the last sentence the words, "payable only out of," for the actual words, "shall apply on." These terms are by no means synonymous.

If, as seems inevitable, this note must be construed as payable on demand, it follows that there can be no uncertainty as to the amount. Payment is not made dependent upon the sufficiency of the proceeds of the resale. If demand be made for the payment of such a note immediately after delivery, the promise is to pay the full amount. If

demand be made after a resale of the shingles the promise still is to pay the full amount, the proceeds of the shingles to be applied on that amount. If so applied, such application in the nature of the thing can have no other or different effect on the promise to pay or upon the amount to be paid than any other partial payment. The promise is still, and from the beginning was, an unconditional promise in writing to pay to order of the payee, and, in any event, a sum certain on demand. This meets every requirement of the statutory definition of a negotiable instrument.

The third section of the negotiable instrument act (2 Rem. & Bal. Code, § 3394) defines an unconditional promise as follows: "An unqualified order or promise to pay is unconditional within the meaning of this act, though coupled with (1) an indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited with the amount; or (2) a statement of the transaction which gives rise to the instrument. But an order or promise to pay only out of a particular fund is not unconditional." This section is held but declaratory of the common law. Slover on Negotiable Instruments, p. 50; First National Bank of Hutchinson v. Lightner, 74 Kan. 736, 88 Pac. 59, 8 L. R. A. (N. S.) 231, 118 Am. St. Rep. 353.

The reference to the consideration of the note and the direction to apply the proceeds of the resale of the shingles thereon must therefore be construed in the same manner, and as having the same effect as under the law merchant at common-law. The true test in every case is and was at common law, Does the general credit of the maker accompany the instrument? If it does, the note is negotiable; otherwise it is not. 4 Am. & Eng. Ency. of Law (2d Ed.) p. 89. In an early case, Haussoullier v. Hartsinck, 7 Durnford & East's Reports, p. 733, decided by the Court of King's Bench in 1798, the note read as follows: "No. 300. Original Security Bank London No. 300. 35 Cornhill. This 7th day of September 1797. £25. On the 19th day of November next and after that date on demand we promise to pay to — or bearer £25, being a portion of a value as under deposited in security for the payment hereof, according to the receipt in our hands. Hartsinck and Co." The ground of defense was the same as here, and is reported as follows: "That the notes were not payable at all events, but payable out of a particular fund alluded to in the notes, in case that fund should be sufficient. That the sum secured by one of them was described as 'a portion of a value as,' etc., in terms pointing out the fund out of which it was to be paid. That the payee was, of course, to resort to that fund, and not to the makers at all events." "But," continues the report, "the

court said they were clearly of opinion that, though as between the original parties to the transaction the payment of the notes was to be carried to a particular amount, the defendants were liable on these notes which were payable at all events." It cannot fail to be noted that the language used in the note in that case was much more capable of the construction contended for than that of the note before us. In Walker v. Woolen, 54 Ind. 164, 23 Am. Rep. 639, a note reading "six months after date, or before, if made out of the sale of Drake's horse hay-fork and hay carrier, I promise to pay," etc., was held to be an absolute promise to pay, and the note was held negotiable. See, also, Charlton v. Reed, 61 Iowa, 166, 16 N. W. 64, 47 Am. Rep. 808; Cota v. Buck, 7 Metc. (Mass.) 588, 41 Am. Dec. 464; Ernst v. Steckman, 74 Pa. 13, 15 Am. Rep. 542; Hawley & Dodd v. Bingham, 6 Or. 76; Schmittler v. Simon, 101 N. Y. 554, 5 N. E. 452, 54 Am. Rep. 737; Redman v. Adams, 51 Me. 429; Whitney v. Elliot National Bank, 137 Mass. 351, 50 Am. Rep. 316; Nichols v. Ruggles, 76 Me. 25; Louisville Banking Co. v. Gray, 123 Ala. 251, 26 South. 205, 82 Am. St. Rep. 120; Corbett v. Clark, 45 Wis. 403, 30 Am. Rep. 763; Joergenson v. Joergenson, 28 Wash. 477, 68 Pac. 913, 92 Am. St. Rep. 888. The negotiability of notes and drafts is favored in law, and, whenever the promise can be held unconditional without doing violence to the ordinary meaning of the language used, it will be so held. 7 Cyc. p. 575 et seq. Following the decisive trend of authority, both ancient and modern, we hold the note here in question a negotiable instrument.

The judgment is affirmed.

CROW, CHADWICK, and MORRIS, JJ., concur.

McGRAW v. MANHATTAN CO. et al.  
(Supreme Court of Washington. Dec. 27, 1911.)

1. APPEAL AND ERROR (§ 1015\*) — REVIEW — GRANT OF NEW TRIAL — CONFLICTING EVIDENCE.

Where there is a substantial conflict in the testimony, the appellate court will not disturb an order granting a new trial on the ground that the evidence was insufficient to justify the verdict.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.\*]

2. NEW TRIAL (§ 72\*) — GROUNDS — WEIGHT OF EVIDENCE.

While the trial judge cannot substitute his judgment for that of the jury, he may in his discretion set aside the verdict and order a new trial whenever he believes it against the weight of the evidence, and may grant new trials until he is reasonably certain that a jury will return no other verdict.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 146-148; Dec. Dig. § 72.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Department 1. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Action by Lillie L. McGraw against the Manhattan Company and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Holzheimer & Herald, for appellants. Million & Houser, for respondent.

FULLERTON, J. The respondent brought this action against the appellants to recover upon a promissory note executed by the appellant to J. W. McGraw, and by him indorsed to the respondent. The appellants defended on the ground that the notes were obtained by duress and intimidation and under the fear of a threatened criminal prosecution. A trial was had before the court and jury, wherein a verdict was returned in favor of the appellants. The respondent thereupon moved for a new trial upon various statutory grounds, among which was the ground that the evidence was insufficient to justify the verdict. The court granted the motion on this specific ground, making a recital in his order to that effect. This appeal is from the order granting the motion.

[1] This court has repeatedly and with emphasis declared the rule that it would not disturb the order of a trial judge granting a new trial on the ground that the evidence was insufficient to justify the verdict where it could ascertain by an examination of the record that there was a substantial conflict in the testimony. *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907; *Hughes v. Dexter Horton & Co.*, 28 Wash. 110, 66 Pac. 109; *Latimer v. Black*, 24 Wash. 231, 64 Pac. 176; *Angus v. Wamba*, 50 Wash. 353, 97 Pac. 246; *Faben v. Muir*, 59 Wash. 250, 109 Pac. 798. The case at bar falls within the rule. The note was executed by McGraw on behalf of himself and his comaker; and, while he testifies on his direct examination that he was induced to execute it by threats of prosecution made against him by the payee named in the note and one of his former attorneys, he is contradicted on this point by both the payee and the attorney. It is true that the payee's testimony appeared by deposition taken prior to the trial and does not specifically negative the testimony of McGraw, but it gives the payee's version of transactions leading up to the execution of the note, and this is at variance with the statements of McGraw.

[2] But the appellant seems to think that this rule in some way deprives them of their right of trial by jury. In a case triable by jury, where a jury is insisted upon and where the evidence is conflicting, the trial judge has no authority to substitute his own judgment for the judgment of the jury; that is to say, he cannot set the verdict aside and direct a judgment for the losing

party, but he may set the verdict aside and order a new trial wherever he believes that the jury have found against the weight of the evidence. How many such new trials he may grant in the same case rests largely in his discretion, but certainly he may continue to grant them until it is reasonably certain that the jury is not likely to return any other verdict.

The judgment is affirmed.

DUNBAR, C. J., and GOSE, PARKER, and MOUNT, JJ., concur.

NORTH COAST R. CO. v. NEWMAN et al.  
(Supreme Court of Washington. Dec. 28, 1911.)

1. EVIDENCE (§ 323\*)—VALUE—OFFERS TO PURCHASE.

In proceedings to condemn land for a railroad right of way, evidence of offers to purchase is inadmissible to prove value.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1214-1217; Dec. Dig. § 323.\*]

2. EVIDENCE (§ 155\*)—EVIDENCE ADMISSIBLE BY REASON OF THE ADMISSION OF OTHER EVIDENCE.

In proceedings to condemn certain lots for a railroad right of way, a witness for defendants as to value, on direct examination, stated that the inside lots were worth \$850, and on cross-examination was asked, "That means when you sell them to the railroad?" to which he replied, "No, sir. I was offered \$800 for mine across the street, and I refused." Held, that the part of the answer referring to such offer having been stricken as not responsive, such answer did not entitle defendants to the admission of offers to purchase as evidence of the value of the lots.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 445-458; Dec. Dig. § 155.\*]

Department 2. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

Condemnation proceedings by the North Coast Railroad Company against Mary V. Newman and another. Judgment for petitioner, and defendants appeal. Affirmed.

W. C. Jones, for appellants. Danson & Williams and George D. Lantz, for respondent.

MORRIS, J. [1] This was a proceeding to condemn land for railroad purposes. The errors assigned grow out of the refusal of the court to permit appellants' witnesses to testify as to offers made for the purchase of lots. It has been settled in this court that in proceedings of this character such evidence is not admissible to prove value. *Parke v. Seattle*, 8 Wash. 78, 35 Pac. 594; *Chicago, M. & St. P. Ry. Co. v. Alexander*, 47 Wash. 131, 91 Pac. 626; *Williams v. Hewitt*, 57 Wash. 62, 106 Pac. 496, 135 Am. St. Rep. 971.

[2] Appellants contend that this evidence was admissible on redirect examination, be-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cause of the character of the cross-examination of appellants' witnesses. Such cross-examination is too lengthy to set out here. We can, however, find nothing in it to sustain appellants' contention. It is unquestioned that, where matter inadmissible in the first instance is brought out by the cross-examination, the door is opened for an examination as to such matter on the redirect. Such, however, is not the situation here. A witness for appellants had testified the value of inside lots to be \$850. On cross-examination he was asked: "Q. Now, I understand you to say that these lots inside are worth, in your opinion, \$850? A. Yes, sir. Q. Well, that means when you sell them to the railroad, don't it? A. No, sir. I was offered \$800 for mine across the street and I refused." This answer was stricken on motion of respondent. It is apparent it was not responsive to the question and a volunteer statement by the witness, and as such properly stricken. As before stated, there was nothing to justify the admission of this offer as evidence of the value of the lots.

Some complaint is made in the briefs that respondent's value witnesses were not shown to be competent. There is no merit in this contention.

Finding no error, the judgment is sustained.

CROW, ELLIS, and CHADWICK, JJ., concur.

#### SMITH v. PORTER et al.

(Supreme Court of Washington. Dec. 28, 1911.)

#### APPEAL AND ERROR (§ 465\*)—BOND—SUFFICIENCY.

Rem. & Bal. Code, § 1722, provides that an appeal bond must be executed in a penalty not less than \$200 in any case, and, in order to effect a stay of proceedings where the appeal is from a final judgment for recovery of money, shall be in a penalty double the amount of damages and costs recovered in such judgment, and in other cases shall be in such penalty not less than \$200, and sufficient to save the respondent harmless from damages by reason of the appeal as a judge of the superior court shall prescribe, and shall be conditioned that the appellant will pay all costs and damages that may be awarded against him on the appeal or on a dismissal thereof, not exceeding \$200. Held that, where plaintiff appealed from a judgment of dismissal with costs taxed at \$23, a bond conditioned, not only in the form of an appeal bond, but also as a supersedeas bond in strict compliance with such section, in a penalty of \$200 only, was insufficient.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2235-2240; Dec. Dig. § 465.\*]

Department 2. Appeal from Superior Court, Spokane County; John D. Hinkle, Judge.

Action by John Smith against John D. Porter and others. From a judgment dis-

missing the cause, plaintiff appeals. Dismissed.

Samuel T. Crane, for appellant. Cannon, Ferris, Swan & Lally, for respondents.

PER CURIAM. This is an action for personal injuries. The trial court sustained defendants' motion for a nonsuit, and entered judgment of dismissal with costs which the clerk taxed at \$23. The plaintiff has appealed.

Respondents have moved this court to dismiss the appeal for the reason that the bond in the sum of \$200 is conditioned both as an appeal and supersedeas bond, and is insufficient. In *Hewitt v. Lansdale*, 28 Wash. 615, 67 Pac. 354, the final judgment was one of dismissal, with costs taxed at \$53. The appeal bond, in the sum of \$200 conditioned both as an appeal and supersedeas bond, was held insufficient, and the appeal was dismissed. Appellant insists the recitals of the bond herein show it was intended for an appeal bond. That is true, but they do not show it was intended as an appeal bond only. Its conditions show that in form it was also a supersedeas bond drawn in strict compliance with the requirements of section 1722, Rem. & Bal. Code. The bond is insufficient. *Washington Water Power Co. v. Abacus Association*, 49 Wash. 261, 94 Pac. 1072; *Hassett v. Fraternal Brotherhood*, 59 Wash. 161, 109 Pac. 305; *Carson v. Bunn*, 59 Wash. 266, 109 Pac. 797.

The appeal is dismissed.

#### STATE v. BOWINKELMAN.

(Supreme Court of Washington. Dec. 28, 1911.)

#### 1. HOMICIDE (§ 340\*)—APPEAL—HARMLESS ERROR—INSTRUCTIONS.

While Rem. & Bal. Code, § 2406, provides that homicide is justifiable when committed in the lawful defense of the slayer or any person in his presence, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or do some great personal injury, an instruction in a homicide case that a person attacked may repel force with such force as he honestly believes, and has reasonable ground to believe, is necessary to save his own life or to protect himself could not have prejudiced accused, for it gave him the benefit of his own belief, which the statute did not expressly give.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 715-720; Dec. Dig. § 340.\*]

#### 2. HOMICIDE (§ 116\*)—JUSTIFICATION—ELEMENTS.

Under Rem. & Bal. Code, § 2406, providing that homicide is justifiable when committed in lawful defense of the slayer or any person in his presence, when there is a reasonable ground of apprehension of a design on the part of the person slain to commit a felony or to do some great personal injury, the slayer must have an honest belief of the existence of the danger to justify his act.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 158-163; Dec. Dig. § 116.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

### 8. HOMICIDE (§ 325\*)—APPEAL—OBJECTION BELOW—INSTRUCTIONS.

In a homicide case, where no instructions were requested, there can be no complaint on appeal of the failure of the trial court to submit all matters of justification.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 693; Dec. Dig. § 325.\*]

Department 1. Appeal from Superior Court, Yakima County; El. B. Preble, Judge.

Henry Bowinkelman was convicted of manslaughter, and appeals. Affirmed.

Frank A. Luse and H. J. Snively, for appellant. J. Lenox Ward and Harold B. Gilbert, for the State.

PARKER, J. This defendant was charged by information in the superior court for Yakima county with murder in the first degree, by the killing of John Meeboer. Upon a trial before the court and a jury, the defendant was convicted of manslaughter, from which he has appealed to this court.

[1] Upon the trial evidence was introduced in behalf of appellant tending to show that the homicide was justifiable, in that it was committed by appellant in lawfully defending himself against an assault made upon him by the deceased. This called for instructions to the jury upon the law of justifiable homicide. Touching the grounds of apprehension of danger upon which the defendant might kill his assailant, the court instructed the jury as follows: "A person attacked at a place where he has a right to remain need not retreat, but may repel force by force in a defense of his person against one who at the time is actually, or apparently, intending or endeavoring, unlawfully, to kill him or to inflict upon him great personal injury, and in such defense the assailed may lawfully meet the attack made upon him in such a way and with such force as, under the circumstances, he at the moment honestly believes, and has reasonable grounds to believe, are necessary to save his own life or to protect himself from great personal injury; and in such defense the assailed may lawfully kill the assailant, if at the time he is actually or apparently in imminent danger of death or great personal injury at his assailant's hands, and if, under all the circumstances, he honestly believes, and has reasonable grounds to believe, such killing to be necessary to save his own life or to protect him from great personal injury." This instruction is the same as one approved by this court in *State v. Churchill*, 52 Wash. 210, 218, 100 Pac. 309. It is here conceded by counsel for appellant that, had there been no change in our law relative to justifiable homicide since the deciding of that case, the instruction given in this case would not be erroneous. The new Criminal Code, which has become the law

since the decision of the *Churchill* Case, provides as follows:

"Homicide is also justifiable when committed either—

"(1) In the lawful defense of the slayer, or his or her husband, wife, parent, child, brother or sister, or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished; or

"(2) In the actual resistance of an attempt to commit a felony upon the slayer, in his presence, or upon or in a dwelling, or other place of abode, in which he is." Section 2406, Rem. & Bal. Code.

This section, defining justifiable homicide, it will be noticed, makes no reference, by specific words, to any belief or apprehension of danger which may exist in the mind of the accused. It is contended by counsel for appellant that the learned trial court erred in making any reference in the instruction given to any belief which may have existed in the mind of appellant, thus leading the jury to believe that they might consider such belief in determining appellant's justification, because, as is contended, the belief of the accused is not an element to be considered in determining the right of self-defense under this statutory definition of justifiable homicide. It seems to us that whatever error there may be in this respect in this instruction is against the state, and not against appellant. Instead of putting a greater burden of proof upon appellant to establish his justification, this instruction lessens that burden, if it has any influence thereon, reading the statutory definition literally, as counsel insist. From a literal reading of this law, it might be argued that an accused is, under no circumstances, to be given the benefit of his honest belief as to his danger, and that the question of his act being justifiable is to be determined only by the reasonable ground to apprehend danger then existing, as the jury might view it, regardless of the defendant's honest belief relative thereto. The instruction gives appellant the benefit of a more liberal view than this of the law in his favor.

[2] Now, when we read in this section the words "reasonable ground to apprehend," etc., the question immediately arises, Reasonable ground to apprehend by whom? Surely this reference to a reasonable ground of apprehension must mean a reasonable ground of apprehension by some one at the time the act is committed. It manifestly means reasonable ground to apprehend by the person who is prompted to do the act of defense sought to be justified. It seems to us that it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

cannot be said that there is "reasonable ground to apprehend," etc., by the accused, unless the ground is such as actually produces in his mind an honest belief of the existence of the danger which would justify his act of defense. A ground which would not produce such an honest belief surely could not be said to be a reasonable ground to justify the taking of human life. Surely it cannot be said that he would be justified by a reasonable ground of apprehension which might be apparent to others when he himself had no ground of apprehension of danger. We think that the instruction here given was not erroneously prejudicial to appellant. He could with better reason complain of the instruction, had the court limited it in the respect he is now contending for.

[3] Learned counsel for appellant make some other contentions touching the duty of the court to submit to the jury instructions bearing upon justifiable homicide, as defined by subdivision 2 of section 2406, above quoted. This, we think, however, involves only a question of the court omitting to give instructions for which no request was made. We see no merit in this contention.

The judgment is affirmed.

DUNBAR, C. J., and FULLERTON, MOUNT, and GOSE, JJ., concur.

#### HEIM et al. v. ELLIOTT et al.

(Supreme Court of Washington. Dec. 26, 1911.)

1. MECHANICS' LIENS (§ 105\*) — RIGHT TO LIEN—NOTICE TO OWNER—"EVERY PERSON." Rem. & Bal. Code, § 1133, provides that every person furnishing material to be used in the construction of a building shall, at the time the material is delivered, deliver or mail to the owner of the property on which the material is to be used a duplicate statement of all material to be delivered, etc. *Held*, that the term "every person," as so used, included a subcontractor.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 137; Dec. Dig. § 105.\*]

For other definitions, see *Words and Phrases*, vol. 3, p. 2516; vol. 8, p. 7655.]

2. MECHANICS' LIENS (§ 88\*)—LIEN FOR LABOR—INDIVISIBLE CONTRACT.

Where a contractor furnishes labor and materials for a building, Rem. & Bal. Code, § 1129, entitles him to a lien for the labor, though he is not entitled to a lien for the materials, and both were furnished under an indivisible contract.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. § 119; Dec. Dig. § 88.\*]

3. MECHANICS' LIENS (§ 99\*)—MATERIALS—NOTICE TO OWNER—"AT THE TIME."

Rem. & Bal. Code, § 1133, provides that a materialman, to be entitled to a lien for materials furnished, at the time the material is delivered, shall deliver or mail to the owner a duplicate statement thereof, etc. Petitioner contracted to furnish materials for a dwelling, and commenced delivering the material September 14, 1909, and continued until March 31,

1910; the deliveries being made from day to day. On the date of the first delivery, petitioner mailed to the owner a duplicate statement of all the material covered by the contract, and no other duplicate statement was given or mailed. *Held*, not to constitute a substantial performance of the statute, and that petitioner was therefore not entitled to a lien for the material.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 181, 132; Dec. Dig. § 99.\*]

4. MECHANICS' LIENS (§ 239\*)—PAYMENTS—APPLICATION.

Where a materialman furnished items to a contractor, for some of which he was not entitled to a lien, payments made by the contractor's surety out of money belonging to the contractor, the surety having contributed nothing to the source which furnished the fund, in the absence of any direction by the debtor or application by the creditor, were properly credited to the nonlienable items.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 420, 421; Dec. Dig. § 239.\*]

Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge.

Suit by W. M. Heim and another against J. S. Elliott and wife and certain others, to enforce mechanics' liens. From a judgment in favor of the lienors, Elliott and wife appeal. Reversed, with directions.

William A. Greene and James B. Murphy, for appellants. Reynolds, Ballinger & Hutson, Peterson & Macbride, and S. A. Keenan, for respondents.

GOSE, J. The appellants, as the owners of two lots in the city of Seattle, on September 3, 1909, entered into a contract with the respondent Martin, hereafter called the contractor, whereby the latter agreed to furnish all the labor and material and erect a dwelling house on the lots for a stipulated price. The respondent Wilkinson thereafter, in pursuance of an agreement with the contractor, furnished the material for and installed and finished the hardwood floors. The contract price therefor was \$194. Thereafter, at the contractor's request, Wilkinson did extra work of the value of \$15.50. No payments were made upon this contract. The respondent Heim, in pursuance of an agreement with the contractor, furnished the material and labor for and installed the plumbing and the heating plant. The contract price was \$2,060. The alleged balance is \$666.98. At the conclusion of the trial, a judgment was entered against the contractor in favor of the respondent Wilkinson for \$209.50, and in favor of the respondent Heim for \$472.98, and making these amounts a lien against the appellants' property. The facts applicable to the other respondents will be stated in discussing the liens decreed in their behalf. The owners of the property have appealed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

[1] The respondents Wilkinson and Heim contend that they are subcontractors, and that they were not required to deliver or mail to the owner a duplicate statement of the material which they furnished. This contention is not tenable. Our statute (Rem. & Bal. Code, § 1133) provides that "every person" furnishing material to be used in the construction of a building "shall at the time" the material is delivered deliver or mail to the owner of the property upon which the material is to be used a duplicate statement of all material delivered, etc. It seems clear, therefore, that the respondents, having failed to deliver the duplicate statements, cannot be allowed a lien for the material which they furnished. *Finlay v. Tagholm*, 62 Wash. 341, 113 Pac. 1083.

[2] The respondent Wilkinson testified that the labor performed in completing his contract was of the value of \$117.61, and the respondent Heim testified that the same item in his contract was of the value of \$546.20. The respondents contend that these items are lienable. The appellants assert that they are not lienable, because the contract of each of the respondents with the general contractor was entire. They had no contract with the appellants. Hence there was no privity of contract between them. *Hunnicutt & B. Co. v. Van Hoose*, 111 Ga. 518, 36 S. E. 669. Rem. & Bal. Code, § 1129, entitles these respondents to a lien for their labor, and we do not think that this right is defeated because the contract with the general contractor was indivisible. Such a determination would not be in harmony with the rule of liberal construction enjoined by the provisions of Rem. & Bal. Code, § 1147. The lien of the respondent Wilkinson will be reduced to \$117.61, and the lien of the respondent Heim will not be disturbed. The court made a deduction of \$194 from his claim on account of defective workmanship.

[3] The respondent Ballard Lumber Company was given a lien upon the property for \$467.23. In September, 1909, it contracted with Martin, the general contractor, to furnish material to be used in the erection of the dwelling. It commenced delivering the material in pursuance of its contract on September 14, 1909, and continued until March 31, 1910. The deliveries were continued from day to day. On the date of the first delivery, it mailed to the appellants a duplicate statement of all the material covered by its contract. No other duplicate statement was mailed to the appellants, and none was delivered to them. This lien should not have been allowed. The duplicate statement was not mailed "at the time" such material was delivered. This respondent invokes the rule of liberal interpretation. To enforce this lien would be legislation, rather than interpretation. Six and one-half months elapsed between the first and the last deliveries. The statute was not substantially complied with. *Finlay v. Tagholm*, supra.

[4] The respondent contractor purchased material from the respondent Bailey Du Bois Sash, Door & Mfg. Company, of the value of \$2,269.80, to be used in the erection of appellants' dwelling. Of this amount \$1,165.45 was delivered between January 29 and April 6, 1910. The balance was delivered prior to January 28th. It is admitted that no statement was mailed or delivered to appellants prior to January 28th. The evidence is conflicting as to whether respondents mailed the duplicate statements on and after January 28th. A reading of the evidence, however, has convinced us that it mailed the statements conformably to the statute after that time. A judgment was entered in favor of the respondent against the contractor for \$923.60, and a lien was established in its favor against the appellants' property for that amount. The following payments were made on the account before the commencement of the suit: December 7, 1909, \$400; April 5, 1910, \$200; April 26, 1910, \$746.11. The last two payments were made out of the contractor's money by an agent of the company which had bonded him. When the payments were made, no directions were given as to how they should be applied. The respondent credited them as they were severally made upon the oldest items of the account. If these credits were properly made, or if the law would make a like application when the debtor gives no direction as to how he wishes the payment applied, the lien was properly established. The appellants concede that, in the absence of a direction by the debtor or an application by the creditor, the general rule is that the first item on the debit side of the account is discharged or reduced by the first item on the credit side. They contend, however, that this rule is not applicable here, because the bonding company through whom the payments were made has an equity in the money. We do not understand how this question is open to the appellants. The bonding company is not a party to the suit.

Assuming, however, that the appellants may raise the question, we do not think the authorities cited are controlling upon the facts before us. In the case of *Crane Co. v. Pacific Heat & Power Co.*, 36 Wash. 95, 78 Pac. 460, cited by the appellants, the creditor had applied the payments to prior accounts having no connection with the building which was the source of the fund from which the payments were made. In *Merchants' Ins. Co. v. Herber*, 68 Minn. 420, 71 N. W. 624, it was held that the obligee in a bond, as against a surety, could not apply payments made by the principal to a debt which the principal owed before the bond was given. It is argued that the payments made in the case at bar were affected with an equity in favor of the surety. The equity of the surety in this fund was less than the equity of the respondents. The money be-

longed to the principal. The material furnished by the respondent was one of the sources of the fund. The surety had, so far as the record discloses, contributed nothing to the source which furnished the fund. Where a party performs work upon and furnishes material for a building, some of which embraces extra work which is not lienable, and has received partial payments without any direction as to its application, a court of equity will apply the payment to the nonlienable account. *Barbee v. Morris*, 221 Ill. 382, 77 N. E. 589. The lien was properly allowed.

The judgment will be reversed, with directions to enter a judgment conformably to this opinion.

PARKER and MOUNT, JJ., concur.

#### ERNST et ux. v. SCHMIDT et ux.

(Supreme Court of Washington. Jan. 4, 1912.)  
FRAUDS, STATUTE OF (§ 138\*)—EFFECT—IMPROVEMENTS.

Where plaintiffs entered land under parol contract by defendants to convey to plaintiffs at the expiration of four years residence thereon, and plaintiffs, on the faith of such parol agreement, improved the land by erecting buildings and cultivating a portion thereof, the contract being unenforceable under the statute of frauds, defendants having breached the same by ordering plaintiffs to remove from the premises before the time arrived for a conveyance, plaintiffs were entitled to recover the value of their improvements.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. § 333; Dec. Dig. § 138.\*]

Department 1. Appeal from Superior Court, Adams County; O. R. Holcomb, Judge.

Action by Jacob Ernst and wife against Jakob Schmidt and wife. Judgment for plaintiffs, and defendants appeal. Affirmed.

Lovell & Davis, for appellants. John Truax, for respondents.

MOUNT, J. The plaintiff Jacob Ernst is the son-in-law of the defendants, and Hattie Ernst is their daughter. In December, 1908, the defendants owned a section of land in Grant county. This land was at that time incumbered by a mortgage of \$4,000. They desired to give the land to their children, 80 acres to each of the daughters. With that object in view, they agreed with the plaintiffs that, if plaintiffs would occupy and improve a certain 80-acre tract for a period of 4 years, at the expiration of that time the defendants would deed the land to the plaintiffs free from the mortgage. The plaintiffs accepted this offer, and moved upon the land, which was unimproved, and proceeded to improve the same by erecting a dwelling house, barn, outhouses, fences, etc., and cultivated a portion of the land.

In October, 1909, the plaintiff Jacob Ernst and his father-in-law, Jakob Schmidt, had some words which led to blows, and the latter ordered the plaintiffs to leave the premises, which about one month later they did. The plaintiffs thereupon brought this action to recover from the defendants the value of the improvements which they had placed upon the land. Upon a trial of the case, the lower court found in favor of the plaintiffs, and entered a judgment against the defendants for \$960, being the value of the improvements upon the land. The defendants have appealed from that judgment.

Defendants argue that there was no breach of the contract on their part, but that the plaintiffs themselves violated the agreement by leaving the premises, and are therefore not entitled to recover. It is conceded that the defendant Jakob Schmidt, at the time of the trouble, ordered the plaintiffs to leave the property; but it is claimed that the defendants a few days later sent word to the plaintiffs that they need not leave, but should remain upon the land, and there is evidence in the record to support this claim. The plaintiffs denied that they were so informed. The court, after hearing all the evidence upon this point, found that the defendants at the time of the trouble, "and several times immediately thereafter, ordered and directed plaintiffs to leave the said lands and premises and to vacate the same; that, pursuant to said orders and directions, and for the reason that it was impossible for plaintiffs and defendants to live longer in peace and harmony upon said premises, plaintiffs removed therefrom." We must assume, therefore, that the defendants breached the contract.

The rule is stated in *Martin v. Atkinson*, 7 Ga. 228, 50 Am. Dec. 403, as follows: "As to the right of Martin to recover compensation for the value of the improvements which he put upon the land, over and above the rents and profits while he occupied it, it would seem to be founded on the clearest principles of equity. Atkinson got the benefit of these improvements. What justice would there be in not making him pay for them?" And in *Pitt v. Moore*, 99 N. C. 85, 5 S. E. 389, 6 Am. St. Rep. 489, as follows: "Whatever may have been the ancient rule, it is now well settled by many decisions, from *Baker v. Carson*, 21 N. C. 881, in which there was a divided court, but *Ruffin, C. J.*, and *Hastin, J.*, concurring; and *Albea v. Griffin*, 22 N. C. 9, by a unanimous court, to *Hedgepeth v. Rose*, 95 N. C. 41, that, where the labor or money of a person has been expended in the permanent improvement and enrichment of the property of another by parol contract or agreement, which cannot be enforced because, and only because, it is not in writing, the party repudiating the contract, as he may do, will not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



be allowed to take and hold the property thus improved and enriched, 'without compensation for the additional value which these improvements have conferred upon the property,' and it rests upon the broad principle that it is against conscience that one man shall be enriched to the injury and cost of another, induced by his own act." See, also, notes to the same case in 6 Am. St. Rep. supra. Whether the original contract in this case was within the statute of frauds or not is immaterial, because, where the defendant is found to have breached the contract, he would be liable in either event.

The judgment is therefore affirmed.

DUNBAR, C. J., and PARKER, FULLERTON, and GOSE, JJ., concur.

NELSON v. SIBLEY CONTRACTING CO.  
(Supreme Court of Washington. Jan. 4, 1912.)  
EVIDENCE (§ 129\*)—RELEVANCY—DIFFERENT SUBSTANCE.

Where plaintiff claimed to have been injured through the explosion of a blasting powder known as "Jexite," a highly explosive and dangerous substance, furnished him without warning, which was a white powder containing no picric acid, but composed of 66 per cent. potash and 34 per cent. flour, evidence of an expert as to the explosive and dangerous character of a yellow substance, called "Jexite," composed of 73 per cent. chloride of potash, picric acid, and flour, but which had never been put on the market, nor used commercially, was inadmissible.

[Ed. Note.—For other cases, see Evidence, Dec. Dig. § 129.\*]

Department 2. Appeal from Superior Court, Spokane County; Henry L. Kennan, Judge.

Action by Theodore Nelson against the Sibley Contracting Company. Judgment for defendant, and plaintiff appeals. Affirmed.

W. H. Plummer and Henry Jackson Darby, for appellant. Cannon, Ferris, Swan & Lally, for respondent.

MORRIS, J. Appellant, claiming to have been injured while in the employ of respondent, through the explosion of a blasting powder known as "Jexite," brought this action, alleging the negligence of respondent in furnishing him with a highly explosive and dangerous powder with which he had no previous experience, without warning him of its highly explosive and dangerous character, and that while using it as directed it suddenly exploded, due solely to its highly explosive and dangerous character. It will not be necessary to refer to the defense as set up in the answer, since no question arises thereon. At the conclusion of the evidence the court sustained respondent's challenge to its sufficiency, and dismissed the action, and plaintiff appeals.

The main error alleged is the court's ac-

tion in striking out the testimony of a chemist, who had testified to the explosive and dangerous character of a yellow substance, called "Jexite," which had been furnished him by appellant for experimental purposes, and dismissing the action on respondent's challenge. Without this testimony there was absolutely no evidence of the dangerous character of Jexite, as charged in the complaint. It subsequently appeared that Jexite, as used by respondent in its construction work and furnished to appellant, was a white powder, differing materially from the yellow substance examined by the chemist and concerning which he testified; that the yellow powder was composed of 73 per cent. of chloride of potash, picric acid, and flour, the percentage of the last two ingredients not being given; that the company manufacturing Jexite had used picric acid in combination with chloride of potash and flour, producing a yellow substance similar to appellant's exhibit, but that such combination was only used in the experimental stage; that the product had never been put on the market, nor manufactured commercially; that the powder used by respondent, and which was used by appellant, was a white powder containing no picric acid, but was composed of potash, 36 per cent., and flour, 34 per cent. It was also shown that, while the yellow powder would explode by friction, the white powder would not. Appellant made no attempt to rebut this testimony, or to make any showing that the yellow powder was the one used by him at the time he claims to have been injured. The testimony of the chemist was therefore immaterial and properly stricken. Respondent's testimony being unchallenged, and there being no attempt to show that the powder used by appellant in preparing the blast that injured him was of the character as charged in the complaint, and upon which he based his right of action, there was nothing to submit to the jury, and the challenge was properly sustained, and the motion granted. *Scarpelli v. Washington Water Power Co.*, 114 Pac. 870.

The other assignments of error are without merit, and the judgment is affirmed.

DUNBAR, C. J., and CHADWICK, CROW, and ELLIS, JJ., concur.

COLE et al. v. GERRICK et al.  
(Supreme Court of Washington. Dec. 29, 1911.)

En Banc. On rehearing. Former opinion affirmed.

For former opinion, see 62 Wash. 226, 113 Pac. 565.

PER CURIAM. A petition for rehearing in this case having been granted, argument thereon before the court en banc was heard

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

on December 28, 1911. A majority of the court being of the opinion that the judgment should be affirmed for the reason stated in the majority opinion of department 1 (62 Wash. 226, 113 Pac. 565), rendered February 17, 1911, it is so ordered.

**MULLINS v. MULLINS et ux.**  
(Supreme Court of Washington. Dec. 26, 1911.)

**LIMITATION OF ACTIONS (§ 197\*)—ALIENATION OF AFFECTIONS—SUFFICIENCY OF EVIDENCE—LIMITATIONS.**

Evidence in an action for alienating the affections of plaintiff's husband *held* to show that his affections were alienated for more than three years before the beginning of the action, barring it.

[Ed. Note.—For other cases, see Limitation of Actions, Dec. Dig. § 197.\*]

Department 1. Appeal from Superior Court, Yakima County; E. B. Preble, Judge.

Action by Anna E. Mullins against Patrick Mullins and wife. From a judgment for plaintiff, defendants appeal. Reversed and cause dismissed.

Englehart & Rigg, for appellants. Wende & Taylor and Charles A. Riddle, for respondent.

**MOUNT, J.** The plaintiff brought this action against the defendants to recover damages on account of alleged alienation of the affections and loss of consortium of her husband. She recovered a judgment in the court below, and the defendants have appealed.

At the trial of the case defendants moved the court for a nonsuit at the close of the plaintiff's evidence, and again at the close of all the evidence moved for a directed verdict. These motions were denied. A number of errors are assigned, but our view upon the question hereinafter noticed is conclusive of the case, and we shall therefore not notice the other questions presented. It is argued by the appellants that the action was barred by the two-year statute of limitations, but if the three-year statute applies to a case of this kind, then the evidence conclusively shows that the action was not begun within three years after the cause accrued. The respondent concedes that the action was not begun within two years, but it is claimed that the action did not accrue until February 2, 1907, and was therefore well within the three-year statute which applies to this case.

It is not necessary to decide which statute applies, for we are clear that the action was not commenced until after the expiration of three years from the time it accrued. The plaintiff and John R. Mullins were married in Butte, Mont., on November 28, 1905. John R. Mullins was the son of the defendants. After the marriage and on April 10, 1906, the plaintiff and her husband

came from Butte to North Yakima, to make their home with the defendants. The plaintiff at that time was pregnant. They lived with the defendants at their home until some time in June, 1906, when the two families moved into a new hotel constructed and owned by the defendants. The son, John R., was employed in the management of the hotel. In August, 1906, the plaintiff's mother, who then lived in St. Paul, Minn., was invited by the plaintiff and her husband to come to North Yakima to take care of her daughter during childbirth and confinement. She arrived on August 18, 1906. A child was born to the plaintiff in September. After the arrival of the plaintiff's mother at Yakima, the families were not harmonious. It is also apparent that prior to that time the relations were not altogether harmonious between the two Mullins families, for the plaintiff testified that her mother-in-law had frequently said to plaintiff's husband that plaintiff "was only a common working girl, not good enough for Johnny; was not in his class, and they would never live together if she could help it," and such like expressions. After the baby came and some time in October, 1906, plaintiff and Mrs. Mullins, her mother-in-law, had some difficulty, and plaintiff slapped Mrs. Mullins in the face. Thereupon the defendant Patrick Mullins told plaintiff she would have to go. She thereupon had her clothes packed and she and her mother, on November 3, 1906, left for St. Paul. The plaintiff and her husband had not gotten along well prior to this time, and she had refused to live with him. Plaintiff's husband, however, did not want her to go to St. Paul. After the plaintiff had gone to St. Paul, she and her husband corresponded. In February she sent her husband a telegram, stating that the baby was sick and for him to come. He started immediately, but did not reach St. Paul until after the baby died. On the day of the funeral, plaintiff and her husband consorted together and the next day, which was February 21, 1907, plaintiff's husband endeavored to effect a reconciliation with her. She testified that he cursed her and abused her and she refused to live with him as his wife. It was then agreed that he return to this state and procure a divorce. He returned, but did not seek a divorce. Later, in the month of April, 1907, she came to this state, and brought an action for divorce upon the ground of cruelty. Her husband resisted the divorce, which was granted on May 16, 1908. She, thereafter, on October 30, 1909, brought this action.

It is apparent from the evidence of the plaintiff in this case that, whatever the defendants said or did to alienate the affection of plaintiff's husband was said and done prior to October 30, 1906, and it is also ap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key Ne. Series & Rep'r Indexes

parent that, if her husband ceased to love and consort with her, he ceased to do so many days prior to October 30, 1906. The evidence is clear that the last thing that defendants or either of them said or did to separate the plaintiff and her husband was about October 15, 1906, when they ordered the plaintiff to leave the premises. It is apparently not claimed, and could not well be claimed from the evidence, that defendants did anything after that time, for the separation was then complete. But plaintiff contends that because her husband came to St. Paul on or about February 20, 1907, and consorted with her for one day, the statute did not begin to run until that time. But her testimony is clear to the point that she then refused to live with her husband who solicited her to do so. If the conduct of his parents had previously incited him against her so that he was cruel to her and abused her so that she could no longer endure him, there is no evidence to show that they did anything new at that time. Whatever they did was done previously to that time; and if she lost the affection or consortium of her husband, it was lost prior to that time, and she knew it. If she had then gone to live with her husband and in good faith had endeavored to regain his affection, and if the defendants thereafter had incited him against her, no doubt the cause of action would begin to run from the last wrongful act of the defendants. But that state of facts did not occur. The plaintiff's husband sought her to live with him, but she refused, and they then agreed to be divorced—not on account of what occurred there, but of what had previously taken place. The wrong of the defendants, if any, was committed more than three years prior to the time the action was begun, and was during all that time within the knowledge of the plaintiff.

The trial court for this reason should have sustained the motion for nonsuit made by the defendants. The judgment is reversed and the cause ordered dismissed.

DUNBAR, C. J., and PARKER and GOSE, JJ., concur.

## COLE v. SPOKANE GAS & FUEL CO.

(Supreme Court of Washington. Dec. 27, 1911.)

### 1. MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—SUFFICIENCY OF EVIDENCE.

In an action by a servant for injuries received from a falling pan which he was helping to carry, evidence held insufficient to show that the accident was caused by the loss of rivets fastening the handle to the pan.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 276.\*]

### 2. MASTER AND SERVANT (§ 235\*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—COMMON INSTRUMENT.

An instrument presenting no complicated question of power, motion, or construction, and intelligible in all of its parts to the dullest intellect, is not within the rule that a master must provide safe instrumentalities for his servants, as there is no reason why the servant brought in daily contact with it should not be chargeable equally with the master with a knowledge of its defects, so that where, in an action for injuries to a servant, the injury was caused by an ordinary pan in which the servant was accustomed to carry coke and which he handled several times a day, the instrumentality was so simple that it was the duty of the servant, upon finding it defective, to either call the attention of the master to it, or protect himself against the possibility of injury, and an action for such injury will not lie.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 710; Dec. Dig. § 235.\*]

### 3. MASTER AND SERVANT (§ 265\*)—LIABILITY FOR INJURIES TO SERVANT—RES IPSA LOQUITUR.

While, under the doctrine of *res ipsa loquitur*, the establishment of certain facts will speak negligence and put the burden of disproving it upon the party charged, it is the facts surrounding the injury, and not the injury itself, which raise that presumption, so that, in an action for injuries to a servant from the falling of a pan, negligence of the master will not be presumed from the mere falling of such pan.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 881; Dec. Dig. § 265.\*]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Wesley F. Cole against the Spokane Gas & Fuel Company. From a judgment for defendant, plaintiff appeals. Affirmed.

W. H. Plummer and Henry Jackson Darby, for appellant. Post, Avery & Higgins, for respondent.

CHADWICK, J. Appellant was a stoker in the employ of respondent. He brought this action to recover compensation for injuries which he says resulted from respondent's negligence. The case is predicated upon the legal principle that it is the duty of an employer to provide the servant such safe and sufficient appliances or instrumentalities as are reasonably calculated to insure the safety of the servant, and to maintain them in a reasonable state of repair. Appellant was 43 years old at the time he was injured, and had performed common labor for many years. He had worked as a stoker for respondent from April 6, 1910, to December 21, 1910, the day he was injured. He with another carried coke along the line of series of retorts, taking it out of one and putting it into another as the process of manufacture required. The vehicle in which the coke was carried was an iron pan with two handles projecting lengthwise from the ends, so that a man could walk between them after the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fashion of handling a wheelbarrow. While thus engaged appellant dropped the pan. It fell upon and fractured his ankle. The specific omission of duty on the part of the employer, as it is alleged, is this: That one of the handles of the pan gave way because some of the rivets were out of the handle, so that it had become loose, and but for this the accident would not have occurred. At the close of appellant's case the court took the case from the jury and thereafter entered a judgment in favor of defendant.

[1] A careful review of the evidence convinces us that there can be no doubt of the correctness of the court's judgment. There is no evidence to sustain counsel's theory that the accident occurred because some of the rivets attaching the handle to the pan were out. Appellant's own testimony does not sustain this theory. He says that the right-hand handle slipped in his hand, that he made a "kind of a grab," and that he "grabbed for a new hold," when he lost it altogether. Appellant had used the pan for some time before the accident happened, and it was used for two or three days thereafter. It is not shown by any evidence that the loss of the rivets in any way impaired the usefulness of the instrument. Appellant admits that his gloves were wet, and it is as likely or more likely from the evidence that the accident happened from this cause rather than any defect in the pan.

[2] Or, if it be held that there was a defect, its character was such that plaintiff who was handling the pan many times a day would be charged with notice of it, as well as the duty of taking it to the blacksmith who was kept upon the premises by respondent to do all needful repairing. The master could have no more knowledge of such a defect than the servant possessed, for the instrumentality was so simple that it was the duty of the servant to know its condition, and either call the attention of the master to it or protect himself against the possibility of injury. The rule seems well established that an implement of simple structure, presenting no complicated question of power, motion, or construction, and intelligible in all of its parts to the dullest intellect, does not come within the rule of safe instrumentalities, for there is no reason known to the law why a person handling such instrument and brought in daily contact with it should not be chargeable equally with the master with a knowledge of its defects. *Cahill v. Hilton*, 106 N. Y. 512, 13 N. E. 339; *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *McMillan v. Minetto Shade Cloth Co.*, 134 App. Div. 28, 117 N. Y. Supp. 1081; *Wachsmuth v. Shaw Elec. Crane Co.*, 118 Mich. 275, 76 N. W. 497; *O'Brien v. Missouri, K. & T. R. Co.*, 36 Tex. Civ. App. 528, 82 S. W. 319; *Holt v. Railway Co.*, 94 Wis. 596, 69 N. W. 853; *Stirling Coal & Coke Co. v. Fork*, 141 Ky. 40, 131

S. W. 1030; *Jenney Elec. Lt. & Power Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30.

[3] The doctrine of *res ipsa loquitur* is invoked. Under that doctrine it has been held that certain facts, when established, will speak negligence, and put the burden of disproving it upon the party charged. It has never been carried to the extent of raising a presumption of negligence from the mere fact of injury. It is the facts from which the injury resulted, and not the injury, that sets the doctrine in motion.

Judgment affirmed.

DUNBAR, C. J., and CROW, MORRIS, and ELLIS, JJ., concur.

#### CAMPBELL v. WINSLOW LUMBER CO.

(Supreme Court of Washington. Jan. 8, 1912.)

##### 1. MASTER AND SERVANT (§ 205\*)—ASSUMPTION OF RISK—RELIANCE ON CARE OF MASTER.

Where the foreman of a mill company for whom plaintiff was working told him not to use a ladder until it was made secure, and himself nailed the ladder in its first position, the plaintiff, after it had been moved and replaced, had a right to assume that it had been made secure in its new position.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 547; Dec. Dig. § 205.\*]

##### 2. MASTER AND SERVANT (§ 245\*)—CONTRIBUTORY NEGLIGENCE—OBEDIENCE TO DEMAND.

If a danger is not so absolute or imminent that injury must almost necessarily result from an obedience to the order, and a servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 778-788; Dec. Dig. § 245.\*]

##### 3. MASTER AND SERVANT (§ 289\*)—ACTION FOR INJURIES—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.

In a servant's action for injuries, *held*, under the evidence, that the question of contributory negligence was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1089-1132; Dec. Dig. § 289.\*]

##### 4. MASTER AND SERVANT (§ 288\*)—ACTIONS FOR INJURIES—QUESTION FOR JURY—ASSUMPTION OF RISK.

In a servant's action for injuries, *held*, under the evidence, that the question of assumption of risk was for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1078; Dec. Dig. § 288.\*]

##### 5. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

In an action for personal injuries, a physician who had attended plaintiff testified as to the character of the injury, stated that there was a severe laceration of the ligaments, and offered an opinion as to its permanency. Another physician who had also attended plaintiff, and who had examined him recently for defendant, was allowed to testify fully as to the condition of plaintiff's ankle at the time of trial, and that it was in fair condition, that there was no swelling or enlargement, and that aside from a little stiffening it was a good ankle, and that a Pott's fracture would nec-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

essarily cause a stiffening of the ankle. Held that, as this testimony fairly negated the testimony and opinion of plaintiff's witness, error, if any, in excluding his further testimony tending to show that there had been no laceration of the ligaments, and that the injury was known as a Pott's fracture, from which permanent injuries are less likely to occur than if complicated by lacerated tendons, was not prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4195, 4200-4206; Dec. Dig. § 1058.\*]

Department 2. Appeal from Superior Court, Stevens County; D. H. Carey, Judge.

Action by A. B. Campbell against the Winslow Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Jesseph & Grinstead, for appellant. Danson & Williams, J. A. Rochford, and A. E. Barnes, for respondent.

CHADWICK, J. Plaintiff is a carpenter, and at the time of the injury complained of was employed by the defendant in assisting in the work of putting its mill in a state of repair. A part of the work was the institution of some new live rolls and, in order to work from below, a ladder had been placed, leading from the lower floor up to and under the frame upon which the live rolls were placed. Plaintiff was working under the direction of a foreman who had, according to the testimony of the plaintiff, told him at the time the ladder was originally placed and when he was about to use it that it was dangerous, and that he should not use it until it had been nailed to the floor. This was accordingly done at the time. It may be stated in passing that the weather was very cold, and the lower floor of the mill was damp and covered with frost. The ladder remained in this position and in use for about two weeks, when it was removed by the foreman to another part of the mill. It was thereafter brought back and placed at or near the place it had formerly occupied. Occasion requiring, plaintiff was directed to go to the lower floor for some material. He says he had started for the stairway when the foreman called him and directed him to go down the ladder, it being closer at hand; that he attempted to do so when the ladder, the bottom of which he could not see, slipped, throwing him to the floor beneath and fracturing his leg. From a judgment in favor of the plaintiff, the defendant has appealed.

It is contended that respondent cannot recover, because, the ladder being an instrument of such simple construction, any danger attending its use would be as well within the knowledge of the respondent as of the appellant; that no legal liability would be imposed upon appellant to warn or protect respondent within that line of cases which we have just followed in *Cole v. Spokane Falls Gas & Fuel Co.*, 119 Pac. 831, decided

December 27, 1911. This might be held if the accident had resulted from a defect in the ladder itself. But the testimony takes this case out of that rule.

[1] The evidence shows that respondent had been told by the foreman not to use the ladder unless it was made secure. Appellant foreman nailed the ladder in its first position, so that, when it had been moved and replaced, respondent had a right to assume that it had been made secure in its changed position.

[2] These facts carry the case within the rule of *Withiam v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900, where the text of *Labatt, Master & Servant*, § 439, was adopted. We shall not take space to repeat more than the last part of the quotation there employed: "In other words, if a danger is not so absolute or imminent that injury must almost necessarily result from an obedience to the order and a servant obeys the order and is injured, the master will not afterwards be allowed to defend himself on the ground that the servant ought not to have obeyed the order."

[3, 4] We think that the questions of contributory negligence and assumption of risk were for the jury.

[5] Two physicians attended respondent after he was injured. He called one of them as a witness. The physician testified as to the character of the injury, and offered an opinion as to its permanency. Among other things he said that, aside from the fracture, there was a severe laceration of the ligaments. Appellant called the other physician and sought to show by him that there was no laceration of the tendons; that the injury was what is known as a "Pott's fracture" from which permanent injuries are less likely to occur than if complicated by lacerated tendons. It is contended that respondent by putting one physician on the stand waived his privilege to object to the other being heard. We do not find it necessary to pass upon this disputed question in the law, for, granting that the testimony was improperly excluded, we think no prejudice sufficient to warrant a new trial could have occurred. The physician whose testimony was rejected had examined respondent the day before, and was allowed to testify fully as to the then condition of respondent's ankle. He found it to be in "fair condition." "It has a little ankylosis; a little still; otherwise he has got a good ankle." He found no swelling or enlargement. He also testified that a Pott's fracture would necessarily cause a stiffening (ankylosis), and that use of the limb soon after the fracture would tend to increase that condition. This testimony fairly negatives the testimony and opinion of the first physician, for we may assume that, if there had been any evidence of lacerated tendons, it would have been

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 119 P.—53

evident at the time the examination was made. The fact that, in the judgment of the second physician, the defendant had a good ankle save a slight stiffness, is in its resultant force all that appellant could have shown had the doctor been examined as to the appearance of the member immediately after the injury.

Finding no reversible error, the judgment is affirmed.

CROW and ELLIS, JJ., concur.

DUNBAR, C. J. While I have no fault to find with the doctrine announced by Judge CHADWICK, I think it conclusively appears for another reason that the action of the court in regard to the rejection of testimony was without prejudice. It is not contended by the appellant that the verdict was excessive. In fact, it was candidly announced by the attorney for the appellant in his argument that no question was raised as to the excessiveness of the verdict. That being true, the testimony offered was entirely without materiality, and therefore its rejection was without prejudice.

I therefore concur in the result.

#### NORWEGIAN DANISH METHODIST EPISCOPAL CHURCH OF SPOKANE FALLS v. HOME TELEPHONE CO.

(Supreme Court of Washington. Jan. 8, 1912.)

##### 1. MASTER AND SERVANT (§ 88\*)—INJURIES TO SERVANT—INDEPENDENT CONTRACTOR.

Where blasting is done in making a conduit for telephone wires, and the work was done in aid of the telephone company's enterprise, and the alleged independent contractor and the telephone company had the same president, that he was directing the work, and that the alleged contractor was engaged in no work other than construction work for the telephone company, a prima facie case of the telephone company's responsibility for negligence in the blasting was made out.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 146; Dec. Dig. § 88.\*]

##### 2. MASTER AND SERVANT (§ 265\*)—INJURIES TO SERVANT—ACTIONS—BURDEN OF PROOF.

Where the relation of an employer to a construction company is as consistent with the theory of agency as that of independent contractor, the burden is on the employer to show the true relation.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. § 265.\*]

##### 3. APPEAL AND ERROR (§ 928\*)—REVIEW—PRESUMPTIONS—ISSUES SUBMITTED AND PROPER INSTRUCTIONS GIVEN.

Where the instructions are not made a part of the record, the Supreme Court will assume that a specific issue was submitted to the jury by proper instructions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3749-3754; Dec. Dig. § 928.\*]

##### 4. MASTER AND SERVANT (§ 88\*)—INJURY TO SERVANT—INDEPENDENT CONTRACTOR.

The relations of independent contractor and agent are not necessarily repugnant, and

where a telephone company is laying conduits in the street under a municipal franchise, so that its independent contractor would necessarily act, not only for himself, but also as an agent for the company, the company may be liable for negligence of the contractor, under the doctrine of respondeat superior.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 146; Dec. Dig. § 88.\*]

##### 5. MASTER AND SERVANT (§ 297\*)—INJURIES TO SERVANT—VERDICT—RESPONSIVENESS TO ISSUES.

In an action against a telephone company for damages from blasting, the exoneration of a codefendant who had no relation whatever, either to the telephone company or the construction company, and who, as an accommodation, merely loaned men to the one in charge of the construction company to do the blasting, does not render a verdict against defendant invalid as being unresponsive to the issues.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1197; Dec. Dig. § 297.\*]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by the Norwegian Danish Methodist Episcopal Church of Spokane Falls against the Home Telephone Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John F. Davies and L. B. Cornell, for appellant. Severin Iverson, for respondent.

CHADWICK, J. This action was brought by the respondent to recover damages. It seems that it was necessary to blast out a ditch or conduit in one of the streets of the city of Spokane and adjacent to the property owned by respondent, in which to put the wires and conduits belonging to appellant's telephone system. The complaint alleges that the damages resulted because of the careless and negligent manner in which the work was done by appellant, its agents, and servants. Appellant's answer is a general denial. At the trial respondent showed the character and extent of its damage, and there was some testimony from which the jury might find negligence. In submitting its case, respondent called as a witness one of the men under whose actual direction the work was done. He testified that the work was in charge of and carried on by the Interstate Consolidated Telephone Company; that "they [the consolidated company] have a contract. What their contract is I don't know. That is out of my jurisdiction. I am simply employed on the construction work." He said, also, that the Home Telephone Company had nothing to do with the work, and further: "Q. Who employed you? A. C. S. Lane. Q. And who is he? A. He is president of the Interstate Consolidated Telephone Company. Q. And isn't he the president of the Home Telephone Company too? A. He is."

[1] It is contended that the evidence shows the work to have been done by an independent contractor, and that no recovery can

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

therefore be had against appellant. We think, however, that, when it was shown that the work was done in aid of a general scheme prosecuted in aid of appellant's enterprise, that the alleged independent contractor and appellant had a common president, that he was directing the work, and that the alleged contractor was engaged in no work other than construction work for the Home Telephone Company, a *prima facie* case was made out. *Dillon v. Hunt*, 82 Mo. 154; *Redstrake v. Swayze*, 52 N. J. Law, 129, 18 Atl. 697.

[2] These facts are quite as consistent with the theory of agency as that of independent contractor, and the burden shifts to appellant to show its true relation to the construction company, the best evidence of which would have been its contract, thus making a mixed question of law and fact, or one of law alone. This it did not do, but left the question one of fact only, contenting itself to rest upon the case as made by respondent. "Prima facie, the person at whose instance and for whose use and benefit work is done is liable for all injuries to third persons resulting from the negligence or unskillfulness of those executing the work; that, unless some evidence is given as to the terms of the contract, 'it is no more proper to assume that it gave the contractor an independent employment than that it stipulated for the work to be done under the immediate supervision and direction of the defendant,' if the defense is that the wrongdoer was not a servant, the contract must be shown 'with sufficient particularity to enable the court to determine whether the employment was of this independent character.' *McCamus v. Citizens', etc., Co.* (1863) 40 Barb. (N. Y.) 380." Note to *Richmond v. Sitterding* (1903 Va.) 65 L. R. A. 459, citing *Welfare v. London, etc., L. R. 4, Q. B. 693*; *Moll, Independent Contractors, etc., § 32*.

[3] Although the instructions of the court are not made a part of the record, we confidently assume that the issue as we have stated it was submitted to the jury by proper instructions, so that its verdict is conclusive.

[4] While ordinarily the existence of the relation of contractor, if proven, excludes that of principal and agent or master and servant, it is not always so. The relations of contractor and agent are not necessarily repugnant. Assuming, for the sake of argument, that the relation of independent contractor was shown, it does not follow, considering the facts of the instant case, that appellant might not be liable under the doctrine of respondeat superior. The appellant was prosecuting its work under a franchise given by the city, and its contractor would in law act, not only for itself, but of necessity as an agent for appellant. This distinction is noticed in *Detroit v. Corey*, 9 Mich. 165, 80 Am. Dec. 78, where it is said: "The difference between them [independent contractor and agent] is that a contractor acts

in his own right and for himself; whereas an agent or servant acts for and in the name of another. In the case before us, both relations exist, and must necessarily exist from the peculiar character and circumstances of the case. The contractors not only acted for themselves, but at the same time as agents for the city, under the power given it to construct sewers in its streets, which are public highways. They had no right to make the excavation they did, except as agents for the city; and, had they been proceeded against by indictment for creating a public nuisance, they could not have justified in their own right, but would have had to justify as agents of the city under their contract.

\* \* \* The donee of such a power, whether the donee be an individual or a corporation, takes it with the understanding—for such are the requirements of the law in the execution of the power—that it shall be so executed as not unnecessarily to interfere with the rights of the public, and that all needful and proper measures will be taken, in the execution of it, to guard against accidents to persons lawfully using the highway at the time. He is individually bound for the performance of these obligations; he cannot accept the power divested of them, or rid himself of their performance by executing it through a third person, as his agent. He may stipulate with the contractor for their performance, as was done by the city in the present case, but he cannot thereby relieve himself of his personal liability, or compel an injured party to look to his agent, instead of himself, for damages."

Appellant has briefed and vehemently urged the proposition that the work of blasting is not of such inherent danger as to prevent the principal from exonerating himself by giving the work over to an independent contractor. Inasmuch as this argument is predicated upon the theory that the work was done by an independent contractor, when, as we have shown, the verdict of the jury is sustained in law, this contention will need no discussion.

[5] Finally it is insisted that, whereas one Fife, who was made a codefendant, was exonerated by the jury, it follows that no verdict can stand against appellant. This argument is based upon the assertion that, inasmuch as Fife actually did the work, if he was not careless or negligent, there could be no charge of omission against the principal. The record shows, without contradiction, as we read it, that Fife bore no relation whatever to either the appellant or the construction company. He was engaged in street work in the city of Spokane. When it became necessary to do the blasting complained of, he loaned two of his men to Mr. Sawhill, who had immediate charge of the work, merely as a matter of accommodation; it appearing that Fife had previously done some work for appellant, and that their relations were amicable to a degree warranting

the asking and granting of favors between them.

Finding no error, the judgment is affirmed.

DUNBAR, O. J., and MORRIS, ELLIS, and CROW, JJ., concur.

#### STATE v. ROBERTS.

(Supreme Court of Washington. Jan. 5, 1912.)

##### 1. RAPE (§ 57\*)—EVIDENCE—CORROBORATION.

In a prosecution for rape, corroboration of prosecutrix held insufficient to sustain a conviction as a matter of law.

[Ed. Note.—For other cases, see Rape, Cent. Dig. § 87; Dec. Dig. § 57.\*]

##### 2. RAPE (§ 54\*)—CORROBORATING CIRCUMSTANCES.

Where prosecutrix permitted accused to go home with her after the alleged occurrence, and, with her mother, entertained him at lunch, and made no complaint at that time, the fact that, when they appeared, her mother noticed that her dress was pulled out of her belt, her hair on sideways, and their faces were pretty red on one side, was of no corroborative force.

[Ed. Note.—For other cases, see Rape, Cent. Dig. §§ 83-84; Dec. Dig. § 54.\*]

Fullerton, J., dissenting.

Department 1. Appeal from Superior Court, Spokane County; E. H. Sullivan, Judge.

S. N. Roberts was convicted of rape, and he appeals. Reversed and dismissed.

Nuzum & Nuzum, O. B. Setters, and Geo. H. Armitage, for appellant. John L. Wiley and O. J. Saville, for the State.

MOUNT, J. The defendant was charged with the crime of rape. Upon a trial he was found guilty by a jury, and was sentenced to a term in the penitentiary. He appeals from that judgment.

[1] At the close of the evidence for the state, counsel for the defendant moved the court for a directed verdict. The court denied this motion, saying: "All I see is they were together that night, left home that night, came back that night; and the fact of pregnancy, the clothes disarranged. \* \* \* That's all I can see. I do not think a conviction can stand on this testimony. \* \* \* I will overrule the motion and see what the case develops. Unless I change my mind, I will grant a new trial. I will overrule the motion and examine these authorities." Thereafter nothing was proven which in any respect strengthened the case for the state. The defendant admitted that he was acquainted with the prosecuting witness, and, by not denying her statements, virtually admitted that he had spent several evenings in her company between December 13, 1910, and January 2, 1911, but denied that he had ever had sexual intercourse with her, or had ever been engaged to marry her. He also produced evidence tending to discredit her

statements as to the time and place where she said the act was committed. We are satisfied that the trial court should have granted the defendant's motion and dismissed the case. The prosecuting witness testified, in substance, that she first met the defendant on December 13, 1910. She was at that time 17 years and 10 months of age. He was a young man. The record does not disclose his age, but he is referred to as a boy. The prosecuting witness was employed as a clerk in a department store. The defendant was employed at a soda fountain in the same store. Two or three days after they met they attended a neighborhood party together. A few days later, she says, he asked her to become his wife, but she did not accept this offer until the evening of December 24, 1910. On the evening of December 26th they went together to a theater. They left the theater about 9:15 p. m. and took the street car for home. They got off the car when about three blocks from her home. Defendant asked her to go to his brother's house, which was near by, and which was a little house of three rooms. Other small houses were located near by this. She went with him. They went inside, defendant locking the door. She then said: "I asked him why lock the door, and he said he did not want any one to come while we were there, and then he took hold of me and started to use me in a manner I did not think was right. I told him to leave me alone, and I struggled and hallooed and screamed. I did everything I could. \* \* \* He took me into the bedroom, or at least forced me in there. He threw me on the bed and had sexual intercourse with me. Q. Did anything else occur there that you have not spoken of? A. Yes, sir. I thought if I could get my hat pins I could help myself. I went to grab for them, and he interfered, got ahead of me, took my hat pins, and threw them on the floor, and took my hat away." After this happened, the defendant took her home, which was about three blocks away. She invited him into her mother's house, where he went, and she and her mother and the defendant had lunch there together. She also testified that on January 2, 1911, the same thing occurred at the same place in substantially the same way. The mother of the prosecuting witness testified to the appearance of her daughter and the defendant when they arrived home on the evening of December 26th, as follows: "The first thing I noticed that they were home sooner than usual. I made the remark, 'Why home so soon?' and he said the Washington got out sooner than the Spokane. I also noticed that my daughter's dress was pulled out of her belt, hair all on sideways, and she looked dreadful. 'What was wrong?' Mr. Roberts said they got out at Gordon and walked three blocks

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



to the house. Q. Anything said there about it being unusual with reference to their appearance? A. I noticed that their faces were pretty red—on one side—and I asked my daughter—I couldn't help looking at her—I said, 'What is the matter with your face?' Roberts said they had been walking rather fast, got off the car because it was crowded, and walked home. Q. Was that about all that was said between you? A. Yes; all that I remember. Q. How long did Mr. Roberts stay that evening after coming home? A. Stayed long enough to have lunch. I presume 20 minutes or half an hour."

This is all there is in the record to corroborate the story of the prosecuting witness that she had been ravished by the defendant on that evening or at any time. We are satisfied that this is not such evidence as supports the testimony of the prosecuting witness. The girl's story is very improbable. If she was violently assaulted, as she says she was, it is not reasonable that she would let her assailant escort her home, and, on their arrival there, invite him into the house with her mother, and there entertain him at luncheon. This story is so unreasonable as to lead to the conclusion that defendant did not assault her at all; or, if he did so, it was with her consent.

[2] In either event, the fact that the dress of the prosecuting witness was pulled out of her belt, hair on sideways, and "their faces were pretty red on one side" is no evidence or even a circumstance tending to prove that the crime had been committed. These things might have all occurred and the parties be entirely innocent of wrong. If the daughter had made a complaint at that time, as she undoubtedly would had her story been true, then these circumstances might have had some weight as corroborating circumstances. But, when no complaint was made, we think they are of no corroborative force. In *State v. Gibson*, 116 Pac. 872, we said: "The evidence offered in support must have some real supporting force. It must be something more than a colorable support"—citing *State v. Powell*, 51 Wash. 372, 98 Pac. 741; *State v. Stewart*, 52 Wash. 61, 100 Pac. 153; *State v. McCool*, 53 Wash. 486, 102 Pac. 422, 132 Am. St. Rep. 1089, and *State v. Crouch*, 60 Wash. 450, 111 Pac. 562.

The judgment is reversed and the cause ordered dismissed.

DUNBAR, C. J., and PARKER and GOSE, JJ., concur.

FULLERTON, J. I dissent. There was corroborating evidence. Its weight and the credibility of the prosecuting witness were for the jury, and this court but usurps the jury's function when it assumes for itself the right to pass upon them.

## HALE et al. v. CITY CAB, CARRIAGE & TRANSFER CO.

(Supreme Court of Washington. Jan. 4, 1912.)

### 1. APPEAL AND ERROR (§ 562\*)—MOTION FOR NEW TRIAL—AFFIDAVITS—RECORD.

Affidavits used on a motion for a new trial do not become part of the record by being filed, but, in order to be considered on appeal, must be embodied in, attached to, or made a part of, the statement of facts, and covered by the judge's certificate thereto; it being insufficient to direct the clerk in the notice of the filing of a proposed statement to attach to the statement the exhibits, motion for a new trial, and affidavits on file, together with the order overruling the motion.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 562.\*]

### 2. PARTNERSHIP (§ 64\*)—ASSUMED NAME—FILING CERTIFICATE—ACTIONS—OBJECTIONS.

In an action by a partnership, an objection that plaintiffs were doing business under an assumed name, and had failed to file in the office of the county clerk a certificate setting forth the designation or style of the firm and the true names of all the partners, as required by Rem. & Bal. Code, § 8369 et seq., was unavailable unless taken by demurrer or answer.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 87-91; Dec. Dig. § 64.\*]

### 3. PARTNERSHIP (§ 64\*)—PARTNERSHIP NAME—ASSUMED NAME—CERTIFICATE.

Where plaintiffs did business under the name "Hale-Tindall Co.," which name contained the names of all the partners, plaintiffs were not required by Rem. & Bal. Code, §§ 8369, 8372, to file a certificate of the names of all the partners as required in case of partnerships doing business under an assumed name.

[Ed. Note.—For other cases, see Partnership, Dec. Dig. § 64.\*]

### 4. APPEAL AND ERROR (§ 671\*)—APPEAL FROM ORDER—RECORD.

Where a notice of appeal specified that it was from an order granting a new trial and also from an order subsequently entered, refusing to dismiss the action because of plaintiffs' failure to allege and prove the filing of a partnership statement, but the transcript did not show the latter order or any other proceeding invoking the court's action thereon, it could not be considered on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2867-2872; Dec. Dig. § 671.\*]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by W. D. Hale and others, copartners, doing business under the style of the Hale-Tindall Company, against the City Cab, Carriage & Transfer Company. Judgment for defendant, and from an order granting plaintiffs' motion for a new trial defendant appeals. Affirmed.

John M. Gleeson and Joseph F. Morton, for appellant.

ELLIS, J. Appeal from an order granting a new trial. The jury returned a verdict in favor of defendant, appellant here, and on motion of plaintiffs, respondents here, a new

trial was granted. The motion assigned all of the statutory grounds excepting the sixth (1 Rem. & Bal. Code, § 399), and stated that it was based upon "the records and files herein and upon the affidavits hereinafter to be filed herein." No affidavits were attached to or made a part of the motion as appears from the transcript. The order for new trial was entered January 21, 1911. It is couched in general terms. The appellant contends that the order was granted solely on the grounds of surprise and newly discovered evidence. There is nothing in the order to substantiate this claim. It states no grounds.

[1] Appellant quotes at length from an affidavit purporting to show surprise and new evidence which it is claimed was made in support of the motion. No such affidavit, however, appears anywhere in the record. Reference is also made to other affidavits which it is claimed were used on the hearing of the motion for new trial. They are not embodied in the statement of facts, and there is no certificate of the trial judge that they were so used. None of these affidavits nor any affidavits are embodied in, attached to, or in any manner made a part of, the statement of facts nor covered by the judge's certificate thereto. For this reason, under repeated decisions of this court, we cannot consider them. *Taylor v. Modern Woodmen of America*, 42 Wash. 304, 84 Pac. 867; *Rice Fisheries Co. v. Pacific Realty Co.*, 35 Wash. 535-538, 77 Pac. 839; *State v. Yandell*, 34 Wash. 409, 75 Pac. 988; *Griggs v. MacLean*, 33 Wash. 244, 74 Pac. 360; *Chevalier v. Wilson*, 30 Wash. 227, 70 Pac. 487; *Shuey v. Holmes*, 27 Wash. 489, 67 Pac. 1096. The notice of filing of the proposed statement of facts seems to indicate that counsel for appellant held the mistaken view that it was only necessary to have these affidavits included in the files in the same manner as exhibits. The notice states that the clerk will be requested to attach to the statement the exhibits, "and, in addition thereto, defendant's motion for a new trial, together with affidavits now on file in said court and cause which were used on the hearing of said motion for a new trial, together with the order overruling the same." This would not be sufficient. Affidavits used on a motion for new trial must be made a part of the statement and identified by the judge's certificate as those so used on the hearing before we can consider them.

[2] Counsel also raises, somewhat vaguely, a contention that the court should have refused to grant a new trial because the complaint and evidence show that the plaintiffs were partners doing business under an assumed name, designation, or style, and have failed to file in the office of the county clerk a certificate setting forth the designation or

style of the firm and the true names of all of the partners, as required by chapter 145, p. 288, Laws 1907 (2 Rem. & Bal. Code, § 8369 et seq.). This objection was not taken by demurrer or answer.

[3] The point was barely suggested by an objection to evidence as to who was the managing partner, which on reference to the statute the court overruled on the ground that the partnership designation, *Hale-Tindall Company*, contains the names of all the partners, thus falling within the proviso of section 4 of the act. 2 Rem. & Bal. Code, § 8372. The ruling was correct. *Bowman v. Harrison*, 59 Wash. 56, 109 Pac. 192. Moreover, we have consistently held in construing this statute and the cognate statute as to corporations that they go only to the capacity of the party to sue, and that the objection must be deemed waived unless raised by demurrer or answer. *Bowman v. Harrison*, 59 Wash. 56, 109 Pac. 192; *Pierson v. Northern Pacific Ry. Co.*, 61 Wash. 450, 112 Pac. 509; *Rothchild Bros. v. Mahoney*, 51 Wash. 633, 99 Pac. 1031; *Hale v. Crown Columbia Pulp & Paper Co.*, 56 Wash. 236, 105 Pac. 490; *Thompson-Spencer Co. v. Thompson*, 61 Wash. 547, 112 Pac. 655.

[4] The notice of appeal specifies that the appeal is from the order granting a new trial entered January 21, 1911, and also from an order entered January 30, 1911, refusing to dismiss the action for plaintiff's failure to allege and prove the filing of a partnership statement. This latter order does not appear in the transcript, nor does there appear any motion or other proceeding invoking the court's action in that regard. We cannot entertain an appeal from an order not brought before us. In any event, it is manifest that, if such an order was made, it was correct, since it is apparent that the point was raised after it had been waived by failure to raise it by demurrer or answer and after the order granting a new trial had been made.

No ground for disturbing the order granting a new trial which we can consider being suggested, the order is affirmed.

DUNBAR, C. J., and CHADWICK, MORRIS, and CROW, JJ., concur.

TRIBOU v. SCHOOL DIST. NO. 35 OF COLUMBIA COUNTY et al.

(Supreme Court of Washington. Jan. 9, 1912.)

APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS—CONFLICTING EVIDENCE.

The trial court's finding upon somewhat conflicting evidence will not be disturbed if supported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Department 2. Appeal from Superior Court, Columbia County; Chester F. Miller, Judge.

Action by Ralph A. Tribou against School District No. 35 of Columbia County and others. Judgment for defendants, and plaintiff appeals. Affirmed.

H. S. Blandford, for appellant. T. P. & C. C. Gose and R. M. Sturdevant, for respondents.

**PER CURIAM.** Appellant brought this action to recover a balance due on a subcontract taken by him from one Olson, who was the principal contractor for the erection of a school building in district 35 in Columbia county. The court found that the principal contract provided that no subcontracts should be let, that the respondent directors did not know of the relation of appellant to Olson until after the contract price had been fully paid, and that appellant both by word and conduct had released the school district, if any liability existed.

If we accept the findings of the trial court, and under a long line of decisions pronounced by this court we feel bound to do so, no legal principle is involved. A review of the facts upon which the court based its findings would serve no purpose. It is enough to say that the testimony conflicts in some degree, but in our opinion the judgment of the trial court is sustained by a clear preponderance of the evidence.

Judgment affirmed.

# BLAIR et al. v. CITY OF SPOKANE.

(Supreme Court of Washington. Dec. 29, 1911.)

## 1. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Mere knowledge by a servant of a danger causing injury to him does not of itself constitute contributory negligence in law, but the jury must determine whether, knowing the danger, the servant used care commensurate therewith, and exercised ordinary care under the circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1110-1112; Dec. Dig. § 289.\*]

## 2. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT—WARNING OF DANGERS—EVIDENCE—QUESTION FOR JURY.

Whether a servant killed by the fall of a retaining wall on which he stood performing his work had been warned of the danger held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1044; Dec. Dig. § 286.\*]

## 3. MASTER AND SERVANT (§ 157\*)—INJURY TO SERVANT—WARNING OF DANGERS—EFFECT.

A master who warned a servant of a danger which did not contribute to the servant's death was not thereby relieved from liability for the death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 303; Dec. Dig. § 157.\*]

## 4. MASTER AND SERVANT (§ 226\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

A servant assumes only such risks as are obvious after the master has discharged the duty of using ordinary care in making the servant's work reasonably safe, and in providing him with a reasonably safe place in which to work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.\*]

## 5. MASTER AND SERVANT (§ 226\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Though a servant of a city engaged in reconstructing a retaining wall on a street assumes the obvious risks incident to the situation in which he is placed, he does not assume the negligence of the city in failing to adopt a reasonably safe method in which to do the work, or negligently making his place extra-hazardous; it being the duty of the city in doing the work confessedly dangerous to do it in such a way as to reduce the danger to a minimum.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659-667; Dec. Dig. § 226.\*]

## 6. MASTER AND SERVANT (§ 219\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where an engineer of a city engaged in reconstructing a retaining wall in a street did not anticipate the fall of the wall, a servant killed by the fall of the wall on which he stood while at work could not be said to have assumed the risk on the ground that the danger was obvious.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 614; Dec. Dig. § 219.\*]

## 7. MASTER AND SERVANT (§ 107\*)—OBLIGATION OF MASTER—SAFE PLACE IN WHICH TO WORK.

A master employing men in making a dangerous place safe must take some precaution for their safety, and do what an ordinarily prudent man under the circumstances would do.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 179; Dec. Dig. § 107.\*]

## 8. MASTER AND SERVANT (§ 245\*)—INJURY TO SERVANT—ASSUMPTION OF RISK.

Where a servant was directed by the foreman to take a position on a retaining wall, and neither the foreman nor the servant believed that the wall was dangerous, the master could not escape liability for the death of the servant by the fall of the wall on the theory that the servant was reckless, and should have refused to obey the foreman.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 782; Dec. Dig. § 245.\*]

## 9. MASTER AND SERVANT (§ 270\*)—INJURY TO SERVANT—NEGLIGENCE—EVIDENCE.

Where a city repudiated the contract for the construction of a retaining wall because of the defective methods of the contractor, and took charge of the work intending to retain a part of the wall, and a servant of the city was killed by the fall of that part of the wall, evidence of the negligent construction of the wall was admissible against the city which had authorized the plans for the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927; Dec. Dig. § 270.\*]

## 10. MASTER AND SERVANT (§ 106\*)—LIABILITY FOR DEATH OF SERVANT.

Where a city authorized the plans for the construction of a retaining wall which collapsed because the plans were defective, the city was liable for the death of its servant by the fall of the wall, while the city was engaged in re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

constructing the wall after discharging the contractor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 193-198; Dec. Dig. § 106.\*]

Department 2. Appeal from Superior Court, Spokane County; John D. Hinkle, Judge.

Action by Bessie Ida Blair and others against the City of Spokane. From a judgment for plaintiffs, defendant appeals. Affirmed.

Cannon, Ferris, Swan & Lally and A. M. Craven, for appellant. Nuzum & Nuzum and Geo. H. Armitage, for respondents.

MORRIS, J. Action by respondents to recover for the death of their husband and father, caused by the alleged negligence of the city. The accident in which the deceased met his death occurred August 25, 1910, through the fall of a retaining wall and the slide of a fill on what is known as the "Sprague avenue fill." This work had originally been done under contract, but, because of the defective methods employed by the contractor, the city had repudiated the contract, and at the time of the accident was taking out the fill and tearing down the wall in places in order to reconstruct on safer and better plans. The charge of negligence was "the said city of Spokane, defendant, acted carelessly and negligently in removing said rocks from the said fill, as aforesaid, carelessly and negligently removed the support from the side of the said fill, as aforesaid, carelessly and negligently failed to put in braces or supports while removing the rock from said fill." In another paragraph the original negligent construction was charged under faulty and insufficient plans, and the adoption of faulty plans in taking down the retaining wall and removing the fill. It will thus be seen that the negligence charged consisted in the original faulty plans and construction, and in the negligent methods employed in seeking to remedy the defects in the original construction.

Deceased was a signal man who stood upon the wall, or on the fill within a few feet of the wall, to convey signals to the engineer who controlled the operation of the boom and skip that was being used to take the rock and earth from the fill and dump it outside the wall. All of this fill was not to be removed, but only so much of it as was deemed necessary in order to rebuild the wall which was the main purpose in the reconstruction. This wall as originally constructed was built as a dry wall; stones and rocks being used without mortar, cement, or other binding force. It was 500 feet long, 30 feet high, 15 feet wide at the base, and 2 feet wide at the top. There was abundant evidence to justify a finding by the jury of all the phases of negligence charged in the

complaint. It was also fairly established by the evidence that the wall at the point where deceased either stood upon it or within a few feet of it was not to be taken down on account of a wing wall coming in at that point to support a street crossing. It is also deducible from the evidence that deceased was directed to stand where he did by his foreman, in order to be in the best possible position to give his signals to the engineer, especially after dark, when his position was within the rays of an arc light where he could be plainly seen and his signals readily comprehended. The accident happened at about 7:30 or 7:45 in the evening. This was amply sufficient to establish the cause of action, unless the right of recovery was lost by reason of the matters set up in defense, which in so far as the same are here urged are contributory negligence and assumption of risk. In support of these defenses it was sought to be shown that deceased had full knowledge of the danger confronting him, and that he had been repeatedly warned.

[1] Upon the first point it is sufficient to say that knowledge of the danger does not of itself constitute contributory negligence in law, and that it is for the jury to say whether knowing the danger the deceased used care and caution commensurate with the danger. This doctrine has been so often announced by this court that further citation is not now necessary. As was said in *Cowie v. Seattle*, 22 Wash. 659, 62 Pac. 121, and reiterated in *Atherton v. Tacoma Ry. & Motor Co.*, 30 Wash. 395, 71 Pac. 39: "The law does not require the plaintiff in an action for personal injuries to be absolutely free from any negligence whatever, in order to recover, for such a requirement would impose upon him a duty of exercising extraordinary care and prudence, which is not the standard by which his negligence is measured. All the law requires of the plaintiff in such cases is the exercise of ordinary care under the circumstances surrounding him, and this he may do, although he may be guilty of some slight negligence in the broadest sense of that term."

[2] Upon the question of the deceased being warned as to the danger, this under the circumstances developed was a question of fact for the jury. Three instances are relied upon by appellant. One was by a foreman named Jacobs, who testified he warned deceased of danger from the falling wall in the presence of the other foreman, Shawgo. This conversation is denied by Shawgo. The second warning relied upon was from Stephenson, the superintendent of the work. Respondent produced a witness who testified that on the morning of the accident Stephenson's attention was called to a crack in the wall when a large rock rolled down the slope against it, and that Stephenson told them to keep on working, that the wall was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in no danger of falling. The third warning was from the city engineer, who says he asked Blair if he did not think he was in a dangerous position, standing with one foot on the wall and the other on the fill, and warned him to be careful of the wall, as he did not think it was very safe. He further testifies that he did not think the wall was going to fall, that the principal danger he had in mind was the falling of large rocks weighing from 500 to 1,000 pounds from the top of the wall, but that, outside of the danger of falling rocks, he thought Blair was in a reasonably safe position, and that he did not anticipate the wall itself would fall; if he had, he would not have allowed Blair to stand where he did.

[3] It will thus be seen that the jury could have found the first two warnings were not given, and that the third was of a danger which did not contribute in any way to the cause of Blair's death, and hence, if given, could not defeat a recovery, based upon a danger the witness himself says he did not anticipate.

[4] As to the defense of assumption of risk, while it is true that an employé assumes all the dangers inherent in the work and that are ordinarily incident thereto, it does not follow that he assumes the risk of his employer's negligence. The risks assumed by the servant are those and those only that are obvious after the master has discharged the duty imposed upon him by law of using ordinary care and prudence in making the servant's work reasonably safe, and in providing him with a reasonably safe place in which to do that work. This is the rule as announced by us in *Howland v. Standard Mill & Logging Co.*, 50 Wash. 34, 96 Pac. 686, where it was said: "But it is not the rule that a servant who goes into a dangerous situation assumes the risk of all dangers surrounding the place. He assumes those dangers only which are inherent in and which exist from the nature of the business, those dangers against which there is no absolute protection, not those caused by some negligent act of the master, and which would not exist but for such negligent act." Such is the oft-repeated announcement of the law in other jurisdictions. In *Curtis v. McNair*, 173 Mo. 270, 73 S. W. 167, it is said: "It is the duty of the master to exercise reasonable care commensurate with the nature of the business to protect his servant from the hazards incident to it. This duty the law imposes on the master, and will not allow him to cast it off. It is contrary to public policy to allow the master to relieve himself by contract from liability for his own negligence. What the law forbids to be done by express contract it will not assist to be done by implying a contract. A risk which the law, on the ground of public policy will not allow the servant to assume, it will not imply from his conduct that he has assumed. \* \* \* The servant never assumes the risk of the mas-

ter's negligence." So in *American Window Glass Co. v. Noe*, 158 Fed. 777, 86 C. C. A. 133, the same rule is announced: "Plaintiff undoubtedly assumed all the risks that naturally inhered in this extrahazardous work, but he did not assume the risk of its being made still more hazardous by defendant's negligence." *Yongue v. St. Louis & S. F. R. Co.*, 133 Mo. App. 141, 112 S. W. 985, thus expresses the same thought: "He (the servant) only assumes such risks as are incident to his job after his employer has fulfilled the primary duty of using care to furnish proper working places and appliances." Many other cases might be cited to the same effect.

[5] The above, however, are sufficient to show the rule properly applicable to the situation confronting us, which as applied to this case means that, while Blair could be said to have assumed the obvious risks incident to the situation in which he was placed, he did not assume the negligence of the city in failing to adopt a reasonably safe method with which to do the work, nor in making his place of work extrahazardous in failing to use a reasonably safe plan to dismantle this wall, or to make such slopes in taking out the fill as would add unnecessary and extra hazards to the work. It was the duty of the city in doing this work, confessedly dangerous and attendant with many risks, to do it in such a way as to reduce the danger to a minimum, and not increase it by careless and negligent methods of operation. That it did so increase the danger and add to the risk by faulty and negligent methods is abundantly established by the evidence.

[6] Again, the deceased met his death because of the falling wall. It would hardly be a just inference to say this was a plain and obvious danger, when the city engineer who knew more about the strength of this wall and the probability of its falling says he anticipated no danger from its fall, nor did he observe any indications that it would fall. The fall of the wall could hardly then be said to be so apparent that the ordinary workman unskilled in matters of this kind would have anticipated it. It was not obvious to the engineer in charge, it could hardly be said to be obvious to the deceased.

[7] The next contention is that the doctrine of "reasonably safe place" does not apply. It is probably true that, when men are engaged in making a dangerous place safe, the obligation of the master to provide his servant with a reasonably safe place in which to do his work does not apply with all the force that it does in situations where the danger is not so imminent. This only means, however, that the rule is limited in its application. It does not call for its abrogation. Wherever men are engaged in employment, the law imposes the duty upon the master to make the place as reasonably safe as the circumstances surrounding the place and the character of the work will admit. The mas-

ter must take some precaution for the safety of his employes. He will not be permitted to say: "This work is known to be dangerous, and I am therefore absolved from any legal requirement as to protecting the safety of my employes." The duty is not lessened because, notwithstanding its exercise, the danger remains. The law requires the master shall make the effort, and he cannot be absolved until he does. Having performed this duty as an ordinarily prudent man under the same circumstances would have performed it, he has done his full duty, and his employe then assumes the inherent danger incident to that which he undertakes to do. This feature of the case is so interwoven with the point we have previously discussed that it may be said to rest upon the same legal principle; and that is, the servant does not assume the negligence of the master. "While it is true that a servant employed to make a dangerous place safe assumes the risk of the very danger which he undertakes to remove, he does not assume the risk of the method employed in doing such dangerous work if that method is unnecessarily hazardous in respects as to which the employe has no knowledge, provided that in these respects the employment could have been rendered less hazardous by the exercise of reasonable care on the part of the employer." *Clark v. Johnson County Tel. Co.*, 146 Iowa, 428, 123 N. W. 326. See, also, *Jacobson v. Hobart Iron Co.*, 103 Minn. 319, 114 N. W. 951; *Wolf v. G. N. R. Co.*, 72 Minn. 435, 75 N. W. 702; *Bradley v. Chicago, M. & St. P. Ry. Co.*, 138 Mo. 293, 39 S. W. 763; *Byrne v. Brooklyn City Ry. Co.*, 6 Misc. Rep. 441, 27 N. Y. Supp. 126; *Norton Coal Co. v. Murphy*, 108 Va. 528, 62 S. E. 268; *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612; *Hawley v. Railway Co.*, 133 Fed. 150, 66 C. C. A. 216; *Liedke v. Moran Bros. Co.*, 43 Wash. 428, 86 Pac. 646, 117 Am. St. Rep. 1058; *Etheridge v. Gordon Construction Co.*, 62 Wash. 256, 113 Pac. 639; *McLeod v. Chicago, M. & P. S. Ry. Co.*, 117 Pac. 749.

[8] We have heretofore referred to the fact that the deceased was placed in the position he occupied at the time of the accident by his foreman, Shawgo. Under these circumstances, it might well be said, as in *Witham v. Tenino Stone Quarries*, 48 Wash. 127, 92 Pac. 900, it is reasonable to assume that neither the deceased nor his foreman deemed such a position overhazardous at the time, nor that the danger of such a position was so absolute or imminent that injury must almost necessarily have resulted. Under such circumstances, the master cannot be heard to say that the position deceased was instructed to take was so foolhardy and reckless that he should have refused to obey the instructions of his foreman, and

his failure to do so bars a recovery. Such is not the law in this state as announced in the cases written by us as cited in the *Witham Case*.

[9] Much is said in appellant's brief concerning the error in admitting evidence of the negligent construction of this wall and fill and of the instructions of the court in submitting it to the jury. This was not error, in view of the evidence that it was the intention of the city to retain the wall at the point where deceased was standing. Such intention was in itself an assertion that the wall was reasonably safe for the purpose for which it was intended. It further appeared that the plans for the construction were authorized by the city.

[10] Such being the case, the city could not escape liability when the evidence justified a finding that the collapse of the wall was due to defective plans in the original construction. Such was the holding in *Potter v. Spokane*, 115 Pac. 176, in speaking of this same fill with reference to the damage to abutting property.

What we have said disposes of all the errors suggested by appellant, both in the matter of the admission of improper evidence and in the giving and refusal of instructions. It will not be necessary therefore, to make a more specific reference to them.

Finding no merit in any of appellant's assignments of error, the judgment is affirmed.

DUNBAR, C. J., and ELLIS, CROW, and CHADWICK, JJ., concur.

#### NICHOLLS v. CITY OF SPOKANE.

(Supreme Court of Washington. Dec. 29, 1911.)

Department 1. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by Florence Nicholls against the City of Spokane. From a judgment for plaintiff, defendant appeals. Affirmed.

Cannon, Ferris, Swan & Lally and A. M. Craven, for appellant. Curtiss & Remele, for respondent.

PER CURIAM. The respondent brought this action to recover damages for the death of her husband, which she alleges was caused by the negligence of the city. The deceased received the injury which later caused his death while working as a common laborer in the employ of the city in the Sprague avenue fill on August 25, 1910. He had been directed by the foreman to go to a certain place to work, and, in obedience to the order, he had just arrived at the designated place when the well gave way. He was caught and crushed in the rock and debris, causing the injury from which he later died. There was a verdict and judgment for the plaintiff. The defendant has appealed.

The cause is a companion one to *Blair v. City of Spokane*, 119 Pac. 839, just decided, and is controlled by it in every respect. Upon its authority, the judgment is affirmed.

## STATE v. RACKICH

(Supreme Court of Washington. Dec. 27, 1911.)

## 1. EVIDENCE (§ 320\*)—HEARSAY—PEDIGREE.

One may testify as to the nationality of his parents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1201; Dec. Dig. § 320.\*]

## 2. EVIDENCE (§ 320\*)—HEARSAY—AGE.

One may testify as to the ages of other members of his family as well as to his own age.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1201; Dec. Dig. § 320.\*]

## 3. EVIDENCE (§ 157\*)—BEST EVIDENCE.

The best evidence rule is not applicable to exclude testimony as to nationality of witnesses' parents.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 460-470; Dec. Dig. § 157.\*]

## 4. CRIMINAL LAW (§ 596\*)—CUMULATIVE EVIDENCE.

A continuance was properly denied, in a prosecution for selling intoxicants to a half-blood Indian, in order to procure the evidence of the alleged half-blood's parents as to their nationality, in absence of a showing that testimony of the parents would have differed from that of the half-blood or of diligence in procuring the testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1328-1330; Dec. Dig. § 596.\*]

## 5. CRIMINAL LAW (§ 742\*)—JURY QUESTION—CREDIBILITY OF WITNESSES.

In a prosecution for selling intoxicants to a half-blood Indian, the fact that the prosecuting witness, to whom the liquor was sold, was employed as a government agent in detecting persons selling liquor to Indians, did not, as a matter of law, make his evidence unworthy of belief, as that may be a proper method of detecting wrongdoers; the weight of his evidence being for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1138, 1719-1721; Dec. Dig. § 742.\*]

## 6. INTOXICATING LIQUORS (§ 223\*)—ACTIONS—PROOF—VARIANCE—QUANTITY SOLD.

That the information charged the sale of a quart of intoxicants to a half-blood Indian, while the proof only showed the sale of a pint, was not a fatal variance.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 271; Dec. Dig. § 223.\*]

Department 1. Appeal from Superior Court, King County; John B. Yakey, Judge.

John Rackich was convicted of selling intoxicating liquors to a half-blood Indian, and he appeals. Affirmed.

John H. Allen, for appellant. John F. Murphy and Alfred H. Lundin, for the State.

FULLERTON, J. The appellant was convicted of the crime of selling spirituous liquor to one Brown, an Indian of the half blood.

[1] On the trial Brown was permitted to testify, over the objection of the appellant, as to his parentage, stating that his mother was a full-blooded Indian and that his father was a Portuguese. The appellant argues in this court that this evidence was inadmissible, being but hearsay, and consequently not

the best evidence. But we think a person, competent otherwise to be a witness, may testify as to his parentage. While no case has been cited us holding directly that a witness may so testify, analogous cases are numerous. For example, it was held in *State v. Miller*, 71 Kan. 200, 80 Pac. 51, that the prosecuting witness was competent to testify as to her own age, notwithstanding both of her parents were present and testifying to the same fact, and this is a case where the question of her exact age at a particular time was a material question at issue. To the same effect are the following cases: *State v. McClain*, 49 Kan. 730, 81 Pac. 790; *Hill v. Eldridge*, 126 Mass. 234; *State v. Cain*, 9 W. Va. 559; *State v. Best*, 108 N. C. 747, 12 S. E. 907; *Loose v. State*, 120 Wis. 115, 97 N. W. 528; 2 Jones on Evidence, § 303.

[2] So, also, a witness may testify as to the ages of other members of his family. 2 Jones on Evidence, § 303. The principle that permits a person to testify to his own age, or as to the ages of the different members of his family, will also permit him to testify as to his parentage. He acquires the knowledge of the one fact in the same manner that he does the other facts, and, while such evidence partakes somewhat of the character of hearsay evidence, it is admissible on grounds of public policy.

[3] The appellant argues further that, since it was shown that the parents of the prosecuting witness were still living, they were the only persons competent to testify to the prosecuting witness' parentage, and that in consequence the evidence admitted was not the best evidence of which the case in its nature was susceptible. But the rule that permits a person to testify as to his parentage is not founded on the principle that it is substitutionary in its nature. On the contrary, it is of itself original evidence. It may be weaker than would be that of the parents themselves; but to permit the one to testify when the others are within call is not a substitution of evidence. It is no more than the selection of the weaker competent evidence instead of the stronger. To do this violates no rule of evidence. 1 Greenleaf on Evidence, § 82.

[4] At the trial, and after the prosecuting witness had testified that his parents were still living, the appellant moved orally for a continuance until such time as the parents could be brought into court. The court denied the motion, and the appellant excepted. It is thought that the court abused its discretion in denying the motion, but we think otherwise. There was no showing that the testimony of the parents would have differed from that of the prosecuting witness, nor was there any showing of diligence in attempting to procure their testimony. The court's business must proceed orderly and with dispatch, and interruptions in the pro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ceedings such as was here sought is not to be tolerated unless for the gravest reasons.

[5] It appears that the prosecuting witness to whom the liquor was sold was in the employ of a government agent engaged in the detection and prosecution of persons selling liquor to Indians, and it is thought that this fact rendered his testimony concerning the alleged sale unworthy of belief. But this was for the jury. There is nothing inherently wrong in this method of detecting wrongdoers; in fact, the method resorted to is sometimes indispensable if violators of the liquor statutes are to be brought to justice.

[6] The charge in the information is that the appellant sold to the prosecuting witness one quart of spirituous liquor, while the proof was that one pint of such liquor was so sold. It is thought that this was such a variance as to amount to a failure of proof, but the rule is otherwise. The crime consists in the selling of spirituous liquors, not in the selling of any particular quantity thereof. Hence the substance of the issue was proven, which is all that is required.

The other assignments touched upon in the appellant's brief seem to have no support in the record. For that reason it is unnecessary that we consider them.

The judgment is affirmed.

DUNBAR, C. J., and GORE and MOUNT, JJ., concur.

STATE ex rel. GABE v. MAIN, Judge.  
(Supreme Court of Washington. Dec. 27, 1911.)

# 1. CRIMINAL LAW (§ 987\*)—PRESENCE OF DEFENDANT—JUDGMENT.

Rem. & Bal. Code, § 2193, provides that, upon a conviction for an offense punishable by imprisonment, the defendant must be personally present for the purpose of judgment, but, where punishable by fine only, some responsible person may undertake to secure the payment of the judgment and costs, where the defendant is not personally present, in which case the judgment may be rendered in his absence. Rem. & Bal. Code, § 2145, provides that no person prosecuted for an offense punishable by death or by confinement in the penitentiary or in the county jail shall be tried, unless personally present during the trial. *Held*, as section 2193 is specially applicable to the necessity for the presence of the defendant for judgment, it will control the more general terms of section 2145, which is merely declaratory of the common law as applicable to felonies, and will determine the necessity for the presence of the defendant for judgment on a verdict at the time it is rendered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2511; Dec. Dig. § 987.\*]

# 2. CRIMINAL LAW (§ 987\*)—PRESENCE OF ACCUSED—JUDGMENT.

Rem. & Bal. Code, § 2193, provides that, upon a conviction for an offense punishable by imprisonment, the defendant must be personally present for the purpose of judgment, but, where only punishable by fine, his presence is not essential for the rendition of judgment, where some responsible person is pres-

ent and undertakes to assume the payment of the judgment and costs. *Held*, that the statute contains nothing which militates against the common-law rule that, if in cases of felony less than capital the prisoner be under bail and voluntarily absent himself without leave, he will be deemed to have waived his right to be present, and the court may proceed with the trial and have the verdict received and published, even when it is a verdict of conviction, and, as the statute clearly implies that in case of acquittal there is no necessity for the presence of the defendant, a defendant, in an action for selling liquor without a license, although temporarily absent from the courtroom at the time the jury was ready to return its verdict, still had an absolute right to a judgment upon verdict of acquittal after its rendition and publication.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2511; Dec. Dig. § 987.\*]

# 3. BAIL (§ 79\*)—RELIEF FROM FORFEITURE—ACQUITTAL IN ABSENCE OF ACCUSED.

Although a defendant in a prosecution for selling liquor without a license was not present when the jury notified the court it was ready to return a verdict, where it was not necessary that she be present, the verdict being one of acquittal, the return of the verdict and its filing had the effect of discharging a judgment of default upon the bail bond of the defendant entered upon a discovery of her absence, as such judgment was merely ancillary and incidental to the main case, and it thereupon became the plain duty of the court to vacate such default and judgment and enter a judgment of acquittal on the verdict.

[Ed. Note.—For other cases, see Bail, Cent. Dig. § 350; Dec. Dig. § 79.\*]

# 4. MANDAMUS (§§ 1, 3\*) — NATURE AND GROUNDS—EXISTENCE OF OTHER REMEDY—APPEAL—IMMEDIATE RIGHT.

Under Rem. & Bal. Code, § 999 et seq., mandamus is made a much broader remedy than the old prerogative writ, and is intended to give relief in all cases in which the ordinary course of law will not furnish a plain, adequate, and speedy remedy, so that where, in a prosecution for selling liquor without a license, the defendant has an absolute right to have a judgment of default entered upon her bail bond set aside and a judgment of acquittal entered, there is a right to instant relief, and as the remedy by appeal from the court's refusal to so act would cause delay, mandamus to compel the action of the judge is the proper remedy.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 1-3; Dec. Dig. §§ 1-3.\*]

Department 2. Mandamus by the State of Washington, on the relation of Anna Gabe, against John F. Main, Judge of the Superior Court of King County. Peremptory writ ordered.

W. F. Hays, for plaintiff. James E. Bradford and R. H. Pierce, for respondent.

ELLIS, J. This is an application for a writ of mandate requiring the respondent to enter a judgment upon the verdict of a jury finding the relatrix not guilty and also requiring the respondent to vacate his order for judgment against the relatrix and her bondsman on her bond on appeal from a conviction and fine in the police justice's court of Seattle.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



The application for the writ and the respondent's return thereto show the following undisputed facts: The relatrix was arrested and tried before the police justice of the city of Seattle for selling liquor without a license in violation of a city ordinance. She was found guilty and fined in the sum of \$100 and appealed to the superior court. The cause came on for trial, a jury was impaneled and sworn, the trial proceeded in the usual course, and the jury retired to deliberate upon its verdict. Shortly afterwards the relatrix and her counsel left the courtroom. The jury notified the court that they had arrived at a verdict, and, the defendant (relatrix) not being present and not having been excused by the court, the city attorney orally moved the court for an order forfeiting her bail bond and for judgment thereon against her and her surety, which motion was granted. Immediately thereafter the verdict was received. It was "not guilty." The return states that the court instructed the clerk to receive, but not to file, the verdict. It appears, however, and is not denied, that the verdict was at once received and filed. A few days afterwards, and apparently as soon as the relatrix learned of the action of the court, she made application to the court for judgment of acquittal upon the verdict and for a vacation of the judgment upon the bond against her and her bondsman. Both requests were denied by the court, whereupon this writ was sued out. The affidavits in support of the motion for vacation show, and it is not denied by the return, that during the trial the relatrix became ill and upon the retiring of the jury was advised by her attorney that she might go home, which she, accordingly, did. The return alleges that the court, noticing that the relatrix and her counsel had left the courtroom, directed the clerk to notify her counsel that her presence would be necessary when the verdict was received, and that the clerk did so by telephone and was informed by her counsel that relatrix was feeling unwell and had retired to her sick room, but did not then nor at any time inform the clerk or bailiff that the return of the relatrix would cause anything more than an inconvenience.

[1] The respondent bases the refusal to enter judgment of acquittal and the right to forfeit the bond upon 1 Rem. & Bal. Code, § 2145, reading as follows: "No person prosecuted for an offense punishable by death, or by confinement in the penitentiary or in the county jail, shall be tried unless personally present during the trial." Assuming that this section includes the reception of the verdict, it is only declaratory of the common law as applicable to felonies. It has been usually held that after appearing and being placed on trial, in cases of felony less than capital, if the prisoner, being out on bail, voluntarily absent himself without leave, he will be deemed to have waived his right to

be present, and the court need not stop the trial, but the verdict may nevertheless be received and published, even when it is a verdict of conviction. *Robson v. State*, 83 Ga. 166, 9 S. E. 610; *Barton v. State*, 67 Ga. 653, 44 Am. Rep. 743; *State v. Guinness*, 16 R. I. 401, 16 Atl. 910; *State v. Kelly*, 97 N. C. 404, 2 S. E. 185, 2 Am. St. Rep. 299; *Lynch v. Commonwealth*, 88 Pa. 189, 32 Am. Rep. 445; *State v. Perkins*, 40 La. Ann. 210, 3 South. 647; *Fight v. State*, 7 Ohio, 180, pt. 1, 28 Am. Dec. 626; *Price v. State*, 36 Miss. 531, 72 Am. Dec. 195; *Jackson v. State*, 49 N. J. Law, 252, 9 Atl. 740.

The rule and the reasons therefor are just as applicable under the statute as they were at common law; there being in the statute no express nor necessarily implied prohibition of a waiver. But we do not think the above section of the statute governs the question here under consideration. The necessity for presence of the defendant for the purpose of judgment upon the verdict is determined by 1 Rem. & Bal. Code, § 2196, which is as follows: "For the purpose of judgment, if the conviction be for an offense punishable by imprisonment, the defendant must be personally present; if for a fine only, he must be personally present, or some responsible person must undertake for him to secure the payment of the judgment and costs; judgment may then be rendered in his absence." This section, being special to that subject, must control the more general terms of section 2145, requiring the defendant's presence at the trial.

[2] It is manifest that section 2196 does not militate against the general rule announced in the decisions above cited that the verdict should be received and published when the defendant, out on bail, voluntarily absents himself without leave of court. It is also manifest that there is no direct requirement that he be present for the purpose of judgment except in case of conviction. There is a clear implication that in case of acquittal his presence is not necessary. It seems plain therefore that the court should have entered a judgment of acquittal upon the verdict of not guilty, there being no claim or showing that the presence of the relatrix was required for the purpose of answering any other charge than that for which she had been tried. The right to this judgment was perfect when the verdict of the jury was returned and filed. Indeed, it has been held that the verdict of "not guilty" operates in itself as a discharge of the prisoner. *Mills v. McCoy*, 4 Cow. (N. Y.) 406. In any event, the relatrix was entitled as a matter of right to a judgment of acquittal, when, a few days after the reception and filing of the verdict of "not guilty," she applied for it. In such a case mandamus is the proper remedy. 2 Spelling on Injunction & Other Extraordinary Remedies (2d Ed.) §§ 1405, 1407.

[3] On the second branch of the case it seems equally plain that the forfeiture and

judgment on the bail bond should have been set aside. The verdict of "not guilty" discharged the bond. While the judgment on the bond had been entered a few minutes before the verdict was received, there can be no question, under the facts shown by the respondent's answer, that on an appeal from that judgment it would have to be set aside. *People v. Higgins* (Com. Pl.) 7 N. Y. Supp. 658; *People v. Madden*, 18 Daly, 63, 8 N. Y. Supp. 531; *People v. Cooney* (Com. Pl.) 9 N. Y. Supp. 285; *People v. Treanor* (Com. Pl.) 9 N. Y. Supp. 285; *People v. Tietjen* (Com. Pl.) 9 N. Y. Supp. 285; *People v. Grossman*, 15 Daly, 311, 5 N. Y. Supp. 446; *People v. Samuels*, 5 Misc. Rep. 585, 25 N. Y. Supp. 81; *State v. Saunders*, 8 N. J. Law, 177; *Mills v. McCoy*, 4 Cow. (N. Y.) 406.

[4] The respondent contends that, even granting this, the relatrix should be remitted to her right of appeal; that appeal is an adequate remedy; and that mandamus will not lie. Upon the facts admitted by the respondent's answer, it was the plain duty of the court to vacate the default and judgment. It had the right to and actually did receive and file the verdict of "not guilty." It was plain at that time that the judgment upon the bond could not stand. Under our statute (1 Rem. & Bal. Code, § 999 et seq.) mandamus is a much broader remedy than the old prerogative writ. "In our practice, mandamus is nothing more than one of the forms of procedure provided for the enforcement of rights and the redress of wrongs. The procedure has in it all the elements of a civil action. The facts stated in the affidavit for the writ may be controverted by a return, raising both questions of law and fact. The return likewise may be controverted, and a trial had on the issues of fact thus raised, either before the court, a jury, or a referee, as the court may order. Judgment can be entered on the verdict or findings not only directing the issuance of a peremptory mandate, but for damages and costs on which execution may issue. The statute has been so framed as to afford complete relief in all cases falling within its scope and purport, whether these be cases of willful violations of recognized rights, or denials, made in good faith, that the rights contended for exist. In other words, the right to sue out the writ is not made to depend on the character of the dispute, but on what answer is given to the question: Can the ordinary course of law afford a plain, speedy, and adequate remedy? If the ordinary course of law will furnish such a remedy, the writ will not issue; otherwise, it will. It was to avoid circuity of action, thus doing away with the necessity of resorting to more than one proceeding for the enforcement of a right, that the law was framed." *State ex rel. Brown v. McQuade*, 36 Wash. 579-583, 584, 79 Pac. 207.

Can it be said that the remedy by appeal is adequate where the absolute right to instant relief is shown by the admitted facts, and where under those facts there was no room for discretion on the part of the court? The judgment on the bond was merely ancillary to and an incident of the main case. The relatrix was acquitted by the jury, and the real matter of controversy and every part of it was ended in her favor. This carried with it the things ancillary and dependent upon the main issue. The relatrix was found not guilty, and yet she must in effect pay a fine in double the amount imposed upon her by the police justice or appeal. Such a remedy would be neither adequate nor in keeping with the spirit of the law. The relatrix, having stood her trial and having been found not guilty, was entitled without any delay to the full fruits of the verdict. She then stood innocent under the law and had an immediate right to an unqualified discharge.

The peremptory writ is ordered.

DUNBAR, C. J., and MORRIS, CHADWICK, and CROW, JJ., concur.

#### STATE v. POLK.

(Supreme Court of Washington. Dec. 30, 1911.)

#### 1. INTOXICATING LIQUORS (§ 39\*)—LOCAL OPTION—EVIDENCE OF ADOPTION.

Under Rem. & Bal. Code, § 6297, providing that proof of the result of any local option election may be made in any court by the official certificate of the city or town clerk or the county auditor, the certificate need not be in the form of a certified copy of the record of the result of the election, but may be a mere statement of the clerk as to the election and its result.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 33; Dec. Dig. § 39.\*]

#### 2. INTOXICATING LIQUORS (§ 224\*)—PROSECUTION—BURDEN OF PROOF.

One seeking to justify a sale of intoxicating liquor within a local option territory on the ground that he is a physician has the burden of proving that defense.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 277; Dec. Dig. § 224.\*]

#### 3. INTOXICATING LIQUORS (§ 236\*)—PROSECUTION—EVIDENCE—SUFFICIENCY.

In a prosecution for the sale of intoxicating liquor within a local option territory, evidence held to warrant a conviction.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 236.\*]

Department 1. Appeal from Superior Court, Okanogan County; E. K. Pendergast, Judge.

A. M. Polk was convicted of unlawfully selling intoxicating liquors, and appeals. Affirmed.

Smith & Gresham, for appellant. Fred T. Neal, A. W. Barry, and C. H. Neal, for the State.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

PARKER, J. The defendant was charged with the offense of selling intoxicating liquor in Conconully, a town of the fourth class in Okanogan county, on January 21, 1911, while that town was a unit in which the sale of intoxicating liquor was prohibited and unlawful by virtue of an election under the local option law. Upon a trial before the court and a jury at which the defendant offered no evidence in his defense, he was convicted, and adjudged to pay a fine of \$100 and costs, from which he has appealed to this court.

[1] For the purpose of proving that the sale of intoxicating liquor was unlawful in the town of Conconully at the time charged, the prosecuting attorney offered in evidence the certificate of the town clerk, as follows: "State of Washington, County of Okanogan—ss.: Certificate of Frank Weeks, Town Clerk. I, Frank Weeks, do hereby certify that I am the duly elected, qualified and acting town clerk in and for the town of Conconully, Okanogan county, Washington, a municipal corporation of the fourth class; that I was acting as such clerk at all times during the year 1910. That during said year of 1910, to wit, on the 7th day of June, a special election was duly and regularly held in said town, which is in Okanogan county, Washington, for the purpose of determining whether the sale of intoxicating liquors should be permitted within the corporate limits of said town, and at said special election a majority of the legal votes cast thereat were against said proposition, namely, 33 votes were cast for the sale of intoxicating liquor within said precinct, and 34 votes were cast against the sale of intoxicating liquor in said precinct. In witness whereof I have hereunto set my hand and affixed the corporate seal of said corporation at Conconully, Okanogan county, Washington, this 16th day of February, 1911. F. R. Weeks, Clerk of the Town of Conconully, Okanogan County, Washington. [Corporate seal.]" The admission of this certificate in evidence by the court over the objections of counsel for appellant is claimed to be erroneous. It is insisted that, in order to be admissible, the certificate of the town clerk must be in the form of a certified copy of the record of the result of the election as appears upon the town records, and not a mere statement of the clerk as to the election and its result. This contention, it seems to us, is answered by the language of the local option statute providing the mode in which such facts may be proven in court, as follows: "The returns of any such election shall be canvassed in the manner provided by law for other city, town or county elections, and after such canvass the city or town clerk or county auditor, as the case may be, shall publicly certify the result of the election, and shall cause notices of such result to be published in some newspaper circulating in

the unit in which the election was held, within ten days after said canvass is completed; and shall record in a well-bound book, to be kept in his office by him and his successors, the result tabulated by precincts of said vote; and said result may be proved in all courts and in all proceedings by such record or by the official certificate of such city or town clerk or county auditor. \* \* \* Section 6297, Rem. & Bal. Code.

It seems to us that the Legislature used the words "official certificate" advisedly. Had it been intended to require proof by a certified copy of the record, it would have been very easy to have so stated in the law. Besides, we may readily find a probable reason for not requiring a certified copy in the fact that in many of the units for voting upon local option there are a great many precincts, and the lawmakers might well desire to prevent the necessity of producing the original record or a certified copy of the entire record of the tabulated vote by precincts as evidence in every prosecution for a violation of the law. If it be held that this provision as to proof by certificate of the town clerk means a certified copy of this much of the record, as counsel for appellant insist, then why not require a certified copy of every step in the election proceedings, including the petition for the election, election notice, proof of its publication, etc. When a person is elected to an office, the certificate of his election generally contains a statement of the facts showing his election with no greater particularity than does this certificate show the holding of and the result of the local option election. We have not had our attention called to any authority holding that the usual certificate of election showing a person elected to a public office is not evidence in court of that fact, at least *prima facie*. We think there is no such authority, but, on the other hand, that the admissibility of such a certificate is an elementary rule of evidence. Under a statute in substance the same as this, it has been held in Illinois that a certificate of this nature is admissible to prove the fact sought to be shown here. *People v. Will*, 147 Ill. App. 207. We conclude that there was no error in the admission of this certificate in evidence.

[2] Several assignments of error are made upon the giving and refusing to give certain instructions by the trial court. Most of these claimed errors have to do with the general contention made by counsel for appellant that the court prevented the jury from considering any right of defense which appellant may have by reason of being a physician. If the law gave to appellant any right to justify the sale because he was a physician, the answer to the contention is found in the fact that he offered no proof upon that question. As we have already noticed, he offered no proof of justification nor of any other nature. If he had any right to

justify his act on this ground, the burden of proof was upon him to establish facts constituting such a defense. *State v. Shelton*, 18 Wash. 590, 48 Pac. 258, 49 Pac. 1064; *State v. McCormick*, 58 Wash. 469, 105 Pac. 1087; *Black on Intoxicating Liquors*, § 511; *Joyce on Intoxicating Liquors*, § 686. We express no opinion, however, as to the circumstances under which he might so justify his act as a physician or otherwise, under the law.

[3] Under the contention that the evidence does not support the verdict, counsel for appellant insist: (a) That the evidence fails to show that the local option law was in force in Conconully; and (b) that the evidence fails to show that the sale took place in Conconully. We have already noticed that the certificate of the town clerk was admissible in evidence and was at least prima facie proof of the unlawfulness of the sale in the town, and, there being no other proof on that subject, it was of course sufficient to sustain the conviction so far as that question is concerned. Whether or not the certificate would be conclusive proof of that fact under all circumstances we need not now decide. That the sale took place in the town of Conconully was testified to by one witness, by a general statement to that effect, though the exact place of the sale in the town is not very certain, nor were the corporate limits of the town proven. This being uncontradicted, and no other evidence offered on that question, it was sufficient in that regard to support the verdict.

What has been said by us disposes of most of the assignments of error, including several not specifically noticed by us. Others are without merit and do not call for discussion.

The judgment is affirmed.

DUNBAR, C. J., and MOUNT, FULLERTON, and GOSE, JJ., concur.

#### HEWITT LEA LUMBER CO. v. SANDELL et ux.

(Supreme Court of Washington. Jan. 9, 1912.)

#### MECHANICS' LIENS (§ 99\*)—MATERIALMEN— NOTICE TO OWNER.

Rem. & Bal. Code, § 1133, provides that a materialman, in order to be entitled to a lien, shall give notice to the owner or reputed owner by delivering or mailing to him a duplicate statement of the materials furnished, and that no materialman's lien shall be "filed or enforced" unless the provisions of the law be complied with. *Held* that, where plaintiff furnished materials to a vendee holding only under a contract of sale with knowledge that the title to the property was in the vendor, but gave no notice to the latter, he was not entitled to a lien.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 131, 132; Dec. Dig. § 99.\*]

Department 2. Appeal from Superior Court, King County; Boyd J. Tallman, Judge. Action by the Hewitt Lea Lumber Company against F. F. Sandell and wife. Judgment for plaintiff, and defendants appeal. Reversed, with instructions.

Peters & Powell, for appellants. Alexander & Bundy, for respondent.

CHADWICK, J. On April 7, 1910, appellants Sandell and one Holden executed a contract covering certain lots in the city of Seattle. The terms of the contract material to our present inquiry are as follows: "I have this day leased to D. N. Holden for a term of five years from this date the north-east corner of Park Ave. and Navy Yard Ave., technically described as the east twenty feet of lots seventeen, block sixteen, East Seattle, King county, Washington, rent to be paid every six months; said rental is twenty-five dollars per year from date, and I further agree to sell to said D. N. Holden at any time within sixty days from date for the sum of three thousand dollars the east one-half of lots sixteen and seventeen and allow all money paid for the above lease to apply on purchase price of said one-half of lots sixteen and seventeen, twelve dollars and fifty cents of which I have this day received." Holden went into possession and began the erection of a building. Appellant F. F. Sandell protested this act in writing. On April 29th the parties came together, and it was agreed that Holden would provide for the payment to appellants of a certain insurance premium, then in process of collection, in which event a deed was to be executed and a mortgage given for the balance due. This occurred about April 30th. On May 31st Holden paid \$800, and appellants executed a deed, taking a mortgage to cover the balance of the purchase price, which was made payable in one, two, and three years. On April 30th respondent, the Hewitt Lea Lumber Company, began to furnish material for the building which Holden was erecting, and continued to do so from time to time up to May 21st. It is conceded by respondent that it knew, at the time it furnished the material to Holden, that he had not obtained a deed for the property, and that Holden had only a contract for the purchase thereof; but it contends that, when appellants saw fit to change the form of their security, releasing the contract and taking a mortgage, they must depend entirely upon the mortgage, basing its contention upon section 1132, Rem. & Bal. Code, wherein it is provided that the liens created under the mechanic's lien statute are preferred to any lien, mortgage, or other incumbrance which may attach subsequently to the time of the commencement of the performance of the labor or the furnishing of materials for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

which a right of lien is given. While it is conceded that appellants had notice of the nature of Holden's title, we will nevertheless take the liberty of quoting a part of the testimony of the sales agent of respondent, in order to make our conclusion plainer than it otherwise might be. It follows: "Q. Do you know, Mr. Payton, who the reputed owner of that property was on or about April 30, 1910? A. Well, it was understood that the deed was in Mr. Sandell's name, but Mr. Holden had a contract on it to buy it. Q. Did you have any conversation with Mr. Holden at the time you sold the first bill of lumber, in regard to who owned this property, in regard to the title of the property? A. Yes, sir. Q. What did Mr. Holden state? A. He showed me a contract that he had, and said that he would take it up at a certain time, and he told me he was going to when he got this insurance money."

We are of the opinion that the amendment to the lien law (page 71, Laws 1909; section 1133, Rem. & Bal. Code) is decisive of this case. The law is that a notice shall be given to the owner or reputed owner (in this case the owner was known), by delivering or mailing to him a duplicate statement of the materials furnished, and that no materialman's lien shall be "filed or enforced" unless the provisions of the law be complied with. No notice was given in this case. The law being in terms mandatory, we have given it literal construction. In *Finlay v. Tagholm*, 60 Wash. 539, 111 Pac. 782, we said that the purpose of the law was not so much to insure a right of lien, as to protect property owners against dishonest contractors. We were asked to give the law a liberal construction in *Finlay v. Tagholm*, 62 Wash. 341, 113 Pac. 1083, but met the contention squarely, saying that: "There is no primary obligation on respondents. In order for the appellant to get the lien of the statute, it must comply with its terms. \* \* \* The Legislature has made no exception for cases where the owners of the property have knowledge that the material is being furnished." In *Helm v. Elliott*, 119 Pac. 826, just decided, our previous interpretations of the statute are reaffirmed.

We have sought by reference to equitable principles to find some way in which respondent can recover the amount of its bill; but, having failed to comply with the statute, it has no lien, and hence no standing of which equity can take notice. The words of the statute that, unless duplicate statements be sent to the owner, no lien shall be filed or enforced, marks the bounds of our right to interfere. Having no right to file a lien, it does not follow that, because appellants changed the form of their security, life and validity can be given to that which the statute has said shall be as nothing.

The legislative policy is clearly expressed in the statute, and to construe it to meet the equities of the present case would be to emasculate the law and to make the right to file and enforce liens dependent upon the conscience of the chancellor, rather than upon the written expressions of the legislative will.

Judgment reversed, with instructions to enter a judgment in favor of the appellant.

MORRIS, ELLIS, and CROW, JJ., concur.

### MARTIN v. HILL

(Supreme Court of Washington. Jan. 4, 1912.)

#### 1. MASTER AND SERVANT (§ 97\*)—LOWERING GIN POLES—DUTY OF EMPLOYER.

Whether the fall of a gin pole resulting in injury to an employé, who was requested to aid in lowering it, was caused by the foreman releasing a guy rope or by force of gravity, the employer was bound to use due care to protect plaintiff.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 163; Dec. Dig. § 97.\*]

#### 2. MASTER AND SERVANT (§ 232\*)—INJURY TO CARPENTER—CONTRIBUTORY NEGLIGENCE.

That a carpenter's duties did not require him to aid in lowering a gin pole does not show that he was guilty of contributory negligence in complying with the foreman's request to so assist, so as to bar recovery for injury to him, caused by the pole falling.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 678-680; Dec. Dig. § 232.\*]

#### 3. MASTER AND SERVANT (§ 281\*)—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

That other members of a crew engaged in lowering a gin pole avoided injury when the pole fell, on being warned to "look out," does not show that plaintiff, who was injured, was guilty of contributory negligence; he not having been in as advantageous a position as the others.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 281.\*]

#### 4. MASTER AND SERVANT (§ 288\*)—FALLING GIN POLE—ASSUMPTION OF RISK—JURY QUESTION.

Whether a carpenter, injured through fall of a gin pole which he was assisting in lowering, assumed the risk *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1068-1088; Dec. Dig. § 288.\*]

#### 5. MASTER AND SERVANT (§ 217\*)—ASSUMPTION OF RISK—ESSENTIALS.

To show assumption of a risk, it must appear that the danger was appreciated by the employé or that it was such that one of ordinary prudence would, under instinct of self-preservation, have refused to assume it.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

#### 6. MASTER AND SERVANT (§ 190\*)—FELLOW SERVANTS—EXISTENCE OF RELATION.

A builder's foreman, in releasing a guy rope, was a vice principal, and not a fellow

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes 119 P.—54

servant of a carpenter who was injured by fall of the pole, while aiding in lowering it.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449-474, Dec. Dig. § 190.\*]

**7. DAMAGES (§ 182\*)—PERSONAL INJURY—EXCESSIVENESS.**

Four thousand, four hundred ninety-five dollars and ninety-five cents is not excessive recovery for injury to a carpenter, consisting in a compound fracture of the leg, where he was confined in the hospital five months, his leg was shortened one-fourth to three-eighths of an inch, and he suffers rheumatic pains, though he was able to resume work about eight or nine months afterwards.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385; Dec. Dig. § 132.\*]

Department 2. Appeal from Superior Court, King County; John F. Main, Judge.

Action by W. J. Martin against Samuel Hill. Judgment for plaintiff, and defendant appeals. Affirmed. Verdict was returned in favor of plaintiff for \$5,495.95, but, in passing upon the motion for a new trial, the trial court found the verdict to be excessive, and ordered the recovery reduced to \$4,495.95.

McCafferty, Robinson & Godfrey, for appellant. James T. Lawler, for respondent.

CHADWICK, J. Plaintiff, who is a carpenter, was engaged in taking down forms on a house built of concrete. The house was owned by the defendant. A gin pole had been set up on the roof of the building, and having performed its office the carpenter's foreman, one Thompson, said, in the presence and hearing of several workmen engaged on or about the roof: "Come, boys, and give us a hand to take down that gin pole." Plaintiff left his task, and with others prepared to assist in lowering the pole, which was some 35 feet high and made up of sections of rolled iron pipe, 6 inches in diameter at the bottom and about 4 inches at the top. The number of men on the roof, and whether all of them lent a hand, were disputed questions of fact; but it is certain that plaintiff stooped down and took hold of the pole near the bottom, to hold it in a frame or seat made of two by four scantling, so as to keep it from slipping. One workman, and possibly two others, took positions so as to reach the pole as high up as possible, so as to let it down gradually. Others held two guy ropes that had been used to hold the pole in place. These ropes performed no office, other than to steady and direct the pole as it was lowered. Thompson went down to man the main guy rope, which was attached to a telephone pole on the street, and about 75 feet away. The weight of the pole was upon this guy rope. When he started to lower the pole, and it had come to an angle of about 45 degrees, one of the workmen said: "Look out! Let go—" and all of those engaged let go of the pole

with the exception of the respondent, who was caught under it, and he suffered a compound fracture of the lower limb. It is alleged that the foreman, "without warning, completely released the guy rope which he was handling, thereby causing said gin pole to fall with great force, and in doing so it came in contact with plaintiff's leg, in proximity to the ankle joint, breaking the same, and causing the damages hereinafter complained of."

[1] Appellant attacks the sufficiency of the complaint and the evidence, and, as he well says, the same principles of law govern both contentions, and then proceeds to discuss them together. It is contended that there was no evidence to sustain the allegations that appellant's foreman "wholly released the head guy rope." Whether those on the roof could see the foreman when releasing the rope was a disputed fact, and we think it may be conceded that there is no positive testimony to the effect that the guy rope was purposely released. It was the contention of the appellant upon the trial and here that the rope was not in fact released, but, following the natural law of gravity, it fell of its own weight when it reached a sufficient angle, and that those who undertook to sustain it became panic stricken and released their support; otherwise the accident would not have happened. But it seems to us that the legal consequences would be the same, whether the foreman released the guy rope, or it fell when it reached a point where the law of gravity intervened to thwart the plans of those engaged in the work. Having assumed to release and pay out the guy rope, knowing that the weight of the pole would be upon it, it was the duty of the foreman to exercise due care to protect those who had complied with his request to lend a hand; or, if the other theory be adopted, then we are of the opinion that the character of the work was such as to call for a more careful superintendence on the part of the appellant. In the case of *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25, 29 L. R. A. (N. S.) 481, a somewhat similar contention was made; that is to say, that the accident occurred as the result of a violation of a natural law, and that, by the exercise of those faculties with which all men are endowed, the danger might have been foreseen and avoided. We there said: "It is true that, as viewed by learned counsel and by those versed in the laws of mechanics, the result might have been expected as a consequence of the violation of natural laws. But it is not to be expected that a common laborer will have knowledge of, or be bound by, natural laws, unless they are so obvious as to prompt the instinct of self-preservation in men of ordinary prudence and understanding." This case is even stronger than the *Engelking Case*, for, al-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

though respondent be charged with a knowledge of the law of gravitation, his apparent assumption that those who stood up to receive the pole as it came down would be able to hold it and lower it without danger to him was made an issue for the jury to decide.

[2] Nor can we agree with counsel for appellant that the affirmative defenses were so made out as to warrant the court in setting aside the verdict of the jury. It may be true that respondent was not bound to comply with the request to lend a hand, but it does not follow that because he did so he is to be charged with contributory negligence. The work of the master was at hand. The evidence shows that Thompson laid out the work and directed the men, and it is the common experience of mankind that in building houses and in the prosecution of work of like character there is a time when artisans and mechanics are called upon to act in common, or in concert, to do that which one or even a few men could not do. When obedience is the natural thing to do, men who obey will not be held to be volunteers. To hold that one who so acts is *prima facie* guilty of contributory negligence (and that would be the legal effect of such holding) would be to ignore that impulse which prompts men to help others, and to put an unwarranted burden upon the builder; for, if such work is to be held to be extra work requiring extra men, the harshness of the rule would fall in the end upon the owner, rather than the employé.

[3] Nor is respondent to be charged, because he did not get away or save himself when some one gave the warning to "look out." The fact that others did save themselves is not evidence, in itself conclusive, that he might have done so. It will be remembered that respondent was in a stooping position, and had not the advantage of the others, who were on their feet. But there is evidence tending to show that he did attempt to save himself. Hence this issue is foreclosed by the verdict, for whether he might have done so is a relative question, which has been decided in his favor.

[4] Appellant insists that the danger was open and obvious, and that respondent cannot recover because he assumed the risk. Whether the danger was such that a man of ordinary prudence would have refrained from doing the work was a question for the jury, to be determined in the light of all the evidence.

[5] An assumption of risk involves a mental process, or a charge of it, which may be likened to notice, express or implied. It must appear that the danger was in fact known and appreciated, or that its character was such that a man of ordinary prudence would, in the exercise of the instinct of self-preservation, have refused to assume it. The fact that three or possibly more men, all mechanics, some of whom were witnesses

(and they seem to be men of intelligence), put themselves in positions of almost equal danger would in itself seem to be enough to show that a court would not be warranted in holding, as a matter of law, that respondent had assumed the risk. *Engelking v. Spokane*, supra.

[6] The defense of fellow service is not to be found in the evidence. There was no conassociation, although there was concert of action. As said in *Hall v. Northwest Lumber Company*, 61 Wash. 354, 112 Pac. 371: "But the work was of such a character as to require concert of action on the part of the several workmen engaged in its performance, and could not proceed with any degree of efficiency without the immediate and direct supervision of some one. When the master, therefore, took the burden upon itself of selecting such a supervisor, it became responsible for the acts of the person so selected, and if he performed his duties negligently it became responsible to any one injured by such negligent performance. *Anderson v. Globe Nav. Co.*, 57 Wash. 502, 107 Pac. 376; *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25 [29 L. R. A. (N. S.) 481]; *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400." So, in the case at bar, there was a lack of proper superintendence, when the character of work was such as to demand it. Respondent had no opportunity of knowing whether Thompson was performing his work in a careful manner, and no control over his action. The safety of the act depended primarily upon the manner in which the line was paid out, and the case naturally falls within the rule that the question of fellow service will not be resolved by measuring the rank of the employé, but by the character of the act itself. We find that the offending employé was engaged in the performance of the master's duty, or charged therewith, in reference to the act out of which this controversy arose, and that he is not to be denied a recovery under the rule of fellow servant. *Jackson v. Danaher Lumber Co.*, 53 Wash. 596, 102 Pac. 416.

[7] We think this disposes of all the contentions of appellant, excepting the one that the damages allowed are so excessive as to warrant the assumption that they are the result of passion and prejudice. Respondent suffered a compound fracture of the leg, was confined to the hospital from April 6th to September 6th, his limb is shortened from one-fourth to three-eighths of an inch, and he suffers rheumatic pains which, he says, are constant, but which will not, so far as the evidence shows, prevent him from working at his trade. Respondent was able to resume his ordinary occupation some time in January following the accident, when he found employment at the rate of \$4 per day. He was earning \$5 per day when injured. Allowing \$1,000 for loss of time, he is entitled to compensation for pain and suffering, and to cover the permanency of his injury. The

recovery as allowed by the court is liberal, even generous, as it seems to us; but a review of the cases convinces us that it is not so disproportionate to the amounts allowed to stand in many of our decisions, considering a similar state of facts, that we would be warranted in substituting our judgment for that of the lower court. While it is not a hard and fast rule, yet the inclination of the court has been generally to follow the judgment of the trial judge in matters of this kind. *Smith v. Seattle Electric Co.*, 61 Wash. 175, 112 Pac. 87; *Cox v. Wilkinson Coal & Coke Co.*, 61 Wash. 343, 112 Pac. 231; *Nelson v. Western Steel Corporation*, 61 Wash. 672, 112 Pac. 924. The case at bar is somewhat analogous to *Smith v. Hewitt-Lea Lumber Co.*, 55 Wash. 357, 104 Pac. 651, where we allowed \$4,000; *Cogswell v. West Street Electric Ry. Co.*, 5 Wash. 48, 31 Pac. 411, where \$5,000 was allowed; and *Mueller v. Washington Water Power Co.*, 58 Wash. 556, 106 Pac. 476, where we allowed \$5,250 to stand.

Finding no reversible error in the record, the judgment is affirmed.

DUNBAR, C. J., and ELLIS, CROW, and MORRIS, JJ., concur.

#### In re CITY OF SEATTLE.

#### METROPOLITAN BLDG. CO. et al. v. CITY OF SEATTLE.

(Supreme Court of Washington. Dec. 20, 1911.)

#### 1. MUNICIPAL CORPORATIONS (§ 508\*) — ASSESSMENTS FOR BENEFITS — JUDICIAL REVIEW.

The amount to be assessed against property within a special assessment district and subject to assessment is subject to judicial inquiry; but the judgment of the trial court confirming a special assessment will not be disturbed unless the evidence so preponderates against the judgment as to indicate an arbitrary disposition on the part of the commissioners or the court.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1181; Dec. Dig. § 508.\*]

#### 2. MUNICIPAL CORPORATIONS (§§ 438, 503\*) — SPECIAL ASSESSMENT — SPECIAL BENEFITS — CONFIRMATION BY COURT.

Under Rem. & Bal. Code, §§ 7790, 7795, 7796, providing for the assessment of special benefits, and authorizing a hearing of objections to assessments and a modification thereof when necessary to obtain justice, a special assessment can only be made against property specially benefited from an improvement, general benefits not being allowed to be the basis of a levy, and the court in proceedings to confirm an assessment must inquire whether the property is assessed more or less than it is specially benefited, and, unless there is a special benefit, the court has no jurisdiction to order its inclusion in the assessment roll.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1052, 1175; Dec. Dig. §§ 438, 503.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 508\*) — SPECIAL ASSESSMENT — SPECIAL BENEFITS.

An assessment roll returned by commissioners, in proceedings to assess special benefits for an improvement, is in itself proper to be considered as evidence of the judgment of the commissioners, as well as of the fact that the improvement did not affect property excluded from the assessment roll, and overcomes a prima facie showing made by a reassessment including excluded property under the arbitrary direction of the court and against the judgment of the commissioners.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1181; Dec. Dig. § 508.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 514\*) — ASSESSMENTS OF BENEFITS — JUDICIAL DISCRETION.

The court refused to confirm a special assessment roll on the ground that the district did not include enough territory, and a reassessment was ordered. A new roll was brought in including additional territory, and, on a hearing for confirmation, the commissioners testified that the additional property was not dependent on the improvement and was not benefited thereby. *Held*, that the reassessment was not the result of the discretion of the commissioners, but was the result of the arbitrary direction of the court as against the judgment of the commissioners, and a judgment of confirmation was improper.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1207-1215; Dec. Dig. § 514.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 451\*) — SPECIAL ASSESSMENTS — AUTHORITY TO LEVY.

Under Laws 1907, c. 153, §§ 9, 20, and section 23 as amended by Laws 1909, c. 211, authorizing the council to determine what portion of the sums necessary to pay compensation and damages shall be raised by assessment on the property specially benefited, and providing that the commissioners shall determine, by comparison of the public and private benefits, what portion of the cost shall be borne by the city and what by the property specially benefited, the council may make the apportionment, but, where it fails to do so, the commissioners must do so, and the right of the commissioners to act depends on the inaction of the council.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. § 451.\*]

#### 6. MUNICIPAL CORPORATIONS (§§ 438, 495\*) — SPECIAL BENEFITS — APPORTIONMENT BETWEEN CITY AND PROPERTY OWNERS.

Under Rem. & Bal. Code, § 7790, requiring the commissioners to examine the locality where the improvement is proposed to be made and the property which will be specifically benefited thereby, and to estimate what part of the cost will be a benefit to the public and what part will be a benefit to the property specially benefited, and to apportion the same between the city and such property, the benefit to the public must be a special benefit, and not the benefit in a general way accruing to a city by virtue of every improvement, and a finding of the commissioners that there is no benefit to the general public is conclusive on the courts unless the commissioners acted arbitrarily.

[Ed. Note.—For other cases, see *Municipal Corporations*, Dec. Dig. §§ 438, 495.\*]

Department 2. Appeal from Superior Court, King County; J. T. Ronald, Judge.

Proceedings by the City of Seattle for the assessment of property for street improvements, and, from orders confirming reassess-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



ments, the Metropolitan Building Company and the Sisters of Charity of the House of Providence appeal. Affirmed in part; reversed in part.

Bausman & Kelleher and Douglas, Lane & Douglas, for appellants. Scott Calhoun and William B. Allison, for respondent.

CHADWICK, J. This suit involved the reassessment of property within the Fifth avenue and Fifth avenue south regrade projects in the city of Seattle, and is brought here on the appeal of the Metropolitan Building Association and the Sisters of Charity of the House of Providence. These appeals are taken from an order of the superior court confirming a reassessment made under order and direction of the court, and inasmuch as they involve different propositions will have to be discussed separately. Considering first the case of the Building Association, the north boundary of the assessment district as first fixed by the commissioners was at the south boundary of the first lot south of Seneca street; that point being, as we take it from the record, one block north of the point where work was actually done on the avenue. The property of the appellant abutting on Fifth avenue and contiguous thereto being north of Seneca street was not assessed for benefits. The court refused to confirm this roll, and it was vacated with directions to bring back another roll. Under the reassessment the limit of the assessment district was extended north to a point slightly beyond Union street and the property of the Building Association was assessed at \$1,544.40. It is contended that the reassessment was made under the arbitrary direction of the court and against the judgment of the commissioners. It is said that the trial court followed and was controlled in his judgment by the case of *Spokane v. Gilbert*, 61 Wash. 381, 112 Pac. 380. That case defines and limits the procedure in this class of cases, and, after quoting pertinent statutes (sections 7790, 7795, 7796, Rem. & Bal. Code), says: "These statutes clearly give the court power to adjust the assessment between the city and the property owner, so that each one may pay the proportionate share of the cost of the improvement. The court is not bound by the assessment made by the commissioners. In *Re Pike Street*, 42 Wash. 551 [85 Pac. 45], we said: 'The statute gives the court power to modify, change, alter, or annul the assessment, and we think it may lawfully find that an improvement is of sufficient general benefit to make an appropriation of the cost a general charge against the municipality.' In order to do this, the court must necessarily hear and consider evidence bearing upon such question."

[1] But we do not understand that it was there held that property that was not in fact specially benefited should be assessed, but rather that the amount to be assessed against property within the district and prop-

er to be assessed was an appropriate subject of judicial inquiry, and, following a long line of cases, the judgment of the court would not be disturbed or modified unless the evidence so preponderated against the judgment as to indicate an arbitrary disposition on the part of the commissioners or the court. In *re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279; In *re Seattle*, 46 Wash. 63, 89 Pac. 156; In *re Western Avenue*, 47 Wash. 42, 91 Pac. 548; *Seattle v. Felt*, 50 Wash. 323, 97 Pac. 226; In *re Seattle*, 50 Wash. 402, 97 Pac. 444; In *re Pine Street*, 57 Wash. 178, 100 Pac. 755. But here we are confronted with a question not heretofore decided by this court. Can the court include in its judgment of confirmation property which is not abutting or contiguous thereto and is shown to be beyond the zone of benefit contemplated by the plan. Without holding that it cannot be done, for questions depending upon facts cannot be stated as hard and fast rules of law, we think that the showing here made is not sufficient to sustain the order of confirmation.

[2] It will be obvious to any one who reads the special assessment statutes that it was the intent of the Legislature to permit the assessment of only such property as was specially benefited (section 7790), and that general benefits could not be made the basis of a levy. So that sections 7795 and 7796, quoted in *Spokane v. Gilbert*, supra, must be read with this thought in mind. When so read, it will be seen that it is the duty of the court to inquire whether the property is assessed more or less than it is specially benefited, and, unless there is a special benefit, the court has no jurisdiction to order its inclusion in the roll.

[3] The first roll returned by the commissioners is in itself proper to be considered as evidence of the judgment of the commissioners, as well as of the fact that the improvement did not embrace the property of the appellants within the zone of property specially benefited, and is sufficient to countervail the prima facie showing which has been held to be made out by the roll under present consideration. *Town of Elma v. Carney*, 4 Wash. 421, 30 Pac. 732; *Seattle v. Smith*, 8 Wash. 387, 36 Pac. 280; *Hamilton v. Chopard*, 9 Wash. 352, 37 Pac. 472.

[4] We come therefore to an examination of the testimony. It will be borne in mind that the first roll did not involve the property sought to be charged, and that the court, for the reason that he thought the district was too small or did not include enough territory, ordered a reassessment. A new roll being brought in, a hearing was had. The record shows that the highest point on Fifth avenue is Madison street, and that traffic originating and landing in the territory north of Madison street on Fifth avenue would naturally follow the easier grades to the west and be carried over Third and Fourth avenues. It would seem that the point fixed by

the first roll as the north limit of the district was a natural dividing point.

Mr. Foster, one of the commissioners, testified as follows: "Q. What was your reason for not crossing [Seneca street] before? A. At that time we felt that the fact that Seneca street offered an accessible grade from Fifth to Fourth avenues, that there existed at that point a diverting influence by reason of that accessible grade between Fifth and Fourth, giving the properties north of Seneca street on Fifth avenue easy access to Fourth avenue, and, consequently, we thought that, by reason of that diverting influence, that would be the reasonable place and the logical place in which to fix the limit of the district. Q. And that reason still obtains, does it not? A. Oh, yes; our deliberations have not changed the grades on Seneca street. Q. And traffic will still continue to go down Seneca street instead of going up a grade to Madison and over Fifth; that is your opinion, is it not? A. I take it that much of it will. Q. Yes. A. In other words, I think that the property to the north of Seneca street is not as dependent upon the bettered condition of Fifth avenue as the property to the south of Seneca street."

Mr. Merrifield, another one of the commissioners, testified as follows: "Q. Then, the present assessment roll is not in your own opinion a fair and equitable one? A. If I had the making of it alone, no. I believe the first roll is the better roll of the two, the way I look at it. \* \* \* Q. This roll does not carry out the suggestions or instructions of the court at the hearing upon the last roll in so far as the extension of the district and the further spreading out and sloping off of the assessment, does it? A. Well, we aimed to, yes; according to the instructions of the court, we aimed to. I was not here myself. I was excluded from the courtroom on that hearing. \* \* \* A. My opinion, as I stated before, is that I don't think that the property at the extreme north end of this improvement is benefited. I do not believe that they are especially benefited. Q. How about the lots on Fifth avenue north of Madison street; there is no change in the grade on these lots, is there? A. No, sir. Q. There the value of property is determined almost exclusively on its access to the shopping and retail business district immediately to the west and to the north; isn't that so? A. Yes, sir. \* \* \* Q. In your opinion did not all the benefits cease, I mean all the benefits for this improvement cease, at the place where you terminated your previous roll? A. Well, that is my opinion. They might not cease, but I thought they did. Q. You still think so, don't you? A. Yes, sir."

The other commissioner, Mr. Goodhue, said: "A. I think, if your honor pleases, that the benefits should be confined to the abutting property on the southern end of the district. \* \* \* I don't believe as a commissioner that such a congestion exists at pres-

ent, and, if it did, Fifth avenue, with its grade much heavier than Fourth and other streets to the west, would not be used except on cases of extreme necessity, for the reason that any teamster hauling a load will probably seek, even if he has to go around a little further, seek the better grade where it is materially better. If it had been intended to make Fifth avenue an important north and south thoroughfare, I think it would have to have been included with a widening to make it susceptible of heavy traffic. \* \* \* Well, I believe that the grade even after the improvement is perfected will be still so much heavier than the parallel streets that it will not be used except in cases of necessity, and that would mean a considerable growth of the city beyond its present size."

Counsel for respondent insists that some of this testimony was taken without special reference to the case of the appellants; but it nevertheless goes to show that the judgment of the commissioners sustains the first rather than the second roll. It has been held that section 22, Laws of 1905, page 91, did not make a commissioner of the superior judge, or permit a substitution of his judgment upon questions of fact, but that his power was limited to the appointment of the commissioners and a judicial review of the assessment roll returned by them. *Seattle v. Seattle & Montana Ry. Co.*, 50 Wash. 132, 98 Pac. 958. This holding was made under an act which provided that the superior judge should examine the locality and otherwise act as a commissioner. This power was eliminated in the later statutes so as to make them harmonize with this ruling.

Considering, then, the record as we have it before us, we think it has been clearly shown, and for sufficient reasons as disclosed by the commissioners when called as witnesses, that the reassessment does not voice either their better or their true judgment, but that it was made to meet the desire, if not the command, of the court. This case is not unlike *In re Everett*, 61 Wash. 493, 112 Pac. 658, where the assessment was directed by the court. After copious quotation from the record, we there said: "Assessment according to benefits is largely a matter of opinion, and while we have often refused to disturb assessments where there was a conflict in the testimony as to the character and extent of the benefits, and have held the assessment roll as handed in by the commissioners and confirmed by the court was conclusive in the absence of fraud or apparent mistake, we have likewise held it will not be so regarded when it appears to have been arbitrarily made; such an assessment being a manifest abuse of the discretion vested in the commissioners. *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279." While we there referred to the remarks of the trial judge as indicating a lack of judicial discretion, the testimony of the commissioners, taken as a whole, convinces us that in this case there was no

room for the exercise of judicial discretion. We are reminded that we said, in *Re Pine Street*, 57 Wash. 178, 106 Pac. 755, and in *Re Seattle*, 50 Wash. 402, 97 Pac. 444, that a special assessment will not be disturbed as unequal or unjust where it rests upon opinion and the evidence is conflicting. We reaffirmed the doctrine of those cases, but this case is not like unto them. It is not the equalness or justness of the assessment that is here involved, but the right to assess at all. And while all of these matters rest largely in opinion, and if there be a conflict of opinion appellate courts will not intervene to substitute their own judgment, yet after all the property owner is entitled to the judgment "of those whom the law has charged with the duty of establishing the district and apportioning the cost" (*In re Seattle*, 50 Wash. 402, 97 Pac. 444), without judicial interference when that judgment is undivided.

In this case there is no conflict of opinion. It is certain, and, being ascertained, must be held to be controlling, not only upon the superior court, but this court as well. Other suggestions are made by appellants, which might be sufficient to warrant a reversal of this case; but the determination of them will be reserved by the court until such time as it is necessary to decide them.

[5] We are asked to intervene on behalf of the Sisters of Charity. The first proposition urged is that chapter 153, Laws 1907, as amended by Laws 1909, c. 211, provides, in sections 19 and 20, that the council may determine whether all, or, if not all, what portion, of the sums necessary to pay compensation and damages shall be raised by assessment on the property specially benefited, and that the later section (section 23, Laws 1909, c. 211) provides that the commissioners shall determine by a comparison of the public and private benefits to be derived from the proposed improvement what proportion of the cost shall be borne by the city and what proportion shall be borne by the property specially benefited. It is said that it is of the essence of the whole statute to provide who shall apportion and assess the burden of expense; that clearly the question cannot be determined by both tribunals. The question put by appellant is not without its vexations; but we think no violence is done to legal principles in holding that it is within the power of the council to make the apportionment, but that, if it does not do so, that duty falls upon the commissioners—in other words, that the right of the commissioners to act at all in this behalf depends upon the inaction of the council. In any event, the roll comes into the superior court for confirmation, and, being passed upon judicially, we are not willing to hold that there has been any violation of legal rights or a denial of due process of law.

[6] But it is said that the evidence shows that there was in fact a benefit to the general

public, so that there was no discretion left, either in the commissioners or the court, to do anything other than to apportion the cost. The commissioners say that there was no benefit, and then admit upon more searching examination that there is or may be a benefit to the general public. No questions come to this or any other court that involve such entanglements and complications as do these assessment cases. They cannot be resolved by reference to equation or theorem. As one of the commissioners said in this case: "The damages or benefits cannot be figured out." "It is a matter of judgment." In *re Pine Street*, 57 Wash., 106 Pac., supra. "Justice in its abstract sense is impossible," said the trial judge, and we admit that it can hardly be approximated. All we can hope for, then, is that, in confirming these rolls, no greater injustice is done to one than to another. But it does not follow that the law is not satisfied. A benefit in a general way accrues to a municipality in virtue of every improvement. But the improvement may not be of such special character as to invoke the equitable power of the court in distributing its cost. Section 7790, Rem. & Bal. Code: "It shall be the duty of such commissioners to examine the locality where the improvement is proposed to be made and the property which will be especially benefited thereby, and to estimate what proportion, if any, of the total cost of such improvement will be of benefit to the public, and what proportion thereof will be a benefit to the property to be benefited, and apportion the same between the city and such property, so that each shall bear its relative equitable proportion \* \* \*"—seems to imply that the benefit referred to is a special benefit and not a general one. It would seem further that, if this were not so, the statute under which assessment districts are formed, and which implies that the property within the district shall meet the cost of the improvement, served no purpose; for it would have been enough to say that the abutting property in whole or in part should sustain the charge. In *Re Pine Street*, supra, one of the contentions was that a "just proportion of the cost was not assessed against the general fund; such improvement being largely for the benefit of the public generally." While the point is only suggested in the briefs, the court held that the whole improvement could have been made at the expense of the property specially benefited. The court said: "It is true that only a small part of the total cost of the improvement was finally assessed against the general fund; but, so far as the record shows, there was no obligation to assess the general fund at all. The whole improvement, notwithstanding, might have been made at the expense of the property specially benefited, without reference to the general benefits."

We see in this case, not so much the possible deprivation of a right, as a want of a

remedy. If the case were sent back, the return of the commissioners would no doubt bring the same result; for it is not within our power to substitute our judgment for or coerce the opinion of the commissioners unless it has been arbitrarily exercised. They have found that there is no such benefit to the public as will warrant a tax upon the general fund. Their findings and return of the fact conclude us.

The appeal of the Metropolitan Building Association is sustained, and this case will be remanded, with directions to dismiss it from this proceeding, with its property exonerated from any charge for the improvement of Fifth avenue south of the first lot south of Seneca street. The judgment of the lower court as to the property of the Sisters of Charity of the House of Providence is affirmed.

DUNBAR, C. J., and CROW, ELLIS, and MORRIS, JJ., concur.

#### DELBRIDGE et al. v. BEACH et al.

(Supreme Court of Washington. Jan. 2, 1912.)

#### 1. CONTRACTS (§ 111\*)—LEGALITY OF OBJECT—PUBLIC POLICY.

It is the policy of the law to permit one owning property to dispose of it in any legal manner he chooses, and the law will not permit its processes to be used, in a divorce suit or otherwise, to coerce a husband into an unwilling division of his separate property with his wife, so that an agreement of employment of an attorney to secure for a wife the settlement of property rights in the property of the husband, to be accomplished if in no other way, by the bringing of an action for divorce, is void where there is no showing that the wife had any interest in the property or grounds for divorce.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 515-520; Dec. Dig. § 111.\*]

#### 2. CONTRACTS (§ 111\*)—LEGALITY OF OBJECT—PUBLIC POLICY—CONTRACT TO BEING ACTION FOR DIVORCE.

It is the policy of the law to discourage actions for divorce, so that an agreement to facilitate the bringing of an action for divorce to force a settlement of property rights between the parties where no ground for divorce is shown is void.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 515-520; Dec. Dig. § 111.\*]

#### 3. CONTRACTS (§ 138\*)—LEGALITY OF OBJECT—PUBLIC POLICY—ENFORCEMENT.

Agreements against public policy and sound morals will not be enforced by the courts.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 681-700; Dec. Dig. § 138.\*]

#### 4. CONTRACTS (§ 111\*)—LEGALITY OF OBJECTS—PUBLIC POLICY—SUIT FOR DIVORCE—STATUTORY PROVISION—COMPENSATION OF ATTORNEYS.

While, under Rem. & Bal. Code, § 474, which provides that the measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties, a party having a meritorious ground for divorce may agree with an attor-

ney upon the measure and mode of compensation for his services in the divorce action, the statute cannot be invoked to support a contract to force a settlement of property rights between the husband and wife by coercion and institution of a divorce suit, where no actual right to divorce is shown.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 515-520; Dec. Dig. § 111.\*]

#### 5. CONTRACTS (§ 108\*)—LEGALITY OF OBJECT—PUBLIC POLICY.

Whether a contract of employment is void as against public policy is determined by the effect of the services contracted for, and that the parties contracted in good faith will not of itself validate a void contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 498-503; Dec. Dig. § 108.\*]

Department 1. Appeal from Superior Court, King County; Wilson R. Gay, Judge.

Action by Edward J. Delbridge and others against Alda I. Beach and another. From a judgment for defendants, plaintiffs appeal. Affirmed.

William R. Bell, for appellants. Aust & Terhune, for respondents.

GOSE, J. This is a suit to recover for services performed upon an oral contract. Demurrers were sustained to the complaint, and a judgment entered in favor of the defendants. The plaintiffs have appealed.

One of the appellants is an attorney at law. The contract relied upon for a recovery is set forth in paragraph 2 of the complaint, as follows: "That about the 28th day of April, 1909, the defendant Alda I. Beach entered into a formal oral agreement with the plaintiffs, whereby she employed them to investigate, and, if possible, ascertain whether a certain will, executed by one Elizur Beach, shortly after his marriage with the said defendant, by the terms of which she was devised and bequeathed outright a one-third interest of all the property, real and personal, wherever situate, of which the said Elizur Beach should die seised or possessed, had been destroyed or nullified by codicil or codicils, or by the execution of a new will, and if any new will had been made or the old will modified, and to ascertain the tenor and contents of such codicil or codicils or such later will, and, further, to ascertain the condition of the title to the various tracts of land standing in the name of the said Elizur Beach in the state of Washington and other states at and prior to the time of the marriage of the defendant Alda I. Beach to said Elizur Beach, and, further, to ascertain what property had been acquired or disposed of by him since the date of their marriage, and particularly to take all steps and proceedings necessary in the judgment of the plaintiffs to ascertain the intention of the said Beach toward the defendant Alda I. Beach in the matter of the final disposition of his property after his death, and to institute such suits or pro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ceedings as in the judgment of the plaintiffs would secure to her the largest possible share in said estate, and to prevent any disposition of any part thereof adverse to her interest, and, if the desired results could not be obtained by any other means, to institute a suit for a legal separation, and as an incident thereto to precipitate a settlement and division of the property rights of the defendant Alda I. Beach and her said husband. That in consideration of such services the defendant Alda I. Beach agreed to and with the plaintiffs to pay all expenses connected with said investigation and with any suits or proceedings which should be instituted, and as compensation to pay to the plaintiffs one-fifth of all money, and to convey to them by a good and sufficient deed an undivided one-fifth of all property turned over to her by the said Beach, whether the money and property so secured should be by voluntary settlement, agreement or compromise, devise or bequest, or as the result of a judgment or decree of court." It is further alleged that in pursuance of the contract the respondent Beach paid to the appellant Snyder a retainer of \$100, and advanced to him for his coappellant the sum of \$475 as expense money; that the appellants entered upon and continued in the performance of the contract until about the 25th day of August, 1909, when the respondent Beach repudiated the contract and prevented further performance; that, by utilizing the evidence collected by the appellants and their counsel and advice, she has accomplished a settlement and division of the property rights of herself and husband, and has received \$58,666 in money, and real property of large value, a description of which is set forth in the complaint. It is further alleged that for the purpose of defrauding the appellants the respondent Beach conveyed the real estate to her corespondent, and that it accepted the conveyance with knowledge of all the facts and for the purpose of aiding her in the perpetration of a fraud upon the appellants.

[1, 2] Respondents contend (1) that, the contract being oral and having as one of its objects the conveyance of real property, it is within the statute of frauds and void in its entirety; and (2) that it is void as against public policy, in that it is "an agreement to procure evidence for a contemplated divorce action, and an attempt to facilitate the bringing of an action for divorce, not for the purpose of the divorce itself but to force a settlement of property rights between the defendant Beach and her husband." We think the second contention must be upheld. It is patent that the employment contemplated coercing the husband into a division of his separate property so as to secure to the wife "the largest possible share" therein. The charge is that, if this could be accomplished in no other way, a divorce suit was

to be instituted, having for its object a division of the husband's property. There is no averment in the complaint disclosing that the wife had any interest in the property. Under certain conditions, the wife may claim a homestead in the separate property of the husband. These conditions are not shown to exist. Under other conditions, the wife could claim support out of the same character of property. These conditions are not alleged. Nor is it alleged that the wife had any ground for divorce. As was said in *Hillman v. Hillman*, 42 Wash. 595, 85 Pac. 61, 114 Am. St. Rep. 135, it is the policy of the law to discourage actions for divorce. It is equally the policy of the law to permit one owning property to dispose of it as he chooses, so long as the manner of disposal violates no rule of law or public policy. The law will not permit its processes to be used in a divorce suit or otherwise to coerce a husband into an unwilling division of his separate property with his wife, except where she discloses some legal ground for divorce, and none is shown here.

If authority is needed in support of these views, it may be found in the following cases: *Succession of Elliot*, 28 La. Ann. 183; *Speck v. Dausman*, 7 Mo. App. 165; *Barngrover v. Pettigrew*, 128 Iowa, 533, 104 N. W. 904, 2 L. R. A. (N. S.) 260, 111 Am. St. Rep. 206; 9 Cyc. 519. In the *Succession of Elliot* it is said: "The item of \$500 charged by said attorneys for entering 'upon the business of securing evidence' for a contemplated suit for separation between Elliot and his wife, which was never brought, we do not regard as legitimate. An attorney ought not to recover on such a demand." In the *Speck Case* it is said: "\* \* \* Courts will never lend themselves to the enforcement of a contract intended to promote the dissolution of marriage. The wife could not contract for alimony whilst the marriage existed; and such pretended agreements, if they are to have any force, must be subjected to the examination of the divorce court, and derive their sanction from a decree made by the court with a knowledge of the facts. If fair and equitable, the arrangement between the parties will receive the sanction of the court. If concealed from the court, their tendency is to produce collusion." In the *Barngrover Case* the plaintiffs, one a lawyer and the other a detective, learning that the defendant's wife was about to commence an action for divorce from the defendant, informed the defendant of that fact, and before the commencement of the divorce suit entered into a written contract with the defendant, whereby they agreed "to prepare evidence" and try the cause prosecuted against him by his wife, and "to furnish proof" in the trial of the case of the wife's infidelity and to secure a divorce on his cross-petition to be filed in the suit for a stipulated compensation, to be paid when the divorce

was procured on the cross-petition or upon the compromise of the suit by the defendant. The complaint, after setting forth the matters stated, alleged that the divorce suit had been compromised, and that the wife had been permitted to secure a divorce without opposition. A recovery was prayed both upon the contract and upon a quantum meruit. The court denied relief upon both grounds, saying: "The clearly expressed object of the agreement was to bring about a dissolution of the marriage contract, and to put an end to the various duties and obligations resulting from it. It is therefore against sound public policy and void. The marriage relation is sacred, and one which the law will encourage and maintain when formed. Its dissolution will not be left to the caprice of the parties themselves, nor will it be permitted to rest on the interference of strangers. Hence any agreement conditioned on the obtainment of divorce, or intended or calculated to facilitate its obtainment, is void. Such is the settled policy of the law as expressed in the universal rule adopted by the courts."

[3] It is a well-settled principle of law that agreements against public policy and sound morals will not be enforced by the courts. *Wilde v. Wilde*, 87 Neb. 891, 56 N. W. 724; *Brown v. First National Bank*, 137 Ind. 655, 37 N. E. 158, 24 L. R. A. 206; *Stokes v. Anderson*, 118 Ind. 533, 21 N. E. 331, 4 L. R. A. 813; *Reed v. Johnson*, 27 Wash. 42, 67 Pac. 381, 57 L. R. A. 404; *Cascade Public Service Corporation v. Rallsback*, 59 Wash. 376, 109 Pac. 1062. In the *Brown* Case it is said: "It follows, to state the rule comprehensively, that all agreements relating to proceedings in the courts, civil or criminal, which may involve anything inconsistent with the full and impartial course of justice therein, are void, though not open to the charge of actual corruption. 3 Am. & Eng. Enc. Law, 879-881; Bish. Cont. § 549. And this is true regardless of the good faith or intent of the parties at the time the contract was entered into, or the fact that no evil resulted by or through the contract."

[4] The appellants rely upon the provisions of Rem. & Bal. Code, § 474, *Smits v. Hogan*, 35 Wash. 290, 77 Pac. 390, *Hillman v. Hillman*, 42 Wash. 595, 85 Pac. 61, 114 Am. St. Rep. 135, and *State ex rel. Arthur v. Superior Court*, 58 Wash. 97, 107 Pac. 876. The Code provision is as follows: "The measure and mode of compensation of attorneys and counselors shall be left to the agreement, express or implied, of the parties," etc. In the *Arthur* Case it is said that this provision applies to actions for divorce as well as to other actions. Neither the provision of Code nor the causes cited apply to the facts at bar. It cannot be doubted that a party having meritorious ground for divorce may agree

with an attorney upon the measure and mode of compensation for his services in a divorce action. Nor can it be doubted that, under like conditions, the husband and wife may agree upon a fair and reasonable division of their property, where there is no arrangement for a collusive decree. *Long v. Long*, 38 Wash. 218, 80 Pac. 432. But these principles do not aid the appellants.

[5] The case must be controlled by the legal effect of the services contracted for, and not by the good faith of the appellants in entering into the contract. We express no opinion as to whether the contract contravenes the statute of frauds.

The demurrers were rightfully sustained, and the judgment is affirmed.

DUNBAR, C. J., and MOUNT, PARKER, and FULLERTON, JJ., concur.

#### SMITH et ux. v. FLATHEAD RIVER COAL CO. et al.

(Supreme Court of Washington. Dec. 30, 1911.)

CORPORATIONS (§ 404\*)—DISPOSAL OF CORPORATE PROPERTY—POWER OF TRUSTEES.

The trustees of a corporation formed to buy, sell, and deal in real and personal property, with the ratification of a majority of the stockholders, may, over the objection of minority stockholders, sell coal lands belonging to the corporation, where the price obtained was not inadequate, and there is no showing that the sale would disrupt the corporation, or that the proceeds would not be invested in other enterprises consistent with the articles.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 404.\*]

Department 1. Appeal from Superior Court, Spokane County; John D. Hinkle, Judge.

Action by J. H. Smith and wife against the Flathead River Coal Company and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

John M. Gleeson and Joseph F. Morton, for appellants. Skuse & Morrill, for respondents.

DUNBAR, C. J. This action was brought by the plaintiffs against the defendants, as trustees, for the purpose of obtaining a permanent injunction to prevent the defendants from disposing of all the company's property consisting of a lease of 2,896 acres of coal land in British Columbia at an alleged inadequate price. The defendant company is capitalized for \$200,000, divided into shares of the par value of \$1 each. Appellants are the owners of 35,000 shares. The court granted judgments of dismissal in favor of the defendants. From this judgment this appeal is taken, and the granting of the judgment is the substantial error assigned.

From an examination of the testimony we

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

are of the opinion that the judgment of dismissal was justified. The appellants rely largely upon the case of *Theis v. Spokane Falls Gaslight Co.*, 34 Wash. 23, 74 Pac. 1004, but we think that the law announced in that case has no application to the case at bar. That was an application by a minority stockholder to prevent the disincorporation of the company for the purpose of fraudulently forcing out of the corporation a minority stockholder who would not agree to the disincorporation, the ulterior purpose of which was the organization of another corporation to do the same business, with the petitioning stockholder eliminated; and we held that section 4275, Bal. Code, providing that any corporation may dissolve and disincorporate by application to the superior court upon a vote of two-thirds of the stockholders, authorizes a disincorporation only upon a bona fide intent upon the part of the people interested to discontinue the business; and does not, as against the objection of a single stockholder, authorize the dissolution of a prosperous company for the purpose of enabling the majority stockholders to get control of the business by a sale of the property and the organization of the new corporation, with the same powers and to continue the same business. The whole record in that case showed a fraudulent intent to pervert the spirit of the law. But we are unable to gather any such intent on the part of the respondents from the testimony in this case. First, it must be borne in mind that one of the objects of this corporation as expressed was to do just what it did do, viz., sell, or contract to sell its property; for article 2 provides, among other things, as follows: "To buy, own, hold, deal in, mortgage or otherwise lien, and to lease, sell, exchange, transfer or, in any manner whatsoever, trade in or dispose of both real and personal property, and to develop and improve the same." It will thus be seen that it was a speculating and prospecting corporation, and had a right to do what it was attempting to do, if it was not done fraudulently. It might not have exercised good judgment, but it had a right to exercise its best judgment through its trustees and a majority of its stockholders. The contract of sale made with one Davis was ratified by a meeting of the stockholders of the corporation, regularly held for that purpose, at which meeting 180,994 shares of the capital stock of the company were represented and voting, of which 126,663 shares voted for the ratification of the contract and 54,331 voted against it. Outside of a bare insinuation, there is nothing whatever tending to show an attempt to deceive or coerce any stockholder. It was simply a difference of opinion in regard to the value of the leasehold interest which was sold; and, while

there was some opinion testimony that the price for which the property was sold was entirely inadequate, it must be borne in mind that the land, which was principally valuable for its supposed coal deposits, had not reached the development stage, and that the value was purely speculative, the tract of land comprising 2,896 acres having been developed only to the extent of a tunnel 35 feet in depth with a crosscut of 20 feet.

It also appeared that the plaintiffs had purchased shares of the capital stock at 7½ and 8 cents per share, which would be a little less than the amount realized on all the shares at the price obtained under the contract. It also appeared that the company was embarrassed financially and unable to meet the requirements of the Canadian government concerning this land, and that the deficit had to be advanced by the president of the corporation to prevent a forfeiture of its rights. There is no showing that the sale disrupts the corporation, or that the proceeds will not be invested in other enterprises consistent with the articles of incorporation. The case we think falls squarely within the rule announced in *Lange v. Reservation Mining & Smelting Co.*, 48 Wash. 167, 93 Pac. 208.

The conclusion we have reached renders it unnecessary to discuss the third assignment of error, viz., that the court erred in not allowing plaintiffs to continue their case and make Thomas Davis a party.

The judgment is affirmed.

MOUNT, PARKER, FULLERTON, and GOSE, JJ., concur.

#### WOOD v. CITY OF TACOMA.

(Supreme Court of Washington. Dec. 16, 1911.)

##### 1. MUNICIPAL CORPORATIONS (§ 845\*)—TORTS—ACTIONS—SUFFICIENCY OF EVIDENCE.

Evidence, in an action against a city for damages to plaintiff's property by casting water thereon from an alleged defective storm sewer, held to show that the real cause of the water collecting upon plaintiff's lots was the raising of the grade of a street and the alley.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.\*]

##### 2. MUNICIPAL CORPORATIONS (§ 385\*)—TORTS—GRADING STREETS—ORIGINAL GRADE—LIABILITY OF CITY.

Damages cannot be recovered from a city for injuries to private property caused by casting surface water thereon by the original grading of streets and alleys; *Laws 1909, c. 80, § 1* (Rem. & Bal. Code, § 7815), authorizing payment of damages for injuries caused by grading a street, expressly providing that the section shall not apply to the original grading of a street.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 925-928; Dec. Dig. § 385.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

### 3. WATERS AND WATER COURSES (§ 116\*)—SURFACE WATER.

Surface water caused by rain or melting snow is a common enemy against which every landowner may defend his land, even to the injury of others.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 127; Dec. Dig. § 116.\*]

### 4. MUNICIPAL CORPORATIONS (§ 394\*)—STREETS—ORIGINAL GRADING—CASTING SURFACE WATER.

A city cannot by the original grading of a street gather surface water and discharge it upon private property in a concentrated form without making itself liable, its liability in such case being an exception to its nonliability generally for injury caused by the original grading of streets; but there was no liability by the city, where it appeared that the water flooding plaintiff's land escaped from a manhole in a street and flowed upon the land in a diffused form as it would have done in absence of street grading.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 938-945; Dec. Dig. § 394.\*]

### 5. MUNICIPAL CORPORATIONS (§ 723\*)—TORTS—LIABILITY.

A municipal corporation is liable for injuries resulting from the negligent exercise of its powers involving a violation of a duty.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1545; Dec. Dig. § 723.\*]

### 6. MUNICIPAL CORPORATIONS (§ 394\*)—GRADING—DRAINAGE.

A city is not bound to furnish temporary drainage for abutting lots pending the original grading of a street and placing drains therein, especially if it would cause expense and result in serious interference with the grading, or if incompatible with the plan of improvement, nor if the property owner had sufficient notice of the contemplated improvement and the manner of doing it, as to enable her to protect her lots by herself providing drainage or filling the lots, and the fact that temporary ditches had been dug in the alley and an adjacent street before they were graded with the city's permission would not require it to furnish such temporary drainage.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 938-945; Dec. Dig. § 394.\*]

Department 2. Appeal from Superior Court, Pierce County; M. L. Clifford, Judge.

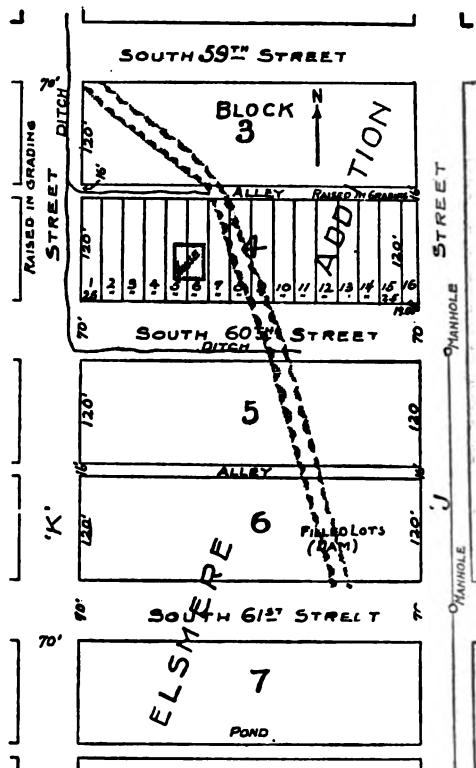
Action by Victoria A. Wood against the City of Tacoma. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Govnor Teats, Hugo Metzler, Leo Teats, and Ralph Teats, for appellant. T. L. Stiles, F. R. Baker, and F. M. Carnahan, for respondent.

ELLIS, J. This is an appeal from a judgment of nonsuit and dismissal of an action to recover damages consequent upon the grading of and construction of storm sewers in certain streets in the city of Tacoma.

About three years before any of the streets in the vicinity of her property had been graded, the appellant bought lots 5 to 10, inclusive, in block 4 of Elsmere addition to Tacoma. Block 4 fronts to the south on

Sixtieth street and is bounded on the east by J street, on the west by K street, and on the north by the alley between blocks 3 and 4. We reproduce a plat from respondent's brief, the correctness of which seems not to be questioned, merely for the purpose of illustration and to show the location of streets in relation to the appellant's lots:



Elsmere addition is in an outlying part of the city. Some houses had been built there and in that neighborhood apparently before any of the streets were graded or any drainage provided. The general slope of the land in that vicinity is from the south and east to the north and west. Appellant's lots occupy low ground across which originally the natural drainage of the country to the south and east for a considerable distance flowed. Originally this surface water ran off of appellant's lots and across block 8 to the northwest. At the time when the city began the grading here in question, improvements and filling by the owners of block 3 had obstructed the natural course of the water so that it ran in a small ditch, it does not appear by whom dug, along the alley to K street and thence north. There was also a ditch on the southerly side of Sixtieth street which carried a part of the surface water to K street. This was apparently dug after the appellant had purchased and built on her lots, and also after that time the city dug a ditch northward along K street to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



carry all this surface water to a large drain on Fifty-Eighth street. It appears that these ditches and also other ditches and drains on this sloping territory, the location and character of which are not made clear by the evidence, had been made some of them by the city and others by the owners of different properties. It seems to be admitted that no permanent system of drainage had been constructed or adopted by the city in this territory when appellant purchased her lots and built her house, nor up to the time of the grading complained of in this action. Up to that time the drainage, such as it was, was merely temporary in character and constructed and adapted to the natural surface of the ground.

In the fall of 1909 the city by contract began the grading of the streets and alleys in the vicinity of appellant's property. The work apparently included all of these streets excepting South Sixtieth street. This grading was the initial improvement of these streets, the first change from the natural contour of the ground. Just before the heavy rains of November, the grading of K street had been completed, and between Sixtieth and Fifty-Ninth streets it had been necessary to raise the level of the street and sidewalks a little above the natural surface. At the same time and as a part of the same work the alley between blocks 3 and 4 was correspondingly raised. There was therefore a fill variously estimated at from a foot to two feet in the alley in the rear of appellant's lots. This grading of the street and alley filled the ditch in the alley and stopped up the K street end of the ditch on Sixtieth street. At the same time the city was constructing a storm sewer from Sixty-Fourth street north along J street to Sixtieth street and along Sixtieth to K street. The heavy rains stopped the work before it reached K street. It does not appear that this sewer was fully completed from Sixty-Fourth street down to Sixtieth street; but it does appear that the pipes were laid at Sixtieth and J streets, and that there was a manhole at Sixty-First street and another at Sixtieth street.

In the grading of Sixty-First street there was a slight cut between K and J streets, and the surplus dirt was used in filling the lots in the vacant block 6 abutting on the north side of Sixty-First street. This whole block was filled to about 18 inches above the street. When the heavy rains of November came, the water, following its usual course, from the higher ground from the south and east, being arrested by this filling of block 6, collected in Sixty-First street and vicinity forming a pond. A part of the filling on the lots near J street washed away, and some of the water which had collected in Sixty-First street flowed into the unfinished storm sewer and out again through the manhole at Sixtieth and J streets, thence down

Sixtieth street onto appellant's lots, and was there retained by the filled grade of K street and of the alley in the rear of her lots causing the injury complained of. It is fairly deducible from the whole of the evidence that little, if any, more water was thus collected upon appellant's lots than would have been the case had no water been allowed to collect in Sixty-First street and had no storm sewer been constructed in J street. The water which came from Sixty-First street would simply have collected in the first instance in Sixtieth street and upon the appellant's lots. It was merely delayed in its progress by the filling in block 6 and reached appellant's lots possibly a little later than otherwise by going around the block instead of crossing it diagonally. But even if there was an increase in the amount of water, it has been held not to create a liability unless the water be cast in a concentrated and destructive body upon the land. *Davis v. City of Crawfordsville*, 119 Ind. 1, 21 N. E. 449, 12 Am. St. Rep. 361; *Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E. 268, 36 L. R. A. 519, 57 Am. St. Rep. 859; *Hume v. Des Moines*, 146 Iowa, 624, 125 N. W. 846, 29 L. R. A. (N. S.) 126-132; *Miller v. Morristown*, 47 N. J. Eq. 62, 20 Atl. 61.

[1] The real cause of the water collecting upon appellant's lots was the raising of the grade of K street and the alley back of these lots, which stopped the drains in Sixtieth street and the alley, thus impounding the water. The evidence fairly indicates that but for this grading the water would have passed off as formerly. The appellant herself makes this plain. With reference to the old drains in the alley in Sixtieth street and K street, she testified: "Q. This is Sixtieth street, as I understand you. What do you call this (referring to identification A)? There was a drain which you say the city made some time down there, and opened it down there in Sixtieth street? A. Yes. Q. Was the ditch in K street at that time the same kind of a drain? A. No, it was a box. Q. Was it open on K, on this side? A. No, they covered it up. Q. How far does it run? A. Run down, as I understood, down to Fifty-Eighth. They had a big ditch down Fifty-Eighth. Q. If it was not for putting that drain in there by somebody by Mr. Wright or somebody, all of this water would have come across your place? A. Yes. Q. So far as that is concerned, that relieved you some? A. Yes, after they graded the street last winter, they put the dirt in here (indicating on exhibit). Q. That is what you complain of? A. Yes, I complain of them stopping the ditches and the natural drain. Q. Is it not a fact that the natural drain went down across the lots further? A. No, it went through the alley, not through Hadland's lots at all."

[2] It is now established law in this state that damages cannot be recovered for conse-

quential injuries to private property occasioned by the original grading of streets and alleys. The dedication of streets and alleys to the public use implies an agreement of the dedicant and his successors in interest that the city may establish grades and improve the streets and alleys thereto in aid of such use. *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061; *Fletcher v. Seattle*, 43 Wash. 627, 86 Pac. 1046, 88 Pac. 843; *Laws* 1909, p. 151, § 1 (2 Rem. & Bal. Code, § 7815); 4 *Dillon's Municipal Corporations* (5th Ed.) § 1684.

[3] It is also the settled doctrine in this state that surface water, caused by the falling of rain or the melting of snow, is to be regarded as an outlaw or common enemy against which every proprietor of land may defend himself, even if in consequence of such defense injury result to others. As to surface waters this court has definitely adopted the rule of the common law as distinguished from the contrary rule of the civil law. *Cass v. Dicks*, 14 Wash. 75, 44 Pac. 113, 53 Am. St. Rep. 859; *Harvey v. Northern Pacific Ry. Co.*, 116 Pac. 464; *Gould on Waters* (3d Ed.) § 265; 30 Am. & Eng. Encyc. of Law (2d Ed.) p. 330.

From the adoption by this court without qualification or restriction of these two doctrines, namely, that a municipal corporation is not liable for injuries consequent upon the initial grading and improvement of its streets, and that surface water is a common enemy against which any one may defend himself, arises the corollary that a city is not liable in damages for injuries to private property by the collection of surface water thereon caused by the initial grading or improvement of its streets and alleys. Injuries resulting from the reasonable exercise of a legal power are consequential and cannot be made the basis of recovery. Such is the rule in all those jurisdictions which have adopted without modification the common enemy doctrine of the common law. "In the jurisdictions which adopt the common-law rule, it is held that the rule applies fully to municipal or quasi municipal corporations as to individuals, and that such a corporation does not incur any liability if in the improvement of its streets or highways it prevents the flow of surface water from adjacent lots; and the same has been held true with regard to the improvement of city lots owned by a municipality. On the other hand, it has been held that a landowner may, by erections or obstructions on his own lands, prevent the flowage of surface waters from a highway upon his land." 30 Am. & Eng. Encyc. of Law, pp. 331, 332; 4 *Dillon, Municipal Corporations* (5th Ed.) §§ 1732, 1733; *Elliot on Roads & Streets* (3d Ed.) § 556; *Gould on Waters* (3d Ed.) § 269.

[4] There is an exception to this rule of nonliability, which though not indorsed by some of the courts, and which we do not

find has often been applied to the initial grading of streets, we nevertheless believe to be sound in any case. A city may not gather up surface water and discharge it upon land in a concentrated volume to the injury of the land without liability whether the water be such as naturally would have flowed onto the land or not. The reason is that when collected and discharged in considerable volume upon the land at a given point it may erode and wash channels in the land, thus becoming very destructive and injurious. *Johnson v. White*, 28 R. I. 207, 58 Atl. 658, 65 L. R. A. 250, and note to page 262. The appellant contends that the evidence brings this case within the exception. But we think not. It falls to show that the water was discharged upon the appellant's lots in a concentrated volume. It escaped from the manhole in the street and flowed upon the appellant's land in a diffused form as it would have done in any event. In such a case the mere fact that the water was concentrated in its course to appellant's land does not create a liability which would not otherwise exist. *Clay v. City of St. Albans*, 43 W. Va. 539, 27 S. E. 368-370, 64 Am. St. Rep. 883.

[5] There remains to be considered the question of negligence. It must be conceded that a municipal corporation, like an individual, is liable for injuries resulting from the negligent exercise of legitimate powers. There is no evidence whatever that on the completion of the storm sewer on J and Sixtieth streets and the new drain on K street that they did not furnish adequate drainage for this district including appellant's property, nor was there any evidence that if the improvement had been completed before the rainy season any injury would have occurred. The evidence does not make a case of improper or negligent final construction, but merely shows a failure to provide adequate temporary drainage during the progress of the work and the delay made necessary by the rainy season. There is no negligence where there is no violation of duty.

[6] There was no absolute duty on the part of the city to furnish temporary drainage for appellant's lots pending the grading and placing of drains in K street and the construction of the storm sewer on J and Sixtieth streets, nor was it bound to do this if it would entail expense or cause any considerable interference with the prosecution of the work of grading the streets after it had been undertaken or if it was incompatible with the plan of improvement adopted by the city. Nor was the city bound to do this at all if the appellant had sufficient notice of the contemplated improvement of the streets, and the manner in which the work was to be done, to have enabled her to protect her lots by providing drainage herself or by filling the lots as the evidence shows she has since

done. The fact that the old temporary ditches had been dug in the ungraded alley and in the ungraded Sixtieth street either by the city or with its permission can make no difference. The city did not thereby abdicate its right to establish an initial grade for its streets and fill them to that grade even if in so doing it filled these ditches. Any other view would make the city liable to some one for some inconvenience every time it sought to grade a street for the first time, and thus render the statute nugatory. The rule, in such a case, which appeals to us as reasonable, and especially as in consonance with our statute, which does not permit recovery for damages for injuries resulting from the reasonable exercise of the power to grade streets for the first time (2 Rem. & Bal. Code, § 7815), is declared by the Supreme Court of Iowa, in a case cited by appellant, as follows: "The true rule here, as we understand it, is that, as the city had power to grade and gutter its streets, it is not liable for defective plans, for in adopting them it acts in a judicial capacity. But it is liable if it negligently carries out such plans, or if, without the adoption of any plans, it proceeds in a negligent manner to make embankments or fills, to the injury of an abutting or adjoining proprietor. As applied to the facts of the case, the city was not liable because of its establishment of grades for West Walnut and West Sixteenth streets, because its act in so doing was either legislative or judicial in character; but, in bringing the streets to these grades established, it was bound to the exercise of ordinary care and prudence, and if it unnecessarily or negligently filled ditches and drains in West Sixteenth street, and thus cast surface water back upon plaintiff's lots, without notice to her, and without her knowledge, and without giving her a reasonable time to bring her lots to grade, the city is liable, not because of defective plans, but by reason of negligence in doing a purely ministerial act—that is, of bringing the streets to the established grade, and, in so doing, filling the ditches and drains for the escape of surface water without providing an escape, either temporary or permanent, for the surface water. Moreover, there was evidence tending to show that it so filled the streets as to collect surface water and discharge it upon plaintiff's lot. As plaintiff had the right to fill her lot by bringing it to the established grade, doubtless defendant was not obliged to provide permanent culverts, drains, or bridges, although that point we do not now decide. If, after her property is brought to grade, such culverts, ditches, or drains should be constructed, a question may then arise as to defendant's duty in the premises." *Hume v. Des Moines*, 146 Iowa, 624, 645, 125 N. W. 846, 854, 29 L. R. A. (N. S.) 127-136.

The evidence shows that the appellant had notice of the city's intention before the old

ditches were filled. She says she protested to the city officials, and in fact that she brought suit against the city in an attempt to stop the grading of K street. She made no attempt to protect her lots either by filling, diking, or by opening the old drains which the city would doubtless have permitted after the drain in K street was completed. This was before the rains set in. The evidence sufficiently shows that this would have been permitted, since the city, in about two days after the first accumulation of water, as appellant admits, "drained it out the best they could" by digging a ditch in the alley, and in the spring, she says, "they drained it all out and finally put in a box." The testimony of both the appellant and her husband shows that neither before the fall rains nor after did they themselves do anything whatever either to protect the property from water or to drain it off after it accumulated. Surface water being a common enemy, they had the same right to protect their property from it as the city had to protect its streets. 4 Dillon's Mun. Corp. (5th Ed.) § 1733. "It is clear that there is no liability on the part of a municipal corporation for not exercising the discretionary or legislative powers it may possess to improve streets, and, as part of such improvement, to construct gutters or provide other means of draining for surface waters, so as to prevent them from flowing upon the adjoining lots. And even when the work of grading the streets has been entered upon, there is not ordinarily, if ever, any liability to the adjoining owner arising merely from the non-action of the corporation in not providing means for keeping surface waters from property situate below the established grade of the street. There are indeed, cases which go further, and assert that there is no such liability where, in making improvements upon streets or elsewhere, authorized by law, surface waters are purposely turned from one's own land to that of another—from the street directly upon the adjacent property owner." 4 Dillon's Mun. Corp. (5th Ed.) § 1734.

It would be worse than useless to attempt to harmonize the wilderness of decisions from other states on the questions here involved. Some of them follow the common-law rule, others the opposite rule of the civil law, and still others a modified form of the one or the other. So far as we are able to discover by a careful reading of the authorities cited by the appellant, they nearly all arose upon a change of an established grade, and not upon an initial grading of the street. In none of them was there a statute involved such as we have here. Manifestly they would not apply under the provisions of our statute which expressly limits recovery to injury by changes of grade. Moreover, they differ widely in their facts from the case before us. In view of the statute as construed in *Ettor v. Tacoma*, su-

pra, and the rule as to surface water as announced in *Cass v. Dicks*, supra, we are compelled to hold that the evidence here fails to make a prima facie case against the city.

The judgment is affirmed.

DUNBAR, C. J., and CROW, MORRIS, and CHADWICK, JJ., concur.

#### HARVARD INV. CO. v. SMITH et al.

(Supreme Court of Washington. Jan. 4, 1912.)

#### LANDLORD AND TENANT (§ 208\*)—RENT—ASSIGNMENT OF LEASE—LIABILITY OF ASSIGNEES.

The lessor of premises unqualifiedly consented to an assignment of the lease to defendant and to assignment by defendant to codefendants, on condition that defendant should not be released from any of the covenants of the lease. Codefendants assigned to another. The original lease was made for three years, and bound the lessee to pay the full rental for that period in monthly installments. *Held*, that defendant and codefendants are not liable for rent after they surrendered possession under the assignments made by them; the assignment to defendant being absolute; and there being no consideration for the condition imposed upon the consent to the assignment to codefendants.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 821-831; Dec. Dig. § 208.\*]

Department 2. Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Action by the Harvard Investment Company against Loretta Smith and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Byers & Byers, for appellant. Emerson H. Carrico and Pierre P. Ferry, for respondents.

CHADWICK, J. The main point in this case is whether the respondents are bound by the terms of a written lease made by the appellant to one Mary A. O'Reilly. The original lease was made for a term beginning October 1, 1907, and ending September 30, 1910. By it O'Reilly became bounden to pay the full sum of \$16,150, payable, after the first month's rental of \$400, at the rate of \$450 per month. It was further covenanted and agreed that O'Reilly would not assign the lease, or any interest therein or any part thereof, without the written assent of the appellant, or its "agents, had and obtained thereto." On May 16, 1908, O'Reilly, with appellant's consent, assigned all of her interest in the lease to respondent Belond, who signed the following: "I hereby accept the above assignment and agree to all the conditions of the within lease and promise to perform all its covenants and obligations." An absolute consent, without reservation, was given to this assignment. In February, 1909, Belond assigned to respondent Loretta Smith, a married woman; Smith and her husband signed an acceptance in the

same form. On the same sheet of paper, which is attached to the lease, we find the following consent: "Consent is hereby given to the assignment of interest of Elizabeth Belond in the within lease to Wm. J. Smith and Loretta Smith, but it is expressly understood that said Elizabeth M. Belond is not released from any of the covenants of said lease, but remains bound as if this assignment and contract had never been executed, and neither this consent nor the receipt of rent from said assignee shall be construed as a release. [Signed] Dexter Horton & Co., Assignee, by West & Wheeler, Agent." Thereafter, by like assignment, acceptance, and consent, Mrs. Smith assigned to one Jarnigan. Jarnigan went into possession, but remained only a few days, when, to protect their own interests, the Smiths re-entered and held possession until May 10, 1910, when their interest was assigned to M. P. Blum. This assignment was never formally accepted by Blum, nor was written consent given by the owner, although Blum went into possession and so remained for a period of two days, when, on account of differences with the Smiths, culminating in litigation, he threw up his possession. No rent has been paid since May 10, 1910, and this action is brought upon the covenants of acceptance and consent to recover from Belond and Smith the rent for the remainder of the month of May and rent due June 1, 1910.

We think there can be no question as to the correctness of the judgment in favor of Belond. The assignment to her, as well as the consent of the owner, was absolute. She could not be thereafter bound to pay rent for the full term by a contract less formal than that which bound her assignor. *Tibbals v. Iffland*, 10 Wash. 451, 89 Pac. 102, is decisive, and for the reasons therein stated the judgment as to Belond is affirmed.

It will be noticed that the consent to the assignment to Mrs. Smith is in the same form. The reservation in the consent that Mrs. Belond is not released from the covenants and conditions of the lease would not enlarge her undertaking, or be held binding beyond the term of her occupancy, unless she had consented thereto. Of this there is no evidence. So the same rule of law would relieve the Smiths from the payment of rent under the lease after their assignment to Jarnigan.

It is unnecessary to notice the further contention of respondents Smith, that the re-entry after Jarnigan's abandonment, without assignment or consent, was independent of the lease, and made them tenants from month to month. It is enough that they are liable under the terms of their contract only for the time the property was occupied by them, and are relieved of the obligation to pay rent by assigning the lease, with consent of the owner, without express agreement to be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

further bound. Under all authority, the assignment of the lease terminates the privity of estate existing between the assignor and the grantor, and the privity is transferred to the assignee. And on principle it should be so. The owner has it in his power to control the tenancy. If he desires to hold the original lessee or any assignee, he may do so by withholding his consent or consenting to a sublease, or, in the event of an assignment, make his consent conditional, so that in the event of a reassignment the one taking possession will be bound to pay rent for the full term. The possession would then furnish a consideration for the promise. But when the intent to hold the assignor is manifested in a consent to an assignment to a new party at the time the assignor is going out, there is no consideration to support a promise to sustain the reservation. This conclusion makes it unnecessary to discuss the other propositions advanced by respondents to sustain the judgment of the lower court.

Judgment affirmed.

DUNBAR, C. J., and MORRIS, ELLIS, and CROW, JJ., concur.

#### ADAMS et ux. v. CANUTT et ux.

(Supreme Court of Washington. Jan. 3, 1912.)

#### 1. SPECIFIC PERFORMANCE (§ 114\*)—CONDITIONS PRECEDENT—PERFORMANCE—COMPLAINT.

An allegation in a complaint for specific performance that plaintiffs, having complied with all the agreements to be by them performed, were entitled to have defendant bank perform the agreements required by the contract to be performed by it, was a sufficient allegation that taxes and sums agreed to be paid the vendors had been paid, and that the land had been farmed in a proper manner, as required by the contract.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 365; Dec. Dig. § 114.\*]

#### 2. TRUSTS (§ 35\*)—SPECIFIC PERFORMANCE (§ 97\*)—EXPRESS TRUSTS—DUTY OF TRUSTEE.

Defendant O. and wife, having contracted to purchase school lands, and desiring to sell a part of the land to plaintiffs' assignor, but being unable to do so directly, because of a rule that an assignment of any part thereof less than the whole, unless described by government subdivisions, could not be entered at the state land office, agreed that the sale contract with the state should be assigned entire to a bank; that plaintiffs' assignor should farm the property; that one-third of the crops should be applied to payment of the balance due the state, and when that was paid, and all the terms of the contract had been performed, the bank, as trustee, was directed to procure a deed to the land, and to convey the parts agreed on to defendants and to plaintiffs' assignor; the contract also providing that the state was authorized to receive from the bank the performance of the contract. *Held*, that such contract at least implied an agreement that the bank, as trustee, should receive and pay over the money to the state to perfect the title, so that the bank, in receiving and paying such money, acted as trustee, and not as plaintiffs' agent; and hence an allegation, in a suit for specific per-

formance, that plaintiffs had paid over the money to the bank, but that the bank had refused to pay the same to the state and convey the property, was not objectionable, on the theory that the bank, in accepting the money and agreeing to pay the same over, if it did so agree, acted merely as plaintiffs' agent.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 45-60; Dec. Dig. § 35; \* Specific Performance, Dec. Dig. § 97.\*]

#### 3. TRUSTS (§ 43\*)—WRITTEN CONTRACT—CREATION OF TRUST—EXPLANATION BY PAROL.

Where an assignment of a contract to purchase school land from the state in fact created a trust, whereby a bank, as trustee, was to take the title on the completion of the state's contract of sale, and convey the property to plaintiffs' assignor and defendants, but the trust agreement was ambiguous as to the duty of the trustee to receive and pay money to the state, parol evidence was admissible to make the instrument definite and certain, so that it might be construed in the light of the object sought to be attained.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 63-64; Dec. Dig. § 43.\*]

#### 4. SPECIFIC PERFORMANCE (§ 116½\*)—COVENANTS—CONDITIONS—FAILURE TO PERFORM—DEFENSES.

In a suit for specific performance, an objection that plaintiffs and their assignor had failed to meet certain covenants and conditions of their contract, and were therefore not entitled to enforce performance, is matter of defense which cannot be urged on demurrer.

[Ed. Note.—For other cases, see Specific Performance, Dec. Dig. § 116½.\*]

Department 2. Appeal from Superior Court, Whitman County; Thos. Neill, Judge.

Action by W. F. Adams and wife against John L. Canutt and wife. Judgment for defendants, and plaintiffs appeal. Reversed and remanded, with instructions.

Pattison, Stotler & Pattison, for appellants. J. T. Brown and Chas. R. Hill, for respondents.

CHADWICK, J. In 1905 defendants Canutt entered into a contract with the state of Washington for the purchase of certain school lands. On January 30, 1908, Canutt and wife entered into a written contract with Frank H. Endsley, whereby they agreed to sell Endsley a fractional part of the lands. Endsley paid them the sum of \$1,004.94 in money, and agreed to meet all balances due and to become due to the state upon the principal contract. There were other covenants with reference to the occupation and use of the land, not now necessary to be considered.

In order to carry out the agreements of the parties and to effect a final division of the land, a written contract was executed, the material parts of which follow: "The purchase price of said property is the sum of \$7,404.94, which the party of the second part agrees to pay the parties of the first part as follows: The sum of \$1,004.94 cash upon the signing and delivery of this agreement, the receipt of which is hereby acknowledged and the balance of said purchase price

to be paid as follows: \* \* \* It is further agreed that the parties of the first part will pay all taxes or assessment levied or assessed against said premises for the year 1906 and previous years and the party of the second party will pay all taxes levied or assessed against said premises for the year 1907 and subsequent years. \* \* \*

It is further understood and agreed by and between the parties hereto as part of the consideration of this agreement that the party of the second part will farm said lands in good and farmerlike manner during each and every year of this agreement until the full purchase price and interest has been fully paid, and that the title to an undivided one-third of all crops raised upon said premises during each and every year of this agreement is and shall remain in the parties of the first part until the payment of the interest and principal due on said contract with the state of Washington then due shall have been paid. It being the intention of the parties hereto that at least one-third of said crops clear of all expense shall be applied during each year of this agreement towards the payment of the sum due the state of Washington upon said contract. If the party of the second part fully, faithfully and promptly pays said sums of principal and interest due on said contract with the state of Washington, according to the terms of said contract or any extension that the state may grant, subject to the conditions hereinbefore expressed, and shall pay said taxes as herein agreed, and shall fully and faithfully comply with all of the terms of this agreement to be by him performed, then the trustee, hereinafter named, is authorized and directed to procure a deed to said lands and premises in the name of said trustee and execute a deed to the lands herein agreed to be conveyed to the party of the second part and to execute a deed to the remainder of said lands to the parties of the first part. If the party of the second part should fail or neglect to fully and faithfully comply with all the conditions herein expressed to be by him performed promptly at the times herein stated, time being the essence of this agreement, then the parties of the first part are released and discharged from all obligations in law or in equity to convey said premises, or any part thereof, and all payments made shall be kept and retained by the parties of the first part as liquidated damages and as rent for the use of said premises. It is understood and agreed that the parties of the first part will make, execute and deliver to the Farmers' State Bank of Colfax, Washington, as trustee, an assignment of said contract with the state of Washington, to be by said bank held as trustee to carry out the terms of this agreement, and if the party of the second part should fail or neglect to fully comply with the conditions of this agreement to be by him performed as here-

in set forth, said bank is authorized and directed to reassign and redeliver said contract to the parties of the first part."

The following assignment was attached to the principal contract: "John L. Canutt and Nettie E. Canutt, his wife, the within named purchaser, for and in consideration of the sum of one (\$1.00) dollar, to them in hand paid by Farmers' State Bank, a corporation, trustee, of Colfax, county of Whitman and state of Washington, hereby sells, assigns and transfers all their rights, title and interest in and to the within contract and the lands therein described unto the said Farmers' State Bank its assigns forever, and we do hereby authorize the state of Washington to receive from said bank the performance of all covenants and agreements in said contract specified to be performed by the party of the second part, and upon such performance to execute to it a patent as it would have been executed to me had this assignment not been made. And Farmers' State Bank, said assignee, hereby covenants and agrees to keep and perform all the covenants and conditions specified in said contract to be performed by the party of the second part. Given under our hands and seals this 30th day of January, A. D. 1908. John L. Canutt. Nettie E. Canutt. Farmers' State Bank of Colfax, Wash., P. B. Stravens, Pres. P. O. Address, Colfax, Wash."

Thereafter Endsley, for a valuable consideration, sold all his right and interest in the land to plaintiffs Adams who, on the 27th day of October, 1909, tendered to the Farmers' State Bank the full sum due on the contract, and demanded that it procure a deed to the lands in controversy and convey to them the part they were entitled to. This the bank refused to do, because the Canutts had, on the 20th day of October, served notice upon it that they had declared the contract forfeit and no longer binding upon them. This action was brought to compel specific performance. It was the view of the trial court that the complaint did not state a cause of action, because it was not made to appear that Endsley or these plaintiffs had paid the sums due on the contract to the state of Washington; that a payment to the bank would not be a payment to the state, and that if payments had been made to the bank the bank would become an agent merely of appellants to transmit the money. The court further held that the contract was subject to forfeiture; or, to use the words of the trial judge, the complaint could not be made to state a cause of action. Accordingly a demurrer was sustained, whereupon plaintiffs filed an amended complaint, wherein it is alleged: "(6) That on the said 30th day of January, 1908, said plaintiffs, John L. Canutt and Nettie E. Canutt, his wife, and defendant Frank H. Endsley delivered to the Farmers' State Bank of Colfax, Washington, a corporation,

the original said agreement, and said bank accepted the same, and covenanted and agreed to keep and perform all of the covenants and conditions specified in said contract to be performed by the said John L. Canutt, and said bank agreed upon the receipt of the payments due the said state of Washington, as set forth in said contract, to forward the same to the state of Washington, and procure a deed for said lands in accordance with the terms and conditions of the aforesaid agreement." It was also alleged, as it had been in the original complaint: "(13) That plaintiffs, having complied with all of the agreements to be by them performed, are entitled to have said defendant Farmers' State Bank perform said agreements to be by it performed."

Upon demurrer the trial judge was still of the opinion that, considering the contracts and assignment which were made a part of the pleadings, there was no obligation on the part of the bank to receive and transmit the fund, and that he could not decree that it should do so; it nowhere being alleged that appellants or their assignor had paid or tendered payment to the state. He further held that there was nothing for the trustee to do until payment had been made to the state by the plaintiffs or their assignor, and that paragraph 6 of the amended complaint, above quoted, could not be considered in the light of the writings which, in his judgment, negatived the bare allegation that the bank agreed to receive and transmit the money.

[1] The court was of the further opinion that the complaint lacked in other particulars; that it did not allege that certain taxes and sums agreed to be paid the Canutts had been paid; and that the land had been farmed in a proper manner. We think that paragraph 13 of the complaint sufficiently covers this point as against a demurrer, and will proceed to a discussion of the main issues.

[2] It occurs to us that the vice of the trial court's reasoning lies in this: That he is inclined to treat the trustee as a principal; whereas, this controversy must be decided upon the equities existing between Canutt and Endsley and his assignees. When so considered, we think the amended complaint, as well as the original complaint, states a cause of action. The bank has answered that it has no interest, except as defined by the assignment, and that it is willing to abide any order the court may make, and perform any duty that may be put upon it. The assignment to the bank was made with reference to the agreement between the Canutts and Endsley, and that agreement was made with reference to the law as it existed at the time. It is a fundamental rule that writings in which trusts are declared are to be construed liberally; in order to effect the object of the parties concerned; that the intention of the parties affords the only sure

test for construing the deed a contract creating an express trust; and that technical constructions are not favored. *Porter v. Bank of Rutland*, 19 Vt. 410; 28 Am. & Eng. Ency. Law, 991; 1 Perry on Trusts (4th Ed.) § 95.

The only parties who have an interest in this trust are the parties to the contract of sale, and the first inquiry should be what they intended to do, rather than the means adopted to accomplish that purpose. It was the intention of the Canutts to sell all of a certain section of land, except a certain part lying south of a county road. An assignment of any part thereof, less than the whole, unless described by government subdivisions, could not be entered at the state land office. (We take judicial notice of the rules and practice of that department.) To secure both parties, the title, in so far as it was controlled by the contractee, was put in the Farmers' State Bank, under the terms following: "We do hereby authorize the state of Washington to receive from said bank the performance of all covenants and agreements in said contract specified to be performed by the party of the second part. \* \* \*" As we read this contract, we are unable to agree with the trial judge in his ruling that "there is nothing for the trustee to do until all the payments have been made and all other conditions have been complied with." This would be equivalent to holding that the bank was to do nothing but execute the deeds. To so hold ignores its agreement to keep and perform all the covenants of Canutt's contract with the state, to receive a deed upon full payment, and Canutt's command to the state to receive from the bank the performance of all his covenants, the most material of which is the promise to pay the purchase price. But if an agreement to receive and pay the money over to the state is not expressed, it is certainly to be implied as a part of the bank's obligation. To hold otherwise would be to make the manner and form of payment to the state not merely material, but controlling; whereas, considering the design of the parties, it was and must be now so held of no consequence to the Canutts whether the payment to the state was made by the bank, Endsley, or these plaintiffs, so long as his obligation was discharged.

[3] Furthermore, there being no question as to the creation of a trust, the assignment, which, in this case, is the trust instrument, is to be construed in the light of the object sought to be obtained, and to that end, if it be held that the assignment is uncertain, incomplete, or ambiguous, parol evidence may be received to show the situation and circumstances surrounding its execution. Or, to restate the proposition, while an express trust in lands (assuming that the bank is a trustee of lands) cannot be proved by parol, the trust being established, parol evidence will be received to make the instrument cer-

tain, if it be uncertain, or to show its terms, to the end that the true purpose of the parties in interest be not defeated. *Reid v. Reid*, 12 Rich. Eq. (S. C.) 213; *Beach on Trusts*, 753; *Hinckley v. Hinckley*, 79 Me. 320, 9 Atl. 897; *Nesbitt v. Stevens*, 161 Ind. 519, 69 N. E. 256. Under this rule, paragraph 6 of the amended complaint makes the complaint state a cause of action, although it be held that the original did not.

[4] It was urged upon the argument of this cause, and is suggested in the brief, that appellants and their assignor have failed to meet other covenants and conditions of their contract. If so, it may be shown in defense of this action. We are not holding that there may not be a defense, but merely that the complaint before us states a cause of action, and entitles the appellants to be heard in a court of equity.

Reversed and remanded, with instructions to overrule the demurrer.

DUNBAR, C. J., and ELLIS, CROW, and MORRIS, JJ., concur.

#### WESTERMAN v. CORDER et ux.

(Supreme Court of Kansas. Jan. 8, 1912.)

##### (Syllabus by the Court.)

#### 1. ESTOPPEL (§ 83\*)—FALSE REPRESENTATIONS—"EQUITABLE ESTOPPEL."

Where false representations are made by a vendor in the sale of property, the application of the doctrine of equitable estoppel does not necessarily depend upon the knowledge of the vendor of the falsity of the representations, but may rest upon the principle that one who, by representing that a certain state of facts exists, has misled another is precluded from denying the truth of such representations and from setting up a claim inconsistent with the facts as represented, where such claim would result in loss to the other and operate as a fraud upon him.

[Ed. Note.—For other cases, see Estoppel, Dec. Dig. § 83.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2497-2508; vol. 8, p. 7655.]

#### 2. CONTRACTS (§ 94\*)—FALSE REPRESENTATIONS—BONA FIDE PURCHASER.

When a false representation is of a matter presumably within the knowledge of the person making it, not made in the way of commendation or as an opinion merely, but as a positive assertion of an existing fact to induce the other party to enter into the contract, such party, having no knowledge to the contrary, may, if he act in good faith, accept the representation as true, and is not bound to make inquiries or examination for himself.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420-430; Dec. Dig. § 94.\*]

Appeal from District Court, Thomas County.

Action by Henry Westerman against Kizer Corder and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

E. H. Benson, for appellants. Mahin & Mahin, for appellee.

BENSON, J. The defendants, Kizer Corder and wife, appeal from a judgment quieting the title to a tract of land in the plaintiff, Henry Westerman. The appellants claim title to an undivided one-half of the tract under a quitclaim deed from the Kansas Town & Land Company. The appellees are in the possession under a deed from the appellants, purporting to convey the land, made and delivered before the conveyance from the land company was executed, and contend that the appellants are estopped from asserting their after-acquired title, because of their previous conveyance to the appellee, and because of the representations of the appellant Kizer Corder that he was the owner of the land.

The district court found that the conveyance by the appellants to the appellee was by quitclaim deed, and that it did not estop the grantors therein. The appellee contends that, while the word "quitclaim" is used in the deed, it nevertheless purports to convey an indefeasible estate in fee simple in the land, and not the grantor's interest merely, and that it therefore works an estoppel as provided in section 1656 of the General Statutes of 1909. The language of the deed is quite similar to that of the deed referred to in *Bruce v. Luke*, 9 Kan. 201, 12 Am. Rep. 491, which was held to create no estoppel. The district court found for the appellees on the other question presented, viz., that the appellants were estopped by their representations. The evidence of both parties shows, and the court found, that while negotiations were pending for the sale and purchase of the land the appellant Kizer Corder stated that he owned the land by warranty deed from C. F. Jilson, except an interest therein held by one Tilden, and that a conveyance from the appellants would vest the absolute title, except that outstanding interest which he advised the appellee to purchase. The appellee believed these representations to be true and relying upon them entered into an agreement with appellants for a conveyance of the land for \$650, which sum he paid, and received the conveyance as agreed, and also bought the Tilden interest, paying \$500 therefor, all in reliance upon the truth of the representations so made. When he made the representations, and when he delivered the deed Corder believed that he owned the land (except the Tilden interest), and that his statements concerning the title were true, and intended that the deed made by him and wife should convey a perfect title, but about 10 months afterwards he was informed by an abstractor that the Kansas Town & Land Company owned an interest in the land, and thereupon he obtained a quitclaim deed from that company of its title and interest for the sum of \$2, and this is the interest ad-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



judicated against him in the district court.

The only question that need be decided is whether the representations concerning the title so made and relied upon estop the appellants from asserting and holding adversely the interest so acquired after their conveyance to the appellee. While admitting that the representations were made and that they were untrue, it is contended that because they were made in good faith, believing them to be true, and no fraud was intended, therefore an estoppel was not created. It must be conceded that the effect is the same as it would have been if guilty knowledge had been shown. It does not repair the loss of the grantee to be told that the grantor supposed he was telling the truth.

It has often been held that false representations made and acted upon to the injury of another, although not known to be false by the party making them, may, nevertheless, in a proper case, afford ground for the recovery of damages. Thus it was said in *Holcomb v. Noble*, 69 Mich. 396, 399, 37 N. W. 497, 498: "Careful examination of the cases adjudicated in this state satisfies me that the doctrine is settled here, by a long line of cases, that if there was in fact a misrepresentation, though made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he would have a right of action for the damages caused thereby either at law or in equity." The decision last cited was applied and followed in an action for damages on the sale of real estate, in *Aldrich v. Scribner*, 154 Mich. 23, 117 N. W. 581, 18 L. R. A. (N. S.) 379.

The Nebraska Supreme Court in considering this subject, in *Johnson v. Gulick*, 48 Neb. 817, 65 N. W. 883, 50 Am. St. Rep. 629, said: "Whether, in an action for damages for false representations, it is necessary either to aver or prove the scienter, the authorities do not agree. The better rule, and the one adopted by this court, is that the intent or good faith of the person making false statements is not in issue in such a case." "It is immaterial whether such statements are made innocently or knowingly. It is as fraudulent to affirm the existence of a fact about which one is in entire ignorance as it is to affirm what is false, knowing it to be so." *Bullitt v. Farrar*, 42 Minn. 8, 43 N. W. 566, 6 L. R. A. 149, 18 Am. St. Rep. 485. This subject is reviewed in a case note in 7 L. R. A. (N. S.) 646.

[1] Whatever may be the rule respecting guilty knowledge in actions for damages for deceit, the application of the doctrine of equitable estoppel does not necessarily depend upon such knowledge, but may rest upon the principle that one who, by false representations that a certain state of facts exists, has misled another, is precluded from

denying the truth of such representations where such denial would result in loss to the other party and operate as a fraud upon him. *Cornell University v. Parkinson*, 59 Kan. 365, 373, 53 Pac. 138; 2 *Tiffany on Modern Law of Real Prop.* § 457; 16 Cyc. 728. Equitable estoppel in general terms has been defined as "such conduct that it would be \* \* \* a fraud upon the rights of another \* \* \* to repudiate, and to set up claims inconsistent with it." Note in 1 L. R. A. 522. "It is in strict agreement with equitable notions to say of such party that his repudiation of his own prior conduct which had amounted to an estoppel, and his assertion of claims notwithstanding his former acts or words, would be *fraudulent*—would be a *fraud* upon the rights of the person benefited by the estoppel." 2 *Pomeroy, Eq. Jur.* (3d Ed.) § 803. This principle has been applied to representations concerning title to real estate. *Kirk v. Hamilton*, 102 U. S. 68, 77, 26 L. Ed. 79. *Bigelow v. Foss*, 59 Me. 162.

In *Babcock v. Case*, 61 Pa. 427, 100 Am. Dec. 654, the grantee in a tax deed represented that he had examined the title and that it was good. The suit was to recover the consideration paid for the land. The court said that although the action was at common law it was still equitable. "The seller was bound to exhibit the truth of the case as it existed, whether he knew them (the facts) or not. That is to say, his ignorance of them, having undertaken truly to state them, would not redeem a falsehood in regard to them in any material matter, from being a fraud, and a fraud that would avoid the contract." "When the vendee relies on the representations of the vendor, and acts upon the faith thereof, without relying on his own judgment or opinion, and this is known to the vendor, the latter cannot shelter himself under the pretense that his representation was a mere expression of opinion, when it is discovered to be false." *James Rimer v. Barney Dugan*, 39 Miss. 477, 77 Am. Dec. 687. "It is not necessary to an equitable estoppel that the party should design to mislead. It is enough that the act was calculated to mislead and actually did mislead the defendants while acting in good faith, and with reasonable care and diligence. \* \* \*" *Blair v. Wait et al.*, 69 N. Y. 113, 116.

It is contended that the appellee should be denied relief because he did not examine the records. It would be highly inequitable to say to one who in good faith has relied upon the express declaration of another that he owned the land and could convey a perfect title, that he might have ascertained its falsity by proceeding to the county seat, which in this case was 17 miles distant, and making an examination of the record. The obligation of ordinary good faith precludes the vendor from seeking shelter under such

a claim. Ewart on Estoppel, 137; Bigelow on Estoppel, 608; 2 Pomeroy, Eq. Jur. (3d Ed.) § 810.

[2] When a false representation is of a matter presumably within the knowledge of the party making it, not made in the way of commendation or as an opinion merely, but as a positive assertion of an existing fact to induce the other party to enter into the contract, such party, having no knowledge to the contrary, may, if he act in good faith, accept the representation as true, and is not bound to make inquiries or examination for himself. This rule accords with fair dealing and is sanctioned by authority. 2 Pomeroy, Eq. Jur. (3d Ed.) §§ 891, 893; Culver v. Avery, 7 Wend. (N. Y.) 380, 22 Am. Dec. 586; Hunt v. Barker, 22 R. I. 18, 46 Atl. 46, 84 Am. St. Rep. 812; Dodge v. Pope, 93 Ind. 480; Kiefer v. Rogers, 19 Minn. 32 (Gil. 14); Beaupland v. McKeen et al., 28 Pa. 124, 131, 70 Am. Dec. 115. See, also, as bearing upon the question generally, Zinc Co. v. Freeman, 68 Kan. 691, 697, 75 Pac. 995.

General expressions in a commissioner's decision in Chellis v. Coble, 37 Kan. 558, 15 Pac. 505, are cited as opposed to some of the principles followed in this opinion, but, as applied to the facts of this case, these principles are well founded in equity and sustained by the authorities.

The judgment is affirmed. All the Justices concurring.

#### GIBSON v. McCLEES et al.

(Supreme Court of Kansas. Jan. 6, 1912.)

(Syllabus by the Court.)

#### TAXATION (§ 704\*)—TAX DEED—DEFECTIVE REDEMPTION NOTICE.

The inclusion in a redemption notice of an amount in excess of the taxes charged, with interest calculated to the last day of redemption, renders the tax deed voidable and subject to be defeated if attacked in due time.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1418-1423; Dec. Dig. § 704.\*]

Appeal from District Court, Seward County.

Action by Charles E. Gibson against Caroline McClees and others. Judgment for plaintiff and J. V. Lycan and others, defendants, appeal. Affirmed.

F. S. Macy and H. V. Tucker, for appellants. Scates & Watkins, for appellee.

JOHNSTON, O. J. This was an action to quiet title of Chas. E. Gibson in a tract of land as against Caroline McClees. Service on defendant was obtained by publication, and, no defense being made, judgment by default was taken against her. Thereafter the judgment was set aside on motion, as provided by section 83 of the Code of Civil Procedure (Gen. Stat. 1909, § 5676), and J. V.

Lycan, who had acquired the interest of McClees, was substituted as defendant. In the petition Gibson alleged he held the patent title to the land, which was vacant and wholly unoccupied, and that defendants claimed an interest therein the nature of which was unknown to him. Lycan answered, claiming title under a tax deed issued to McClees in 1892, and that she had transferred her interest under it to him in 1908, and, further, that he had taken possession of the land in August, 1908, and had made improvements thereon. Gibson replied alleging that the tax deed was invalid because, in the amount named in the redemption notice upon which the deed was based, were included certain fees for advertising not lawfully chargeable. A trial resulted in a judgment for appellee Gibson.

The appellant insists that the petition of appellee was insufficient in that he failed to state the nature of appellant's claim of title or to show that it in fact constituted a cloud on appellee's title, or anything which called for the aid of a court of equity. If this be a defect it was cured by the answer of appellant who set out in his answer the source and nature of his claim of title. Casner v. Gahlman, 60 Kan. 857, 56 Pac. 1131; Harp v. Wilson, 84 Kan. 45, 113 Pac. 309; Brice v. Saylor, 82 Kan. 500, 108 Pac. 815; Parker v. Vaughn, 85 Kan. 324, 116 Pac. 882. The issue was sharply drawn by the pleadings; appellee basing his claim on the patent title, appellant claiming under a tax title, and appellee responding that the tax title, which was not five years old when the action was commenced, was invalid. As the pleadings stood, the objection to the introduction of any testimony was not good.

The regularity of the proceedings upon which the tax deed was founded remains. A sale was made in September, 1898, for the unpaid taxes of 1897, amounting to \$6.36. A tax deed was executed in September, 1902, the consideration of which was the taxes for the years 1897 to and including 1901, the compromise order having been made on November 8, 1901. It appears that the sum stated in the redemption notice, as necessary to redeem, exceeded the taxes charged, and interest calculated to the last day of redemption, against the land as provided in section 9474, Gen. Stat. 1909. The excess, although not large, being 40 cents for each of three years, is fatal to the deed when attacked in time. This excess, it seems, was charged on the theory that it was proper to include the printer's fees. The county treasurer testified that it had been the practice in that county to include these amounts in the redemption notice. These were not proper charges, and the inclusion in the redemption notice of an amount in excess of the taxes charged, and interest, makes the tax deed voidable when challenged within five years

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of the time the tax deed is recorded. *Shinkle v. Meek*, 69 Kan. 368, 76 Pac. 837; *Casner v. Gahlman*, 6 Kan. App. 295, 51 Pac. 56.

There is no force in the suggestion that the amount of taxes charged, and interest calculated to the last day of redemption, cannot be determined because what was the last day of redemption was not shown. It was shown that there was a September sale in 1898. The law fixes the day of sale as the first Tuesday of that month and, also, the expiration of the period of redemption, so that the amount necessary to redeem could be definitely ascertained.

The judgment is affirmed. All the Justices concurring.

SWAN v. BEVIS ROCK SALT CO.  
(Supreme Court of Kansas. Jan. 6, 1912.)

(Syllabus by the Court.)

1. NEW TRIAL (§ 123\*)—MOTION—CONSTRUCTION.

Where a number of special findings are made against the party in whose favor a general verdict is rendered, a motion for a new trial, filed by him, on the ground that the verdict is against the evidence, will be interpreted as meaning that such special findings are against the evidence.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. § 261; Dec. Dig. § 128.\*]

2. JUDGMENT (§ 211\*)—TIME FOR RENDITION—OBJECTIONS TO SPECIAL FINDINGS—APPROVAL BY COURT.

Where special findings returned by a jury are attacked as contrary to the evidence, no judgment can be rendered upon them until they have been approved by the trial court.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 386; Dec. Dig. § 211.\*]

(Additional Syllabus by Editorial Staff.)

3. WORDS AND PHRASES—"VERDICT."

Bouvier's definition of a verdict is the unanimous decision of a jury, reported to the court, on matters lawfully submitted to them in the trial, and the term "verdict" is often used in distinction to answers to special questions, but is not necessarily synonymous with "general verdict"; and the word, as so used in law, is not applicable to findings of fact by the court.

[Ed. Note.—For other definitions, see *Words and Phrases*, vol. 8, pp. 7293-7295, 7827.]

Appeal from District Court, Rice County.

Action by Clara O. Swan against the Bevis Rock Salt Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Ellerbe & Brokaw and Samuel Jones, for appellant. Ryan & Haney, for appellee.

MASON, J. Harry Swan lost his life while in the employ of the Bevis Rock Salt Company. His mother brought an action against the company, alleging that his death was caused by its negligence. Upon the trial, the jury brought in a general verdict for the plaintiff, but returned answers to special questions which the defendant maintains en-

titled it to a judgment. The plaintiff filed a motion for a new trial, which the court sustained. The defendant appeals from the order granting a new trial.

The motion for a new trial embraced all the grounds specified in section 305 of the Code (section 5899, Gen. St. 1909), which were stated in the exact language of the statute, except for unimportant clerical errors. The record does not show why the new trial was granted. It may have been for any reason covered by the motion. With respect to some of the grounds presented, the trial court has a considerable discretion, and a better opportunity for information than can be afforded a reviewing court.

"Trial courts are invested with a very large and extended discretion in the granting of new trials; and new trials ought to be granted whenever, in the opinion of the trial court, the party asking for the new trial has not in all probability had a reasonably fair trial, and has not in all probability obtained or received substantial justice, although it might be difficult for the trial court or the parties to state the grounds for such new trial upon paper so plainly that the Supreme Court could understand them as well as the trial court and the parties themselves understood them. \* \* \* For, unless the Supreme Court can see, beyond all reasonable doubt, that the trial court has manifestly and materially erred with reference to some pure, simple, and unmixed question of law, and that, except for such error, the ruling of the trial court would not have been made as it was made, and that it ought not to have been so made, the Supreme Court will not reverse the order of the trial court, granting the new trial." *City of Sedan v. Church*, 29 Kan. 190.

While a number of questions of law are suggested and argued by the appellant, we are unable to say how far, if at all, they affected the decision of the trial court. Nor can we say, against that decision, that the plaintiff received substantial justice at the first trial.

[1, 3] The motion for a new trial assigned, among other grounds, that the "verdict, report, or decision" was given under the influence of passion or prejudice, and was, in whole or in part, contrary to the evidence. The defendant interprets these allegations as applying solely to the general verdict, asserts that the plaintiff made no attack upon the special findings, and argues that, as the verdict was in favor of the plaintiff, she cannot be heard to ask a new trial on the ground that it was due to prejudice, or was against the evidence. Such an interpretation of the language of the motion is too literal and narrow. In the situation stated, the word "verdict," as used in the motion, must be regarded as including the special findings—indeed, as referring especially to them.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**Bouvier's definition of a verdict is:** "The unanimous decision, made by a jury and reported to the court, on the matters lawfully submitted to them in the course of a trial of a cause." The term "verdict" is often used in distinction to the answers to special questions, but is not necessarily absolutely synonymous with "general verdict." It must be construed according to its context. It ordinarily applies only to the decision of a jury (*Kerner v. Petigo*, 25 Kan. 632), and yet, as used in a motion for a new trial, it has been given a broader significance; the court saying: "The word 'verdict,' as it is used in law, is not applicable to the findings of fact by the court. The Code does not use the word in that sense, but uses it to express the report of the jury on the evidence submitted to them, while it uses an entirely different phraseology to express the report of the court on the evidence. But, while the word is inaptly chosen for the purpose, it sufficiently indicates the object of the motion to be understood, and will be so treated." *McCullagh v. Allen*, 10 Kan. 150, 154.

[2] The defendant asks this court to direct a judgment in its favor upon the special findings. Where a general verdict is attacked as contrary to the evidence no judgment can be rendered upon it until it has been approved by the trial court. "It has been the unvarying decision of this court to permit no verdict to stand, unless both the jury and the court trying the cause could, within the rules prescribed, approve the same." *K. C. W. & N. R. Co. v. Ryan*, 49 Kan. 1, 30 Pac. 108. If in the present case the special findings are in fact inconsistent with a recovery by the plaintiff, it can be said that, "as it is impossible to reconcile the special findings with the general verdict, the former constitute the verdict of the jury." *Garth v. Edwards County*, 63 Kan. 755, 758, 66 Pac. 999, 1000. Regarded as a verdict, the findings are subject to the same rule as a general verdict—if they are challenged as against the evidence, they cannot be made the basis of a judgment until they have been approved by the trial court. Here the plaintiff challenged them upon that ground, and the court refused to approve them. Therefore no judgment can be directed upon them.

Harry Swan, the workman who was killed, was employed as a "top cageman." A car would be loaded with salt in the mine, placed in the "cage" or elevator, and raised until the platform was level with the floor at the top of the shaft. It was then the duty of Swan to empty the car, replace it, and signal the engineer, by pulling a wire connected with a gong, to lower the cage. The jury found that his death was occasioned by the engineer moving the cage without having received any signal; Swan

falling down the shaft. The defendant assumes that it is not liable for the engineer's negligence, because he was Swan's fellow workman. There seems room for the contention that while Swan was at work it was necessary that the platform of the cage should be kept level with the floor, in order that he should have a safe place in which to work; that to keep it so was a non-delegable duty; that the removal of the platform while he was still at work, before he had given a signal, was a character of negligence for which the employer would be liable, irrespective of the fellow servant matter. This question is not before us now for decision; but it is mentioned in order that this court may not be understood to accept the view that the defendant is not liable for the engineer's negligence.

The order sustaining the motion for a new trial is affirmed. All the Justices concurring.

**EDWARDS v. ATCHISON, T. & S. F.  
R. Y. CO.**

(Supreme Court of Kansas. Jan. 6, 1912.)

(*Syllabus by the Court.*)

**RAILROADS (§ 352\*)—CROSSING ACCIDENT—VERDICT—INCONSISTENT FINDINGS.**

The plaintiff recovered a judgment for damages for injuries occasioned by the collision of one of the defendant's engines with his wagon at a street crossing. He drove by a crossing bell at the side of the street while it was sounding warning of the approach of the train. Applying to certain special findings of fact the measure of vigilance which the law required of him, he must have heard the bell. According to another special finding, he need not necessarily have heard the bell, although not inattentive. *Held*, the findings are inconsistent, and, being inconsistent upon a matter material in estimating the prudence of each party, they do not furnish a basis for a judgment in favor of either one.

[Ed. Note.—For other cases, see *Railroads*, Dec. Dig. § 352.\*]

Appeal from District Court, Edwards County.

Action by John Edwards against the Atchison, Topeka & Santa Fé Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Wm. R. Smith, O. J. Wood, F. Dumont Smith, and A. A. Scott, for appellant. W. H. Broadie and T. S. Haun, for appellee.

**BURCH, J.** The plaintiff sued the defendant for damages resulting from a collision with one of the defendant's trains at a point where the railway track crosses a street in Kinsley. The plaintiff recovered and the defendant appeals.

The street in question extends north and south, and is crossed by four parallel tracks, running from the northeast to the southwest. The first track approached from the north is a switch track; 57 feet to the south is the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

main track; 26 feet from the main track is a storage track; and 11 feet beyond is the branch line track. The storage track was occupied by a line of freight cars, protruding into the east side of the street and extending a long distance to the northeast. The plaintiff was driving a team of mules, hitched to a loaded wagon, and was going south. He crossed the switch track without halting, but stopped to look and listen, and before going upon the main track, which was clear. He neither saw nor heard a branch line passenger train coming from the northeast behind the line of cars on the storage track, and drove on until the engine of the train struck his wagon. The following is a portion of his account of his conduct:

"As I came to the [main] track, I pulled up my mules and looked to the east. I couldn't see anything; the cars were in my road; then I let the mules go on. As I came by the cars, I couldn't see or hear any train, or hear any bells ringing. I listened for the train; I listened for signals. As the mules got by these cars, they sprang ahead, and as I got by, when I got far enough ahead so I was by the cars, the train was a little way from me—I can't say how many feet—but it was close to me. I remember of raising up to urge the mules a little more, and they were on the track. I raised up, but I don't remember any more. I didn't know anything after that. \* \* \* My hearing and eyesight are good."

A crossing bell was located at the west side of the street, between the main line track and the storage track.

The jury returned the following special findings of fact:

"Q. 1. How long had the plaintiff been in the habit of coming to Kinsley and crossing the track where the accident occurred? A. 1. About five years."

"Q. 28. Is this an automatic bell, operated by the approach and passage of trains, which cause a circuit to close and a bell to ring whenever a train is within a certain distance of it? A. 28. Yes.

"Q. 29. Was this bell in good condition at the time of the accident? A. 29. Yes."

"Q. 32. Was the crossing bell ringing when the train in question approached the crossing? A. 32. Yes."

"Q. 35. If the bell was in order, at what distance from it would the approach of a train cause it to ring? A. 35. About 600 feet."

"Q. 46. Did the witness Mills hear the crossing bell ring when he was 100 feet away from it? A. 46. Yes.

"Q. 47. Did the witness Pleasant hear the crossing bell ring when he was 100 feet away from it? A. 47. Yes."

"Q. 40. If the plaintiff did not hear the crossing bell ringing or the approach of the

train, was that not due to the rattling of his wagon or his own inattention? A. 40. No."

The plaintiff drove by the bell while it was sounding warning of the approach of the train. It has been said that it is the duty of a person in the situation of the plaintiff to be vigilant in trying to see. *Railway Co. v. Jenkins*, 74 Kan. 487, 488, 87 Pac. 702. Likewise it was the plaintiff's duty to be vigilant in trying to hear. Giving him credit for the alertness which the law required, he could not escape hearing the bell, if the findings, other than No. 40, be true. If finding No. 40 be true, he would not necessarily be attracted by the sound of the bell, although he were not inattentive, and although his hearing were not obstructed by the rattling of the wagon. Consequently the findings are inconsistent.

The defendant asks for judgment on the special findings. Since, however, the findings are inconsistent upon matters material in estimating the prudence displayed by both parties, they cannot furnish a sound basis for a judgment in favor of either.

The judgment of the district court is reversed, and the cause is remanded for a new trial. All the Justices concurring.

#### YOUNG et al. v. SCOTT et al.

(Supreme Court of Kansas. Jan. 6, 1912.)

#### 1. MINES AND MINERALS (§ 77\*)—OIL AND GAS LEASE—NOTICE OF FORFEITURE.

Notice of forfeiture of an oil and gas lease, given to the former manager of the assignee of the lease after the assignee had passed into the hands of a receiver, was unavailing.

[Ed. Note.—For other cases, see *Mines and Minerals*, Dec. Dig. § 77.\*]

#### 2. MINES AND MINERALS (§ 77\*)—OIL AND GAS LEASE—FORFEITURE.

An oil and gas lease provided that, on failure of the lessee at any time to pay the rent due under the lease, the same might be forfeited after 30 days notice. The lessee's assignee passed into the hands of a receiver, and within 30 days after notice of forfeiture had been served on him he caused the lease to be again assigned, and the assignee deposited the amount of rent in arrears for the seller's benefit. Held that, since, in order to declare a forfeiture, there must have been a default in the payment of rent when due, and also the giving of 30 days notice of the default and the intent to forfeit, the lease was not forfeited.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 204; Dec. Dig. § 77.\*]

Appeal from District Court, Wilson County.

Action between J. S. Young and another and H. B. Scott and others. Judgment for the latter, and the former appeal. Affirmed.

J. T. Cooper and James M. Kennedy, for appellants; Farrelly & Evans, for appellees.

PER CURIAM. This action involves an oil and gas lease, executed by Cain and wife, on July 20, 1903, to one who assigned it to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the Chanute Cement & Clay Products Company. It was for a term of five years, and contained a forfeiture provision, as follows: "Second party agrees to pay said first party a rental of \$1.00 per acre per year, semi-annually, payable in advance, to continue until exceeded by royalty when said rental shall cease, and a failure to pay at any time rental when due according to the terms of said lease, and after thirty days' notice in writing by parties of the first part to said second party, shall forfeit all right to within lease."

Rental was paid by the cement company when due, and in 1908, before the expiration of the term, an agreement was made, extending the term of the lease, without changing any of its conditions, for an additional period of five years. The lessors continued to receive rentals from the cement company until July 20, 1909, and about that time the company became bankrupt. In August, 1909, a letter, asking for a payment of rent, was sent to the former manager of the company, but it was not received by the receiver or trustee of the bankrupt company. In October, 1909, another letter was sent to the former manager, stating a purpose to cancel the lease, but it was not received by the receiver or trustee, or any one else. On January 10, 1910, the lessors sent a letter, intended as a notice of cancellation, which did reach the trustee of the company on about January 15, 1910. On February 4, 1910, the trustee assigned the lease to the appellees, and they at once placed \$200, the rent in arrears, in the depository designated in the lease.

It appears that on January 8, 1910, the lessors had executed another lease on the same land to McIntyre and Foster, and it contained a provision that: "This lease is given subject to a lease already given to the Chanute Cement & Clay Products Co., with which said company has failed to comply." On June following, they assigned a half interest in the lease to the appellants.

[1,2] On the testimony the court found in favor of the appellees, and the findings made are sustained by the evidence, and settle all disputed questions of fact. A notice to Patterson, the former manager, while he was not connected with the company, was unavailing. A notice of forfeiture did reach the trustee, who was in control, and within 30 days from its receipt the rentals were paid. Under the terms of the lease, this prevented a forfeiture. Two things were necessary to a forfeiture—a default in the payment of rent when due, and the giving of 30 days notice in writing of the default and the purpose to forfeit. The notice required, in substance, is that: "You are in default, and if the rental is not paid within 30 days a forfeiture will be in effect." The rental was paid within 30 days after an effective

notice was given. There was no abandonment of the lease, and it was duly assigned to appellees. The appellants took their lease with notice of the rights of appellees, and if inquiry had been made they would have learned definitely that appellees' lease had been extended, and was uncanceled.

The judgment is affirmed.

#### McCULLAGH v. STONE et al.

(Supreme Court of Kansas. Jan. 6, 1912.)

#### APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONFLICTING EVIDENCE.

Findings of the trial court based on conflicting evidence admitting of a finding either way will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

Appeal from District Court, Cherokee County.

Action by John McCullagh, trustee, against Fred L. Stone and another. Judgment for plaintiff, and defendants appeal. Affirmed.

S. C. Westcott, for appellants. T. T. Burr, for appellee.

PER CURIAM. The principal ground urged for reversal is that the court erred in refusing to find as a fact that the small motor was turned over to the defendants to be held as security for the rent of the large motor. The evidence, however, was conflicting upon this question. Mr. Stone, a witness for the defendants, testified that he had made such an arrangement with two directors of the company, Dow Moore and John W. Tate. On the other hand, Mr. Moore denied that it was turned over to be held as security for the rental. Mr. Tate testified that in the only conversation he had with Stone there was nothing said about the terms upon which the defendants would rent the motor. It seems to be conceded that the company was to pay \$75 monthly rental for the large motor for three months, and that the small motor was delivered to the defendants to be held as security for the payment of the purchase price. The court might have found either way upon the conflicting evidence, and therefore it was not error to make the findings requested.

There is nothing to show that the court proceeded upon the theory that the company could not be bound by the contract made with its directors. The plaintiff's objections to the defendants' evidence on that ground were overruled, and defendants were permitted to offer proof that such a contract was made. The evidence was not sufficient to satisfy the trial court.

There is no question of law for us to decide, and the judgment must be affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

OREGON SHORT LINE RY. CO. v. BLYTH.  
(Supreme Court of Wyoming. Jan. 5, 1912.)

1. PRINCIPAL AND AGENT (§ 23\*)—TRANSPORTATION OF GOODS—CREATION OF AGENCY—EVIDENCE.

While the mere declarations of one claiming to be an agent are not sufficient to establish the agency, such a person is a competent witness to prove the agency; and where, in an action for goods lost in shipment, the plaintiff testified that he directed a storage company to pack and ship the goods in question, and the agent who made the shipment also testified to that fact, the agency was sufficiently established.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.\*]

2. EVIDENCE (§ 264\*)—ADMISSIONS—CONSTRUCTION—NEGLIGENCE.

Where, in an action against a railroad company for a failure to deliver goods, there is no allegation that the loss was caused by the carrier's negligence, an offer of the carrier to confess judgment for a certain sum does not amount to an admission of liability for negligence, where it did not admit that the loss was the result of any negligence.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1023; Dec. Dig. § 264.\*]

On petition for rehearing.

For former opinion, see 118 Pac. 649.

BEARD, C. J. The defendant in error has filed a petition for rehearing, but no questions, not discussed and decided in the opinion handed down, are presented. Counsel does not seem to keep in mind the distinction between the liability of a common carrier as an insurer and for negligence, and argues the case on the theory that the contract was invalid, because the law forbids such carrier to contract for exemption from liability on account of its negligence. But this is not that kind of a case. Negligence, in order to be proven, must be alleged; and we think we quite clearly explained that the petition in this case does not charge negligence.

[1] It is further urged that the agency of the storage company was not established, because agency cannot be established by the declarations of one claiming to be an agent. Here, again, we have no such question. No declarations or statements of the agent were offered in evidence. Mr. Blyth testified that he directed the storage company to pack and ship the goods, and the agent who did ship them was on the stand as a witness. It is true that agency cannot be established by the mere declarations of one claiming to be an agent; but it is equally true that such a one is a competent witness to prove his agency.

[2] It is further claimed that the railroad company admitted its liability by offering to confess judgment for \$20. But nowhere did it admit that the loss was the result of any negligence on its part; and the plaintiff below might have taken judgment on the

pleadings for \$20. It is now argued that we should have directed such judgment to be entered, instead of remanding the case for further proceeding. Probably, under our statutes, we might have done so; but we did not think we should deprive the plaintiff below of the privilege of applying to the district court for leave to amend his petition, if the facts would warrant an amendment, and he be so advised. We see no good reason for departing from the decision as handed down, and therefore a rehearing is denied.

Rehearing denied.

SCOTT and POTTER, JJ., concur.

THOMASON et al. v. LANE-POTTER LUMBER CO.

(Supreme Court of Idaho. Dec. 14, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1002\*)—REVIEW—CONFLICTING EVIDENCE.

Where there is a substantial conflict in the evidence, the verdict of the jury will not be set aside.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3935; Dec. Dig. § 1002.\*]

2. APPEAL AND ERROR (§ 1135\*)—REVIEW—AFFIRMANCE.

Where there appears no reversible error in the record, the judgment must be affirmed.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4454; Dec. Dig. § 1135.\*]

Appeal from District Court, Bonner County; Robt. N. Dunn, Judge.

Action by Hegbert Thomason and others against the Lane-Potter Lumber Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

B. S. Bennett, for appellant. H. H. Taylor, for respondents.

SULLIVAN, J. This action was brought by the respondents, who were the plaintiffs in the court below, to recover from the appellant the sum of \$838.55, for and on account of goods, wares, and merchandise claimed to have been delivered and sold by the plaintiffs to the defendant.

It is alleged in the complaint that between the 1st day of August and the 31st day of December, 1907, the plaintiffs sold and delivered to the defendant and to John McGill, agent for the defendant, at the instance and request of the defendant, goods, wares, and merchandise of the value of \$1,072.25, and that no part thereof has been paid, except the sum of \$232.70.

The answer of the defendant denied the partnership of the plaintiffs and admitted the corporate character of the defendant, and denied that plaintiffs sold or delivered to the defendant any goods, wares, and mer-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

chandise whatever, and denied that the defendant agreed to pay the plaintiffs for any goods, wares, or merchandise.

Upon the issues made, the case was tried before the court with a jury, and a verdict returned in favor of the plaintiffs for the sum of \$838.55, and judgment was entered for that sum, with interest and costs. A motion for a new trial was denied, and this appeal is from the judgment and order denying the new trial.

Ninety-nine errors are assigned, relating to the sufficiency of the evidence to support the verdict, the admission and exclusion of evidence, and the giving and refusing to give certain instructions to the jury.

It is first contended that the evidence is insufficient to sustain the verdict. It appears that one McGill made a contract with the appellant corporation to do certain logging for said company, and, according to the testimony of McGill, he informed the representatives of said company that he did not have money enough to run a camp, and that the company would have to supply the camps, pay the men, and supply everything, and that the company delivered to him two order or check books, and McGill was instructed how to draw the checks on the company. It seems that McGill proceeded with the logging business, and drew a great many checks on the appellant company, and many of them were paid and introduced on the trial. We will here insert one of the checks, which is a sample of the many introduced in evidence, to wit: "\$111.30. Clarksford, Idaho, Oct. 17, 1907. To The Lane-Potter Lumber Co.: Pay to the order of Thomason Bros. Hardware Company the sum of one hundred and eleven 30-100 dollars. For hardware. [Signed.] John McGill." Said check was thereafter paid by said lumber company, and the following indorsement made thereon: "Paid Oct. 2, 1907. Lane-Potter Lbr. Co., Ltd." The checks issued by McGill covered the months of October, November, and December. The evidence also shows that the Lane-Potter Lumber Company had certain control over the lumber camps and business of McGill, as such camps were closed by the order of the appellant.

[1] There is a substantial conflict in the evidence, and under the well-established rule of this court, where such conflict exists, the verdict of the jury will not be disturbed. After a careful examination of all the evidence, we are fully satisfied that it is sufficient to support the verdict of the jury.

[2] We have examined with considerable care the errors assigned with regard to the admission and rejection of certain testimony offered, and do not find any reversible error in the rulings of the court in that regard; and, taking all of the instructions to-

gether, we think they fully and fairly state the law of the case.

We conclude that the court did not err in giving said instructions and in refusing to give certain instructions requested. The judgment will therefore be affirmed, and it is so ordered. Costs of this appeal are awarded to respondent.

STEWART, C. J., and AILSHIE, J., concur.

## HORES v. HORES.

(Supreme Court of Idaho. Dec. 14, 1911.)

### (Syllabus by the Court.)

#### 1. SUFFICIENCY OF EVIDENCE—CORROBORATING TESTIMONY.

*Held*, under the evidence, that there is sufficient corroboration of the testimony of the plaintiff to sustain the findings of fact.

#### 2. SUFFICIENCY OF EVIDENCE—NO ERROR.

*Held*, that the court did not err in entering a decree in favor of the plaintiff.

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by Amanda Carrie Hores against Jacob Hores for divorce and to quiet title to certain property. Judgment for plaintiff, and defendant appeals. Affirmed.

Jas. A. Wayne, for appellant. Walter H. Hanson, for respondent.

SULLIVAN, J. This action was commenced by plaintiff for the purpose of securing a divorce from the defendant and of having the title to certain property quieted in her. The divorce was sought on two grounds: First, extreme cruelty; second, adultery. The defendant appeared in the action and filed his answer denying the material allegations of the complaint, except as to the marriage and residence, and filed a cross-complaint in which he charged the plaintiff with adultery and desertion, and asked for a decree of divorce in his favor, and that the plaintiff be required to give defendant a mortgage on her property for the sum of \$700. The action was tried by the court on the 30th day of November, 1910, and the court found that the defendant treated the plaintiff in a cruel and inhuman manner and had contracted a loathsome, venereal disease, but did not find the defendant guilty of adultery as alleged in the complaint, and entered judgment in favor of the plaintiff, granting her a decree of divorce from the defendant and quieting the title to certain property in her. The appeal is from the judgment.

There are two errors assigned: The first to the effect that the court erred in granting plaintiff a divorce, and, second, that the court erred in quieting the title to the property described in the complaint in the re-



spondent; each of said assignments of error being based on the ground of the insufficiency of the evidence to justify the decree.

[1, 2] The main contention of the appellant is that the evidence of the plaintiff was not sufficiently corroborated, as required by the provisions of section 2661, Rev. Codes. On an examination of the evidence we think the corroboration is amply sufficient to sustain the findings made by the court and the decree entered thereon.

The judgment will therefore be affirmed, with costs in favor of the respondent.

STEWART, C. J., and AILSHIE, J., concur.

### PARK v. BRANDT et al.

(Supreme Court of Idaho. Nov. 25, 1911.)

#### (Syllabus by the Court.)

#### 1. SUFFICIENCY OF EVIDENCE—FORMER DECISION FOLLOWED.

Evidence in this case examined, and held to be sufficient to support the verdict of the jury, and approving *Park v. Johnson*, 119 Pac. 52, decided by this court.

#### 2. PRINCIPAL AND AGENT (§§ 104, 156\*)—BILLS AND NOTES (§ 509\*)—AUTHORITY OF AGENT—SUFFICIENCY OF EVIDENCE—GOOD FAITH OF PURCHASER OF NOTE.

In an action upon a promissory note given in payment for the purchase of a stallion, where it appears that the sale of such stallion is made by an agent of the principal, it is proper to show the representations and statements made by such agent where fraud and misrepresentations and breach of warranty are plead as a defense, and the principal is bound by such representations and warranties made by such agent, and such evidence may be considered by the jury in determining the good faith and bona fides in the purchase of such note from such principal, where such purchaser took such note with knowledge of such facts or knowledge of circumstances which would lead a reasonable and prudent man to know such facts at the time such purchase was made.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 294-297, 574-582; Dec. Dig. §§ 104, 156;\* *Bills and Notes*, Cent. Dig. §§ 1740-1745; Dec. Dig. § 509.\*]

#### 3. TRIAL (§ 194\*)—INSTRUCTION—INVASION OF PROVINCE OF JURY.

In an action upon a promissory note, where fraud and breach of warranty are plead as a defense, it is error for the trial court to incorporate as a part of an instruction the following language: "The court charges you as a matter of law that a willful ignorance of facts is as much evidence of bad faith as actual knowledge of the same." By use of this language the court invades the rights and privileges of the jury in determining the weight of the evidence, inasmuch as the court advises the jury that willful ignorance of facts has as much weight as actual knowledge of the same.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 439-441; Dec. Dig. § 194.\*]

#### 4. INSTRUCTION—ERROR NOT PREJUDICIAL.

The instructions in this case examined, and some are erroneous; yet, taken as a whole, no prejudicial error was committed.

#### (Additional Syllabus by Editorial Staff.)

#### 5. BILLS AND NOTES (§ 538\*)—ACTIONS—INSTRUCTION.

In an action by the indorsee of a note, an instruction that, in considering whether or not the plaintiff is a holder in good faith, the jury may consider the fact, if shown in evidence, as to whether the plaintiff has attempted to recover on the note from the indorsers, as he has a right to proceed against the indorsers, and may consider whether the plaintiff knew or was acquainted with the defendants or any of them, was proper, the evidence having shown that the plaintiff was well acquainted with the indorsers, and that they were perfectly responsible.

[Ed. Note.—For other cases, see *Bills and Notes*, Dec. Dig. § 538.\*]

#### 6. TRIAL (§ 235\*)—INSTRUCTIONS—RULES OF EVIDENCE.

In an action on a note, an instruction that the positive statement of the plaintiff as to his actions in purchasing the note is not necessarily to be taken as conclusive, but the jury should consider all of the circumstances and facts known and given in evidence and determine from all of the facts and circumstances, together with the statements of the plaintiff, whether the plaintiff is a bona fide purchaser, is proper.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 539-541; Dec. Dig. § 235.\*]

Appeal from District Court, Kootenai County; R. N. Dunn, Judge.

Action by Howard C. Park against Axel J. Brandt and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Elder & Elder, for appellant. Whitla & Nelson, for respondents.

STEWART, C. J. This is an action upon a promissory note executed by respondents to McLaughlin Bros., and by them indorsed and transferred to appellant. The complaint is in the ordinary form, and alleges that the note sued upon was sold and delivered to the plaintiff for value before maturity, and that the plaintiff is now the owner and holder thereof. The answer puts in issue the allegations of the complaint, and affirmatively pleads fraud, want of consideration, breach of warranty, and false representations on the part of McLaughlin Bros. in the inception of the note. The cause was tried to a jury, and a verdict rendered in favor of the respondents. Judgment was rendered in accordance with the verdict. This appeal is from the judgment, and also from an order overruling the motion for a new trial.

[1] Sixty-one errors are assigned, 32 of which errors relate to the ruling of the trial court in permitting certain questions to be asked plaintiff upon cross-examination. All of these errors were fully discussed and passed upon by this court in *Park v. Johnson*, recently decided by this court, and reported in 119 Pac. 52. In that case the plaintiff was the same as in the case under consideration, and the note in suit was given in payment of the purchase of a stallion sold by the same McLaughlin Bros., and the only

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

difference in the two transactions is the names of the defendants, and in the former case one Wood was the agent of McLaughlin Bros., while in the case now under consideration one Byers was the agent who made the sale. The evidence, however, is practically the same. What this court said in that case applies in this case, and justifies this court in holding that the evidence in this case is sufficient to support the verdict of the jury, and that the trial court committed no error in his ruling upon the questions asked the plaintiff upon cross-examination, and that such inquiries were proper cross-examination, and that the evidence was relevant, competent, and proper.

In principle we think the case of *City National Bank v. Jordan*, 139 Iowa, 499, 117 N. W. 758, and the case of *Citizens' Savings Bank v. Houtchens* (Wash.) 116 Pac. 866, support the decision of this court. These two cases to which reference has thus been made were cases in which the courts were dealing with promissory notes executed to the same McLaughlin Bros., who were payees of the note involved in this case, and were given under the same circumstances and in like cases as the case now under consideration. These cases are likewise supported in many of the questions involved by the following cases where the same McLaughlin Bros. were payees of the notes, and such notes were given under circumstances very much like the one now under consideration: *Hallowell v. McLaughlin Bros.*, 136 Iowa, 279, 111 N. W. 429; *Union National Bank v. Windsor*, 101 Minn. 470, 112 N. W. 999, 118 Am. St. Rep. 641; *Hallowell v. McLaughlin Bros.* (Iowa) 121 N. W. 1039. A reading of these cases will throw much light upon the transactions of the McLaughlin Bros. and their relationship with persons who had purchased promissory notes given to McLaughlin Bros. under the same circumstances and for like payment as the case now under consideration, and discuss many legal questions which are interesting and of value in such cases, and all of which we think clearly hold that promissory notes given under the circumstances discussed by this court in the cases of *Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525, and *Park v. Johnson*, supra, and the present case, are tainted with fraud in their inception, and that a purchaser of such notes under like circumstances is not a holder in good faith before maturity.

[2] Assignments of error from 32 to 42 relate to the action of the court in allowing evidence, in regard to fraudulent representations made by Byers, the agent of McLaughlin Bros., made to defendants at the time their signatures were procured to the note. We think the court did not commit any error in allowing this evidence. Byers was the agent of McLaughlin Bros. It was he who negotiated the sale to the defendants, and it was his representations as the agent and representative of McLaughlin Bros. that induced

the defendants to execute the note sued upon; and it was perfectly proper to introduce evidence showing the representations made by Byers at the time the sale was made and the note was executed and their falsity, as McLaughlin Bros. were responsible for the representations made by Byers in the course of his employment and while acting as such agent; and the plaintiff in this case, as the purchaser of said note from McLaughlin Bros., is bound by such representations the same as McLaughlin Bros. would be bound, provided the plaintiff was not a purchaser in good faith and before maturity, and this question was one for the jury to determine. *Shellenberger v. Nourse*, 118 Pac. 508.

Assignments of error Nos. 42 to 49, inclusive, relate to the action of the trial court in refusing to give certain instructions requested by the plaintiff. We shall not discuss these requested instructions. The cases of *Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525, and *Park v. Johnson*, heretofore referred to, fully discuss the questions involved in these requested instructions, and we are satisfied that the trial court committed no error in refusing to give them.

Counsel for appellant contend that the trial court erred in adding to the definition of a holder in due course, as provided by the statute, certain explanations and modifications thereof. This same objection was urged in the case of *Park v. Johnson*, supra, and passed upon and the instruction disapproved, but held not prejudicial error, and the court again disapproves said instruction, but holds that the same was not prejudicial error when taken into consideration with the other instructions given by the trial court.

[5] Objection is also urged to instruction No. 14 given by the trial court. This instruction reads as follows: "The court instructs the jury that, in considering the question whether or not the plaintiff is a holder of the instrument sued on in good faith, you may consider the fact, if shown in evidence before you, as to whether or not the plaintiff has attempted to recover on the promissory note from the indorsers—that is, McLaughlin Bros.—as he has a right to proceed against McLaughlin Bros. as the indorsers of the said promissory note to recover the amount due thereon from the indorsers. You may also consider as to whether or not, if given in evidence before you, the plaintiff knew or was acquainted with the defendants, or any of them."

We have discussed in the case of *Park v. Johnson*, supra, the right to show by evidence in this class of cases whether the plaintiff has attempted to recover on the promissory note from the indorsers, McLaughlin Bros., as a circumstance which may be taken into consideration by the jury in determining the question of good faith of the plaintiff in purchasing the note from McLaughlin Bros. in connection with all the facts in the case, and we think it is proper

in such cases that the jury may take into consideration the fact that the plaintiff was well acquainted with McLaughlin Bros., the indorsers, and knows them to be perfectly responsible upon the note purchased, but notwithstanding such fact, upon default of payment, brings suit against the makers of the note who are strangers to him, and with whose financial responsibility the plaintiff is unacquainted, and consider such facts in determining whether or not the plaintiff was a purchaser in good faith and before maturity. For this reason this instruction is not error.

[3] Exception is also taken to instruction No. 15. This instruction reads as follows: "The court instructs the jury that if you find from the evidence in this action that the plaintiff, Howard C. Park, prior to the time he claims to have purchased the note in controversy, had purchased other notes from McLaughlin Bros., and had controversy over said notes, and had been compelled to commence action against the makers to collect the same, and in such actions the defense of fraud in the inception of the note, or securing the note by false and fraudulent representations, has been set up, and that plaintiff knew that such defenses were being made to the notes secured by McLaughlin Bros. for the sale of stallions, and made no inquiry regarding the note in controversy whatever, such facts may be considered by you in determining whether the plaintiff is a holder in good faith, and the court charges you as a matter of law that a willful ignorance of facts is as much evidence of bad faith as actual knowledge of the same." The latter part of said instruction is clearly erroneous, and should not have been given. It is as follows: "And the court charges you as a matter of law that a willful ignorance of facts is as much evidence of bad faith as actual knowledge of the same." We do not believe that a person purchasing a promissory note is placed in a position where he cannot recover unless he fully investigates all the facts in relation to the execution of such promissory note, or, if he does not do so, he is guilty of bad faith the same as though he had actual knowledge of such facts. What the plaintiff was required to do was to exercise such care as an ordinarily prudent man would do under like circumstances, but the mere willful ignorance of facts would not necessarily establish bad faith in the purchaser, even though it be shown that there was fraud in the execution of such note. If the facts, however, are such as would lead an ordinarily prudent man to investigate, and an investigation is not made, then such failure may be taken into consideration in determining whether the purchase was made in good or bad faith. But the mere fact that the plaintiff was ignorant of such facts, even though willfully,

is not equivalent to active knowledge of such facts. By this language the court invades the rights and privileges of the jury in determining the weight of the evidence, for in this language the court advises the jury that willful ignorance of facts has as much weight as actual knowledge of the same. The weight of the evidence is a question purely for the jury, and not for the court; and the trial court should refrain in the instruction from advising the jury as to the weight of the evidence. The instruction, however, taken in connection with the other instructions in the case, we think was not prejudicial error.

[8] Objection is also made to the giving of instruction No. 17, as follows: "The court instructs the jury that the positive statement of the plaintiff as to his actions in purchasing the note in question are not necessarily to be taken as conclusive by the jury, but you should consider all of the circumstances and facts known and given in evidence, and determine from all of the facts and circumstances surrounding the alleged purchase, together with statements of the plaintiff, as to whether or not the plaintiff is such bona fide purchaser." We see no objection to this instruction. It seems to comprehensively advise the jury that the positive statements of the plaintiff in relation to the purchase of the note are not conclusive, and that the jury may consider all the circumstances and facts known and given in evidence, and from such facts and circumstances, together with the statements of the plaintiff, determine whether the plaintiff was a bona fide purchaser. We think this is a correct statement with reference to the duty of the jury to determine from the evidence the weight and effect of the plaintiff's statements.

[4] Other instructions have been excepted to, some of which should have been omitted, but in view of the rule announced in the cases of *Winter v. Nobs* and *Park v. Johnson*, supra, we do not believe them prejudicial error.

The judgment is affirmed. Costs awarded to respondents.

AILSHIE and SULLIVAN, JJ., concur.

VAUGHN v. JOHNSON et al.  
(Supreme Court of Idaho. Nov. 27, 1911.)

(Syllabus by the Court.)

1. DEPOSITIONS (§ 101\*)—USE AS EVIDENCE—ORDER OF INTRODUCTION.

Where the evidence of a witness is taken by deposition after notice given as provided by statute, and the adverse party neglects to appear and cross-examine the witness, and thereafter gives notice in conformity with law of the taking of the deposition of the same witness, and in pursuance of such notice takes the dep-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

osition of such witness and in so doing cross-examines the witness on the deposition previously given by him, it is erroneous procedure to admit the later deposition as a part of plaintiff's case and before defendant has opened his side of the case. The party taking such deposition should be required to withhold the same, and introduce it as a part of his defense in making his own proofs.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 237-241; Dec. Dig. § 101.\*]

**2. BILLS AND NOTES (§§ 497, 525\*)—ACTIONS—BURDEN OF PROOF—GOOD FAITH OF PURCHASER.**

Mere evidence of fraud or deception in procuring a negotiable promissory note which is fair and regular on its face is not sufficient to raise a presumption of bad faith against the purchaser of such paper in due course, nor should such fact be given any consideration by a jury in determining the other fact, namely, that the holder of the instrument had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675-1687, 1832-1839; Dec. Dig. §§ 497, 525.\*]

**3. BILLS AND NOTES (§§ 497, 509, 525\*)—ACTIONS—BURDEN OF PROOF—GOOD FAITH OF PURCHASER.**

Evidence of fraud in procuring the execution of a negotiable instrument shifts the burden of proof as to the good faith of a purchaser thereof before maturity and is admissible for that purpose, but of itself in no way tends to establish bad faith on the part of such purchaser.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1675-1687, 1740-1745, 1832-1839; Dec. Dig. §§ 497, 509, 525.\*]

**4. BILLS AND NOTES (§ 339\*)—GOOD FAITH OF PURCHASER—CARE REQUIRED.**

Those who execute negotiable paper and set it afloat are chargeable with a much higher degree of diligence and caution than is chargeable to those who purchase such paper in due and regular course of business.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 339.\*]

**5. BILLS AND NOTES (§ 339\*)—GOOD FAITH OF PURCHASER—CARE REQUIRED.**

The purchaser of negotiable paper in due course, and before maturity, is under no duty to make inquiry as to the title to such paper, fair, and regular on its face, nor is he under any duty to inquire into the consideration given for the note or of the transaction out of which it arose. He is only chargeable with facts which actually come to his knowledge; that is, actual knowledge of a defect in the title, want of consideration, or such facts as would constitute a defense to the note as between the maker and original payee, or actual knowledge of such facts and circumstances as would lead an honest and fair business man to make further inquiry and which inquiry if made would lead to the discovery of the fraud, defect, and defenses.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 821-823; Dec. Dig. § 339.\*]

**6. BILLS AND NOTES (§ 538\*)—ACTIONS—INSTRUCTIONS.**

An instruction to the jury that, if they find from the facts of the particular transaction "or knowledge of other like transactions of McLaughlin Bros. that the plaintiff is not acting honestly, then they had a right to find that he did not act honestly in the purchase of this note," was erroneous, in that it authorized the

jury to infer that the purchase of a negotiable instrument was fraudulent where they found that such purchaser had subsequently done some act they did not consider honest and fair.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 538.\*]

**7. COSTS (§ 154\*)—ITEMS—DEPOSITION.**

Where a party failed to appear at the time and place designated in a notice for taking deposition and cross-examine the witness, and thereafter duly and regularly served notice of the taking of the deposition of the same witness, and in pursuance thereof took the deposition of such witness which consisted of a cross-examination of the witness on the deposition previously given, the costs and expense of taking such subsequent deposition should not be allowed as a part of the costs of the case.

[Ed. Note.—For other cases, see Costs, Dec. Dig. § 154.\*]

Stewart, C. J., dissenting in part.

Appeal from District Court, Kootenai County; R. N. Dunn, Judge.

Action by Edgar J. Vaughn against J. P. Johnson and others. From a judgment for defendants, plaintiff appeals. Modified and affirmed.

Reed & Boughton and Elder & Elder, for appellant. Whitla & Nelson, for respondents.

**AILSHIE, J.** The motion to dismiss the appeals in this case must be denied, and it is so ordered. On the 29th day of March, 1906, the respondents herein executed and delivered their promissory note to McLaughlin Bros. as part payment of the purchase price of a stallion. Thereafter and prior to the maturity of the note and on about the 5th day of February, 1910, McLaughlin Bros. sold and delivered the note to the appellant herein, who thereafter commenced this action against the makers for the collection of the principal and interest thereon. The case was tried before a jury, and a verdict was rendered for the defendants, and a judgment was thereupon entered accordingly.

A large number of errors have been assigned, but most of the questions presented have been considered by this court and passed upon in *Winter v. Nobe*, 19 Idaho, 18, 112 Pac. 525, and *Park v. Johnson*, 119 Pac. 52. We will therefore only consider such questions as have not received consideration in the foregoing cases.

[1] It seems that the deposition of the appellant was taken in conformity with the statute at Columbus, Ohio, on the 3d day of February, 1911; that at the time of the taking of the deposition no one appeared on behalf of the respondents and no cross-examination was had. Thereafter, and about the 27th of March, the attorneys for the defendants served notice on the attorneys for plaintiff that they would take the deposition of the plaintiff at Columbus, Ohio, on the 6th day of May following. The deposition was thereafter taken in conformity with the notice. When this deposition was taken, however, on the part of the defendants, it

was taken as if it were a cross-examination of the witness on his previous deposition. The questions were propounded in the form of cross-examination, and the witness' attention was called to the evidence previously given by him. When the case came on for trial, the plaintiff introduced the deposition containing the evidence he had first given. Before the plaintiff rested his case, the defendants offered "deposition on cross-examination." The plaintiff's counsel objected to the introduction of this deposition as a deposition on cross-examination, and insisted that, if it be admitted at all, it should go in as a part of defendants' evidence when they came to make their defense. The court overruled the objection and admitted the deposition, and the appellant now urges the ruling as erroneous. We think as a matter of procedure it was error for the court to admit this deposition as a part of the plaintiff's case. While it was taken on the theory that it was a cross-examination of a witness and was in fact so treated, it had not been taken at the time and in the manner authorized for the cross-examination of the witness. If the defendants failed and neglected to appear at the time noticed and cross-examine the witness, it was their own fault. If, on the other hand, they saw fit to take the deposition of the witness for their own use as a part of their own case, they had a right to do so, but they should have been compelled to introduce this evidence as a part of their own case. We do not think, however, that the error thus committed calls for a reversal of the judgment. Had the plaintiff been non-suited after the introduction of this deposition and without putting the defendants on their defense, there might be some merit to the contention made by the appellant, and there might be prejudicial error under such circumstances. In the case at bar, however, the bulk of the record consists of evidence introduced on the part of the defendants, and so the jury had the entire case before them for their consideration.

[2] It is contended that the court erred "in admitting the evidence of the defendants' witnesses which tended to show the condition of the horse and the alleged fraud surrounding the inception of the contract upon which the note was based." In other words, the appellant contends that evidence of failure of consideration or fraud in procuring the note could not properly go to the jury and had no bearing on the case, unless the defendants could successfully show that the plaintiff who purchased the note before maturity either "had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith." This contention is substantially correct. *Winter v. Nobs*, 19 Idaho, 26, 112 Pac. 527. The difficulty, however, with which appellant is confronted in the case at bar is that the facts and circumstances in the present case tending to

show "actual knowledge" and "bad faith" were sufficient to go to the jury, and were likewise sufficient to justify them in concluding and finding as a matter of fact that the plaintiff either had actual knowledge of the fraud and deception that had been practiced and the infirmity in the instrument, or had knowledge of such facts and circumstances that would have led him, if acting in good faith, to ascertain the true situation. The frequency with which these cases are arising and finding their way into this court leads us to suggest that mere evidence of fraud or deception in procuring negotiable promissory notes which appear fair on their face is not sufficient to raise any presumption against the purchaser of such paper; nor should such facts be given any consideration whatever by a jury in determining the other fact, namely, *that the holder of the instrument had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith. This latter fact is an independent fact, which must be determined upon evidence wholly independent of the original transaction in which the note was executed.* Bona fide holders of negotiable paper are entitled to absolute protection, and cannot be in the least chargeable with any fraud to which they were not parties that was practiced in procuring the note or in the contract out of which the note arose.

[3] Evidence of fraud in procuring the execution of a note shifts the burden of proof as to good faith, but of itself in no way tends to establish the bad faith of a purchaser of such note.

[4] Those who execute negotiable paper and set it afloat are chargeable with a much higher degree of diligence and caution than is chargeable to those who purchase such paper in the due and regular course of commercial transactions. The frequency with which such defenses as the one set up in this case are being-pleaded reminds us that there is either a grave need of invoking the criminal statutes of this state against persons who are procuring the execution of negotiable paper through fraud, deception, and misrepresentation, or else there is gross negligence on the part of many who are executing such paper, and sending it broadcast in the channels of commerce.

The appellant has assigned a great many errors against the action of the court in admitting certain evidence offered by respondents. We have examined the record in this respect, and do not think there was any prejudicial or substantial error committed by the court in the admission of evidence. These questions have all been considered and passed upon in *Park v. Johnson* and *Winter v. Nobs*, supra.

[5] The appellant has assigned as error the action of the court in giving a number of instructions, and in modifying certain instructions requested by the appellant. We

shall only notice two of these instructions. Instruction No. 22 is, to say the least, misleading, and we do not think should be given in such a case. It is as follows: "The court instructs the jury that a person who in purchasing negotiable paper willfully remains ignorant of facts which are apparent from the transaction, or refrains from making inquiry lest he should become possessed of knowledge of infirmities in the title of the paper which he is about to purchase, shows lack of good faith, and a plaintiff cannot say that he did not know the facts regarding the title of negotiable paper when such lack of knowledge is predicated upon an evasion of plain duty, and you have a right to consider all of the facts and circumstances surrounding the alleged purchase of this note in determining whether or not the plaintiff willfully refrained from making inquiry regarding the title of McLaughlin Bros. to the note in controversy in order not to learn anything regarding their title thereto, and the court charges you that willful ignorance, if it be shown by the evidence, involves bad faith, and is as binding upon the plaintiff as a positive knowledge of the defendants' title would have been." The foregoing instruction is calculated to mislead a jury. They are likely to infer from such an instruction that the purchaser of a negotiable instrument cannot "willfully refrain from making inquiry regarding the title" to a note he is about to purchase; in other words, that it is the duty of such a purchaser to always make inquiry as to the title. Such is not the law. The purchaser of negotiable paper in due course, and before maturity, is under no duty to make inquiry as to the title to paper, fair and regular on its face, nor is he under any duty to inquire into the consideration given for the note or of the transaction out of which it arose. *McNight v. Parsons*, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265. He is only chargeable with facts which actually come to his knowledge. Those facts may be *actual knowledge of a defect in the title, want of consideration, or such facts as would constitute a defense* to the note as between the maker and original payee; or *actual knowledge of such facts and circumstances* as would lead an honest and fair business man to make further inquiry and which inquiry if made would lead to the discovery of the fraud, defect, and defenses. In other words, it must be such actual knowledge of the *defenses* or such actual knowledge of *facts and circumstances* that a failure to make further inquiry would charge a reasonably prudent business man with bad faith and dishonest motives. *Winter v. Nobs*, 19 Idaho, 18, 112 Pac. 525; *Park v. Johnson*, 119 Pac. 52; *Bothwell v. Corum*, 135 Ky. 766, 123 S. W. 291. The first part of the instruction with which we are dealing proceeded upon the correct view of the law, but

the vice is to be found in the closing part of the instruction. In view of the fact, however, that the court had correctly instructed the jury on this subject and in consideration of the nature of the evidence that was submitted to the jury, we are satisfied that the jury were not misled in this respect.

[6] The other instruction which we think was erroneous is No. 28, and is as follows: "The question of honesty of the plaintiff in this transaction is one of the things by which you are to be guided in determining his bona fides, and if you find from the facts and circumstances given in evidence surrounding this transaction, and the knowledge of the plaintiff or other like transactions of McLaughlin Bros., if shown in evidence, that the plaintiff is not acting honestly, then you have a right to find that he did not act honestly in the alleged purchase of this note." This instruction advised the jury that, if they found from the facts of this particular transaction "or knowledge of other like transactions of McLaughlin Bros. that the plaintiff is not acting honestly, then they had a right to find that he did not act honestly in the purchase of this note." This was erroneous. The jury might conclude that the holder of a note had acted dishonestly with the maker in some respect, as, for example, a failure to make the proper indorsement of interest or principal paid, or a failure to defer bringing a suit for a given length of time, or in any number of respects, and yet there be no evidence whatever that he acted dishonestly or in bad faith in the purchase of the note itself. However dishonestly the purchaser of a note may have acted subsequent to the purchase thereof that fact alone would not justify the conclusion that he acted in bad faith or dishonestly in the purchase of the note.

[7] The appellant has also prosecuted an appeal from the order of the district court in taxing costs. It appears that the respondents claimed costs in the sum of \$15.15 for taking the deposition of appellant which has been hereinbefore considered. The specific items for which this \$15.15 is charged do not appear in the memorandum of costs. The cost bill reads: "Expenses in securing deposition of Edgar J. Vaughn for notary fee, stenographer, securing attendance of witness, swearing witness, and return of witness and transcribing testimony." In the first place, this is not properly itemized to show what was a legal charge and what was not; and, in the second place, this extra expense was incurred by reason of the failure of the defendants to appear at the time and place specified when and where the deposition was taken and cross-examine the witness. This also entailed extra trouble and expense on the plaintiff in attending and having counsel present a second time for the taking of this deposition. For these reasons this item should have been stricken

from the cost bill, and it will be so ordered.

We do not think that any error which has been committed is of such a nature or character as to require a reversal of the judgment. From a view of the whole record, we are satisfied that the same result would have been obtained and the same conclusion would have been reached by the jury had the errors hereinbefore pointed out not been committed, and we are satisfied that the evidence adduced in this case justified the verdict returned. The judgment should therefore be modified to the extent of striking therefrom the item of \$15.15 taxed as costs, and, as so modified, is hereby affirmed. Costs of appeal will be equally divided between appellant and respondents.

Cause remanded, with directions to modify the judgment as herein indicated.

SULLIVAN, J., concurs.

STEWART, C. J. (dissenting). I concur in the majority opinion upon the merits of the case, but I dissent to that portion of the opinion in relation to the costs disallowed for the taking of the deposition for cross-examination of Edgar J. Vaughn, the plaintiff, and also in dividing the costs upon this appeal.

The only record presented to this court as to the costs for taking the cross-examination of Edgar J. Vaughn consists in the cost bill itself and the affidavit supporting the same made by E. V. Boughton, and the affidavit of E. B. Whitla in opposition thereto. The item as shown upon the cost bill is as follows: "Expense in securing deposition of Edgar J. Vaughn for notary fee, stenographer, securing attendance of witness, swearing witness, return of witness and transcribing testimony, \$15.15." This court disallows this item. It appears from the transcript that this item was incurred in taking the second deposition upon the cross-examination of the witness Vaughn. The evidence of said Vaughn so taken by a deposition was admissible, and considered proper, relevant, material, and proper cross-examination, and properly admitted in evidence at the trial. That being true, it should make no difference in the allowance of the expense of same as costs whether it was taken at the same time that the original deposition was taken or afterward, because, if taken when the original deposition was taken, the same expense would necessarily have been incurred in taking and certifying the same by the stenographer, and would have been a proper charge as costs in said case, and, if such evidence was proper and thereafter taken and the same expense incurred, I can see no reason why the same should be disallowed as costs of the trial. It is admitted in the evidence of E.

V. Boughton, filed in support of the motion to retax, that at least \$6 could properly be taxed as such costs of said deposition, and, under this admission, there can be no reason given that I can see why at least \$6 should not be allowed. The only additional costs that necessarily were incurred in cross-examining the witness at a time different from the time when the deposition was originally taken was in swearing the witness and certifying to his testimony by the notary. The act of the notary in writing down the questions and answers was the same as would necessarily have been incurred had such examination been taken at the time the original deposition was taken, and would have been properly chargeable as costs.

I am unable, also, to concur in the majority opinion which divides the costs of this appeal between plaintiff and respondents. The main appeal upon the merits of this case is decided in the majority opinion in favor of the defendants, while upon the appeal from the order overruling the motion to retax the costs the order of the trial court is modified and the item of \$15.75 is disallowed. The transcript consists of 237 pages, 210 of which contains the record of the appeal upon the merits, while only 10 pages of the transcript is devoted to the question of the appeal from the order of the trial court refusing to retax the costs, and, even allowing the record containing the cross-examination of the witness Vaughn as a necessary part of the appeal from the order, the total record thus made would be 27 pages, making at most the record on appeal from the order 27 pages. Yet the majority opinion taxes the respondents with half the costs of this appeal when the record necessary to have presented the appeal from the order was only 27 pages, while the record upon the merits, which also necessarily includes the deposition of the same witness, amounts to 237 pages, and yet the appellant is only charged with costs upon this appeal the same as is charged to the respondent. I cannot agree with this principle of adjustment of costs. To my mind it is unfair and unjust, and may often lead to injustice in disposing of the question of costs.

#### WINTER v. HUTCHINS et al.

(Supreme Court of Idaho. Dec. 9, 1911.)

##### (Syllabus by the Court.)

#### 1. BILLS AND NOTES (§ 509\*) — EVIDENCE — BONA FIDE PURCHASER.

Where the issue to be determined is the good faith of the holder of a negotiable promissory note who claims to have purchased the same for a valuable consideration before maturity and without notice of any defenses existing between the makers and payee, and the holder of such note testifies that he paid a specified sum for the note, it is competent for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

him to introduce in corroboration of such testimony the canceled check which he claims to have given in payment for such note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1740-1745; Dec. Dig. § 509.\*]

## 2. BILLS AND NOTES (§ 537\*)—BONA FIDE PURCHASER—QUESTION FOR JURY.

The question as to the good faith of the purchaser of a negotiable promissory note who claims to have purchased the same in due course before maturity and for a valuable consideration is a question of fact, to be determined by the jury in the light of all the facts and circumstances bearing upon the transaction.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1862-1864; Dec. Dig. § 537.\*]

## 3. APPEAL AND ERROR (§ 999\*) - REVIEW - VERDICT.

Evidence examined, and *held* sufficient to warrant the jury in returning a verdict in favor of the plaintiff.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912-3924; Dec. Dig. § 999.\*]

Appeal from District Court, Bonner County; Robert N. Dunn, Judge.

Action by Bert Winter against Charles Hutchins and others. Judgment for plaintiff, and defendants appeal. Affirmed.

E. W. Wheelan, for appellants. Myrvin Davis, for respondent.

AILSHIE, J. This action was prosecuted by the indorsee of a promissory note. The defendants admitted the execution of the note, but denied the delivery of the note, and alleged fraud in procuring the execution thereof, and charged that the plaintiff had notice of these defenses before purchasing the note. A verdict was returned by the jury in favor of the plaintiff, and judgment was thereupon entered. Defendant moved for a new trial, and appealed from the judgment and an order denying his motion.

The only question arising on this appeal is as to the admissibility of certain evidence and the sufficiency of the evidence in its entirety to support the verdict. It is first claimed that the evidence is insufficient to show that any consideration was paid by the respondent for this note. The respondent, who was the plaintiff in the lower court, testified as follows: "I am acquainted with T. D. McLaughlin of McLaughlin Bros. On February 8, 1908, I purchased from them the note of George W. Walker and others, with other notes. Exhibit A is the note I refer to. I paid \$750 for this note. Exhibit C is my check for \$750 payable to McLaughlin Bros., and drawn upon the National Bank of Commerce in Minneapolis, Minn., given in payment of the George W. Walker note." The check referred to as Exhibit C is a check drawn by the respondent on the National Bank of Commerce, Minne-

apolis, in favor of McLaughlin Bros. for \$750. It is stamped "Paid" in perforated letters. It is also stamped on the face thereof with a rubber stamp, "Paid February 8, 1908," which is two days after the date on which it appears to have been drawn. T. D. McLaughlin testified that his firm sold this note to respondent, and that they received the check (Exhibit C) in payment for the note, and that he thereupon deposited the check in the National German-American Bank on February 7, 1908, which was the following day after it was drawn, and received credit for the same. This evidence is not contradicted, but it is claimed that it is not sufficient to support the verdict. We cannot agree with the appellants' contention in this respect. Respondent had testified unequivocally to paying \$750 for the note.

[1] The canceled check, to the admission in evidence of which appellants objected, was evidently introduced as mere corroboration of the testimony of the witness, showing the manner in which the payment was made and the channel through which the money passed. It was clearly admissible for that purpose. If the appellants had any question about the correctness of this evidence, they could have traced the matter through these banks, and ascertained if the evidence given was in any particular incorrect. Respondent also testified that he had no knowledge or information whatever as to any defect in the title or any fraud practiced in procuring the note or any defenses existing between the makers and the payees.

[2] We may say with reference to the proofs made in this case, as we said in the case of Winter v. Nobs, 19 Idaho, 18, 112 Pac. 525, that, "whatever the circumstances may have been, it still remains true that the question of the good faith of the purchaser of the note was one of fact instead of law, and the jury had the right to determine it in the light of all the facts and circumstances presented in the case."

[3] The jury having passed upon the facts and found in favor of the respondent, and there being evidence on all the material issues which tended to support the respondent's position and theory of the case, we would not be justified in disturbing the verdict. We have recently and at the present term of this court had occasion to express the view of the court on the questions presented in this case in the following cases: Park v. Johnson, 119 Pac. 52; Park v. Brandt, 119 Pac. 877; and Vaughn v. Johnson, 119 Pac. 879.

The judgment must be affirmed, and it is so ordered. Costs awarded in favor of respondent.

STEWART, C. J., and SULLIVAN, J., concur.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



## UNFRIED et ux. v. LIBERT.

(Supreme Court of Idaho. Dec. 5, 1911. On Petition for Rehearing, Jan. 5, 1912.)

*(Syllabus by the Court.)***1. TIME FOR APPEAL.**

*Held*, the appeal was taken within the time provided by the statute and the rules of this court.

**2. ACTION (§ 48\*)—JOINDER OF CAUSES.**

Under the provisions of Rev. Codes, § 4169, several causes of action, all arising out of the same transaction, may be united in the same action, and allegations showing separate items of damages growing out of the same facts may be alleged as a part of the same cause of action.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 490-510; Dec. Dig. § 48.\*]

**3. TRIAL (§ 109\*)—PLEADING (§ 380\*)—ARGUMENT OF COUNSEL—ISSUES AND PROOF.**

Where objectionable and improper matters are alleged in a complaint and are stricken from such complaint because the same do not constitute any part of the cause of action, and are of such character as would prejudice the jury against the defendant, it is error for the trial court to permit counsel to discuss or comment upon such matters in his opening statement to the jury, and it is error also to admit evidence in relation to such matters.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 270; Dec. Dig. § 109.\* Pleading, Cent. Dig. § 1245; Dec. Dig. § 380.\*]

**4. TROVER AND CONVERSION (§ 46\*)—MEASURE OF DAMAGES—MARKET VALUE.**

Where personal property is seized and taken possession of unlawfully and without authority of law and is thereafter retained and converted to the use and benefit of the person taking such possession, in an action for damages by the owner of such property for conversion of the same, the plaintiff is entitled to recover, as a general rule, the market value of such property at the time the same was taken.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 263; Dec. Dig. § 46.\*]

**5. CHATTEL MORTGAGES (§ 169\*)—CONVERSION OF PROPERTY—DAMAGES—VALUE OF PROPERTY.**

Where U. and U. give a mortgage to L. upon certain sheep consisting of "1,200 head of ewe sheep and the increase thereof and 300 head of two year old wether sheep," and L. commences proceedings to foreclose said mortgage and applies to the court for the appointment of a receiver, and such receiver takes possession of said mortgaged property and holds the same for L., and the court thereafter revokes the order appointing said receiver, and such receiver thereafter continues in possession of said mortgaged property for L., and L. retains possession of said personal property until judgment is obtained in said foreclosure proceedings and execution issued, and levy is made upon a portion of said mortgaged property, and the same is sold and applied upon the foreclosure judgment, and the portion of the property not levied upon is not returned to U. and U. and no account is given of the same, U. and U., in an action for conversion, may recover the market value of the property so taken and unaccounted for.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 302-304; Dec. Dig. § 169.\*]

**6. DAMAGES (§ 91\*)—EXEMPLARY OR PUNITIVE DAMAGES—GROUNDS.**

Exemplary or punitive damages cannot be recovered unless the evidence shows clearly that the action of the wrongdoer is wanton or gross or outrageous, or where the facts are such as to imply malice and oppression.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 193-201; Dec. Dig. § 91.\*]

**7. CHATTEL MORTGAGES (§ 176\*)—CONVERSION OF PROPERTY—EVIDENCE—WEIGHT AND SUFFICIENCY.**

The evidence in this case examined, and *held* not to show willful malice or fraud or gross negligence on the part of the appellant in the taking of the property, the value of which is sought to be recovered in this action.

[Ed. Note.—For other cases, see Chattel Mortgages, Dec. Dig. § 176.\*]

*(Additional Syllabus by Editorial Staff.)*

## On Petition for Rehearing.

**8. APPEAL AND ERROR (§ 1151\*)—DISPOSITION OF CAUSE—NECESSITY FOR NEW TRIAL.**

Though Rev. Codes, § 3818, authorizes the Supreme Court to modify any order or judgment appealed from, yet where the jury in an action for conversion were erroneously authorized to award punitive damages, and the evidence as to the actual damages is confused and uncertain, the court will remand the cause for new trial rather than enter judgment for a less amount.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4498-4506; Dec. Dig. § 1151.\*]

Appeal from District Court, Nez Perce County; E. D. Steele, Judge.

Action by Fred Unfried and wife against William A. Libert for the conversion of personal property. From a judgment for plaintiffs, defendant appeals. Reversed, and new trial ordered.

Charles L. McDonald and B. F. Tweedy, for appellant. I. N. Smith, James L. Harn, and Clay McNamee, for respondents.

STEWART, C. J. October 23, 1905, the respondents, Fred Unfried and Sylvia Unfried, borrowed from the appellant, William A. Libert, the sum of \$5,000, and executed therefor three certain promissory notes, all dated on the said 23d of October, 1905, as follows: \$1,000, due June 15, 1906, drawing interest at 12 per cent.; one note for \$2,000, due June 15, 1907, drawing interest at 12 per cent.; and one note for \$2,000, due June 15, 1908, drawing interest at 12 per cent. And to secure said notes the respondents executed to the appellant a chattel mortgage upon personal property located in Garfield county, state of Washington. The property in the mortgage was described as follows: "1,200 head of ewe sheep and the increase thereof; 300 head of two year old wether sheep; the said sheep having been purchased from Hamilton Gill. All of such sheep are in possession of the parties of the first part at Alpawai, Washington, and will be ranged on the Alpawai creek in winter, and in the Blue Mountains in summer. All of said sheep to be branded □ ."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

The chattel mortgage contained the following provisions: "Provided, nevertheless, and these presents are upon the express condition, that if the said parties of the first part, their executors, administrators or assigns, shall well and truly pay unto the said party of the second part, his executors, administrators or assigns, the sum of \$5,000, according to the conditions of three certain promissory notes, of which the following are true copies \* \* \* as by said promissory notes, reference being thereunto had, may fully appear, then these presents shall be void. But in case default be made in the payment of said principal sum of money or any part thereof, or interest, or any installment thereof, as provided in said note, or in case said first party does not take proper care of said property or attempts to sell or dispose of the same, or remove the same, or any part thereof, from said county, then and from thenceforth it shall be optional with the party of the second part, his executors, administrators or assigns, to consider the whole of said principal and interest expressed in said notes as immediately due and payable, although the time expressed in said notes for the payment thereof shall not have arrived; and immediately thereupon and without notice of such election to consider the whole sum to be due, and it shall be lawful for, and the said parties of the first part do hereby authorize and empower the said party of the second part, his executors, administrators or assigns, with the aid and assistance of any person or persons, to enter the premises or such other place or places as the said goods or chattels are or may be placed, and to take or carry away the said goods and chattels and dispose of the same for the best price they can obtain by due process of law, or by arrangement of the said parties to this mortgage. \* \* \*

If this mortgage be foreclosed by decree of court, or if it be foreclosed by notice and sale, then counsel fees in the sum of a reasonable amount of dollars. \* \* \* And until default be made in the payment of this sum of money, the said parties of the first part, their executors, administrators and assigns, may remain and continue in the quiet and peaceable enjoyment of the said goods and chattels, and in full and free use and enjoyment of the same."

A mortgage was also executed by the respondents to the appellant as additional security, upon certain real estate in Garfield county, Wash. As a part of said loan, the respondent Fred Unfried also executed an additional promissory note dated October 25, 1905, for \$1,000, due March 15, 1906, with interest from maturity at 12 per cent. per annum. This latter note, however, was not included within the chattel mortgage.

On April 17, 1906, the appellant commenced an action in the superior court of Garfield county, Wash., for the foreclosure of the chattel mortgage given him as herein de-

scribed, and as part of his cause of action set forth the following provisions of said chattel mortgage: "In case said first party does not take proper care of said property, or attempts to sell or dispose of the same, or removes the same or any part thereof from said county, then and from thenceforth, it shall be optional with the said party of the second part, his executors, administrators or assigns, to consider the whole of said principal and interest expressed in said notes as immediately due and payable, although the time expressed in said notes for the payment thereof shall not have arrived, and immediately thereupon, and without notice of such election, to consider the whole sum to be due, and it shall be lawful for, and the said parties of the first part do hereby authorize and empower the said party of the second part, his executors, administrators or assigns, with the aid or assistance of any person or persons, to enter the premises or such other place or places as the said goods or chattels are or may be placed, and take or carry away the said goods and chattels, and dispose of the same for the best price they can obtain," etc. It is also alleged: "That the said parties of the first part since the date of the execution of the said mortgage, without the wish or consent of the party of the second part, and without his previous knowledge, have sold and disposed of a portion of the said sheep, to wit, about two hundred and sixty head of the sheep described as two year old wether sheep." Plaintiff further alleges: "That under the terms and conditions of the said chattel mortgage aforesaid, the plaintiff herein does hereby elect to consider the whole of the sums owing and paying to him from the defendants herein, as evidenced by said promissory notes together with the interest thereon, to be immediately due and payable."

After said action had been commenced, the appellant filed an affidavit in said action setting forth the provisions of the mortgage, and alleging in said affidavit: "That if the said mortgaged property is allowed to remain longer in the possession of these defendants, the same will be wholly lost and destroyed and plaintiff will be cheated and wronged out of his property. That as provided for in said mortgage and by law under the facts as herein stated, plaintiff has elected and does elect to consider the whole of the amounts as provided for in said promissory notes, together with the interest, to be immediately due and payable."

Upon this affidavit the superior court of Garfield county appointed one T. W. Owsley to take charge of the possession of the property described in the mortgage, and in said order enjoined the defendants from selling or disposing of any or all of said sheep or their increase, and enjoining the defendants and their employes from interfering with or molesting said sheep or their increase. Thereafter a motion was made by the de-

fendants in said court to dissolve and vacate the order appointing a receiver and to dissolve and vacate the restraining order, and upon hearing the court ordered that the motion be sustained and the restraining order and the order appointing a receiver were dissolved, vacated, and set aside for want of jurisdiction and proper notice, and the court found that the defendants had sold a portion of the mortgaged property described in the complaint, and that plaintiff had reason to believe that they would sell more of said property, and therefore ordered that the defendants, during the pendency of the action, be restrained and enjoined from selling and disposing of any or all of said property or their increase, or from removing the same from the state of Washington, and that plaintiff enter into a bond in the sum of \$500, and, in case the bond was not filed, such order should be vacated and of no effect.

On August 29, 1906, the superior court of Garfield county entered a decree in the foreclosure proceedings above referred to in effect as follows: That the plaintiff, William A. Libert, recover from Fred Unfried and Sylvia Unfried in the sum of \$3,094.20 with interest, and decreed that the property described in the plaintiff's mortgage as follows: 1,200 head of ewe sheep and the increase thereof; and 300 head of two year old wether sheep, the said sheep having been purchased from Hamilton Gill, be sold by the sheriff of Garfield county, Wash., in accordance with the law, and in accordance with the custom and practice of this court; that the proceeds of the sale be applied toward the payment of the costs of such sale and the amount specified as due from the defendants to the plaintiff; and that if the proceeds of the sale of said property be insufficient to pay said judgment and costs of sale, that the plaintiff have judgment for the deficiency. An appeal was taken to the Supreme Court from this judgment, and it was affirmed. An appeal was also taken to the Supreme Court from the order of the superior court of Garfield county in discharging the receiver appointed to take charge of the mortgaged property pending foreclosure, and the Supreme Court dismissed the appeal. On October 5, 1907, an execution was issued upon the judgment rendered in the superior court of Garfield county, and the sheriff of Asotin county in said state made return as follows: "And on the same day served the same by levying on all the right, title and interest of Fred Unfried and Sylvia Unfried, his wife, named in said execution in and to 677 sheep the same being in said Asotin county, state of Washington, \* \* \* and sold said sheep for the sum of \$2,369.50, which was the whole price paid therefor." Thereafter the sheriff amended his return and made it show that the sale was for 577 head of sheep, and that the costs of sale

was \$5.35 instead of \$535, as stated in the original return.

It further appears that on the 10th day of April, 1906, the respondents executed a mortgage upon a certain band of sheep composed of 1,200 ewes and about 500 lambs, the sheep and lambs being branded on the back, and said sheep and lambs ranging on the range in both Garfield and Asotin counties, state of Washington, the lambs being the increase of said sheep since said mortgage was made, and also 28½ sacks of wool branded on both ends of each sack, for the sum of \$692.15, to one Fred J. Elsensohn, and that Elsensohn brought an action to foreclose said mortgage, and upon the 13th day of June, 1906, in such action judgment was rendered by default against the respondents herein in favor of Fred J. Elsensohn for the sum of \$731.41 with interest, \$75 attorney's fees, and costs, taxed at \$22, and for a decree foreclosing said mortgage, and directed that the mortgaged property be sold to pay said debt.

An order of sale was issued upon the foregoing decree, and the sheriff levied upon and sold 28½ sacks of wool for the sum of \$575, and due return was made thereof, and on the 3d day of July, 1906, in order to protect himself by reason of his interest in the property mortgaged to him by the respondent, as against the interest acquired under the mortgage of Elsensohn, the latter assigned his said judgment to the appellant, and was paid therefor by the appellant the sum of \$828.41. This action was thereafter commenced for the sum of \$21,000 damages. The complaint is based upon four separate causes of action. The first is for damages in the sum of \$5,000 alleged to have been sustained by the plaintiffs by reason of the unlawful seizure of the property described in the chattel mortgage and the value of the wool clip for the year 1906. The second cause of action asks for damages for the sum of \$1,000, claimed to have been sustained by reason of the expenses incurred by the plaintiffs in contesting the appointment of the receiver and in the appeal from the order of the superior court to the Supreme Court. The third cause of action asks for damages in the sum of \$10,000, claimed to have been sustained by the plaintiffs by reason of the negligent manner in which the appellant kept the sheep while in his possession, and the disposal of the wool crop for the year 1907 in the sum of \$2,660, and for the value of the wool crop disposed of in the year 1908 in the sum of \$2,240. For a fourth cause of action plaintiffs claim damages for the sum of \$5,000 claimed to have been sustained by them because of the malicious and willful and wrongful taking of the sheep and the care thereof and the detention and loss in the neglect of said sheep, and the sale of the wool clips for the years 1907 and 1908 and the increase of said sheep. Issue was joined, and the cause was tried to a jury. A verdict was rendered in favor of

the plaintiffs for the sum of \$9,173.75. A motion for a new trial was made and overruled, and this appeal is from the judgment and from the order overruling the motion for a new trial.

[1] The respondents move to dismiss the appeal because not taken in time. This motion is overruled. The record shows that the appeal was taken within the provisions of the statute and the rules of this court.

[2] The first error argued by counsel for appellant upon this appeal is that the trial court erred in not sustaining appellant's motion requiring the plaintiffs to elect which remedy they would pursue under the allegations of their complaint alleging conversion and redemption from the mortgage and between conversion and accounting. The complaint in this case is somewhat peculiar; the allegations showing wrongful acts are intermingled with allegations showing actual injury. For instance, in the first cause of action, the plaintiffs allege the malicious and wrongful taking of the sheep and the plaintiffs' damage therefrom and damage in the loss of the wool crop for the year 1906 as the same cause of action; and in the third cause of action the plaintiffs allege damages in the loss of the wool crop for the years 1907 and 1908, and damages generally for the negligent manner in which the appellant kept the sheep so in his possession; while in the fourth cause of action the plaintiffs allege damages for malicious, willful, and wrongful taking of the sheep, and also damages for the wool crop for the years 1907 and 1908.

The several causes of action alleged in the complaint, however, all grow out of the same transaction, that is, the foreclosure of the chattel mortgage in question, and therefore may be united in the same complaint under the provisions of section 4169, Rev. Codes, and the allegations showing separate items of damage in each separate cause of action also grow out of the same state of facts, and the fact that more than one item of damage is alleged in each separate cause of action does not violate any of the provisions of the statute or render such allegations improperly joined. The court did not err in overruling the motion.

[3] In the briefs of counsel there seems to be a wide difference of opinion as to the theory of the trial court upon which the case was tried; but we think the instructions of the court clearly state the issues and the damages sought to be recovered. The trial court struck out certain allegations in the complaint with reference to the promissory note of \$1,000 alleged in the complaint to have been exacted and demanded by the appellant from the respondents after the execution of the notes and mortgage given upon the sheep involved in this action, and, notwithstanding the fact that such allegations had been stricken from the complaint, the court permitted counsel for respondents

to make reference thereto in his opening statement to the jury, and also to introduce evidence showing the findings of the Washington court with reference to such note. The appellant assigned as error the ruling of the trial court in permitting such statement and in admitting such evidence. We are satisfied from an examination of the record that it was serious error for the court to permit counsel for respondents in his opening statement to the jury to state that, in addition to the notes aggregating \$5,000 to secure which the chattel mortgage was given, appellant took from the respondents an additional \$1,000 note, and by reason thereof the whole transaction was usurious, and follows such statement up by introducing in evidence the record of the proceedings in the superior court of Garfield county, in which the court found that the \$1,000 note was usurious, and by reason of that fact certain deductions of interest were made upon the principal notes and certain penalties enforced. This statement of counsel, and this evidence, no doubt, was a forceful influence which led the jury to assess the large judgment which they rendered by their verdict in this case. The fact that the court had previously stricken this allegation from the complaint certainly left it no part of the case, and the vice in permitting the statement and in admitting such evidence clearly appears in the verdict. The verdict of the jury must have been influenced largely by some feeling or prejudice such as would arise from such statement and evidence; the evidence certainly does not warrant such verdict.

The evidence is very voluminous, and we shall not undertake to review it as a whole. It is clear that the appellant took possession of the sheep mortgaged and in controversy, through one T. W. Owsley, without right or authority, and that the plaintiff retained the possession of such sheep up until they were levied upon by the sheriff under an execution issued upon the judgment rendered by the superior court of Garfield county in the proceedings brought to foreclose the mortgage referred to in this proceeding. The sheep taken were never returned to the plaintiffs.

The court in his instructions to the jury clearly indicated the court's views of the issues made by the pleadings, and the right of the plaintiffs to recover in the action, and in these instructions the court told the jury that the plaintiffs could not recover for the value of the wool crop for the year 1906, for the reason that the wool crop for the year 1906 had been mortgaged to another person, and such mortgage had been foreclosed, and the wool was sold under said foreclosure sale. The court further instructed the jury that the plaintiffs were entitled to recover the value of the crop of wool for the year 1907, and that the mortgage of the appellant did not cover such wool crop. The court

also instructed the jury that the plaintiffs could not recover for the wool crop for the year 1908 for the reason that the sheep sheared for that year were sold under the decree of foreclosure awarded to the appellant, and that he became the owner thereof prior to the shearing season for that year. The court also instructed the jury that the appellant Libert was required to use reasonable and ordinary care of the sheep pending the foreclosure proceedings and while they were in his possession, and, for any sheep which died or became lost through the want of his care, he was liable for the value thereof for the dead or lost between the time he took possession and the time of the sale upon foreclosure; that the care required of the appellant was such reasonable and ordinary care as an ordinarily prudent and cautious person would exercise under the same conditions, and, if such care was so exercised, then the appellant, defendant, would not be liable, but if such care was not exercised, and damages were sustained by reason of such want of care, the number of sheep lost or which died because of such want of care was the basis for estimating such damages, and, in determining the loss sustained, the jury should not consider lambs which might have been born, but only such as were in existence when the sheep were taken; and that there were only two matters which the jury should take into consideration in determining the plaintiffs' claim for actual damages: First, the value of the wool crop converted in 1907; second, the damage sustained by death or loss of sheep while the sheep were in the appellant's possession and prior to the foreclosure sale. The court further advised the jury that the appellant was entitled to certain credits for the deficiency judgment still unpaid in his favor in the foreclosure suit brought by him and also for the deficiency in the judgment obtained by Elsensohn and assigned to appellant, and that such sums should be deducted from the actual damage sustained by respondents. The court further instructed the jury that they might allow punitive damages in addition to the actual damages arising from the malicious taking of said sheep, and if such taking was for the malicious purpose of oppressing and harassing the plaintiffs, and not for the purpose of, in good faith, endeavoring to collect his indebtedness and protect his own interests, then the jury should allow such damages as to them seemed proper.

The court also instructed the jury that the plaintiffs should not be allowed punitive damages unless the evidence showed that the appellant had no probable cause for taking possession of said sheep, and that the appellant took possession and converted the wool and permitted the sheep to die and become lost while in his possession for the malicious purpose of oppressing and harassing the plaintiffs, and not for the purpose

of in good faith endeavoring to collect the indebtedness and protecting his own interest. The court also called the attention of the jury to the fact that evidence had been introduced with reference to the past history of the transaction between the parties, and that such evidence was admitted for the purpose of giving to the jury all the light possible in determining the allegations of malice, and whether damages should be administered as punishment in addition to the actual damages sustained, but that such evidence was not to be considered as a guide for the amount of punitive damages; that the amount of punitive damages was purely and solely a question to be determined by the jury, provided they find the allegations of malice proven by the evidence. This latter instruction was no doubt intended to guide the jury in considering the statements made by counsel for the plaintiff and the evidence in relation to the usury embraced in the original transaction when the loan of \$5,000 was made by the appellant to the respondents and the mortgage in controversy was given. We are convinced, however, that this instruction is not couched in such language as to overcome the influence and vice of the statements made, and the evidence offered, in influencing the jury in fixing the amount of punitive damages, because in this case there is absolutely no evidence which in any way shows any malice or hatred or design to prosecute the action for the foreclosure of the chattel mortgage, other than for the sole and only purpose of collecting the debt secured thereby and protecting the property covered by said mortgage.

It is apparent that the action originally in the superior court of Garfield county and the appeals that were taken to the Supreme Court were all prosecuted in good faith and for the sole purpose of enforcing the legal rights of the appellant and the protection of the property which was covered by the mortgage as security for the indebtedness due him. The mere fact that he made a mistake in asking the court originally to appoint a receiver to take charge of the mortgaged property pending the foreclosure proceeding, and that the court appointed a receiver without proper showing having been made to give the court jurisdiction to do so, does not deny him the right under the terms of the mortgage, whenever he was satisfied that the mortgaged property was not being properly cared for, or that the mortgagor was selling or disposing of the mortgaged property, to declare the mortgage indebtedness due and proceed to collect the same. And in all the legal proceedings in the courts of Washington he was proceeding strictly in accordance with the provisions of the contract of mortgage and pursuing his legal rights, although the court in some of the steps taken by him held against him, yet in the end his

mortgage was foreclosed in accordance with the terms of the contract, and he recovered judgment for the amount due upon the mortgage debt according to the findings of the trial court, and from a full and fair examination of all the evidence we are satisfied that the evidence does not support the allowance in this case of any punitive damages.

The other instructions of the trial court as to damages state rules of law correctly as applied to the facts. While we express no opinion as to the correctness of the rule announced in the instruction with reference to the wool crop of 1906, whether the mortgage included such crop of wool, yet we are inclined in this case to approve the instruction in so far as the plaintiffs' rights in this particular case are concerned, for the reason that the mortgage covered property located in the state of Washington, and the terms of such mortgage were construed by the Supreme Court of that state, in which it was held that a mortgage upon sheep and their increase did not include the wool sheared from such sheep. *Libert v. Unfried*, 47 Wash. 186, 91 Pac. 776.

[5] The evidence of damages sustained by the plaintiffs by reason of the taking of the sheep and the loss sustained by reason of the loss of the sheep so taken is very much in conflict; but we are inclined to give the respondents herein the full benefit of the proof and allow the highest estimate the jury could form from the evidence. The mortgage specifies that it covers 1,200 head of ewe sheep and the increase thereof and 300 head of two year old wether sheep. This makes 1,500 head of sheep as described in the mortgage. The evidence, we think, fully established that the appellant, through Owsley, took possession of all the property mortgaged, which included the 1,500 head mentioned in the mortgage, and 528 lambs, and also 120 other sheep not described in the mortgage. Whether the lambs were the increase of the sheep mortgaged does not appear from the evidence; but inasmuch as the mortgage was given on the 25th day of October, 1905, and the seizure was made about the 19th day of April, 1906, we will assume that the lambs taken were the increase of the mortgaged sheep. The appellant therefore seized and took possession of at least 1,620 sheep and 528 lambs. Of the sheep thus seized 577 were sold on the 19th day of October, 1907, upon execution issued upon the judgment of foreclosure of the chattel mortgage in controversy, for the sum of \$2,369.50. This left 1,043 head of sheep and 528 lambs still in the possession of the appellant, for which he has never made any account to the respondents. The amount, however, realized from the sale of 577 head of sheep, to wit, \$2,369.50, was credited upon the judgment of foreclosure, less the expenses of sale, which amounted to \$5.35.

The judgment of \$3,094.20 drew interest at 6 per cent. from its date, August 1, 1906, to the date of sale on the 19th day of October, 1907, which amounted to \$206.28, which together with the principal made the amount due upon the judgment at that time \$3,300.48, and deducting therefrom the amount realized from the sale left a balance due of \$936.33, and this is one of the deficiency judgments which the trial court in his instructions directed the jury to consider in making up the verdict. In this connection we may as well refer also to the judgment of Fred J. Elsensohn heretofore referred to and its assignment to the appellant and the sale of the wool under the execution issued upon said judgment and the deficiency arising after the sale, as follows: Date of judgment, June 13, 1906; amount of judgment, \$731.41; interest, \$112.75; attorney's fees, \$75; costs, \$22; total, \$941.16; amount realized from sale of the wool, \$575, leaving a deficiency of \$366.16. The interest upon the \$936.33, the deficiency upon the foreclosure judgment from the date of sale to the date of trial, at 6 per cent. amounts to \$138.08, making the sum of \$1,074.42, and the interest upon the Elsensohn deficiency judgment from the date of sale made under the judgment to the date of the trial at 10 per cent. amounts to \$84.08, which added to the principal makes \$450.24, and the two added makes a total of \$1,524.65, the total amount of these two deficiencies which appellant was entitled to have considered and allowed by the jury as against any amount they might determine due the plaintiffs for damages for the taking of the property involved; and under the proof in the case at the time the verdict was rendered the respondents were indebted to the appellant in said sum of \$1,524.65.

Returning now to the sheep taken: As seen, the appellant has given account for 577 head of sheep taken, and the same has been properly credited upon the indebtedness due from the respondents to the appellant. The remainder of the sheep, to wit, 1,043 head and 528 lambs, which were never returned to the respondents, are unaccounted for. When the appellant seized the property taken, he became responsible for the value thereof to the respondents, and it was his duty to care for the same and return such property or account for its conversion, and the evidence in this case shows that the market value at the time the sheep were taken was \$3.50 a head and for the lambs \$1 a head. The total value of the sheep taken and unaccounted for therefore was \$3,650.50 and for the lambs \$528, making a grand total of \$4,178.50.

It is impossible from the evidence in this case to tell just what became of the 1,043 head of sheep and the 528 lambs unaccounted for by the appellant. There is evidence in the record showing that the winter during which they were detained was a very hard

winter, and that there was excessive loss by reason of the severity of the season. There is other evidence in the case showing the consumption of a large number of the sheep by the employees and the straying away of some; but, whatever may have been the cause of the disappearance of these sheep, the appellant is responsible for their value; he took them at his own risk, and it was his duty to return the property taken or its value, and it can make no difference in this case what he may have expended in caring for such sheep, or how they happened to disappear. He is responsible to the respondents for the value of the property taken.

The evidence also shows that for the year 1907 appellant clipped from the sheep then in his possession 5,993 pounds of wool and sold the same at 16 cents a pound, upon which he paid a commission of 5 per cent., making the total amount received upon the sale of such wool \$910.94. This wool was sheared from 698 sheep, 577 head of which did not at that time belong to the appellant, but were in his possession and were the property of the respondents, and the wool sheared from such sheep is chargeable under the instructions of the court against the appellant and was recoverable in this action, and as the wool sheared from 698 sheep brought \$910.94, the value of the wool sheared from 577 sheep would be \$753.02. This amount also draws interest from the date of sale to date of judgment and amounts to \$185.11, and added to the amount received for the wool makes the sum of \$938.13. The value of the sheep taken, to wit, \$4,178.50, also draws interest from the date of taking, amounting to \$1,653.98, making in the aggregate the sum of \$6,770.61. Deducting therefrom the amount due the appellant from the deficiency judgments leaves a balance of \$5,245.96 due respondents, for which sum the evidence authorized the jury to find a verdict, and which in our judgment the evidence fully supports.

It is also argued that the appellant should be charged for the value of some bucks taken and supplies and camping outfit and dogs, etc.; but an examination of the transcript fails to disclose the value of any such property, even if it were taken, and for that reason it could not be figured as an item of damages.

[6, 7] The court instructed the jury that they should take into consideration and deduct from the damages proven the amount realized by the appellant from the sheep taken and sold under execution issued upon the foreclosure judgment and the amount of a certain deficiency judgment held by the plaintiff against the respondents assigned to the plaintiff and recovered by one Elsensohn. These are the deficiencies which we have considered and which no doubt the jury allowed in arriving at their verdict. We believe that the figures we have above given can be the only true data upon which the

jury could have acted in this case and correctly show the actual damages sustained by the respondents. This makes no allowance for any punitive or exemplary damages. It is true that at the beginning when the sheep were first taken the appellant took possession of the same wrongfully; yet the courts of Washington held that appellant was proceeding to foreclose a chattel mortgage, and thereafter rendered a decree in his favor, and the mere fact that in entering the decree of foreclosure the court found that he had exacted usury from the respondents at the time the mortgage and the notes were given, and for that reason entered a decree and allowed reductions in the amount actually due upon the notes given, as a punishment, and the fact that the appellant may have made statements to the effect that he intended to break the respondents up, and the fact that he did not give to the sheep the common ordinary care which should have been given them, were not sufficient of themselves to show that his actions were malicious and wanton, or outrageous, or showed such a state of facts as would justify the jury in implying the existence of malice or oppression in the things he did do. As we understand the rule of exemplary or punitive damages, they cannot be recovered unless the evidence shows clearly that the action of the wrongdoer is wanton, malicious, or gross and outrageous, or where the facts are such as to imply malice and oppression, in which case the law authorizes the court to allow a sum of money as punishment to the wrongdoer for the injury done. In this case, however, we do not believe that the facts show the existence of malice or oppression. *Sutherland on Damages*, vol. 2, pp. 1084, 1095; *Lyles v. Perrin*, 119 Cal. 264, 51 Pac. 332; *Mabb v. Stewart*, 183 Cal. 556, 65 Pac. 1085. In 13 Cyc. p. 111, the rule is stated as follows: "As a general rule they (speaking of exemplary damages) will only be allowed where such injury is attended by circumstances of willful fraud, malice, or gross negligence."

We think the general rule recognized by the weight of authority is that exemplary or plenary damages may be allowed where the injury complained of is attended by acts of the wrongdoer which show willful malice, fraud, or gross negligence. The evidence, however, must show the malice and negligence, or facts from which the same may be inferred. In this case we are satisfied there is no evidence whatever showing any willful malice or any fraud or gross negligence on the part of the appellant in foreclosing his mortgage and pursuing the mortgaged property. The instruction given by the trial court in relation to exemplary damages should not have been given, and the court was in error in so instructing the jury.

[4] But where, as in this case, the facts show that the appellant wrongfully took possession of the mortgaged property and re-

tained the same and converted such property to his own use, or permitted it to be lost or injured or destroyed, he is responsible to the owner for the market value of such property at the time the same was taken.

We conclude in this case that the judgment is excessive, and that it should be reduced to \$5,430.93, and we direct that, in case the respondents will satisfy and remit the judgment to that sum, the judgment will be affirmed for the amount of \$5,430.93; that such satisfaction shall be entered of record in the office of the clerk of the district court within 30 days from the time the remittitur is filed in that court; and in case it is not so entered and filed a new trial is hereby ordered and directed. The costs of this appeal are divided equally between the parties.

AILSHIE and SULLIVAN, JJ., concur.

#### On Petition for Rehearing.

AILSHIE, J. [§] In this case the appellant has filed a petition for a rehearing, in which he claims that the court in the original opinion allowed an excessive amount against him, and that some of the items constituting the amount awarded are unauthorized by the evidence. Among other things, he claims that he has been overcharged in the sum of \$1,582 for sheep taken; that he should have been allowed for the cost and expense of keeping and caring for the sheep that were returned; and that he should have also been allowed for such loss of sheep as was not occasioned by the negligence or wrongful act of appellant. He also complains of the allowance of interest at the rate of which it was figured by the court; and, lastly, and chief of all the contentions made by appellant, is that he should be granted a *new trial*, for the reason that the case was submitted to the jury on an instruction that they could allow punitive and exemplary damages, and that the verdict was returned on that theory, rendering it now impossible for this court or any one else to determine how much of the verdict was made up of punitive damages and how much of actual damages.

There is undoubtedly merit in this last contention. There can be no doubt, however, of the power and authority of this court under section 8818, Rev. Codes, to "modify any order or judgment appealed from." It is nevertheless apparent in this case that, after we determined that the respondents were not entitled to recover punitive or exemplary damages, we were under the necessity of ascertaining from the record and computing ourselves the amount of actual damage sustained by the respondents. In doing so, we had to determine a standard of values and a class of proofs which we would follow in arriving at the amount to be allowed, and so we said: "The evidence of damages sustained by the plaintiffs by reason of taking the sheep and the loss sus-

tained by reason of the loss of the sheep so taken is very much in conflict; but we are inclined to give the respondents therein the full benefit of the proof and allow the highest estimate the jury could form from the evidence"—and accordingly made our computation upon the basis of the most favorable evidence to the respondents. In the light of the contentions made by appellant in his petition for rehearing, and of the further fact that respondents have also filed a petition "for reconsideration of amount allowed respondents", and therein call our attention to certain errors and inaccuracies in the computation of the amount to be allowed, we have concluded that it would best serve the ends of justice to order a new trial in this case, and so we have decided to vacate the order and judgment of the court, in so far as it directs that judgment be entered for a specified amount in favor of the respondents, and, on the contrary, order and direct that a new trial be had upon the theory of the law and in harmony with the views expressed in the original opinion herein.

The respective counsel in their petitions admit that there is and has been throughout a confusion of figures as to the number of sheep taken and the number accounted for and the number that should in justice be charged to the appellant. Counsel for respondents admits that the court has charged appellant with 141 head of old sheep that had been accounted for. On the other hand, respondents contend that they should have been given a credit for the 1906 wool clip, and that by making these two corrections respondents would still be entitled to a larger judgment than that ordered by the original opinion in this case.

The more we consider the record in this case and the various and divergent views expressed by counsel in their briefs and petitions for rehearing, the more we are convinced that the evidence ought to be submitted to a jury, where all the proofs may be gone into fully with a view to arriving at a correct estimate of the actual damages, free from all notion of inflicting any punitive or exemplary penalty on the appellant.

The court's instruction to the jury with reference to the wool clip of 1906 was correct and would preclude any recovery by respondents from appellant for the wool grown for that year.

The legal rate of interest in the state of Washington may also be ascertained and allowed on the value of the property converted, and likewise as to the Elsensohn and Libert deficiency judgments from the date of entry until paid. The value of the 1907 wool clip from the sheep returned and subjected to the foreclosure sale will be ascertained in the manner indicated in the original opinion herein.

The judgment is reversed, and a new trial



is hereby ordered. Costs of this appeal will be divided equally between the parties.

STEWART, C. J., and SULLIVAN, J.,  
concur.

PRICE et al v. DE REYES et al  
(L. A. 2,765.)

(Supreme Court of California. Dec. 5, 1911.)

1. BOUNDARIES (§ 48\*)—LOCATION BY PARTIES  
—EFFECT.

Where adjoining owners, being uncertain as to the true line, agree by parol upon its true location, and fence along the line agreed, and build up to and occupy to the line as thus fixed, and acquiesce in such location for a period equal to the statute of limitations or under such circumstances that substantial loss would be caused by a change in its position, such line becomes the true line, regardless of the accuracy of the agreed location.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232-242; Dec. Dig. § 48.\*]

2. FRAUDS, STATUTE OF (§ 70\*)—CONVEYANCE  
OF LAND—ESTABLISHMENT OF BOUNDARY.

A parol agreement by the owners of adjoining lands, effective to establish the true boundary line between the lands, whether coinciding with the description of the parties' deeds or not, does not operate to convey title to the land which may lie between the agreed line and the true line, but fixes the line itself, and the description carries title up to the agreed line; and hence such agreement is not in violation of the statute of frauds as a parol conveyance of lands.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 112; Dec. Dig. § 70.\*]

3. BOUNDARIES (§ 48\*)—LOCATION BY PARTIES—BUILDING AND ACQUIESCENCE.

Defendant in 1899 took land by deed describing it by metes and bounds and referring to a map, his grantor pointed out to him the four corners of the land so conveyed, and defendant thereupon placed an iron pipe to mark each of the corners, built a fence along the lines of the land as pointed out by the grantor, occupied and possessed the entire area inclosed, and erected a building along the line of the fence with the knowledge of and without objection by the grantor, and his grantees of the contiguous lot took with knowledge of the defendants' possession and acquiesced therein for more than five years. Held, in an action to establish the boundary line, that the line had been fixed by the agreement and acquiescence of parties.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232-242; Dec. Dig. § 48.\*]

4. BOUNDARIES (§ 48\*)—LOCATION BY PARTIES—WHEN EFFECTIVE—DISPUTE.

The rule that a boundary line between adjoining lands may be fixed by agreement and acquiescence of the parties applies where the location of the line is merely uncertain, and it is not necessary that it be unascertainable, nor is it necessary that there should have been a dispute as to the boundary prior to the agreement as to its location.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232-242; Dec. Dig. § 48.\*]

5. ADVERSE POSSESSION (§ 90\*)—PAYMENT OF TAXES—PROPERTY ASSESSED.

Where parties by agreement establish a boundary line between adjoining lands differing from the description found in their deeds, and thereafter pay taxes thereon according

to the descriptions in their deeds, such payment is a payment on land in possession of parties, and, if continued for a sufficient time, establishes title by adverse possession.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 517-519; Dec. Dig. § 90.\*]

6. BOUNDARIES (§ 36\*)—ADMISSIBILITY OF EVIDENCE—SURVEYOR'S MAP.

In an action to quiet title to lands fronting upon certain streets, the county surveyor's map was admissible for the purpose of showing the difference, if any, between the location of one of the streets at the time of the trial and the location of the south line of one of the blocks as established by a previously recorded map.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 166, 167; Dec. Dig. § 36.\*]

7. BOUNDARIES (§ 35\*)—ADMISSIBILITY OF EVIDENCE—ACQUIESCENCE AND KNOWLEDGE.

In an action to quiet title, evidence on the part of the defendants to prove the acquiescence of the respective owners of the property adjoining in the location of the boundary line, and that, at the time plaintiff purchased the adjoining lot, it was pointed out as the lot lying north of defendants' property, was admissible.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 163-165; Dec. Dig. § 35.\*]

Department 1. Appeal from Superior Court, Los Angeles County; Leon F. Moss, Judge.

Action to quiet title by T. W. Price and another against A. C. L. De Reyes and husband. Judgment for plaintiffs, and defendants appeal. Reversed.

Geo. L. McKeeby, for appellants. M. W. Conkling and Cyril H. Bretherton, for respondents.

SHAW, J. This is an action to quiet title to a strip of land 18 inches in width lying within the inclosure of the defendants, extending along the north line thereof. The real object of the action is to ascertain and adjudge the location of the boundary line between the land of plaintiffs and that of the defendants. The judgment went for the plaintiffs, the defendants' motion for a new trial was denied, and from this ruling the defendants appeal.

The decision of the court below, upon the facts appearing in evidence, was contrary to a long line of decisions of the Supreme Court of this state establishing the rule applying to the location of boundary lines between coterminous landowners, beginning with Sneed v. Osborn, 25 Cal. 619, and ending with Dundas v. Lankershim S. Dist., 155 Cal. 692, 102 Pac. 925. The other cases are the following: Columbet v. Pacheco, 48 Cal. 397; Cooper v. Vierra, 59 Cal. 282; Biggins v. Champlin, 59 Cal. 116; Johnson v. Brown, 63 Cal. 393; Truett v. Adams, 66 Cal. 223, 5 Pac. 96; White v. Spreckels, 75 Cal. 616, 17 Pac. 715; Burris v. Fitch, 76 Cal. 398, 18 Pac. 864; Helm v. Wilson, 76 Cal. 485, 18 Pac. 604; Cavanaugh v. Jackson, 91 Cal. 583, 27 Pac. 931; Dierssen v. Nelson, 138 Cal.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

398, 71 Pac. 456; *Lewis v. Ogram*, 149 Cal. 508, 87 Pac. 60, 10 L. R. A. (N. S.) 610, 117 Am. St. Rep. 151; *Young v. Blakeman*, 153 Cal. 481, 95 Pac. 888.

[1] The rule is thus stated in *Young v. Blakeman*, supra: "When such owners, being uncertain of the true position of the boundary so described, agree upon its true location, mark it upon the ground, or build up to it, occupy on each side up to the place thus fixed and acquiesce in such location for a period equal to the statute of limitations, or under such circumstances that substantial loss would be caused by a change of its position, such line becomes, in law, the true line called for by the respective descriptions, regardless of the accuracy of the agreed location, as it may appear by subsequent measurements."

[2] And, again, to this effect: "The line so agreed on becomes in legal effect the true line, the agreement as to the line may be in parol, and it does not operate to convey title to the land which may lie between the agreed line and the true line, but it fixes the line itself and the description carries title up to the agreed line regardless of its accuracy; the agreement as to the line is not in violation of the statute of frauds, because it does not transfer title; the parties hold up to the agreed line by virtue of their original deeds and not by virtue of the parol agreement; 'the division line when thus established attaches itself to the deeds of the respective parties and simply defines, not adds to, the lands described in the deeds,' and, if more is thus given to one than the calls of his deed actually require, he 'holds the excess by the same tenure that he holds the main body of his land.'"

[3] The facts, which appear from the evidence without substantial contradiction, may be briefly stated. In 1888 a map was filed in the office of the recorder of the county showing a subdivision of land into lots and blocks, known as the map of Hollywood. Upon this map was delineated a block numbered 4 consisting of several acres of land. On the westerly side of this block Cahuenga avenue was located, and upon its southerly side a street now known as Sunset boulevard, the intersection of the two streets forming the southwest corner of the block. In 1896 the street known as Sunset boulevard was widened and straightened so that the lines, as then established, included some of the property situated northerly thereof. The owners of the property, among them the owner of said block 4, executed a deed granting to the county the portions of their property lying within the lines of the street as thus widened. In the year 1899 Joseph R. Bennett had become the owner in fee of a portion of block 4 fronting upon Cahuenga avenue, including the lot of the plaintiffs and that of the defendants. On December 2, 1899, he conveyed to the defendant A. C. L. De Reyes, who is the wife of

her codefendant, a part of this block fronting 103 feet on the easterly line of Cahuenga avenue. The description in the deed declared that the southwest corner of this lot was a point situated 207.5 feet north of the southwest corner of block 4, according to the map of Hollywood recorded in 1888 as aforesaid. The lot conveyed had a depth of 393 feet. Immediately after the deed was executed, Bennett pointed out to defendants the four corners of the lot so conveyed, and thereupon defendants placed on each corner an iron pipe to mark the corners. Immediately afterward the defendants built a fence along the lines of the lot as thus pointed out by Bennett, and they have ever since maintained the same, occupying and possessing the entire area inclosed therein. Shortly after the fence was built, they erected a building at the northwest corner, the north side of which was placed on the line previously occupied by the north fence. It extended some distance to the rear from Cahuenga avenue. This building has ever since been occupied by M. L. Reyes as an office. Bennett at that time, and for three years afterwards, lived on the opposite side of Cahuenga avenue and was fully aware of these improvements and of the possession and claim of the defendants. He made no objection whatever to the claim or possession of Reyes up to the line of the fence so established. On March 26, 1901, Bennett conveyed to Daniel F. Bacon a lot fronting 51.5 feet on the easterly line of Cahuenga avenue lying directly north of the premises of the defendants. This deed declared that the southwesterly corner of the tract conveyed was situated 310.5 feet north of the intersection of Cahuenga avenue and Sunset boulevard, and that the line ran thence north along Cahuenga avenue 51.5 feet. Thus, according to the respective descriptions, and assuming that the corner of block 4 by the map, recorded in 1888, was the same as the intersection of the avenue and the boulevard, as changed in 1896, this lot would be contiguous to and north of the defendants' lot. Bacon afterwards conveyed this tract to Johnson, Johnson conveyed it to Fry, and on October 15, 1902, Fry conveyed to the plaintiffs, each deed having the same description as that given in the conveyance by Bennett to Bacon. Plaintiffs had their lines surveyed, and in 1903 they put up a building the north line of which was 51.5 feet north of the Reyes fence leaving space for a driveway between the building and said fence. None of the parties ever disputed the right, title, or possession of the defendants to the property within their fences and occupied by the building thereon until more than five years after the defendants' fences and buildings were erected. The exact time of the beginning of this action does not appear. The amended complaint was filed in September, 1907. It is conceded, however, that it was begun shortly before that date. The

dispute concerning the location of the boundary line arose a short time before the action was begun. Thereupon a new survey was made, and it appears to have been discovered, at least it was proven to the satisfaction of the lower court upon the trial, that the fence was situated 18 inches north of the true location of the boundary as fixed by the distances stated in the deed executed by Bennett to Reyes in 1899, and that the inclosure of the defendants included a strip of land 18 inches wide lying immediately north of the lot described in defendants' deed, said strip being also included in the conveyance by Bennett to Bacon aforesaid and to which by the succession of deeds above mentioned, the defendants had apparently acquired title. These facts bring the case directly within the rule above stated and the findings and judgment should have been in favor of the defendants.

[4] The plaintiffs claim that this rule does not apply where the location of the boundary is merely uncertain, but that it must have been absolutely unascertainable. We find no such qualification of the rule stated in any of the authorities. Obviously it could not be thus qualified. It is only where the true location is subsequently ascertained that actions of this kind arise. Consequently the rule could not apply if the location was unascertainable. But, according to all the authorities, it is sufficient if the true location is uncertain and the parties fix the boundary because of its uncertainty and afterwards occupy up to it and make improvements thereon. At the time this boundary was fixed Bennett and Reyes were the owners of the respective adjoining lots. The position of the division line had not been marked and was uncertain. Bennett, as the original owner of both tracts, would presumably have knowledge of the location of the lines superior to that of defendants. He pointed them out to Reyes, who desired at that time to know their position. Reyes accepted the location thus fixed. This constituted an agreement as to the location. Reyes acted upon it by building the fence and buildings with the full knowledge and under the observation of Bennett. The succeeding owners took with knowledge of the possession of Reyes up to the fence. Their acquiescence has the same effect as that of Bennett would have had if he had continued to own the lot. It is not necessary for the application of this rule that there should have been a dispute as to the boundary prior to the agreement as to the location. This was expressly decided in *Helm v. Wilson*, supra.

[5] Title was also established in the defendants by adverse possession. Plaintiffs claim that defendants paid no taxes on the strip in dispute. It is conceded that both parties paid taxes each year assessed according

to the descriptions in the respective deeds. As we have seen, a division line thus established "attaches itself to the deeds of the respective parties," and defines the lands described in each deed, so that the one in the possession of the overlap holds the title thereto by the same tenure as he holds the lands technically embraced in the description. *Sneed v. Osborn*, supra; *Young v. Blakeman*, supra; *White v. Spreckels*, supra. The consequence is that under such circumstances the payment of taxes assessed in this manner is a payment on the land in the possession of the parties. Furthermore, the natural inference would be that the assessor put the value on the land and improvements of each party as disclosed by the visible possession, rather than that he ascertained the true line by a careful survey and assessed to one a part of the possessions of the other. We see no ground upon which the decision of the court below can be sustained.

In view of this conclusion as to the merits of the case, we do not find it necessary to discuss the various rulings of the court below upon the introduction of the evidence.

[6] We think it proper to state, however, that the county surveyor's map was properly admissible for the purpose of showing the difference, if any, between the location of the line of Sunset boulevard at the time of the trial and the location of the south line of block 4 as established by the recorded map of Hollywood.

[7] The defendants were entitled to introduce evidence to prove the acquiescence of the respective owners of the property adjoining in the location of the line to their fences. They were also entitled to prove that at the time the plaintiffs and each of their predecessors in interest purchased, the lot to be sold to them was pointed out to them as the lot lying to the north of defendants' property. The rulings of the court upon questions directed to this point seem to have been based chiefly upon the form of the question, which apparently called for the conclusion of the witnesses, and not for facts.

The order is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.

WILSON et al. v. WHITE. (L. A. 2,771.)  
(Supreme Court of California. Dec. 2, 1911.  
Rehearing Denied Dec. 30, 1911.)

1. BROKERS (§ 94\*)—REAL ESTATE BROKERS—AUTHORITY.

Plaintiffs' rights under a contract to purchase land from defendant are unaffected by defendant's brokers' act in agreeing to sell to a third person, where they were not authorized to sell, defendant did not ratify their agreement, and was not estopped to deny their authority before plaintiffs communicated their acceptance of defendant's offer.

[Ed. Note.—For other cases, see *Brokers*, Cent. Dig. § 136; Dec. Dig. § 94.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

## 2. VENDOR AND PURCHASER (§ 194\*)—GROWING CROPS—RIGHT TO.

As between vendor and purchaser, the growing crop constitutes a part of the realty, unless there has been a constructive severance, and passes under a voluntary conveyance unless specially reserved by the grantor.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 403; Dec. Dig. § 194.\*]

## 3. EVIDENCE (§ 441\*)—PAROL EVIDENCE—DEEDS—RESERVATIONS.

Where a writing is essential to the transfer of land, a reservation of crops cannot be established by parol to impair the effect of a deed conveying the land without reservation.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2032; Dec. Dig. § 441.\*]

## 4. BROKERS (§ 91\*)—RECEIPT OF PROPOSALS—EFFECT.

Where real estate brokers conducted negotiations between plaintiffs and defendant for the sale of land, receipt by them of a proposal from defendant was in legal effect a receipt thereof by plaintiffs.

[Ed. Note.—For other cases, see Brokers, Cent. Dig. § 134; Dec. Dig. § 91.\*]

## 5. VENDOR AND PURCHASER (§ 17\*)—CONTRACT TO CONVEY—EXISTENCE.

Real estate brokers sent defendant an offer of \$14,000 cash for land. Defendant wired acceptance for conveyance "without crops." Next day plaintiffs tendered to brokers the \$14,000 and demanded a conveyance, but the tender was rejected. *Held*, that there was a completed contract between the parties for the sale of the land without crops.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 21; Dec. Dig. § 17.\*]

## 6. SPECIFIC PERFORMANCE (§ 49\*)—RIGHT TO RELIEF—INADEQUATE CONSIDERATION.

Under the provision of Civ. Code, § 3391, that a contract cannot be specifically performed if the obligor has not received an adequate consideration or if the contract is not as to him just and reasonable, specific performance of a contract to convey land for \$14,000 was properly denied, where the land was found to be worth \$15,000 and where the vendor, who resided at a great distance from the property, had no personal knowledge as to the condition and value of the property, while the purchasers were well informed.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140-151; Dec. Dig. § 49.\*]

## 7. SPECIFIC PERFORMANCE (§ 49\*)—ADEQUACY OF CONSIDERATION—DETERMINATION.

In determining the adequacy of consideration under a contract sought to be specifically performed as affecting plaintiffs' right to such relief, the question is, not whether the price was the highest obtainable, but whether it was fair and adequate under the circumstances.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140-151; Dec. Dig. § 49.\*]

## 8. APPEAL AND ERROR (§ 1009\*)—REVIEW—FINDINGS—CONCLUSIVENESS.

In a suit to specifically perform a contract to convey, the trial court's finding that relief should be denied for inadequacy of the consideration should not be disturbed on appeal unless clearly unsupported by the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

## 9. VENDOR AND PURCHASER (§ 351\*)—CONTRACT TO CONVEY—DAMAGES.

Under Civ. Code, § 3306, fixing the measure of damage for breach of a contract to convey, where no bad faith of the vendor is shown,

at the price paid and expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon, plaintiffs were not entitled to damages for defendant's breach of an agreement to convey, where there was no evidence to show any expenditure by them.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 1047-1058; Dec. Dig. § 351.\*]

Department 1. Appeal from Superior Court, San Bernardino County; Benjamin F. Bledsoe, Judge.

Action by A. J. Wilson and another against J. L. Owell White. From a judgment for defendant and from an order denying a new trial, plaintiffs appeal. *Affirmed*.

Eugene C. Campbell, for appellants. Halsey W. Allen, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiffs from a judgment in favor of defendant and from an order denying their motion for a new trial in an action brought by them for the specific performance of an alleged contract for the sale to them by defendant, for \$14,000 cash, of certain real property in San Bernardino county, Cal., described in the complaint as being subdivision lot 1 in block 35, East Redlands, according to the plat thereof on record in the office of the county recorder of said county, together with 10 shares of the capital stock of the East Redlands Water Company, a corporation; said property containing 10 acres more or less and being planted to orange trees.

Defendant, the owner of the property, was a resident of the state of Texas, and during the whole period of the negotiations for a sale of the property was in that state. The plaintiffs during all of said period, were in the city of Redlands, Cal., as were also John W. Gill and W. E. Rabbeth, the real estate brokers through whom the negotiations were had. Said Gill and Rabbeth had received a letter written by defendant to them on April 6, 1909, in reply to an inquiry on their part asking for a selling price on the property, in which he said he would sell this property for \$15,000 without the crop. Plaintiffs' negotiations with defendant for the purchase were entirely by means of letters and telegrams which will hereinafter be set forth. To these letters and telegrams we are confined in determining whether there was any contract between plaintiffs and defendant for the sale and purchase of the property.

During the whole period of the negotiations there was on the orange trees on said property about one-third of the annual crop of oranges; the remainder having been harvested. This third of the crop was of the value, according to a finding of the trial court which is sufficiently sustained by the evidence of \$1,200, and the same was not harvested until some time in May, 1909. The

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

evidence was also sufficient to sustain the conclusion of the trial court that these oranges so remaining on the trees had not been theretofore sold by defendant, and that he was then the owner thereof.

On April 13, 1909, at the request of plaintiffs, who within a day or two thereof had been shown the property by Gill and Rabbeth and solicited to make an offer for the same, the following telegram was sent to defendant: "4-13-09, Redlands, Cal. To J. Lowell White, Kingsville, Texas. Have offer 14,000 net to you half cash lower ten advise sale. Much scale in grove. Gill & Rabbeth."

On April 15, 1909, defendant answered this telegram by both telegram and letter. The telegram was as follows: "Kingsville, Tex. Apr. 15-09. Gill & Rabbeth, Redlands, Cal. On terms named will not sell for less than fifteen thousand. J. Lowell White."

The letter was simply a confirmation of the telegram. This telegram was shown to plaintiffs, and on the same day, at their request, another telegram was sent to defendant. It was as follows: "Redlands, Cal. Apr. 15 '09. J. Lowell White, Kingsville, Texas. Cannot get fifteen. Client offers fourteen cash. Gill & Rabbeth."

On April 16th defendant replied by telegram as follows: "Kingsville, Texas, Apr. 16. Gill & Rabbeth, I accept fourteen thousand net cash to me for lower ten without crop. J. Lowell White."

On the same day defendant mailed a letter to Gill & Rabbeth confirming the telegram, and saying he would be glad to hear further in regard to details of the sale, asking that they have their client deposit the money in First National Bank at Redlands for delivery on presentation of a satisfactory deed, and suggesting that the transfer be made on May 1st.

Before the receipt of the last-named telegram, and on April 16th, one W. D. Bethell offered Gill & Rabbeth for the defendant \$15,000 net cash for the property, without the crop, he (Bethell) to pay Gill & Rabbeth the commission on the sale, and Gill & Rabbeth accepted such offer, and received from Bethell \$3,000 on account of such purchase price. Thereafter, on the same day, the telegram last quoted was received, and they showed the same to plaintiffs, and at the same time informed them that prior to its receipt they had sold the property to Bethell, without the crop, for \$15,000 net cash to defendant.

On April 17th plaintiffs tendered to Gill & Rabbeth \$14,000 and demanded a conveyance of the property, and this tender was rejected by said brokers.

On the same day plaintiffs sent directly to defendant, this being the first time they had communicated directly with him and the first time that the names of the proposed purchasers were communicated to him, the following telegram, viz.: "Ar. 17. Mr. Joseph L. White, Kingsville, Texas. On April

15 last, we offered by telegram sent through Gill & Rabbeth to pay you fourteen thousand dollars cash for your sub. lot one, block thirty-five, East Redlands, San Bernardino county, California, and on April sixteenth last through Gill & Rabbeth received your acceptance. Will you carry out and perform said contract of sale? If so, wire instructions concerning delivery of deed and payment of money. Wire answer. A. J. Willson. R. C. Willis."

On the same day Gill & Rabbeth telegraphed to defendant as follows: "Redlands, Cal. April 17, 1909. J. Lowell White, Kingsville, Texas. Before last telegram came we sold grove another party fifteen thousand! First party claims grove at fourteen. Full explanation by letter, Gill & Rabbeth"—and at the same time wrote to him an explanation of the situation.

On April 19th plaintiffs again telegraphed defendant as follows: "Redlands, Cal. April 19, 1909. J. Lowell White, Kingsville, Texas. Have deposited in your name \$14,400, with Citizens National Bank of Redlands, California, and demand deed of sub. lot one, block 35, East Redlands. Letter follows. Willson & Willis."

On the same day defendant telegraphed plaintiffs that, having had no negotiations with them, he regretted that he was unable to answer their message of the 17th, and on April 23d he telegraphed the Citizens' National Bank of Redlands not to accept for his account the money deposited by plaintiffs. This telegram of April 19th was apparently sent in reply to plaintiffs' telegram of April 17th, and, so far as appears, before plaintiffs sent their telegram of April 19th.

One of the questions presented is whether, in view of these facts, a contract in writing for the sale of the property by defendant to plaintiffs was created.

The trial court, among other things, found that there was no understanding or agreement between plaintiffs and defendant as to the sale of the orange crop on the trees by defendant, or as to any disposition of said crop; that plaintiffs never accepted the counter proposition of defendant as contained in his telegram of April 16th as to the sale of the property "without crop," or agreed with defendant for the purchase of the property for \$14,000 net cash, without crop. It further found that plaintiffs never offered \$14,000, or any sum, for the property here sought, and that defendant never accepted in writing any offer of plaintiffs, and that the tender and demand of plaintiffs was for a conveyance of the premises "including the crop of oranges then growing on said property."

In determining the question thus presented it is necessary to consider certain additional facts which must be taken as established on this appeal in view of the record before us.

The trial court found, in response to an allegation of the complaint to that effect,

which was denied by the answer, "that said Gill & Rabbeth in sending and receiving the aforesaid telegrams and letters set out in paragraphs 6 and 7 of the amended complaint were acting as the agents of plaintiffs and were authorized by plaintiffs to despatch and receive said communications, by telegram and letter, from defendant for plaintiffs." The letters and telegrams referred to included all those of April 13th, 15th, and 16th hereinbefore set forth. We regard this finding as most vital to plaintiffs. If Gill & Rabbeth were lawfully acting as plaintiffs' agents in sending and receiving such letters and telegrams, it is obvious that the receipt by Gill & Rabbeth of any such letter or telegram from defendant was a receipt thereof by plaintiffs, their principals, which rendered it unnecessary, in order to make the same effective as a proposition or acceptance, that the same should be communicated to plaintiffs by Gill & Rabbeth. On the other hand, if Gill & Rabbeth were not the agents of plaintiffs in such matter, but were the agents of defendant, it is obvious that, as long as any such letter or telegram from defendant was not communicated to plaintiffs for the purpose of carrying on the negotiations, it was no more effective as a proposal or acceptance than if it had remained in defendant's pocket in Texas. Being in the possession of his agent, it would still have been in his possession, undelivered. There was sufficient evidence to support this finding, and it must here be assumed that Gill & Rabbeth were the agents of plaintiffs in such matter. There was also evidence to support a conclusion that defendant knew that Gill & Rabbeth were acting as the agents for a proposed purchaser in making the propositions for purchase, and not as his agent therein.

[1] The trial court found that Gill & Rabbeth on April 16, 1909, before the receipt of defendant's telegram of that date, acting as agents for defendant, sold the property to one Bethell for \$15,000 net cash, Bethell to pay the sale commission; that at that time Bethell paid Gill & Rabbeth \$3,000 cash on such purchase and took possession of the property and has ever since been in possession. This finding, except in so far as it states that Bethell paid Gill & Rabbeth \$3,000 on account of an attempted purchase by him, is entirely without support in the evidence. There was absolutely nothing in the evidence to warrant the conclusion that Gill & Rabbeth had been authorized by defendant to make any contract on his behalf for the sale of any of his property, or that they were anything more than mere brokers with power merely to find a purchaser. See *Lambert v. Gerner*, 142 Cal. 399, 76 Pac. 53; *Grant v. Ede*, 85 Cal. 418, 24 Pac. 890, 20 Am. St. Rep. 237. And there is nothing in the record to support a conclusion that defendant in any way ratified the attempted action of Gill & Rabbeth in regard to a sale to Bethell prior to the sending or receipt by him

of plaintiffs' telegram of April 19th, or did anything that would operate as an estoppel in Bethell's favor. So we must determine the question raised in regard to the matter of the orange crop without regard to the attempted action of Gill & Rabbeth in the matter of a sale to Bethell.

[2] While for some purposes growing crops are considered personal property, it is practically elementary law that, as between the vendor and vendee of real property having a growing crop thereon, such crop constitutes a part of the realty (unless there has been a constructive severance), and in the case of a voluntary conveyance of the land passes to the grantee unless specially reserved by the grantor.

[3] And while there are some authorities holding that an oral exception or reservation of the crop is effective in such a case, the weight of authority as well as the better reasoning are to the effect that, where a writing is essential to the transfer of real property, such a reservation cannot be established by parol to impair the effect of the writing purporting to convey the land without reservation. See 8 Am. & Eng. Ency. of Law (2d Ed.) pp. 303, 306. And this court appears to have committed itself to this doctrine in *Fisk v. Soule*, 87 Cal. 313, 25 Pac. 430, where it was substantially said that a written contract for the sale of land which did not contain any reservation of the crops bound the grantor to include the crops in his conveyance, notwithstanding an oral understanding that the crops were not to be included, "unless corrected on the ground that by mistake it was not in accordance with the agreement actually made." As we have already seen, the evidence was sufficient to support the conclusion of the trial court that the crop remaining on the trees on this property had not been sold at the time of these negotiations, and that there had been no constructive severance thereof from the land.

[4, 5] The first offer of plaintiffs to purchase the property was that of April 13th. So far as the matter of the crop was concerned, it was clear and certain in its terms. It was an offer of \$14,000 net, half cash, for everything that would then pass by a grant of the land. This, as we have seen, necessarily included the crop on the trees. This offer having been rejected by defendant's telegram of April 15th, plaintiffs on April 15th made a second offer "of fourteen cash"; the necessary implication of the language used being that it was an offer of \$14,000 net cash for the same property referred to in the telegram of April 13th, viz., the realty as it stood, without reservation or exception of any kind. To this, on April 16th, defendant answered by telegram, "I accept fourteen thousand net cash to me for lower ten *without* crop." The italics are ours. His letter of the same day was simply a confirmation of this message, with expressions indicating that he was satisfied that the purchase would

be proceeded with upon the terms stated by him.

It may be conceded that this telegram introduced a provision for a reservation in the proposed conveyance that was not contained in the written offer of plaintiffs, and that defendant's acceptance was therefore a qualified acceptance, which under our law constituted a new proposal. Section 1585, Civ. Code. When this new proposal was received by Gill & Rabbeth, it was, in legal effect, received by plaintiffs. There is nothing to indicate that it was revoked by defendant at any time before the receipt by him of plaintiffs' telegrams of April 17th and 19th. Section 1587, Civ. Code. Defendant's telegram of April 19th to plaintiffs was in no sense a revocation of his previous proposal. If either of these telegrams constituted an acceptance by plaintiffs of defendant's new proposal, the contract was complete so far as the matter of the reservation by the defendant was concerned. "A proposal may be revoked at any time before its acceptance is communicated to the proposer, but not afterwards." Section 1586, Civ. Code. We do not see how it can be held that plaintiffs' telegrams of April 17th and 19th can be considered otherwise than as an acceptance of defendant's proposition. Especially is this true of their telegram of April 19th, when read in connection with that of April 17th. It was an absolute compliance with the terms of the proposition made by defendant's telegram so far as the consideration named was concerned (the \$400 additional being the amount of the agents' commission), and, although silent on the question of reservation of crop so far as express words were concerned, it necessarily implied acquiescence in the making of such a reservation. No other construction could reasonably be given to the telegram, in the light of the other telegrams and letters that had passed between the parties, than that the same was an absolute and unconditional assent to the terms proposed by defendant. The demand therein for a deed was clearly, in effect, one for a deed of the property without the crop. It is not to be doubted, in view of all the writings, that plaintiffs could have been compelled to accept in full satisfaction of the contract a deed containing such a reservation. No condition having been provided by the proposer concerning the communication of the acceptance, any reasonable and usual mode could be adopted, and the consent must be deemed to have been fully communicated between the parties as soon as plaintiffs put their acceptance in the course of transmission to defendant. Civ. Code, §§ 1582 and 1583.

It may be said, in passing, that nothing could be clearer, in view of the evidence, than that it was the understanding of all parties that the crop was not to go with the land; but, as we have said, the agreement to this effect must be shown by the writings.

There is no force in any of the other points made against the validity of the alleged contract. Some of these claims rest upon the assumption that there had been a sale to Bethell before the contract with plaintiffs was perfected—an assumption that we have seen is not warranted. The series of letters and telegrams passing between Gill & Rabbeth, acting for plaintiffs, and defendant, and between plaintiffs and defendant, contained all the essential elements expressed in such a way as to make a complete, certain, and definite contract between the parties. This is certainly true both as to the description of the property and the names of the purchasers, the matters as to which defendant makes his main contention. It cannot be disputed that the description of the property contained in the telegram of April 17th was certain and complete, and the court finds that it was understood by all the parties that the "lower ten" mentioned in the earlier telegrams "was the property described in paragraph 2 of the amended complaint," which included no other land than that described in the telegram of April 17th, as well as that of the 19th. It was shown that defendant owned no other 10-acre piece of land, and that he owned only one other parcel in San Bernardino county, one containing 14.7 acres. It cannot be disputed that plaintiffs themselves could effectually continue in their own names the negotiations theretofore carried on in the name of their agents.

Some claim is made, based on the allegations of paragraph 2 of the amended complaint, that the defendant is the owner of certain land (describing it), "together with 10 shares of the capital stock of the East Redlands Water Company, a corporation," and on the prayer of such complaint by which plaintiffs asked that the defendant be required to execute a conveyance to them of the property hereinbefore described. We do not see how this in any way affects the question of the *validity* of the contract. It is apparent, of course, from what we have said, that if the water stock referred to in this allegation was not appurtenant to the land, and consequently was personal property, the contract made did not include it. If, on the other hand, it was appurtenant to the land, as is claimed in plaintiffs' brief, and therefore legally part of the land, it was covered by the contract.

We conclude, therefore, that there was a good and sufficient contract in writing between these parties for the sale of the land described in paragraph 2 of the amended complaint, and that the findings of the trial court to the contrary are not sustained by the evidence.

[8] We are now brought to the remaining claims of defendant, which relate to the right of plaintiffs to have specific performance of the contract. It is unnecessary to consider his contention that the complaint fails to

state facts showing that the contract should be specifically enforced, for we are satisfied that we cannot interfere with the action of the lower court denying such relief in view of its conclusion upon the question of the fairness, justness, reasonableness, and adequacy of the consideration. It is alleged in the amended complaint that at all the times mentioned \$14,000 "net cash was and is now a fair, just, reasonable, and adequate price for the said property described in paragraph 2." This was denied by the answer, and it was alleged therein that said property was and is reasonably worth \$18,000. As we read the findings, the trial court concluded that the value of the property as it stood at the time of the negotiations, including the crop then on the trees, was \$16,000, and that the value without such crop was \$15,000. The court further found "that the sum of \$14,000, net cash, was and is not a fair or just or reasonable or adequate price for the property," without the crop. There was ample evidence to sustain the conclusion of the trial court as to the real value.

Our Civil Code (section 3391) provides that specific performance cannot be enforced against a party to a contract: "(1) If he has not received an adequate consideration for the contract; (2) if it is not, as to him, just and reasonable." The claim of plaintiffs is that, in view of the small difference between the true value and the consideration agreed on, it cannot be held that there was such an inadequacy in the price agreed on as to support the conclusion of the trial court, quoting Mr. Pomeroy to the effect that the rule is well settled that, where the parties were both in a situation to form an independent judgment concerning the transaction and acted knowingly and intentionally, "mere inadequacy in the price or in the subject-matter, unaccompanied by other inequitable incidents," is never of itself a sufficient ground for refusing the remedy of specific performance. It is clear, of course, that our statute has made inadequacy of consideration a separate ground for refusing specific performance. *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190; *Cummings v. Roeth*, 10 Cal. App. 144, 101 Pac. 434. See, also, *White v. Sage*, 149 Cal. 613, 87 Pac. 193. Clearly the difference between the true value and the agreed value may be such as, under our statute, to warrant the conclusion that specific performance should be refused on the ground alone of inadequacy of consideration.

[7] The question in such cases necessarily is, not whether the price agreed on was the highest price obtainable, but whether such price is a fair and adequate price "under all the circumstances." *Morrill v. Everson*, *supra*.

[8] It is peculiarly a question of fact for

the trial court to determine in the light of all the circumstances, and the conclusion of that court upon the question should not be set aside unless it is clear that it has no sufficient support in the evidence. A conclusion that the agreed price was not adequate means that it was not such as to be, under all the circumstances, a "fair, or just or reasonable" price to be paid by the vendee to the vendor, terms expressly embodied by the trial court in the finding in this case. While a mere difference in value of \$1,000 on property worth only \$15,000 is perhaps not so large as to warrant a conclusion of inadequacy sufficient to justify a refusal of specific performance, something more was shown in this case. The vendor resided and was in the state of Texas, many hundreds of miles from the property, and was dependent upon those near the property for information as to its condition and value. On the other hand, the plaintiffs were on the ground and were well informed regarding the value of orange groves in that vicinity, and one of them had been engaged for eight years in buying and selling such orange groves. In their telegram of April 13th to defendant, Gill & Rabbeth advised a sale on the terms then offered, stating that there was much scale in the grove. We cannot say, in the light of these facts and the inferences that may be reasonably drawn therefrom, that the finding of the trial court that the consideration was not, under the circumstances, fair or just or reasonable or adequate as to defendant, is without sufficient support in the evidence. If the finding is sufficiently supported by evidence, it follows that the judgment denying specific performance was correct.

[9] Complaint is made that, in any event, plaintiffs should have been awarded damages. It was generally alleged that, by reason of the failure and neglect to convey on the part of defendant, plaintiffs had been damaged in the sum of \$2,000. This was denied, and the court found that plaintiffs had suffered no damage whatever. The measure of damage for breach of an agreement to convey real estate, where no bad faith on the part of the vendor is alleged and shown, is prescribed by section 3306 of the Civil Code to be "the price paid, and expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon." There was no evidence whatever to show any such expenditure by plaintiffs, no showing that would have sustained a conclusion of damage, in view of the provisions of section 3306 of the Civil Code.

The judgment and order denying a new trial are affirmed.

We concur: SHAW, J.; SLOSS, J.



## PEOPLE v. COFFEY. (Cr. 1599.)

(Supreme Court of California. Dec. 1, 1911.)

## 1. CRIMINAL LAW (§ 757\*)—INSTRUCTIONS—TESTIMONY OF ACCOMPLICES.

If the evidence requires it, the court should charge the law as to accomplices, leaving, as a rule, the question of whether a witness is an accomplice for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1775; Dec. Dig. § 757.\*]

## 2. CRIMINAL LAW (§ 742\*)—ACCOMPLICE'S EVIDENCE—QUESTION OF LAW OR FACT.

Where the fact of whether a witness did certain things, which would make him an accomplice is in dispute, the matter is for the jury; but, where the facts are not disputed, it becomes a question of law for the court to say whether such acts make the witness an accomplice.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1720; Dec. Dig. § 742.\*]

## 3. CRIMINAL LAW (§§ 934, 935\*)—NEW TRIAL—VERDICT CONTRARY TO LAW AND EVIDENCE.

A contention that a conviction was had upon the uncorroborated evidence of an accomplice presents a legal question, under Pen. Code, § 1181, authorizing the granting of a new trial on the ground that the verdict is contrary to the law and evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2293-2298; Dec. Dig. §§ 934, 935.\*]

## 4. CRIMINAL LAW (§ 507\*)—ACCOMPLICES—DEFINITION—"ACCOMPLICE."

At common law, an "accomplice" includes all participes criminis, whether they be principals in the first or second degree, or mere accessories before or after the fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. § 507.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 75-79; vol. 8, p. 7561.]

## 5. CRIMINAL LAW (§ 507\*)—"ACCOMPLICE"—STATUTES.

Since under the direct provisions of Pen. Code, § 31, all persons concerned in the commission of a crime, whether they directly commit the act or aid and abet therein, or being absent advise and encourage its commission, are principals, such persons are also accomplices within the rule as to accomplice's testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. § 507.\*]

## 6. CRIMINAL LAW (§ 507\*)—"ACCOMPLICE."

The fact that one cannot be convicted as a principal of the same offense of which accused is charged does not prevent him from being an accomplice within the rule as to accomplice's testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. § 507.\*]

## 7. CRIMINAL LAW (§ 507\*)—"ACCOMPLICE."

Pen. Code, § 31, provides that all persons concerned in the commission of a crime, whether they directly commit the act or aid and abet therein, or advise and encourage its commission, are principals. Section 654 provides that an act which is made punishable in different ways by different provisions of the Code may be punished under either of such provisions, but cannot be punished under more than one. *Held*, that the fact that an act of par-

ticipation as an accessory or accomplice has been made a separate crime would not necessarily prevent such accomplice from being indicted so as to prevent him from being an accomplice within the rule as to corroborating an accomplice's testimony.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. § 507.\*]

## 8. BRIBERY (§ 1\*)—DEFINITION AT COMMON LAW.

At common law, "bribery" was the voluntary giving or receiving of anything of value in unlawful payment of an official act done or to be done.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 867, 868; vol. 8, p. 7593.]

## 9. CRIMINAL LAW (§ 507\*)—ACCOMPLICES—DEFINITION.

The test of whether one is an accomplice, within the rule as to accomplice's testimony, is whether his participation in the offense has been criminally corrupt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. § 507.\*]

## 10. CRIMINAL LAW (§ 507\*)—ACCOMPLICES—CORROBORATION.

Pen. Code, § 165, punishes every person who gives or offers a bribe to any member of any board of supervisors of any county or city with intent to corruptly influence him in his action on any matter pending in the body, and every member of such bodies who receives or agrees to receive any bribe upon any understanding that his vote or judgment shall be influenced thereby. *Held*, that one who acted as intermediary for another in offering a bribe to a member of a board of supervisors prosecuted under section 165, for agreeing to receive and receiving a bribe, was an accomplice, requiring his evidence to be corroborated.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1082-1096; Dec. Dig. § 507.\*]

## 11. CRIMINAL LAW (§ 511\*)—ACCOMPLICE'S TESTIMONY—CORROBORATION.

While the corroboration of an accomplice's testimony may be slight, it must of itself, independent of the accomplice's testimony, tend to show accused's guilt, so that the accomplice's own direct evidence is not available as corroborating evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.\*]

## 12. CRIMINAL LAW (§ 511\*)—ACCOMPLICE'S TESTIMONY—"CORROBORATE."

In the prosecution of a member of a city and county board of supervisors for receiving a bribe for his vote, another supervisor testified that, acting for another, he approached the members of the board as to buying their votes, and that he offered accused a certain sum for his vote on a certain proposition, and that accused said it would be all right. *Held*, that such witness' evidence was not "corroborated," within the rule as to corroborating an accomplice's testimony, by evidence which merely showed how accused voted on such proposition, or that immunity was offered to accused for "any and all crimes" he committed as supervisor without specifying any particular crime, or of the receiving of sufficient money by the alleged briber to enable him to make the bribe without a showing that accused received anything, nor was the fact that after accused was indicted such witness tried to induce the dis-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

trict attorney to abandon the prosecution available to corroborate his evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1127-1137; Dec. Dig. § 511.\*]

For other definitions, see Words and Phrases, vol. 2, p. 1627.]

### 13. BRIBERY (§ 1\*)—OFFENSES.

The acceptance by an officer of a gift after an official act is consummated without any prior corrupt understanding does not constitute bribery.

[Ed. Note.—For other cases, see Bribery, Cent. Dig. §§ 1-3; Dec. Dig. § 1.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

M. W. Coffey was convicted of bribery, and, from the judgment of conviction and orders denying motions to set aside the judgment and for a new trial, he appeals. Reversed and remanded.

Carroll Cook, Franklin P. Bull, and Robert Ferral, for appellant. U. S. Webb, Atty. Gen., W. H. Langdon, Dist. Atty., and Francis J. Heney, Asst. Dist. Atty. (Wm. Hoff Cook, of counsel), for the People.

HENSHAW, J. Defendant was indicted under section 185 of the Penal Code, and was charged as a supervisor with having "agreed to receive and receiving" a bribe of \$4,000 from James L. Gallagher, Abraham Ruef, and Tiley L. Ford. It was alleged that the agreement to receive the bribe and the reception of the bribe were "with the willful, felonious, unlawful, and corrupt intent" upon the part of Coffey that his official vote, opinion, judgment, and action should be influenced thereby in the matter of granting to the United Railroads of San Francisco a franchise for an overhead trolley system. From the judgment of conviction and from his various motions to set aside the judgment, in arrest of judgment, and for a new trial, each of which was denied by the court, defendant appeals. His principal contentions are that the court erred in the instructions which it gave upon the law of accomplices, and that his conviction was had in violation of the law, upon the uncorroborated testimony of a self-confessed accomplice in his crime.

[1] When the question of an accomplice arises in the trial of a case, the general and accepted rule is for the court to instruct the jury touching the law of accomplices, and leave the question whether or not the witness be an accomplice for the decision of the jury as a matter of fact. *People v. Kraker*, 72 Cal. 459, 14 Pac. 196, 1 Am. St. Rep. 65.

[2] Whenever the facts themselves are in dispute, that is to say, wherever the question is whether the witness did or did not do certain things, which, admittedly, if he did do them, make him an accomplice, the jury's finding, upon familiar principles, is not dis-

turbed. But where the facts are not in dispute, where the acts and conduct of the witness are admitted, it becomes a question of law for the court to say whether or not those acts and facts make the witness an accomplice. For the law declares in mandatory terms that "a conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence which in itself, and without the aid of the accomplice, tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." Pen. Code, § 1111.

[3] Therefore whenever upon appeal it is argued that the conviction was had upon the uncorroborated testimony of an accomplice, it is equivalent to a declaration that the verdict is contrary to the law and the evidence, and this is always a legal question. Pen. Code, § 1181, subd. 6. Therefore, in every proper case, a Court of Appeals is called upon to consider whether or not the witness is an accomplice, and, if so, whether his evidence has received the corroboration demanded by the law before a defendant may be convicted upon it.

To the consideration of what constitutes a man an accomplice in a bribery case we are thus at once brought, and to an understanding of these matters a brief statement of the evidence becomes necessary. The principal witness for the prosecution was Gallagher, himself a supervisor. Gallagher, by his own statements, was testifying under a promise of immunity, agreed to by the prosecution, in consideration of his giving truthful evidence touching his own crimes, and the crimes of the board of which he was a member, including the crime under examination. He swore that he acted as the intermediary of Abraham Ruef and for Ruef, and approached and consulted with his fellow members on the board in relation to the corrupt bargains which were, and were to be, entered into, and the amounts of money which the members of the board were to receive for voting as Ruef desired. In this particular instance Gallagher spoke to Coffey, at the suggestion of Ruef (quoting from his testimony): "Mr. Ruef told me what he could or would give the board of supervisors in the matter, and asked me to present the proposition to them, and I did so, and I reported back to Mr. Ruef from them that it was all right; that the matter could go through. I said to Mr. Coffey, in the matter of the overhead trolley, that there would be \$4,000 in that matter, and Mr. Coffey said that that would be all right—words to that effect. That is the substance of it." The trolley franchise was granted, and subsequent thereto, Gallagher testifies, he gave to Coffey \$4,000 in two separate payments. This evidence, coming from the prosecution

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

itself, is uncontroverted, and presents the legal question whether, by virtue of it, Gallagher was an accomplice of Coffey in the corrupt agreement thus charged and proved.

The rules of law and principles of evidence controlling the testimony of accomplices are drawn from the common law. The difficulty which the common-law judges experienced was not in determining the weight to be given to the testimony of an accomplice. Under their rules of evidence, a *convicted* felon could not testify. Influenced in no small degree by the maxim of the Roman law that a man of self-confessed infamy should not be heard as a witness against another (*nemo, allegans turpitudinem suam, est audiendus*), their principal difficulty was in determining whether the oath and evidence of a self-confessed though unconvicted felon—an accomplice—should be received at all. When this question was resolved against the doctrine of the Roman law, it was, of course, recognized that evidence of an accomplice, coming from a tainted source, the witness being, first, an infamous man, from his own confession of guilt, and, second, a man usually testifying in the hope of favor or the expectation of immunity, was not entitled to the same consideration as the evidence of a clean man, free from infamy. Hence it soon became the practice of the common-law judges, in the wide latitude allowed to them in the instruction of their juries, to advise the latter that the testimony of an accomplice, for the reasons indicated, was to be viewed with care, caution, and suspicion (see Code Civ. Proc. § 2061), that the accomplice stood before them as a witness entitled to little credit, and that the surest way of establishing his credit in their eyes was for them to note whether his testimony was corroborated in any material matter by independent evidence, and that if it were so corroborated they might put faith in all that the accomplice had said. Instructions to this effect did not, of course, embody any rule of positive law. They were but the expression of considerations naturally arising from a contemplation of the weight and value to be given to such evidence. Subsequently they were cast into the form of positive law by varying enactments in the Codes and statutes of the states. In this state, the rule of positive law since the year 1851 is as has been declared in section 1111 of the Penal Code. Time has not changed the value of such evidence, and succeeding Legislatures have retained the rule; the amendment to the section in 1911 not materially affecting it.

[4] But while the Legislature was thus at pains to declare that a conviction could not be had on the uncorroborated testimony of an accomplice, it omitted to define this word. At common law no difficulty was experienced, for the word was interpreted broadly to include principals in every degree and accessories before and after the fact. Those who "receive, relieve, comfort,

or assist" the felon, were regarded as having participated in his crime, and as meriting the same punishment that he had earned. And so it will be found that at common law, and in the jurisdiction of the federal courts, an accepted definition of an accomplice includes "all participes criminis, whether they are considered, in strict legal propriety, as principals in the first or second degree, or merely as accessories before or after the fact." In *re Rowe*, 77 Fed. 161, 23 C. C. A. 103.

Although the Legislature did not in terms define an accomplice, it did lay down certain rules from which an acceptable definition of an accomplice may readily be derived. Thus it obliterated the common-law distinctions between principals in their different degrees and accessories before the fact, and declared that "all persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or not being present, have advised and encouraged its commission, \* \* \* are principals in any crime so committed." Pen. Code, § 31. The object of this was both to simplify criminal procedure and to do away with the technicalities of the common law, which made the aider or abettor a principal in the second degree, and which forbade the accessory to be brought to trial until the principal had been convicted or outlawed, a rule that lived in modern times and did much mischief. 2 Stephen, *History Criminal Law*, 232.

[5] Rejecting from the category of accomplices the accessory after the fact (*People v. Collum*, 122 Cal. 186, 54 Pac. 589), we may derive a satisfactory definition of an accomplice from the language of section 31 of the Penal Code above quoted. Accomplices, then, are "all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission." Certainly, since the law has said that all such persons are so tainted with guilt that they may be indicted as principals, it cannot be denied that they are also accomplices. This definition, moreover, runs counter to no authority, since, by all, every person of legal responsibility, who knowingly and voluntarily co-operates with or aids or assists or advises or encourages another in the commission of a crime is an accomplice, without regard to the degree of his guilt. 1 *Russell's Crimes*, 49; *Wharton, Crim. Ev.* 440; *Rice, Crim. Ev.* § 319; *Bishop, Crim. Proc.* § 1159.

Having reached the point of defining an accomplice, it becomes proper to consider what acts or facts fix this relationship or characteristic upon a witness. Manifestly, the single, sole determinative consideration is the part which the witness has borne in

the crime perpetrated. If the witness has committed the crime, if he has aided and abetted in its commission, if he has advised and encouraged its commission, the existence of any one of these facts admitted or established stamps his status as that of an accomplice. This is the precise language of the law, and this, and this alone, is the governing principle of the law. Yet, in view of the cases hereinafter to be considered, it will be found that occasionally, a court losing sight of this paramount and all-controlling consideration, namely, the conduct of the witness in relation to the crime, has wandered widely from the true test, and, in accordance with faulty definitions of its own making, has determined upon entirely false premises whether a witness is or is not an accomplice.

[8] The commonest of these errors may thus be expressed: The law declares that all persons concerned in the commission of a crime, whether they directly commit it, or aid and abet in its commission, or advise and encourage its commission, are principals. They are, of course, accomplices. Therefore an accomplice is one who may be indicted for the same crime as that charged against the person on trial, and therefore, if he cannot be charged with the same crime, he is not an accomplice. Here is epitomized the reasoning of such cases as *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127, and the fallacy of the reasoning must be obvious. One is an accomplice in a crime because of the part that he has taken in it, not because he may be indicted as a principal. The latter is a mere accidental circumstance, depending upon the language of the statute, and in no way affecting the true touchstone, namely, the part which the accomplice has taken in the offense. The judicial declaration that, under a statute such as our section 31 of the Penal Code, all accomplices may be indicted as principals, is perfectly sound. But the attempted reasoning from this that if a person cannot be indicted as a principal, he is, therefore, not an accomplice, is absolutely fallacious. To illustrate: In the present condition of our law, no one would question but that the man who instigated and incited a murder and the man who actually committed the murder were both accomplices in the crime of murder. No one would question, moreover, but that both could be indicted as principals in the crime of murder. But suppose that to-morrow the Legislature, as it would be quite competent for it to do, should declare that where a man had incited murder he should be indicted only for subornation of murder, and upon conviction be punished by death, but that the man who committed the murder under such incitement should be charged with murder, and upon conviction should be punished by life imprisonment, there would be presented a case where the law denounced as different

crimes the different acts of the parties. Would it for a moment be said that they ceased therefore and thereby to be accomplices in the crime of murder? Or, again, the law to-day declares that the giver of a bribe may be punished for the giving; that the officer who receives a bribe may be punished for the receiving. A. offers B. a bribe, and by this means advises and encourages the commission of a crime. B., in turn, consults his friend C., who "advises and encourages" B. to accept the bribe. B. returns to A. and agrees to A.'s corrupt proposition, and A. pays the bribe money. C. is admittedly an accomplice. He has advised and encouraged B. in the commission of a crime, but A. has done precisely the same thing, and has gone even further than B., in that he has not only advised and encouraged, but has become a party to the criminal agreement. By what logic or reasoning may it be said that C. is an accomplice and A. is not? Not because of the accidental circumstance, if such circumstance exist, that A. can be charged with another crime growing out of the same acts, not because of the accidental circumstance, if it exist, that A. cannot be charged with the same crime, as B., for these are purely accidental circumstances and are not of the essence of the consideration. At common law the accomplice could not be indicted for the same crime, yet he was none the less an accomplice. The declaration that one is an accomplice if he can be indicted for the same crime charged against the defendant on trial is perfectly sound; but the converse of the declaration, namely, that, if he cannot be indicted for the same crime, he is *not* an accomplice, is the merest sophistry, which, ignoring the true test and meaning of the word, seeks to turn shadow into substance. That test and meaning, as we have said, are expressed in section 31 of the Penal Code. If a man has committed a crime, if he has aided and abetted in its commission, if he has advised or encouraged its commission, he is an accomplice with all other participes criminis.

It is, of course, no argument to say that, where the law has denounced as separate crimes the separate acts of the parties as bribe giving and bribe taking, to hold the parties to be accomplices would make them principals in one crime and accomplices in another "at the same time and through the same overt act." This is a frequent occurrence in and condition of the law. The law may and oft does go further and make different offenses with different punishments of the same act. The prosecution may be had for any of the crimes embraced within the acts committed. But the law exacts only a single punishment, and upon conviction or acquittal for the given acts the defendant may successfully plead *autrefois convict* or *autrefois acquit* against another prosecution for the same acts under

a different section of the Code. Indeed, this condition of the law is expressly recognized in section 654 of the Penal Code, which declares that "an act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other." And as specific illustrations, subornation of perjury is declared a crime punishable by imprisonment in the state prison for not less than one nor more than fourteen years. Pen. Code, §§ 126, 127. A futile effort to induce a witness to commit perjury may be punished as an attempt under section 664 of the Penal Code, when upon conviction the defendant could be sentenced to state prison for a term not exceeding seven years. Yet by section 137 of the Penal Code the same attempt is declared to be a felony, and by section 18 of the Code that felony could be punished only by a term of imprisonment not exceeding five years. Again, extortion under color of office contains all the elements of bribe taking, and the guilty official may be indicted and prosecuted indifferently for either offense, notwithstanding that their punishments may be different. *Com. v. Wilson*, 30 Pa. Super. Ct. 26.

While our law generally does not seek to admeasure the degrees of guilt between principals, accessories, and accomplices, it is quite competent for it to do so, and in the past it has been quite common for it to do so. If A. instigates B., C., D., and E. to join in the commission of a murder, B. furnishing the weapon, C. transporting D. and E. to the scene of the crime, D. holding the victim while E. inflicts the fatal blow, the law might admeasure their degrees of criminality, define their offenses separately, and punish them accordingly. If it did not do so, all, under our Code, would be accomplices and principals alike in the crime of murder. Would they be any the less accomplices, would they any the less have instigated, aided, abetted, and committed the crime because the law should happen to mete out different punishments for their separate acts of participation, as it actually did at common law?

[7] Nor yet does it follow, because the particular act of participation of an accessory or accomplice in a crime has been denounced by our law as a separate crime, that he cannot therefore be indicted as a principal. If the law made manifest its intent that he should not be so indicted as a principal, it would be but an exception to the general provision of section 31. If it did not make manifest this intent, then the situation presented is that contemplated by section 654 of the Penal Code, where the act is made punishable in different ways by different provisions of the Code. But in either

case the accidental circumstances clearly do not affect the definition of an accomplice. One is an accomplice, we repeat, because of what he has done, and not because of the form of punishment which the law may mete out for his acts. Wherever the law has denounced as a separate crime the particular act of participation by an accessory or accomplice, the sole logical and legal effect is not to destroy the relationship of accomplice, but merely to effect a modification of section 31 of the Penal Code, as though by an express proviso it should read, "All persons concerned in the commission of a crime," etc., "are principals in any crime so committed, provided that they shall not be indicted as principals in any case where the law has denounced their participation as a separate crime and declared that they shall be prosecuted exclusively for such separate crime." But this, as we have said, does not and cannot, by any species of legal hermeneutics or legerdemain, relieve an accomplice of his character of accomplice. It is merely prescribing a separate punishment for the particular act of one who is still an accomplice.

By a few courts which have regarded the effort to induce a witness to commit perjury as the essence of the crime of subornation, disregarding as negligible the success of the effort resulting in a corrupt agreement and in the commission of the perjury itself, it is held that in a charge of subornation the perjurer is not an accomplice with the suborner. The case most often cited and here relied upon by respondent is that of *Stone v. State*, 118 Ga. 717, 45 S. E. 630, 98 Am. St. Rep. 145. That was a charge of subornation of perjury; the perjury having been committed. The testimony of the perjurer was received. It was contended that the perjurer was an accomplice. The Supreme Court of Georgia reasoned that while "in perjury and subornation of perjury the act of the two offenders is concurrent, parallel, and closely related in point of time and conduct," still there was "sufficient inherent difference between the two to warrant the lawmaking power in separating the act into its component parts and making that of the suborner a new and independent offense, punishable with greater or less severity than that inflicted on the perjurer." From this the court reasoned that "the suborner is not, under our law, treated as the accessory of the perjurer." This is "further evident from the fact that they are punished differently, while under the Code accessories before the fact are punishable in the same way as principals." The next step in the reasoning is sound. It is that "if not accessories the suborner and the perjurer are not accomplices." And having determined to its satisfaction that the suborner and the perjurer were not accessories, the conclusion that they were not accomplices followed irresistibly. The court would have made a

more plausible presentation if it had reasoned solely from the proposition that the sole substantive element of subornation is the effort and attempt to procure perjury, and that the success or nonsuccess of the effort is a negligible quantity, and that it was thus like the crime of soliciting a bribe or the crime of offering a bribe. But to place its reasoning upon the ground that the suborner is not an accessory of the perjurer, so that if the trial were for perjury the suborner would not be considered as an accomplice, does violence to the common law and to the decision of every state which has made the common law the basis of its jurisprudence. The accomplice at common law—the accomplice in this state—is one who advises and encourages the commission of a crime. How can it be said that the very instigator of the crime—the suborner—has not advised or encouraged it? But faulty as we believe even this reasoning would have been, because we conceive the corrupt agreement to be of the essence of the crime of subornation, though not of attempt to suborn, it would still have been at variance with the common-law rule and the rule of such well-considered cases as *People v. Evans*, 40 N. Y. 5, and *Commonwealth v. Smith*, 11 Allen (Mass.) 243. The latter case merits quotation at length: "The crime of subornation of perjury is clearly in its nature that of an accessory before the fact to the perjury. Both perjury and subornation are felonies under our statute, being punishable by imprisonment in the state prison. Gen. Stats. c. 163, §§ 1, 2, 3; Id., c. 168, § 1. Whoever procures a felony to be committed, though it be by the intervention of a third person, is an accessory before the fact, for it is not necessary that there should be any direct communication between the accessory and the principal. *Rex v. Cooper*, 5 C. & P. 535; *Foster's Crown Law*, 125; 2 Hawk. c. 29, §§ 1, 10; *Earl of Somerset's Case*, cited in 19 Howell's State Trials, 804. And the accessory is a felon, though his felony is different in kind from that of the principal. *Foster's Crown Law*, 343. So it is said to be a principle in law, which can never be controverted, that he who procures a felony to be done is a felon. 1 Russ. on Crimes, 32. We cannot see that the application of these principles is changed, when the crime of the accessory before the fact is made by statute a substantive felony. The object of making it a substantive felony may be either to provide a distinct or milder punishment upon conviction, or to authorize the indictment and conviction of the accessory where the principal has not been convicted. But whether the crime is made the subject of separate prosecution and punishment or is to be included in an indictment with the principal offense will not, in the opinion of the court, change the definition of it, or alter the facts or circumstances in which the commission of it

consists. The same facts to be averred and proved in the same way will substantiate the crime in one case as in the other. \* \* \* The crime of subornation of perjury would consist in procuring perjury to be committed, directly or indirectly, as much after subornation was made a felony as before."

To the same effect is the case of *State v. Fahey*, 3 Pennewill (Del.) 594, 54 Atl. 690, and in *State v. Renswick*, 85 Minn. 19, 88 N. W. 22, the Supreme Court of Minnesota, which, as we shall see, is the only court that announces the extreme view that the briber and bribed are not accomplices, declares that in a trial for subornation of perjury the mere attempt to suborn testified to by the witness does not make him an accomplice; but, if the subornation itself is sought to be established by the testimony of the perjurer, the latter is an accomplice, and his evidence must be corroborated.

Wherever the commission of a crime involves the co-operation of two or more people, the guilt of each will be determined by the nature of that co-operation. Whenever the co-operation of the parties is a corrupt co-operation, then always those agents are accomplices, even as at common law they were principals. To the crime of seduction two parties are necessary, but the co-operation of the seduced is not criminal. She is a victim, and she is not therefore an accomplice of the seducer. In such lesser offenses as laws denouncing the sale of lottery tickets or the sale of liquor, while two are necessary to the transaction and to the commission of the crime, the law reasons that the purchaser's act is entirely innocent, and he will not be regarded as an accomplice. In cases of abortion, where the law denounces the commission of an abortion, some cases hold that the consenting pregnant woman is not an accomplice. These decisions doubtless arise in part out of a tenderness for the sex and a consideration of the extreme temptations by which a woman so situated may be beset. Under our law a woman may or may not be an accomplice, depending upon her part in the transaction. Thus she may consent to the taking of the drugs, or the performance of the operation in ignorance of the intended purpose. She may, indeed, be coerced into submission, in neither of which cases would she be an accomplice. But if a woman voluntarily solicits the performance of such an operation upon herself, and to that extent induces it, it is impossible to see how she can fail to have been an instigator and encourager of the crime, and so an accomplice. Such is the ruling of the Ohio Supreme Court in *State v. McCoy*, 52 Ohio St. 157, 39 N. E. 316, and such is the decision of this state in *People v. Josselyn*, 39 Cal. 893, and the recognition of the relationship of an accomplice is evidenced by the provisions of the Penal Code, which in section 1108 declares

that upon a trial "for procuring or attempting to procure an abortion, or aiding or assisting therein, the defendant cannot be convicted upon the testimony of the woman upon or with whom the offense was committed, unless she is corroborated by other evidence."

In adultery and fornication, where the willing consent of the woman is proven or assumed, the courts have found no difficulty in declaring her to be an accomplice with the man. For there, differing from abortion, no considerations of the temptation of the woman's hard lot operate to soften the court's views. They are accomplices the one with the other because their conduct is corrupt and each has mutually aided the other in the commission of a crime to which the corrupt participation of the two is necessary. *State v. Scott*, 28 Or. 331, 42 Pac. 1; *Merritt v. State*, 12 Tex. App. 203; *Townser v. State*, 58 Tex. Cr. R. 453, 126 S. W. 572, 137 Am. St. Rep. 976.

[8] "Bribery" at common law, as defined by Bishop (1 Bishop, New Crim. Law, 85), was "the voluntary giving or receiving of anything of value in corrupt payment for an official act done or to be done." It is the uniform rule of decision, not only of the common law but of every state of the United States, with one exception hereinafter to be considered, that the giver and the receiver of the bribe are principals in the crime, and so necessarily accomplices of each other. The giving and the receiving are reciprocal. *Rex v. Vaughan*, 4 Burr, 2494; *Regina v. Boyes*, 1 Best & Smith, 311. In the *Vaughan Case*, supra, says Lord Mansfield: "Wherever it is a crime to take it is a crime to give." Various states have in various ways denounced as crimes certain phases, elements, and transactions going to the crime of bribery, but stopping short of its completion. Thus, in some states the soliciting of a bribe without its payment is a crime. Pen. Code, § 93. In others it is not. In some states the offer to pay a bribe without regard to its acceptance is a crime. Pen. Code, § 93. In others it is not. Manifestly in the crimes last mentioned, since the denounced act in no wise depends upon a plurality of agents, in no wise rests upon the corrupt assent, agreement, or procurement of another, the person approached is not an accomplice of the approacher. But whenever a crime embraces the corrupt, guilty, criminal co-operation of two or more persons, those persons always have been and must be accomplices.

[9] This, then, is the true test and rule: If in any crime the participation of an individual has been criminally corrupt, he is an accomplice. If it has not been criminally corrupt, he is not an accomplice. In those cases where the concurrent act or co-operation of two people is necessary, as in seduction, sometimes in abortion, and in the minor offenses of selling liquor, lottery tickets or harmful drugs, the relationship of accomplice

does not exist because the co-operation of the other party is not denounced by the law as criminally corrupt, and, as matter of fact, need not be criminally corrupt. Upon the other hand, where the act requires the co-operation of two persons, and their co-operation is criminally corrupt, the relationship of accomplice is at once established, as in adultery and fornication, in duelling, in agreeing to fight a duel, in illegal rebating (*U. S. v. N. Y. C. R. R. Co.* [C. O.] 146 Fed. 298), in bribery, and in all forms of criminal agreement, where the agreement itself constitutes the crime. Conspiracies are typical instances of agreements in and of themselves constituting crimes. All the conspirators are principals and, of course, accomplices.

In the charge against this defendant of "agreeing to receive a bribe" and "receiving a bribe," each element, the agreeing and the receiving, necessarily contemplates the criminally corrupt co-operation of another (eliminating from consideration, of course, the feigned accomplice). To this proposition the authorities are so numerous and so uniform that one is rather embarrassed by the wealth than by the dearth of them. But on the question of accomplices in bribery alone, as sustaining this principle, either tacitly or with discussion, may be cited *Newman v. People*, 23 Colo. 300, 47 Pac. 278; *People v. Bissert*, 71 App. Div. 118, 75 N. Y. Supp. 630, affirmed 172 N. Y. 643, 85 N. E. 1120; *People v. Winant*, 24 Misc. Rep. 361, 53 N. Y. Supp. 695; *People v. Acritelli*, 57 Misc. Rep. 574, 110 N. Y. Supp. 440; *State v. Callahan*, 47 La. Ann. 444, 17 South. 50; *State v. Smalls*, 11 S. C. 262; *State v. Horner*, 1 Marv. (Del.) 504, 41 Atl. 139; *Murphy v. State*, 124 Wis. 635, 102 N. W. 1087; *People v. McGarry*, 136 Mich. 316, 99 N. W. 147; *People v. Fielding*, 36 App. Div. 401, 55 N. Y. Supp. 530; *Ruffin v. State*, 36 Tex. Cr. R. 565, 38 S. W. 169; *O'Brien v. State*, 6 Tex. App. 665; *Birch v. State* (Tex. Cr. App.) 106 S. W. 344; *State v. Carr*, 28 Or. 389, 42 Pac. 215; *Butt v. State*, 81 Ark. 173, 98 S. W. 723, 118 Am. St. Rep. 42; and *State v. Duff*, 138 Am. St. Rep. 269, note, where it is said: "It may be stated as a general rule that a person offering, giving, or paying a bribe is an accomplice of the person who receives it, particularly wherever the statutes make it a crime for a person to offer, give, or pay, and a crime for a person to receive, a bribe."

There is but one court, as has been intimated, which has advanced a view on this subject contrary to all other authorities and decisions. That is the Supreme Court of Minnesota, in the case of *State v. Durnam*, 73 Minn. 150, 75 N. W. 1127. In that case the defendant was indicted and convicted of the crime of "asking" for a bribe, the crime contemplated in our state by such sections as Penal Code, 93 and 94. He had solicited the bribe from Richards and Halvorson, witnesses in the case. The defendant's demands

were not acceded to; the bribe money was not paid. Upon appeal it was contended that Richards and Halvorson were accomplices. The Attorney General in his brief made the argument that follows: "As to defendant's contention that Richards was an accomplice, it seems to us that, if a person from whom a bribe is asked is an accomplice when he refuses to give it, then a person who is held up on the street at night by a highwayman is an accomplice. In both cases the person robbed and the person solicited furnish subjects upon which the crime could be committed; but that does not make them accomplices. In order to be an accomplice, a person must be a criminal. He must do a criminal act with a criminal intent, and the person who is merely asked for a bribe may refuse it and be perfectly innocent of any offense." The position of the Attorney General was perfectly sound. It could have been adopted by the court with absolute security. But the court went still further and, under the fallacious formula above adverted to, worked out the proposition that if the witness could not have been indicted for the offense he was not an accomplice; and that, consequently, if the law has denounced the acts of participation of the two as separate offenses, "the one is not the accomplice of the other." How utterly mistaken this line of argument is, we think has been abundantly shown. We have already pointed out how this same court, in the case of perjury and subornation, crimes made separate and distinct by the Minnesota law, has held, notwithstanding, that the testimony of the perjurer must be corroborated in a charge against the suborner. We are not called upon to reconcile the inconsistency of these decisions, and it is sufficient to point out that *State v. Durnam* is unique in the history of the law.

[10] The charge against this defendant, as we have seen, is under section 165 of the Penal Code. It is not for asking or soliciting a bribe. It is for "agreeing" to receive and "receiving" a bribe. The agreement necessarily carries with it the essential concept of a criminal and corrupt bargain. There can be no agreement without a meeting of minds, and a meeting of minds for this base bargain is declared to be a crime. There is nothing in the law to suggest even that in such a crime the two parties stand in any different position from that occupied by two who agree to fight a duel. In such an agreement the act of the person who contracts to pay the consideration is admittedly base, corrupt, and criminal. Moreover, his conduct is essential to the very existence of the crime of agreeing. How then shall it be said that he is not, within the narrowest or the fullest meaning of the law, an accomplice of the man agreeing to take the bribe? He is an actual participant in the crime, as well as an aider, abettor, adviser, and encourager in its commission, for it is to be remembered

that in the case at bar the crime itself is the agreement. An officer may solicit bribes, may ask for bribes, may advertise his willingness to accept bribes. Each one of these acts is a separate, distinct, and recognized crime; but no one of them is the crime of agreeing to take a bribe, which *ex vi termini* requires the guilty co-operation of another. *U. S. v. Deitrich* (C. C.) 126 Fed. 664. Moreover, if, as we have seen, by all of the authorities, saving one, when the bribery is completed the payer of the bribe and the recipient of the bribe are reciprocally accomplices in the bribing, it cannot successfully be argued that in the perfected agreement for the accomplishment of this crime the same two persons are not accomplices.

With the law thus before us we are in a position to consider the rulings of the trial court.

The court gave the following instruction: "Where two or more persons are concerned in the commission of a crime, whether they or either of them directly commit the act constituting the offense, or aid and abet in the commission, or, not being present, have advised and encouraged in its commission, each one of them is an accomplice with the other in any crime so committed, and the final test of the question, as applied to a witness in any case, is: Could such witness lawfully be indicted with the defendant for the offense on trial? If so, he is an accomplice within the meaning of the law. If not, he is not, and the man who gives or offers a bribe is not for that reason an accomplice of the one who receives or agrees to receive a bribe." The opening sentence of this instruction defines an accomplice in just terms. But when it proceeds to say that the final test as applied to a witness in any case is: "Could such witness lawfully be indicted with the defendant for the offense on trial?" the court adopted the fallacious reasoning of the *Durnam* Case, *supra*, and fell into error—an error which was repeated in the closing sentence with, "the man who gives or offers a bribe is not, for that reason, an accomplice of the one who receives or agrees to receive a bribe." For, as Lord Mansfield said, "Wherever it is a crime to take it is a crime to give." These crimes are reciprocal and mutually interdependent. The same is true of an agreement to receive a bribe.

It thus being established that Gallagher was clearly an accomplice, the equally important question remains whether or not his testimony was corroborated. If it be corroborated, up to the requirements of the law, it might be argued that, notwithstanding the erroneous instruction above quoted, the jury determined that he was an accomplice, but rendered its verdict because of the corroborating evidence. Upon this it is declared by respondent that, treating Gallagher as an accomplice, his evidence was sufficiently corroborated.

[11] The corroboration of an accomplice's



testimony, as has been said, may be slight. *People v. Melvane*, 39 Cal. 618; *People v. Clough*, 73 Cal. 351. But it must in and of itself, and independent of the testimony of the accomplice, tend to inculcate the defendant on trial with the commission of the crime.

[12] But no part of the testimony which the respondent declares effects such corroboration is of any legal effect for this purpose. Thus it is said that the defendant's act "established primarily by Gallagher's direct testimony" tends to corroborate Gallagher. But this, in legal effect, is but the untenable declaration that one part of the evidence of an accomplice may corroborate another part. "The testimony of independent witnesses as to the defendant's votes in the board of supervisors on the bills and ordinances in relation to the overhead trolley system" does no more than to show how he voted, and affords not the slightest independent evidence that he so voted under a corrupt agreement to accept a bribe for so doing. The immunity contract offered in evidence did no more than to declare that immunity would be granted for any and all crimes which Coffey as a supervisor might have committed, but contained no reference whatsoever to this or any particular crime. The tracing of a fund from the United Railways into the hands of Ruef was likewise insufficient. This was but a showing of the possession of sufficient money by the alleged briber. It did not tend to show that the defendant actually received any of it. See *People v. Blissert*, 71 App. Div. 118, 75 N. Y. Supp. 830; *Id.*, 172 N. Y. 648, 85 N. E. 1120.

The other matters of evidence alleged as establishing sufficient corroboration are equally without substance. It is unnecessary to discuss them all. But in exemplification, after Coffey was indicted for the present crime, Gallagher interceded on his behalf with the district attorney, and sought to have the latter abandon the prosecution. This is urged as corroboration. So far as appears, it was an unsolicited act, and could not have the slightest effect as showing, from an independent source, that Coffey either corruptly agreed to take a bribe, or corruptly received a bribe. The latter fact, the reception of the bribe, stands equally upon the uncorroborated testimony of Gallagher.

[13] Moreover, the money was received after the franchises were granted, and it is well established that, however atrocious in good morals the reception of a present after the act may be, the acceptance of a gift without corrupt prior understanding is not bribery. 2 Wharton's *Crim. Law* (10th Ed.) § 1858; *State v. Ellis*, 33 N. J. Law, 102, 97 Am. Dec. 707; *Walsh v. People*, 65 Ill. 53, 16 Am. Rep. 569.

It follows herefrom that the testimony of Gallagher is corroborated in no respect re-

quired by the law, and for the reasons given the judgment and orders appealed from are reversed, and the cause is remanded.

We concur: BEATTY, C. J.; SHAW, J.; MELVIN, J.; LORIGAN, J.; SLOSS, J.

MARTZ v. AMERICAN BRAN GOLD CO.  
(Sac. 1,902.)

(Supreme Court of California. Dec. 13, 1911.)

1. JUDGMENT (§ 155\*)—VACATING—GROUNDS—MISTAKE AND INADVERTENCE.

The notice of a motion to set aside a default judgment for plaintiff stated specifically that it was "upon the ground that said judgment was entered by mistake and inadvertence," and stated immediately thereafter that "no service has ever been made upon the defendant corporation herein." A sufficient affidavit of merits accompanied the notice. *Held*, that the motion was one for relief from the judgment, under Code Civ. Proc. § 473, upon the ground of inadvertence and mistake, and not one to vacate for want of jurisdiction of the person.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 308, 307; Dec. Dig. § 155.\*]

2. JUDGMENT (§ 159\*)—DEFAULT JUDGMENT—VACATING—INADVERTENCE AND MISTAKE.

An affidavit, served with notice of motion to vacate a default judgment for plaintiff against defendant corporation, showing that none of the officers of the corporation knew of the institution of the suit until after the default judgment was entered, and that the person served was not an agent of the corporation, authorized the vacation of the judgment upon the ground of inadvertence and mistake, pursuant to Code Civ. Proc. § 473.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 312, 313; Dec. Dig. § 159.\*]

3. JUDGMENT (§ 147\*)—DEFAULT JUDGMENT—VACATING—INADVERTENCE AND MISTAKE.

Defendant may waive an objection to a default judgment that he was not personally served, and yet have it vacated on the ground of mistake and inadvertence.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 257; Dec. Dig. § 147.\*]

Department 1. Appeal from Superior Court, Placer County; J. E. Prewett, Judge.

Action by C. E. Martz, administrator of Elmer W. Martz, deceased, against the American Bran Gold Company. From an order setting aside a default judgment for plaintiff, he appeals. Affirmed.

A. K. Robinson, James D. Meredith, and J. B. Landis, for appellant. Ben P. Tabor and C. H. Wilson, for respondent.

ANGELLOTTI, J. This is an appeal by plaintiff from an order setting aside and vacating the default of the defendant and the judgment in plaintiff's favor entered thereon.

The action was one for damages in the sum of \$25,000 for the death of plaintiff's intestate, alleged to have been caused by the wrongful neglect of the defendant. The only attempted service of summons in said action was on August 23, 1909, and consisted

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

of the delivery of a copy of the complaint and summons to one W. S. Fletcher, in Placer county; said delivery being made to him as "the managing agent of said corporation." On May 3, 1910, the default of the defendant was entered, and on May 9, 1910, judgment was entered in favor of plaintiff for the relief demanded in the complaint—\$25,000 and costs of suit. Execution was thereupon issued and levied upon property of defendant. The principal place of business of defendant corporation was at Long Beach, Los Angeles county, where both the president and secretary resided. Such corporation had been engaged in the business of mining in Placer county, and it was the theory of plaintiff that it was so engaged at the time of the attempted service of summons, and that said W. S. Fletcher was then its managing agent in that county.

On May 28, 1910, defendant served upon plaintiff's attorneys and filed a notice of motion to set aside the default and judgment, "upon the ground that said judgment was entered by mistake and by inadvertence; that no service has ever been made upon the defendant corporation herein." The notice stated that the motion would be based upon the affidavits of J. F. Thompson and J. W. Delker, copies of which were served therewith, and upon the records and files in the case. The affidavit of Mr. Thompson contained the matters essential to an affidavit of merits. In such affidavit he further declared that W. S. Fletcher, upon whom the summons was served, was not at any time since April 5, 1909, connected with defendant corporation, either as agent, officer, employé, or stockholder; and, further, that Fletcher did not report to the officers of defendant that he had been served with summons. He further declared that no process had ever been served on any officer or agent of the company, and "that affiant did not know, and that none of the officers of said defendant corporation knew, of the institution of this suit until long after judgment was rendered therein and an execution issued and levied founded upon said judgment." The affidavit of J. W. Delker, the secretary of defendant, contained similar allegations as to Fletcher, and lack of knowledge, prior to May 18, 1910, of the institution or pendency of the action. There was never any denial, either in any affidavit presented by plaintiff or otherwise, of any of the statements contained in these affidavits, except those in regard to the status of Fletcher as managing agent of the company. On May 30, 1910, another notice of motion to vacate the default and judgment, to be based on the same affidavits, records, etc., was served; the exclusive ground stated therein being want of jurisdiction of defendant, for the reason that there had been no service of process therein.

The motions so noticed were heard togeth-

er; the affidavits hereinbefore referred to and numerous other affidavits, together with the files and records of the cause, being received in evidence on such hearing. The question of fact as to which the principal controversy existed on such hearing was whether Fletcher was, at the time of the attempted service of summons, the "managing agent of defendant," within the meaning of those words as used in subdivision 1, § 411, of the Code of Civil Procedure, providing that service of summons on a corporation formed under the laws of this state must be had by delivering a copy thereof "to the president or other head of the corporation, secretary, cashier, or managing agent thereof." Upon this issue there was a substantial conflict in the evidence, and the trial court expressly found in its order vacating the judgment and default that Fletcher, at the time of such service, "was not, nor had he been for more than three months, the agent, managing agent, employé, servant, officer, or stockholder of the defendant corporation." It was, however, contended by plaintiff, upon the authority of *Security, etc., Co. v. Boston, etc., Co.*, 126 Cal. 418, 58 Pac. 941, 59 Pac. 296, that defendant had waived the want of service of summons by uniting with its motion for the vacating of the default and judgment on the ground of want of service, an application for relief on the ground of mistake and inadvertence, under section 473 of the Code of Civil Procedure. It was further claimed that it had waived such want of service by applying to and obtaining from the court two orders shortening the time that must elapse between the service of the notices of motion to vacate and the hearing thereon. The trial court, while apparently treating the motion as one based solely on the ground of want of service of process, expressly found in its order "that said corporation defendant had no knowledge of the pending of said action, nor of the entry of said default, nor of any of the proceedings in said action, until after the issuance of execution herein"—a conclusion absolutely required by the undisputed evidence if Fletcher was not the "managing agent" of the defendant; and it must be assumed, in view of the conflict of evidence on the latter point, and the express finding of the trial court thereon, that he was not such managing agent. The court, concluding "that the defendant corporation was never served with summons herein, and is entitled to have the default set aside and the said judgment vacated," decreed "that the default entered herein be and is hereby set aside, and that the judgment entered herein on the 9th day of May, 1910, be and the same is hereby vacated, annulled and set aside," with leave to defendant to plead to the complaint within 30 days.

[1] We do not deem it necessary to consider the question whether defendant, by the

language of its first notice of motion, and its application for and taking of two orders shortening the time that must elapse between the service of its notices of motion and the hearing thereon, waived the objection of want of jurisdiction of its person. Regardless of that matter, we are satisfied that the first motion should be considered as one by defendant for relief, under section 473 of the Code of Civil Procedure, from a judgment taken against it through its mistake and inadvertence, even if it could be considered as also being a motion to set aside the judgment for want of jurisdiction of the person. It is to be observed that the notice of this motion does not in terms specify want of such jurisdiction as a ground of the motion. It does in terms specify that the motion will be "upon the ground that said judgment was entered by mistake and by inadvertence," following this immediately with the statement "that no service has ever been made upon the defendant corporation herein." A sufficient affidavit of merits accompanied the notice, a thing not essential to an attack for want of jurisdiction.

[2, 3] The affidavits served, by copy, with the notice, stated facts sufficient to warrant the granting of the relief asked because of the excusable mistake and inadvertence of the defendant, for surely, even if the objection of want of jurisdiction by reason of want of legal service of the summons was waived by a voluntary appearance after judgment, the fact that none of the officers of the corporation had any knowledge of the institution of the action until after the judgment had been entered is a sufficient basis for a conclusion that the judgment was taken against the defendant through its excusable mistake and inadvertence. But it is needless to discuss this particular question further, for plaintiff's contention that defendant waived the objection of want of service is based principally upon its further contention that defendant's motion was, in part, one for relief, under section 473 of the Code of Civil Procedure, on the ground of mistake and inadvertence. It is not to be doubted, of course, that a defendant may waive such an objection and still have relief under the section last referred to.

So considering the motion, it is obvious that the order vacating the judgment and default was correct. Assuming that there was a waiver of the want of jurisdiction of the person of defendant by reason of its voluntary appearance after judgment, there was, according to findings of the trial court, sufficiently sustained by the evidence, no actual service of summons upon any officer or agent of defendant, and, according to another finding of the trial court, sustained by undisputed evidence, if Fletcher was not the managing agent of defendant (as is established by the former findings), no actual

knowledge on the part of said defendant of the pendency of the action. Such a state of facts manifestly required that the motion for relief under section 473 should be granted, in order that defendant might have an opportunity to be heard upon the merits. So that, whatever may have been the exact reason for the action of the trial court, its order that the judgment and default be vacated was one that it was bound to make, in view of the facts found.

The order appealed from is affirmed.

We concur: SHAW, J.; SLOSS, J.

SOHER v. CABANISS, Superior Judge.  
(S. F. 5,850.)

(Supreme Court of California. Dec. 13, 1911.)

1. RECORDS (§ 18\*) — DESTROYED RECORD — PROCEEDINGS — PETITION — SUFFICIENCY — "CHARACTER."

Under the McEnerney act (St. 1906 [Ex. Sess.] p. 76), providing for an action to establish title in case of loss of records, and providing, in section 5, that an affidavit of plaintiff, fully and explicitly setting forth the character of his estate, right, title, and interest or claim in and possession of the property, shall be filed with the complaint, an affidavit, alleging simple possession without describing its character, was sufficient to give the court jurisdiction to decide the action; the word "character" having no reference to possession.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 18\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1061-1063.]

2. RECORDS (§ 18\*) — DESTROYED RECORD — PROCEEDINGS—PETITION—SUFFICIENCY.

In an action to establish title under the McEnerney act (St. 1906 [Ex. Sess.] p. 78), an affidavit, alleging complainant's interest and possession, and showing who were her grantors and under what decree she became entitled to possession, is sufficient under section 5, providing for the filing of an affidavit fully setting forth the character of the claimant's estate and possession of the property, during what period the same has existed, and from whom obtained.

[Ed. Note.—For other cases, see Records, Dec. Dig. § 18\*]

In Bank. Petition by Adele Paturel Soher for writ of mandate against George H. Cabaniss, as Judge of the Superior Court, in and for the City and County of San Francisco. From a judgment sustaining a demurrer, petitioner appeals. Demurrer overruled, and writ issued.

J. L. Kennedy, for petitioner. Robert H. Borland and Harding & Monroe, for respondent.

MELVIN, J. Petitioner seeks a writ of mandate to compel respondent, who is a judge of the superior court, to proceed with the trial of an action to quiet title brought under the so-called "McEnerney Act." Respondent demurred to the petition, and as the question involved is purely one of law we

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

may dispose of the whole matter by the ruling on this demurrer.

[1] Petitioner commenced, in the superior court of the city and county of San Francisco, an action in rem to establish her title to certain parcels of land. All the necessary steps were taken, summons was published pursuant to order of court, and the cause was set for trial. Respondent refused to proceed with the hearing of the cause, on the ground that the affidavit accompanying the complaint was insufficient to give the superior court jurisdiction of the action. In our examination of the questions arising out of the court's action in this regard, it will be necessary to scrutinize some of the provisions of the McEnerney act. Stats. 1906 (Extra Session) p. 78. Section 1 of that act provides that in case of the loss or destruction of public records by flood, fire, or earthquake, an action, such as petitioner sought to inaugurate, may be maintained by "any person who claims an estate of inheritance or for life in, and who is by himself or his tenant, or other person, holding under him, in the actual and peaceable possession of any real property." Section 2 prescribes the manner of commencing the action, which must be by filing a "verified complaint," containing, among other things, "a statement of the facts enumerated in section one" of the act, "a particular description of such real property and a specification of the estate, title or interest of the plaintiff therein." Section 5 provides for filing with the complaint an affidavit of the plaintiff, fully and explicitly "setting forth and showing" certain things; among them being "the character of his estate, right, title, interest or claim in, and possession of the property, during what period the same has existed and from whom obtained." Section 15 of said act is as follows: "An executor, administrator or guardian, or other person holding the possession of property in the right of another, may maintain, as plaintiff, and may appear and defend in the action herein provided for."

In her verified complaint, plaintiff mentioned and described, by metes and bounds, five parcels of land in the city and county of San Francisco. Respecting three of these parcels, she alleged that she was "by herself in the actual and peaceable possession of" them, and "claimed an estate of inheritance in" them. She alleged similar estate of inheritance in the other lots, and averred that she was "by her tenants holding under her in the actual and peaceable possession of" them. Her affidavit contained the following statement: "That the character of her estate, right, title, interest, and claim in and possession of all those portions of the real property described in the complaint herein, and therein designated 'Parcel One,' 'Parcel Two,' and 'Parcel Three,' is a fee simple absolute." Respecting the first parcel

the affidavit sets forth the fact that it was obtained by grant, bargain, and sale deed to herself and husband of equal undivided shares, on April 9, 1900, followed by her husband's gift deed to her, July 29, 1900. Then occurs the statement that "said estates, rights, titles, interests, and claims in and possession of said property \* \* \* has existed since the dates of said two deeds." As to parcel 2, it is averred "that said estate," etc., "and possession of said property \* \* \* has existed since the 21st day of April, A. D. 1903." This is followed by a recital that said interests and possession were obtained by a grant, bargain, and sale deed of that date from a certain named grantor, followed, July 7, 1903, by deed of gift from her husband. There is a later allegation that her possession had existed since the dates of the two deeds aforesaid. Of parcel 3, the affidavit alleges the distribution to plaintiff of a one-fourth interest from her mother's estate on a specified date, and the obtaining of the remaining interests in fee simple by certain deeds, giving the dates thereof, and contains the statement that "said estates, rights, titles, interests, and claims in and possession of said real property, designated 'Parcel Three,' have existed since the delivery of said deed from Gustave Paturel, the dates of said two deeds from Alexis Paturel and Emile Paturel, and of said decree of distribution." Of parcels 4 and 5, the affidavit contains the statement that plaintiff obtained an undivided one-fourth interest in each from the estate of her mother by a certain decree of distribution, giving the date, and regarding each parcel she alleges that "said estate, right, title, interest, and claim in and possession of said real property \* \* \* has existed since the said date of said decree of distribution."

Respondent contends that the affidavit in a case of this kind must contain all the facts required by section 5 of the McEnerney act, and that plaintiff's affidavit does not comply with the statute, in that it does not set forth the character of Mrs. Soher's possession of the property. We do not think section 5 of the act requires the affidavit to show the "character" of the possession of the plaintiff. The requirement is that there shall be an affidavit filed, "setting forth and showing" certain things, among which is "the character of his estate, right, title, interest, or claim in, and possession of the property." The reasonable construction of this appears to us to be that the word "character" has no reference to the word "possession," and that the only requirement as to possession is that the affidavit shall show possession. This, we think, is sufficiently done by the affidavit before us to answer all objections on the ground of want of jurisdiction.

[2] It is asserted that plaintiff did not al-

lege from whom she obtained possession. Her affidavit showed her interest in parcels 1, 2, and 3, to be fee simple absolute. Of parcels 4 and 5, she showed by her affidavit an undivided one-fourth interest in each of them, derived from her mother's estate, and alleged possession from the date of the decree of distribution of March 20, 1905. Here was certainly no ambiguity. In setting forth her interest in the two first-named parcels, she described in each instance her deeds, with their dates and the places, books, and pages of their recordation, and alleged that her possession had existed since their dates; and with reference to parcel 3 she followed the same plan, except the decree of distribution was included with the deeds in the averment of the date of her possession. At most, her failure to name the one of her grantors who actually placed her in possession and the exact date of such possession is an ambiguity which cannot be reached in this proceeding. At any rate, regarding these three parcels, she stated a title in fee which gave her the right to possession following the deed of latest date, and she averred possession from a time not later than the completion of her title in fee simple absolute. This was a sufficient compliance with the statute, which is "designed for the benefit of the defendants in enabling them, by verifying plaintiff's claim, to prevent fraud and safeguard their rights." *Potrero Nuevo Land Co. v. All Persons, etc.*, 158 Cal. 735, 112 Pac. 303.

It follows that the demurrer of respondent to the petition herein should be overruled and a writ of mandate issue as prayed for, and it is so ordered.

We concur: ANGELLOTTI, J.; SHAW, J.; HENSHAW, J.; SLOSS, J.; LORIGAN, J.

#### ARNOLD v. CALIFORNIA STANDARD PORTLAND CEMENT CO.

(L. A. 2,773.)

(Supreme Court of California. Dec. 13, 1911.)

##### 1. EVIDENCE (§ 472\*)—OPINION EVIDENCE.

Where, in an action for injuries to an employé by an explosion of dynamite, the employer relied on contributory negligence, questions asked the employé as to whether, when he applied the battery for the discharge of several blasts of dynamite, he exercised the ordinary precaution were objectionable as calling for the opinion of the employé on the merits of the defense, which the jury must determine.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2189; Dec. Dig. § 472.\*]

##### 2. EVIDENCE (§ 481\*)—OPINION EVIDENCE.

Where, in an action for injuries to an employé by the explosion of dynamite, the evidence showed that the employé, after attempting to explode several blasts of powder, cleaned out two holes in safety, and was injured by an explosion of dynamite while attempting to clean out the third hole, a witness could not

properly give his opinion as to whether the employé acted in a reasonable way, in view of his understanding of the business.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2248-2254; Dec. Dig. § 481.\*]

##### 3. APPEAL AND ERROR (§ 1050\*)—ERRONEOUS ADMISSION OF EVIDENCE—PREJUDICIAL ERROR.

Where, in an action for injuries to an employé, there was but slight evidence that the employé used due care, the error in admitting evidence of the opinion of the employé that he exercised the ordinary precautions, and in permitting a witness to state his conclusion that the employé acted in a reasonable way, was prejudicial to the employer, necessitating a new trial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4153-4160; Dec. Dig. § 1050.\*]

Department 1. Appeal from Superior Court, San Bernardino County; George H. Hutton, Judge.

Action by Frank M. Arnold against the California Standard Portland Cement Company. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Reversed.

Horace S. Wilson and Le Roy M. Edwards, for appellant. F. B. Daley, Frank T. Bates, and Bates & Hodge, for respondent.

SHAW, J. Plaintiff sued to recover damages for personal injuries, alleged to have been caused by the negligence of the defendant.

The complaint alleges that defendant negligently furnished for plaintiff's use an unsafe, defective, and insufficient electric battery, in the use of which plaintiff was injured. He was engaged in exploding blasts of dynamite and powder for the defendant. At the time of the injury, it appears, they were blasting in beds of clay. Small holes would be drilled several feet into the clay, at the bottom of which heavy charges of black powder would be exploded to break up the clay, so that it could be shoveled up and carried away. As a part of the process, it was necessary first to enlarge these holes at the bottom, so that they would hold enough of the black powder to lift the dirt. This process of enlargement was called "springing the holes." It was done by putting a small charge of dynamite at the bottom of the hole, connecting it by an "exploder" and wires with an electric battery a safe distance away, tamping about eight inches of dirt in around the wires immediately above the exploder, and then exploding the dynamite by means of an electric charge through the wires from the battery to the exploder. The result would be that the dirt tamped in would resist the upward force of the explosion, which would exhaust itself in making the hole larger at the bottom, ready for the black powder. Nine holes had been drilled, and plaintiff was engaged in "springing" them. After the small dynamite charge was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

exploded, it was his duty to remove the earth that had been tamped in, thus clearing the hole, so that the black powder could be let down to the enlarged space at the bottom. While he was removing this earth from one of these holes, the charge exploded, inflicting the injuries complained of.

The plaintiff first connected the entire nine holes in series, and attempted to explode all of them at once by a single electric shock from the battery. He found that the first hole had blown out—that is, the blast had escaped from the top—because of defective tamping. It could not be ascertained from the surface appearances of the holes which had not thus blown out whether the blast had been set off or not; for, if the tamping had been properly done, the force of the explosion would be spent below the tamping, in springing out the sides of the hole, producing no effect at the surface. Fearing that some of the other blasts had not exploded, he then connected each separately with the battery, and tried them singly with the electricity. None of them upon this trial gave any indication of an explosion. Assuming from this that the first shock from the battery had set off all the charges, he proceeded to clean the holes to receive the black powder. In the third hole the dynamite had not been set off by the battery, and in cleaning it out he exploded the charge, inflicting the injuries alleged. There is evidence that this battery had been in use for several months, and that it sometimes failed to discharge a blast, even when connected with a single hole. Plaintiff had been at work there for a considerable time before the injury, and had often seen this battery. Its defects were well known to the other men in the same service, but there is no conclusive evidence that they were known to the plaintiff. The circumstances also tend to show that the plaintiff knew that a battery would sometimes fail to set off a blast, but the evidence is conflicting on that point. He testified that he proceeded to clean the hole precisely as if there were no dynamite in it, taking no care to avoid an explosion in case there was. The questions whether he used due care in failing to take such precautions as were possible to that end, and in assuming that the blasts were exploded, and whether the failure to explode was due to the weakness of the battery or to his own neglect in failing to make proper connections between the dynamite and the battery, are very close ones, in view of all the evidence in the case. We are not satisfied that it is insufficient to sustain the verdict. But, considering its weakness, it is obvious that the admission of any incompetent evidence on the subject must be deemed to have been prejudicial to the defendant. Evidence of that character was admitted, over the defendant's objection, and

for that reason we think the order denying a new trial was erroneous.

[1] The plaintiff testified that he had been engaged in the business of exploding blasts of powder and dynamite by means of batteries for 3½ years before his injury. He was asked by his own counsel the following question: "At the time you sprung those holes—that is, applied the battery the second time to the four or five holes which you tested—did you use, from your experience in the use of the battery and springing of those holes, the usual, ordinary, and customary precaution?" "At the time, considering your long experience in dealing with a battery, did you use all customary and necessary and usual precaution to see that those wires were connected?" Objections that these questions were incompetent, irrelevant, and immaterial and called for the conclusions of the witness were overruled, and he answered both questions in the affirmative. These rulings were erroneous. One of the defenses was contributory negligence. The question whether or not the plaintiff had used proper care and caution in doing his preparatory work was one for the determination of the jury from all the evidence. It was not a question upon which the opinions of expert witnesses are allowable. The questions called for the decision of the plaintiff as to the merits of the defense.

[2, 3] Another witness for the plaintiff was permitted to state that if, after trying the battery the second time on the holes separately, one of them should be cleaned out, and it was found that the charge in that hole had gone off properly, then, in such case, "the conclusion of a reasonable man who understood his business, and acting in a reasonable way," would be that the next hole, and each of the others, had also been exploded by the battery. This also was witness should have been confined to the testimony should have been excluded. The witness should have been confined to the facts, the usual method of operations in such work, and the things necessary to be done to avoid danger. Even if we admit that the plaintiff was held only to the standard suggested—the care required of a reasonable man who understood the work—nevertheless it was for the jury, and not the witness, to apply the standard and decide from the evidence what a reasonable man should have done or concluded from the facts before him. In view of the slight margin of evidence in favor of the proposition that the plaintiff used due care in connecting the wires and cleaning out the holes, we cannot say that this evidence was without prejudice to the defendant.

The judgment and order are reversed.

We concur: SLOSS, J.; ANGELLOTTI, J.

## In re LAVINBURG'S ESTATE.

LAVINBURG v. SCHWALBE et al.  
(S. F. 5,665.)

(Supreme Court of California. Dec. 13, 1911.)

## 1. WILLS (§ 166\*)—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

Evidence held not to show that a will was made through the undue influence of testator's daughter.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

## 2. WILLS (§ 166\*)—UNDUE INFLUENCE—SUFFICIENCY OF EVIDENCE.

While undue influence may be shown by circumstantial evidence, it must amount to more than a mere suspicion, and be proof of circumstances which are inconsistent with the fact that the will was the spontaneous act of testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

## 3. WILLS (§ 288\*)—VALIDITY—PRESUMPTION.

The presumption in a will contest is in favor of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 651; Dec. Dig. § 288.\*]

## 4. WILLS (§ 166\*)—UNDUE INFLUENCE—EVIDENCE.

That a will was unnatural, in that it did not give a son and daughter that share of the property which they were entitled to expect, does not of itself show undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

## 5. WILLS (§ 163\*)—UNDUE INFLUENCE—EVIDENCE—FIDUCIARY RELATION.

The existence of a confidential relation between testator and the principal beneficiary will not of itself raise the presumption of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 390; Dec. Dig. § 163.\*]

## 6. EVIDENCE (§ 222\*)—DECLARATIONS—WILL CONTEST.

In a will contest by a son against testator's daughters, who were the residuary and principal legatees, another daughter who received only a small sum testified that the month after their father's death she had a conversation with one of the residuary legatees in the absence of the other residuary legatee, in which she charged that such legatee made their father make the will, to which the latter replied, "Of course, wouldn't you have done the same thing if you could?" and evidence was also admitted of such residuary legatee's boast that she could "handle" her father like a child. Held, that the evidence was not admissible; such declarations not having been made in the presence of the other residuary legatee.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 768-800, 803-806; Dec. Dig. § 222; \* Wills, Cent. Dig. § 410.]

## 7. WILLS (§ 81\*)—WILL CONTEST—INVALIDATING IN PART.

A will cannot be invalidated as to one legatee and upheld as to the others.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 201, 202; Dec. Dig. § 81.\*]

## 8. WILLS (§ 165\*)—WILL CONTEST—ADMISSION OF EVIDENCE—AFFECTION FOR CHILDREN.

Declarations tending to show testator's affection for his son, to whom he only gave a small sum, are admissible in evidence in a will contest to show testator's friendliness to

one of his heirs, but it is error not to limit them to that purpose.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.\*]

## 9. WILLS (§ 164\*)—CONTEST—ADMISSION OF EVIDENCE—UNDUE INFLUENCE.

In a will contest on the ground of undue influence, in which contestant claimed that testator's marital troubles had so affected his mind that he was easily influenced by the daughter, who was claimed to have influenced him in making the will, evidence as to his unhappy married life, showing that he was greatly distressed by his wife's divorce, was admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.\*]

## 10. WILLS (§ 164\*)—WILL CONTEST—ADMISSION OF EVIDENCE.

In a contest by testator's son to set aside a will for undue influence, evidence was not admissible for contestant, in rebuttal of contestee's claim that testator believed his son to be wealthy on account of his display of wealth, that contestant was, in fact, poor, though he could deny that he boasted of or displayed any wealth.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.\*]

Department 2. Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Proceedings by Leon Eleazar Lavinburg, contestant, against Sarah Schwalbe, individually and as executrix, and another to contest the will of Samuel L. Lavinburg. From orders denying motions to set aside a verdict for contestant, defendants appeal. Reversed.

Heller, Powers & Ehrman, Marcel E. Cerf, J. E. Harper, and John R. Tyrrell, for appellants. J. J. Dunne, H. H. Davis, and Jerome H. Kann, for respondent.

PER CURIAM. Jessie Bloom and Sarah Schwalbe, two of the legatees under the will of Samuel L. Lavinburg, deceased, appeal from the orders denying their motions to vacate the verdict of the jury rendered in favor of Leon E. Lavinburg in a contest of said will. Contestant is a brother of appellants and also a legatee under his father's will.

By the terms of the will of Samuel L. Lavinburg legacies were provided as follows: To the son Leon L., the contestant, \$500; to Cecilia Werthman, a daughter, \$500; to Jane Ruben, a daughter, \$5,000; and the residue in equal parts to Sarah Schwalbe and Jessie Bloom, daughters. Sarah Schwalbe and California Safe Deposit & Trust Company were nominated as executrix and executor, respectively, but, the latter failing to qualify, Mrs. Schwalbe was appointed and letters testamentary issued.

The contestant did not depend upon any direct showing that the testamentary act of Samuel L. Lavinburg was influenced by Sarah Schwalbe, but, according to the theory of the contest, all of the facts and circumstan-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

es surrounding the acts of the testator in making his will led to the inevitable conclusion that it must have been, not the spontaneous act of Lavinburg, but the product of his daughter Sarah's malign influence over him. The essential facts as shown at the trial were as follows: Lavinburg was formerly a resident of England, living first at London and afterward at Brighton. While residing in the latter city in 1884 he became involved in financial troubles, and wrote a letter to his son who had gone to Canada to live, asking the latter (the contestant here) to return to Brighton, and to assist in the settling of the father's affairs. In response to this letter Leon returned to Brighton, contributed between \$400 and \$500 to the father's account, helped the latter in the settlement of his affairs, and in 1885 accompanied the family to San Francisco, where his father and mother remained, but where he stayed only a short time, returning to the Middle West and settling finally in Chicago, where he resided until 1906, when he returned to San Francisco. Here he has resided ever since. It was shown at the trial that a very warm affection existed between the father and his only son. On the latter's return from Canada to Brighton, the father kissed him and exclaimed, "Oh, Leon, Leon, you have saved me by coming home." The letters of the father to the son, while not frequent, were of most affectionate tenor. When Leon returned to San Francisco in October, 1906, he was met at the station by his sister Mrs. Schwalbe, who conducted him to the home of Mrs. Bloom, another sister, where his father then resided. Again he was received by his father with many demonstrations of love, and during the next few days he and his father were together almost constantly. Without going into the testimony in detail it is sufficient to say that it indicated great affection upon the part of testator for his son. After the family arrived in San Francisco the daughters married. One of them, Mrs. Jessie Bloom, resided for some years in Seattle, but later returned to San Francisco. Lavinburg's wife died in 1892, and soon afterwards he went to live with his daughter Mrs. Cecilia Werthman, but, owing to some quarrel, he sought other quarters. In 1904 there was another disagreement between Mr. Lavinburg and the Werthmans, which apparently was never settled prior to his death at Christmas, 1907. Meanwhile his will was executed on January 5, 1905.

There was abundant evidence of testator's love for his daughter Mrs. Sarah Schwalbe, who was found by the jury's verdict to be guilty of influencing him unduly in the making of his will. Dr. Levy, who had been his pastor and friend for 20 years, testified: "He was a man of very strong will power and determination. He told me he would dispose of his property in his own way, and that Mrs. Schwalbe had been more kind to him

than the rest of the members of his family." Mr. D. R. Wilson, a member of the San Francisco Stock and Bond Exchange, who knew Lavinburg very intimately, gave the following testimony regarding testator's affection for his daughter, Sarah Schwalbe: "He said that he had the utmost confidence in Mrs. Schwalbe; that she had always treated him with filial respect; that he had a great deal of regard and trust in her." Similar testimony was given by Dr. Mann, Mr. Thomas Craig, Mr. Robert F. Parsons, and Miss Cella Caro.

In 1898 Lavinburg married. This union proved to be a very unhappy one, and in 1904 his wife instituted divorce proceedings on the ground of extreme cruelty. The usual order for costs and counsel fees pendente lite was made and an order was issued to him and to the bank which held custody of his property restraining them from disposing of any of it. Lavinburg, who was unquestionably most averse to parting with any of his money, was greatly disturbed by the prospect of having to support his wife after a divorce. A settlement was finally reached, and Mrs. Lavinburg went back to live with her husband on December 20, 1904. By the terms of the agreement with his wife, Lavinburg placed \$6,000 worth of bonds in trust with the California Safe Deposit & Trust Company to provide an income of \$25 a month for her. She remained with him but a short time after the reconciliation, however. She testified that on the morning of January 2, 1905, her husband called her names and quarreled with her without occasion. Afterwards she went out to do some shopping, and on her return Mr. Lavinburg and Mrs. Schwalbe were talking together in the dining room. She overheard the latter say: "I can't stand that any longer. You have to go and see a lawyer and make an end of that." Thereupon Mrs. Lavinburg left the house and never again lived with her husband, although in 1906 Mrs. Schwalbe urged her to return saying: "You know I can make father do better for you if you want to go back."

On January 3, 1905, the day after his wife's departure, Lavinburg and his daughter Sarah Schwalbe, who had remained at his house during the previous night, went to the San Francisco Savings Union, where Mr. Lavinburg conferred with Mr. Robert M. Welch, the cashier of that bank. He told Mr. Welch that he had married a young woman, that divorce proceedings were pending, and that he had made a settlement with his wife, but feared further attacks by her upon his fortune, as she knew he was worth about \$50,000. He desired to part with his title to certain stocks and bonds deposited with the bank to secure an indebtedness. Finally, upon the suggestion of Mr. Welch, Lavinburg made a bill of sale to Mrs. Schwalbe of more than \$50,000 worth of securities, and she became substituted as the bank's debtor



in her father's place for approximately \$30,000. She also placed three certain orders with the bank directing that the securities were to be released to her father as payment of their market value might be made by him; that on payment of the balance due on her note the securities were to be delivered to him; and that he was to collect all dividends on the pledged stocks and bonds. The trust relation thus created was greatly relied on as tending to establish contestant's case, and we shall have more to say of it later. After the transaction at the bank on January 3, 1905, according to the testimony of Mrs. Schwalbe, she said to her father that he had placed a great responsibility upon her, and that he would better make some paper to show what he would wish her to do in case of his death. He replied, "Well, after a while I will make a will," and they parted. She also testified that two weeks later he told her that she and the California Safe Deposit & Trust Company were the "executors" of his will, but that he never revealed its contents to her until after the great fire of April, 1906. After leaving Mrs. Lavinburg on January 3, 1905, and probably on the same day, Mr. Lavinburg went alone to the California Safe Deposit & Trust Company's place of business, and was referred to Mr. Cerf as a lawyer who would properly draft a will for him. He went alone to Mr. Cerf's office. Mr. Cerf was engaged upon some important work, and suggested that while Lavinburg was waiting for him to complete the task at hand the time might be profitably employed in drawing a memorandum of the matters which he wished to incorporate in his will. This was done, and the memorandum in Lavinburg's handwriting, which was introduced in evidence, contained practically the provisions which were afterwards incorporated in the will. After considerable discussion at Mr. Cerf's office Mr. Lavinburg departed. Two days later he returned alone and executed the will, Mr. Cerf and Mr. Norris acting as witnesses, and the document, at Mr. Lavinburg's special request, remained in Mr. Cerf's custody until the testator's death. Mrs. Schwalbe never saw it until after that event. There was not only the testimony of the witnesses to the will that on January 5, 1905, Lavinburg was of sound and disposing mind, but a number of intimate friends testified that he was a man of iron resolution with reference to his own affairs, who was not easily influenced by any one.

Contestant introduced evidence to the effect that Mrs. Schwalbe had a general influence over her father, and was wont to boast of it. His contention seems to be that the will was unnatural; that Mrs. Schwalbe had a great influence over her father; that at a time when he was greatly perturbed over his marital difficulties she suggested that he make a will; that at the time she made such suggestion she was his trustee,

holding his possessions, as counsel for contestant phrase it, "in the hollow of her hand"; that this trust relation, coupled with other facts and circumstances, created a presumption of undue influence; that she accompanied her father to the bank on January 3, 1905, after the opportunity of influencing him accorded by her remaining at his home during the preceding night; and that her influence remained with him and overpowered his volition during the subsequent period of preparation and execution of his last will.

[1] We think that the circumstances shown do not justify the conclusion reached by the jury. The verdict must have been influenced by the idea in the minds of the jurors that the will was unnatural and by certain matters erroneously admitted in evidence which we shall discuss later. Testator was a man who, though of an age somewhere between 74 and 80 years, was abundantly able to conduct his affairs, and who did manage them with ability and thrift. There was some conflict of evidence regarding his bodily vigor at the time the will was executed, but there is no contention that he was not mentally competent. This man of business went alone to the office of an attorney; without suggestion or assistance drew the memorandum of his wishes respecting the disposition of his property by will; returned according to appointment; and executed that instrument. For almost three years thereafter he mingled with his friends, attended to his affairs, met and associated with his son who returned after an absence of 20 years, and yet he made no complaint of his daughter's dominion over him, nor any effort to free himself from that malign charm. It requires better evidence than this record presents to set aside an act done apparently with deliberation and executed with the solemn formality required by law.

[2, 3] To the facts shown by the record before us this language from the opinion in *Re McDevitt*, 95 Cal. 33, 30 Pac. 106, seems thoroughly applicable: "Evidence must be produced that pressure was brought to bear directly upon the testamentary act; but this evidence itself need not be direct. Circumstantial evidence is sufficient. It must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. I think there is nothing beyond suspicion shown here. There is no proof. Circumstances have been proven which accord with the theory of undue influence, none of which are inconsistent with the hypothesis that the will was the free act of an intelligent mind. This does not amount to proof. And many circumstances are shown which are wholly inconsistent with the hypothesis of undue in-

fluence. And the presumption of law, in the absence of all proof, in a contest, is in favor of the will." See also *In re Langford*, 108 Cal. 622, 41 Pac. 701; *Estate of Kendrick*, 130 Cal. 368, 62 Pac. 605; *Estate of Nelson*, 132 Cal. 194, 64 Pac. 294; *Estate of Carithers*, 156 Cal. 428, 105 Pac. 127.

[4] Assuming that the will was an unnatural one which cut off the son and one daughter from that share of the property which they were entitled to expect, that alone cannot avail to sustain the verdict finding undue influence; and in this connection it is well to remember that the testator was not upon good terms with Mrs. Werthman when the will was drawn.

It is insisted by respondent's counsel that, under the circumstances of this case, undue influence is presumed from the confidential relations existing between Mrs. Schwalbe and her father.

[5] The court properly instructed the jury that the existence of a confidential relation between the testator and this beneficiary was not enough, taken alone, to raise a presumption of undue influence. While there was such a relation existing between Mrs. Schwalbe and her father, it was more nominal than real, because, as we have seen, Mr. Lavinburg up to the time of his death held complete control over his property. But, giving to the circumstances of the trust relation all possible weight, it amounts to nothing in view of the fact that the testator had the independent advice of an attorney and acted in the absence of his trustee in the preparation and signing of his will. This is not a case where advantage was taken of a sick man to whom others had no access by one standing with reference to him in a relation of confidence and trust. It is rather the case of a shrewd, stubborn business man who acted after obtaining professional legal advice. This case is similar in several essential particulars to *Estate of Higgins*, 156 Cal. 259, 104 Pac. 8. That was a case in which the testator was an aged, feeble man, and the proponent a favorite son, who stood in a confidential relation to him. This son had urged the father to make a will. After referring to the presumption arising from the existence of confidential relations, Mr. Justice Sloss, speaking for the court, said: "This presumption was fully met and overthrown by the uncontradicted evidence showing the actual circumstances surrounding the preparation and execution of the will. *Estate of Morey*, 147 Cal. 495 [82 Pac. 57]. It was shown that the testator, before executing his will, had consulted with an attorney, who visited him for that purpose. At this interview no member of his family, except his wife, was present. The nature and extent of a surviving wife's interest in community property was explained to the testator, who said that one-half of the estate (all of which he declared to be community property) would be sufficient provision for

Mrs. Higgins. Concerning the disposition of the other half, he said he did not desire to give his daughter an equal share. He first spoke of giving her \$1,500, but before the close of the interview mentioned the sum of \$2,500. He stated that he did not want Mr. Chick, his daughter's husband, to handle any considerable amount of his property. In the afternoon of the same day, the attorney, accompanied by his son, returned with a draft for the proposed will. In the absence of the proponent, the testator was asked for his decision regarding the gift to his daughter. He expressed a thought of raising it to \$3,500. The attorney then suggested a division into shares, instead of a cash legacy. This, after some consideration, was approved by the testator, and he fixed upon the proportions of one-sixth to Mrs. Chick, two-sixths to Albert, and three-sixths to Herbert. Blanks which had been left in the draft were filled accordingly, and the will was executed. Its other provisions, such as appointment of executor, etc., followed the direction of the testator. In the face of this showing, which we have set forth in mere outline, there is no basis for the claim that the will was secured to be made by the undue influence of proponent." In the later case of *In re Ricks*, 117 Pac. 536, the rule is thus stated by Mr. Justice Lorigan: "But no warrant is given to a jury to find that undue influence was exerted at the time the will was made from proof merely of such relation alone. Undoubtedly the relation between respondent and his mother was affectionate and confidential, and that he would have a general influence over his mother proceeding from such relation. But the existence of such relation and this general influence raises no presumption that undue advantage was taken of it by respondent. There is no legal suspicion of undue influence arising from the existence of such a relationship, which imposes upon the son the necessity, when a will in his favor is attacked, of assuming the burden of proof that he had not unduly influenced his mother in making her will. The confidential relation and the opportunity afforded therefrom to exercise undue influence may, of course, always be taken into consideration with other evidence, when the question of undue influence is in issue. But the relation itself and opportunity are not sufficient alone to warrant a finding that undue influence was actually exerted. Proof merely that confidential relations existed between a testator and the main beneficiary under his will is not sufficient to destroy its validity, but there must be some proof, in addition to the relation of facts or circumstances showing the use of that relation at the time the will was made overcoming the free will and desire of the testator, in order to invalidate the testament."

[6] Appellants call our attention to the admission of certain testimony regarding the declarations of one residuary legatee not

made in the presence of the other. There were several instances of this sort of testimony, but it will be sufficient to refer to a few only. Mrs. Werthman related a conversation which she said occurred in Oakland in the month of April following her father's death. She testified that on that occasion she said to Mrs. Schwalbe, "You made father make that will, you know you did," to which, as she testified, Mrs. Schwalbe replied, "Of course, wouldn't you have done the same thing if you could?" Respondent contends that this evidence went in without objection, but an examination of the record shows that, as soon as any conversation with Mrs. Schwalbe was called for in a question to Mrs. Werthman, counsel raised the specific objection that a declaration of one legatee made without the presence of the others was hearsay, and not binding upon them. All the rest of Mrs. Werthman's testimony went in subject, by stipulation, to the same objection and exception. This was clearly error under the rulings of this court in *Estate of Dolbeer*, 149 Cal. 245, 86 Pac. 695; *Estate of Dolbeer*, 153 Cal. 662, 96 Pac. 266. The same error was committed by the court in admitting evidence of Mrs. Schwalbe's boasts that she could "handle," her father and "turn him around in five minutes like a child," and in allowing certain papers in the probate proceedings to be offered as written admissions of Sarah Schwalbe. In allowing one of these documents to be received in evidence the court said: "It will not be binding against her [meaning Mrs. Bloom], but binding against Mrs. Schwalbe."

[7] Evidently the court did not have in mind the rule announced in *Estate of Dolbeer*, supra, *Estate of Freud*, 73 Cal. 556, 15 Pac. 135, and *Estate of Pforr*, 144 Cal. 121, 77 Pac. 825, that a will cannot be invalidated as against one legatee and upheld with respect to others. This misconception led to the erroneous admission of numerous declarations of Mrs. Schwalbe which we need not review with greater particularity.

[8] The court also admitted declarations made before and after the execution of the will tending to show the affection of Lavinburg for his son, Leon. Such declarations, when there is no issue of unsoundness of mind, are properly admitted if limited by the court in suitable instructions to their function of showing friendliness of a testator to one of his heirs, but appellants contend that error was committed by the court in failing to limit their application. We think this contention must be sustained. See *Estate of Ricks*, 117 Pac. 532, and cases there cited.

[9] Appellants also complain of the intro-

duction of evidence by the contestant revealing the unhappy married life of the testator and his second wife, but it was the theory of the contestant that these marital troubles so worked upon the sensibilities of Lavinburg as to make him an easy prey to the machinations of his daughter Sarah. The evidence did show that he was greatly distressed by the divorce case and the incidents connected with it. If the engagement of respondent to show that Mrs. Schwalbe took advantage of her father's distress had been successfully accomplished, the evidence of the domestic woes of the old man would have been material. The court properly admitted it in support of the theory of the contestant.

Appellants also call our attention to the court's refusal to permit the former wife of the testator to answer certain questions with reference to his mental condition at about the time of the execution of the will. The record shows, however, that she testified upon direct examination regarding her former husband's mental condition as favorably to appellants as they could possibly desire. The court properly sustained an objection to an interrogatory on cross-examination by which her opinion was sought upon the question whether or not Lavinburg was easily influenced. The question was not pertinent to anything about which she had spoken on her direct examination.

[10] Respondent was permitted to introduce evidence regarding his financial condition. If this has been done as a part of his case in chief, respondent concedes that it would have been serious error (*Estate of Kaufman*, 117 Cal. 296, 49 Pac. 192, 59 Am. St. Rep. 179), but proof of his poverty he insists was properly allowed in rebuttal of the showing made by appellants that the testator believed his son Leon to be a wealthy man by reason of certain boastings and exhibitions of ready money. He denied on the witness stand that he had ever made any such pretenses of wealth to his father. This evidence, of course, was properly allowed, but, as the material inquiry related to the father's belief on the subject of his son's wealth and not to the fact of the latter's wealth or poverty, the principle of the *Kaufman* case was applicable, and the evidence that Leon Lavinburg was really a poor man was improperly allowed.

Certain instructions are criticised by appellants, but we think that these criticisms are for the most part unfounded. Viewed in its entirety the charge to the jury fully and fairly stated the law.

The orders from which appellants prosecute their appeal are reversed.

**PEOPLE v. SCHAFER.** (Cr. 1,708.)

(Supreme Court of California. Dec. 14, 1911.)

**1. BURGLARY (§ 20\*)—INFORMATION—SUFFICIENCY.**

Under Pen. Code, § 459, providing that every person who shall enter any house, etc., with intent to commit grand or petit larceny therein, is guilty of burglary, an information charging that accused entered a portion of the plant of a tanning company known as the "Beam House" with intent to steal leather is a sufficient statement of the offense of burglary.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. §§ 51-54; Dec. Dig. § 20.\*]

**2. CRIMINAL LAW (§ 1166½\*)—APPEAL AND ERROR—HARMLESS ERROR—PRESUMPTIONS.**

Where a challenge for cause was refused, the juror being peremptorily challenged, the refusal was harmless if it is not shown that the use of this peremptory challenge compelled accused to accept a juror unsatisfactory to him, though accused exhausted all of his peremptory challenges before the jury was selected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3116-3117; Dec. Dig. § 1166½.\*]

**3. CRIMINAL LAW (§ 655\*)—TRIAL—REMARKS BY COURT.**

Where a juror was challenged because he had stated that he knew a probable witness for the prosecution, and that he would believe him in preference to witnesses he did not know, the court's remark to counsel in refusing the challenge "that if you know a man, and he is perfectly satisfactory to you, you would naturally believe him before an unknown," was not objectionable, as it could not have prejudiced the minds of the jurors present.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520-1523; Dec. Dig. § 655.\*]

**4. CRIMINAL LAW (§ 351\*)—EVIDENCE.**

A letter written by accused, who was incarcerated, asking another person to assist him in effecting an escape and stating that he was in a bad fix, is admissible in evidence as tending to show consciousness of guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 778-785; Dec. Dig. § 351.\*]

**5. CRIMINAL LAW (§ 1043\*)—APPEAL—EXCEPTIONS—NECESSITY OF SPECIFIC EXCEPTIONS.**

Where accused objected generally to the admission of the incriminatory letter, he cannot complain on appeal that isolated portions were inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2654, 2655; Dec. Dig. § 1043.\*]

**6. BURGLARY (§ 41\*)—PROSECUTIONS—EVIDENCE—SUFFICIENCY.**

In a prosecution for burglary, evidence held, under Pen. Code, §§ 460, 463, making a burglary committed between sunset and sunrise an offense in the first degree, sufficient to show burglary in the first degree.

[Ed. Note.—For other cases, see Burglary, Cent. Dig. § 98; Dec. Dig. § 41.\*]

**7. CRIMINAL LAW (§ 1147\*)—APPEAL—SENTENCE—DISCRETION OF COURT.**

Pen. Code, § 461, making burglary in the first degree punishable by imprisonment for not less than 1 nor more than 15 years, an accused cannot complain that a sentence of

10 years is an abuse of the trial court's discretion.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3072, 3073; Dec. Dig. § 1147.\*]

In Bank. Appeal from Superior Court, Solano County; A. J. Buckles, Judge.

William Schafer was convicted of burglary, and appeals. Affirmed.

Louis Ferrari, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

ANGELLOTTI, J. The defendant was convicted of burglary in the first degree, and appealed from the judgment and from an order denying his motion for a new trial. The appeal was transferred to this court for determination after decision by the District Court of Appeal for the Third District, affirming such judgment and order.

[1] 1. It is urged that the information does not state a public offense. After accusing defendant and one Daniel McFadden of the crime of "burglary, committed as follows," it proceeds: "The said Daniel McFadden and William Schafer, on or about the 14th day of October, A. D. nineteen hundred and ten, at the said county of Solano, state of California, \* \* \* at and in the city of Vallejo then and there willfully, unlawfully, feloniously, and burglariously did enter that certain portion and part of the plant, premises and building of the Santa Rosa-Vallejo Tanning Company, a corporation, said portion and part of said plant, building and premises being designated, called and known as the 'Beam House,' with the felonious and burglarious intent \* \* \* then and there \* \* \* at and in said 'Beam House' to commit the crime of larceny, contrary to the form, force, and effect of the statute," etc. The claim is that the information does not allege that the defendants entered any place as to which burglary may be committed under our statute. The statute (section 459, Pen. Code) provides that "every person who enters any house, room, apartment, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, or railroad car, with intent to commit grand or petit larceny, or any felony, is guilty of burglary." No demurrer was interposed to this information, and there is no pretense that the defendant was not fully advised thereby as to the precise charge against him. His claim, after trial and conviction, simply is that it so absolutely fails to show the offense of burglary that it cannot serve as sufficient support for the conviction and judgment. While the information, as said by the District Court of Appeal, is "open to some criticism," and contains more words than necessary, we think it substantially alleges an unlawful entry of a house of the tanning company, with intent therein to commit

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

grand larceny. No other construction could reasonably be given to the language used. The qualifying word "beam" used in the information does not detract from the effect of the word "house," which denotes one of the structures named in section 459 of the Penal Code. Substantially the information alleged that the defendants unlawfully entered the "Beam House" of the tanning company, with intent therein to commit larceny. It thus sufficiently stated a public offense to support a judgment.

[2] 2. It is claimed that the trial court erred in disallowing a challenge for cause interposed to juror William Fraser on the ground of actual bias. It is unnecessary to determine whether there was any error in this ruling. Mr. Fraser was subsequently peremptorily challenged by the defendant, and did not serve as one of the jurors. While the record shows that the defendant did subsequently exhaust his 10 peremptory challenges, it does not appear that he had occasion or desire to use an additional peremptory challenge, or that each and all of the 12 jurors finally accepted and sworn were not entirely satisfactory to him. All that the record shows in this connection is the examination of Mr. Fraser and the proceedings and ruling upon the challenge for cause interposed to him, and the fact that the defendant used 10 peremptory challenges, including that used on Mr. Fraser. This is not enough to warrant reversal for error in the ruling on the challenge for cause to Mr. Fraser. It is entirely consistent with the record that the 12 jurors who actually tried the case were absolutely satisfactory to defendant, and that he desired all of them to serve, and would not have excused any one of them if he had been given the opportunity. After judgment, the contrary should not be presumed. It was said in *People v. Durrant*, 116 Cal. 196, 48 Pac. 78: "Thompson on Trials, § 120, thus declares the principle: 'It is a rule of paramount importance that errors committed in overruling challenges for cause are not grounds of reversal, unless it be shown an objectionable juror was forced upon the challenging party after he had exhausted his peremptory challenges. If his peremptory challenges remain unexhausted, so that he might have excluded the objectionable juror by that means, he has no ground of complaint.' The rule above stated finds overwhelming support from the authorities." It is true that in *People v. Durrant*, supra, the defendant had not exhausted his peremptory challenges when the jury was completed, but the fact that he does exhaust them does not preclude the application of the rule above quoted. The important thing is that it does not appear that an objectionable juror was forced upon the defendant. This rule was applied by the Supreme Court of Nevada in *State v. Raymond*, 11 Nev. 98, where the

court said: "In *Fleeson v. Savage Silver Mining Company* [3 Nev. 157], the Supreme Court of this state said that 'the rules governing the impaneling of juries, the introduction of evidence, and the general conduct of trials are but the means by which such right is to be obtained,' and that, if it appeared 'that a departure from them did not defeat or affect the ultimate object of the trial, it would be a mockery of justice to set aside a judgment, otherwise proper and regular, because of such departure.' And it was there decided that, if a juror is challenged for cause, that challenge is overruled, and he is then challenged peremptorily, there does not necessarily arise any inference that the challenging party is thereby injured; that an injury could only arise in case the challenging party was compelled to exhaust all his peremptory challenges, and afterward have an objectionable juror placed on the panel for the want of another challenge. This general principle to which we adhere has been frequently decided in both civil and criminal cases." In *People v. Riggins*, 112 Pac. 862, relied upon by defendant, the opinion states, not only that the defendant exhausted all his peremptory challenges, but that by reason of the rulings of the court he was forced to accept McKeen, a juror objectionable to him and challenged for cause by him, and also that he asked the privilege of challenging McKeen peremptorily, and that his request was denied.

[3] 3. Complaint is made of a remark made by the trial court in a discussion with defendant's counsel as to the merits of the challenge interposed to Mr. Fraser, before the ruling thereon. Fraser had testified that he knew Mr. Johnson, a probable witness for the state, and, on being asked whether in view of his acquaintance with him he would believe him in preference to another witness whom he did not know, answered that he would. Counsel then challenged the juror for cause, whereupon the court said: "Not on that. That is the principle observed by every one. If you know a man and he is perfectly satisfactory to you, and if you don't know the other man testifying, you would naturally believe him first." The claim appears to be that this remark of the court was in effect an instruction to the jury that they must believe the men they knew and mistrust the men they did not know. Of course, what the court said was not by way of instruction to the jury at all, and could not have been considered by any juror as such, but was simply a remark to counsel. The court's instructions to the jury were given later, and were so fair that absolutely no complaint is made concerning them on this appeal. The claim that the remark was of such a character as to operate to defendant's prejudice in the minds of such jurors as may have been present in the courtroom at the

time appears to us to be utterly without basis. Evidently counsel for defendant perceived nothing prejudicial in the remark at the time it was made, for no objection or exception was then made to the same, and nothing was said in regard thereto until the case reached the appellate court.

[4, 5] 4. A letter written by defendant while he was in the county jail awaiting trial was admitted in evidence over his objection. As to this ruling the District Court of Appeal said: "A letter written by appellant in the county jail was admitted over his objection. It was delivered to the jailer by one Edwin Hines, 'a trusty,' two or three days before the latter's term of imprisonment had expired. Hines was not a witness in the case—presumably for the reason that he could not be found. The letter, however, was produced by the jailer with the foregoing explanation, and it was clearly shown to be in the handwriting of appellant. The superscription was, 'Friend Ed,' and a portion of the letter was as follows: 'Hello Ed. Now Ed, can I depend on you Tuesday night? Now Ed don't disappoint me when the lights go out. Be here with the steel saw. I guess one steel saw will do the work. I can work in here in the daytime, two bars inside and one outside. The bar outside I can get out in two hours. It is a snap.' Among additional things the letter contained this declaration: 'We are in a hell of a hole, you know that.' We can see no error in the ruling of the court admitting the letter in evidence. It contained written declarations by appellant of his purpose and intention to escape from jail if possible, and also that which might be reasonably construed as an admission of his guilt. If similar oral statements had been made by appellant, testimony concerning them could certainly be received. That he reduced them to writing makes them no less admissible. They are received as tending to reveal a consciousness of guilt, and the fact that appellant was not furnished the saw, and therefore he made no attempt to carry his purpose into execution, does not affect the question. Appellant complains that certain portions of the letter should not have been admitted, but he made no such objection in the court below; his opposition being to the letter as a whole, and it is too late to make the point now."

No objection to this portion of the opinion of the appellate court has been made in this court. It appears to us to correctly dispose of the claim made by defendant's counsel that the court erred in admitting the letter, and we adopt the same as a portion of this opinion.

[6] 5. It is urged that the evidence was insufficient to sustain a verdict of guilty of burglary of the first degree, which is burglary committed during the period "between sunset and sunrise." Pen. Code, §§ 460, 463. There is no foundation in the record for any such

claim. The evidence is without dispute to the effect that the burglary was committed between 5 o'clock p. m. of the afternoon of October 13, 1910, and some time prior to 7 o'clock a. m. of October 14, 1910; that it had not been committed when Johnson left the tannery at 5 p. m. on October 13th, leaving the place unoccupied by any one; and that it had been committed when he returned some time before 7 a. m. the next morning. The parties committing the burglary took from the house entered by them hides weighing at least 1,400 pounds and loaded them on a wagon brought to the tannery for the purpose. Added to the almost necessary inference that this was not accomplished either in the short period between 5 p. m. and sunset on October 13th, or in the short period between sunrise and a few minutes before 7 a. m. on October 14th, is the testimony of a witness to the effect that he saw Schafer and his codefendant about 2:30 a. m. on the morning of October 14th about 3¼ miles north of Vallejo, driving a single horse attached to a wagon, headed north (going from Vallejo), and that the horse was wringing wet.

[7] 6. It is urged that the court abused its discretion in sentencing the defendant to 10 years imprisonment in the state prison. The punishment awarded may appear somewhat severe, if, as is claimed, defendant had never before been convicted of any public offense, in view of the fact that the building entered was uninhabited and the property stolen was valued at something less than \$130. But in this state the determination of the trial court as to the penalty to be adjudged on conviction of a public offense is conclusive upon all appellate courts, provided the court adjudges a penalty which is authorized by the statutes of the state. Section 461, Penal Code, makes burglary of the first degree punishable by imprisonment in the state prison "for not less than one nor more than fifteen years." As the trial court confined itself within these limits, its action is beyond review by the courts on appeal.

The judgment and order denying a new trial are affirmed.

We concur: MELVIN, J.; LORIGAN, J.; SHAW, J.; HENSHAW, J.; SLOSS, J.

BECKMAN v. WATERS et al. (L. A. 2,724.)  
(Supreme Court of California. Dec. 15, 1911.  
Rehearing Denied Jan. 12, 1912.)

1. MORTGAGES (§ 37\*)—ABSOLUTE DEED AS MORTGAGE.

An instrument purporting to convey the title to real or personal property may be shown to have been intended to secure a debt due from the grantor to the grantee, and to operate as a mortgage only.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 97-107; Dec. Dig. § 37.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

**2. APPEAL AND ERROR (§ 1002\*)—FINDINGS—REVIEW—CONFLICTING EVIDENCE.**

A finding on conflicting evidence will not be reversed, where there is substantial evidence sustaining it.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

**3. MORTGAGES (§ 38\*)—ABSOLUTE DEED AS MORTGAGE—EVIDENCE—FINDINGS.**

Evidence held to sustain a finding that a conveyance of real and personal property, absolute on its face, was intended as a mortgage to secure the price of the interest of the mortgagor's partner in the property mortgaged.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 108, 111; Dec. Dig. § 38.\*]

**4. DEPOSITIONS (§ 76\*)—NOTARY'S CERTIFICATE—SIGNATURE.**

Under Code Civ. Proc. § 2032, providing that a deposition must be certified by the judge or officer taking it, a certificate bearing the notarial seal of the officer taking the deposition, but not signed by him, is insufficient.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 190-196; Dec. Dig. § 76.\*]

**5. CONTINUANCE (§ 46\*)—APPLICATION—DILIGENCE.**

It was not an abuse of discretion to deny a continuance because of the absence of plaintiff, where the affidavit in support of the motion only showed that plaintiff was unable to be present at the time set for trial, and there was nothing to indicate that he would be able to appear at any later time; there being no sufficient excuse for failure to take a deposition before trial.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 132-140; Dec. Dig. § 46.\*]

Department 1. Appeal from Superior Court, Santa Barbara County; Chas. Monroe, Judge.

Action by Elias Beckman against William G. Waters and the San Miguel Island Company. From an order denying plaintiff's motion for a new trial, he appeals. Affirmed.

J. F. Conroy and E. W. Squier, for appellant. W. S. Day and Henley C. Booth, for respondents.

**SLOSS, J.** This is an appeal by plaintiff from an order denying his motion for a new trial. The controversy between the parties turns principally upon the effect of an instrument, in form a deed absolute, executed by the defendant Waters to plaintiff, Beckman, and purporting to convey certain real estate, to wit, the island of San Miguel, containing about 14,000 acres of land, and situated in the Pacific Ocean off the coast of Santa Barbara county. On the part of the plaintiff, the claim was and is that this instrument was in fact what it purported to be, while the defendants contended below, as they contend here, that the deed was intended to be and was a mortgage. The transaction included the execution and delivery by Waters to Beckman of a bill of sale of live stock and other personal property on the island, and the same question of mort-

gage or absolute transfer is presented with reference to this bill of sale.

The action was commenced on March 11, 1904. An amended complaint, filed on July 2, 1904, alleges that on or about the 1st day of February, 1892, Waters executed and delivered to plaintiff a deed conveying the said island of San Miguel, and on the same day executed and delivered to plaintiff a bill of sale transferring the personal property above referred to. It then alleges that on the same day (February 1, 1892) the plaintiff executed and delivered to Waters an instrument in writing, whereby, after reciting the conveyance by Waters to Beckman of all the right, title, and interest of Waters in the island of San Miguel and in the personal property thereon, it was agreed that Waters, his heirs, executors, administrators, or assigns "may at any time hereafter within three years from the date hereof, pay to me, my heirs, executors, administrators or assigns, the sum of \$7,000, gold coin of the United States, with interest thereon at the rate of ten per cent. per annum, interest payable semi-annually, and upon the payment of the said sum and interest thereon in manner and time aforesaid I do \* \* \* agree to reconvey by a good and sufficient quitclaim deed and bill of sale to said William G. Waters \* \* \* all my right, title and interest in and to the above described real and personal property and the increase thereof, excepting such personal property or products from said island that are sold in the meantime, and in the event of such payment in the manner and at the time hereinabove set forth with the interest at the time it becomes due, then the said W. G. Waters shall be entitled to credit for the amount of such sales upon said indebtedness." It is alleged that on March 25, 1892, defendant Waters paid \$1,000 on account of the purchase price of the property mentioned in said instrument; that at divers times prior to January 1, 1896, sums aggregating \$1,500 were received in part payment of said purchase price as proceeds and profits accruing from the property on the island; and that on or about the 1st day of January, 1896, the plaintiff, at the request of Waters, granted said defendant further time for payment of the balance of the purchase price. Plaintiff, it is alleged, held possession of the real and personal property so transferred to him from the 1st day of February, 1892, to the 11th day of May, 1896, said island being in charge and control of a manager employed by plaintiff; said manager died on the 11th day of May, 1896, whereupon Waters assumed charge and control of said island, and he and those claiming under him have ever since held possession of said island and property as trustees for plaintiff. On March 8, 1897, Waters sold, conveyed, and assigned unto his codefendant, San Miguel Island Company, a corpo-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ration, his right to and interest in said island and the property thereon, and said corporation has ever since claimed an interest in said real and personal property. It is further alleged that Waters is the manager of the business of said corporation; that as such he has received rents, issues, and profits of said island for which he has not accounted; and that the defendants claim said island and the property thereon adversely to plaintiff. No payments, except as above stated, have been made under said agreement of purchase. Under these allegations the plaintiff prayed for the appointment of a receiver; that the defendants be required to account; that they be restrained from disposing of the real or personal property; and that upon the ascertainment of the amount due by Waters to plaintiff, under the agreement of February 1, 1892, the court order said amount to be paid to plaintiff, and in default of such payment that the interest of the defendants in the property be divested.

The defendants answered separately, denying most of the material allegations of the complaint and setting up affirmative defenses. The nature of the issues raised will appear with sufficient clearness from the following summary of the findings.

The court found that the possession of the property was never delivered to the plaintiff, and that plaintiff never held possession as owner or otherwise; that defendant Waters never held possession of said property as trustee for the plaintiff or otherwise than as owner; that, in fact, said deed and bill of sale and said written agreement, all dated February 1, 1892, were and were intended by the parties thereto to be a mortgage by Waters to Beckman to secure the payment to Beckman of the sum of \$7,000 on or before three years from February 1, 1892, with interest thereon at the rate of 10 per cent. per annum, payable semiannually. It was found that no extension of time had been granted by plaintiff to defendant, and that plaintiff's claim was barred by the statute of limitations.

As above suggested, the plaintiff's main contention on his motion for a new trial was that the evidence did not sustain the finding that the transaction in question constituted a mortgage. Of course, if the plaintiff's position was that of a mortgagee, there can be no question that his right to relief is barred by limitation. The debt secured by the mortgage was due three years from February 1, 1892. The finding that no extension was granted is not attacked, and, consequently, an action to foreclose the mortgage was barred at the expiration of four years from the maturity of the debt, or February 1, 1899. The last-mentioned date was more than five years before the commencement of the action.

[1, 2] It is thoroughly settled by the decisions of this court that an instrument purporting to convey the title to real or person-

al property may be shown to have been intended to operate as a mortgage. It has often been said that clear and convincing evidence is required to justify a court in finding that a deed which purports to convey the title to land in fee simple was intended to be a mortgage. But, as is said in *Couts v. Winston*, 153 Cal. 686, 96 Pac. 357, in which many earlier cases are cited: "Whether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court. \* \* \* In such cases, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review in this court." And similarly, in *Wadleigh v. Phelps*, 149 Cal. 627, 637, 87 Pac. 93, 98, it is said that this court "will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect."

[3] In the case at bar, it appears that, before any of the transactions here involved, the defendant Waters and one Schilling had been jointly interested in the ownership of San Miguel Island and the personal property thereon. In December, 1890, Waters had purchased Schilling's interest, giving him therefor a promissory note for \$7,000, secured by an instrument described in the record as a "pledge" of the island and of the property thereon. This note and pledge were assigned by Schilling, in January, 1892, to the plaintiff Beckman, who was acting on behalf of himself and one Gaty. A finding, which is not attacked, declares that this assignment was a part of the transaction of February 1, 1892, by which the deed, bill of sale, and reconveyance agreement were executed. Coincident with the assignment of the pledge, Schilling made a quitclaim deed to Beckman of an undivided one-half interest in the island. This deed declared that it was made to Beckman for the purpose of enabling him "to fulfill all the obligations required in the said pledge of the said Schilling." Beckman and Gaty signed an agreement, declaring that they were equally interested in the purchase of the note and pledge from Schilling, and on the 1st day of February—the date on which the papers between Beckman and Waters were executed—Beckman executed to Gaty a deed of an undivided one-half interest in the island and the personal property thereon; such instrument reciting that Gaty had advanced a part of the consideration for the transfer from Schilling to Beckman. On the same day and as part of the same transaction, Beckman conveyed to Waters all of his interest in the island and personal property by instruments reciting that they were intended to discharge the pledge of Schilling. Then followed the making of the deed and bill of sale and the agreement set forth in the complaint.

We think these facts fully justified the tri-



al court in concluding that the conveyance from Waters to Beckman was, in fact, a mortgage to secure the payment of \$7,000, and this, notwithstanding the fact that there was no writing, whereby Waters in terms bound himself to pay such sum to Beckman. It will be observed that \$7,000 was the consideration which Waters had originally agreed to pay Schilling for a one-half interest in the property, and that the payment of this sum was secured by lien upon the property. Beckman and Gaty succeeded to the interest of Schilling. New papers were executed, eliminating Schilling from the transaction, and introducing Beckman as the party with whom Waters was dealing. The same property which had been "pledged" to Schilling to secure the payment of the \$7,000 was conveyed to Beckman, and this property was, by the agreement accompanying the deed and bill of sale, to be reconveyed to Waters upon payment of the same sum of \$7,000, which had, two years before, been the purchase price of an undivided one-half interest. Waters remained in possession, and, as is shown by the pleadings, made partial payments to Beckman.

Taking all of these transactions together, it is a reasonable inference that the transaction between Beckman and Waters was intended to simply substitute the former for Schilling. The fact that under the terms of the agreement set forth in the complaint Waters was to receive a retransfer on payment of the precise sum which had been due to Schilling, lends strong support to the view that Beckman was purchasing the claim of Schilling, together with the security for it held by Schilling. It is certainly unlikely that Waters, after agreeing to pay \$7,000 for a one-half interest in the property, would be willing to part with the entire property for no greater consideration than a release of his liability for this amount. And it would likewise be strange that Beckman, if he were the owner of property, one-half of which had, two years before, been sold for \$7,000, should be willing to agree to sell the entire property at any time within three years for the same sum, with interest. Again, the partial payments which, in his complaint, Beckman admits having received are more consistent with the existence of a debt and mortgage than of an agreement for sale, which contained no provision for partial payments. A further circumstance supporting the conclusion of the court below is the execution by Beckman to Gaty, on February 1, 1892, the very date of the transactions in question, of a deed conveying a one-half interest in the property. If his interest was that of a mortgagee, his conveyance might well have been intended to transfer an interest in the mortgage, but if, on the other hand, he was the owner, and had already made an agreement to sell the property to Waters, he could not properly convey any part of the property to any one else.

It is undoubtedly true that there can be no mortgage without an indebtedness (*Ahern v. McCarthy*, 107 Cal. 382, 40 Pac. 482; *Henley v. Hotelling*, 41 Cal. 22), and that no note for the \$7,000 was given by Waters. But in this respect the case is analogous to *Couts v. Winston*, supra. There, too, there was no direct promise in writing to pay the sum advanced, but the transaction as a whole was such as to justify the inference that the money was advanced as a loan, and that the party executing the deed had at least impliedly agreed to repay the sum advanced. The same inference is permissible here, and is the more reasonable, because of the fact that the instrument providing for a reconveyance speaks of payment of the sum of \$7,000 "at the time it becomes due," and provides for credits to Waters upon his "*indebtedness*."

There are several alleged errors of law assigned by the appellant. The plaintiff offered in evidence a power of attorney from himself to Gaty. This paper does not appear to have been executed on the same day as the instruments in controversy, and was not proven to be a part of the same transaction. Furthermore, there is nothing to show that it was ever brought to the knowledge of the defendant Waters, and it could not therefore bind him.

[4] The plaintiff was not present at the trial. His deposition, taken in a former action, was offered. The defendants objected to its admission upon two grounds, one of which was that the certificate of the notary before whom the deposition was taken was not signed. The objection was sustained. There was no error in this ruling. Under section 2032 of the Code of Civil Procedure, a deposition must be "certified by the judge or officer taking" it. A certificate, prepared in proper form, was attached to the deposition, but, as suggested above, the notary had neglected to sign it, although the notarial seal had been affixed. Where, as here, the form of certificate indicates that it was intended that the authentication should be by means of a signature, we do not think a sealed, but unsigned, certificate amounts to a compliance with the requirement that the deposition shall be certified by the officer.

[5] It is also claimed that the court erred in denying the motion for a continuance on the ground of the absence of the plaintiff. The court did not abuse its discretion in this ruling. The affidavits offered to support the motion showed, at most, that the plaintiff was unable to be present at the time set for the trial. But there was nothing to indicate that he would be able to appear at any later time; nor was there any sufficient showing of an excuse for the failure to take his deposition in proper form before the trial. No other points are raised.

The order is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.

In re CAROTHERS' ESTATE. (Sac. 1,671.)  
(Supreme Court of California. Dec. 15, 1911.)

**1. WILLS (§ 439\*)—CONSTRUCTION—CIRCUMSTANCES OF MAKING.**

By express provision of Civ. Code, 1818, in case of uncertainty arising on the face of a will, testator's intention is to be ascertained from its words, taking into view the circumstances under which it was made.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.\*]

**2. WILLS (§ 602\*)—ESTATES CREATED—DEFEASIBLE FEE—CONDITIONAL LIMITATIONS.**

A will gave to testator's wife and a son an estate in a farm for the life of the wife. It then provides that on the wife's death the farm "vests absolutely in and is the property of" the son, "and in case" he "dies without issue his property herein specified becomes the property of" a second son, and at his death goes to a daughter. Civ. Code, § 1322, provides that a clear and distinct devise cannot be affected by any other words not equally clear. *Held*, that the words of the devise over to the second son and daughter were sufficiently clear to meet the requirements of the statute and to impose conditional limitations on the fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1351-1359; Dec. Dig. § 602.\*]

**3. WILLS (§ 466\*)—CONSTRUCTION—PARTICULAR WORDS—"THAT."**

Where by his will testator creates an estate in fee in his eldest son, and then provides "that in case" the devisee "dies without issue his property herein specified becomes the property of" testator's second son, the word "that," must be construed as "but" or "provided that."

[Ed. Note.—For other cases, see Wills, Dec. Dig. § 466.\*]

For other definitions, see Words and Phrases, vol. 8, p. 6935.]

**4. WILLS (§ 622\*)—ESTATES CREATED—REMAINDERS—FEE ON A FEE.**

Where, after the creation of a defeasible fee in the first son, a will provides that on the death of such son without issue the farm devised becomes the property of testator's second son and on his death goes to testator's daughter, the devise to the daughter is not void as an attempt to create a remainder after a devise in fee to the second son.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1440-1444; Dec. Dig. § 622.\*]

**5. WILLS (§ 542\*)—SURVIVORSHIP—DEATH COUPLED WITH CONTINGENCY—"SIMPLY."**

Civ. Code, § 1336, providing that "words in a will referring to death or survivorship simply relate to the time of the testator's death unless possession is actually postponed, when they must be referred to the time of possession," has no application to the construction of a will containing words of limitation upon a death coupled with a contingency such as dying without issue; this not being death "simply."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1165-1168; Dec. Dig. § 542.\*]

**6. WILLS (§ 545\*)—SURVIVORSHIP—"DIES WITHOUT ISSUE."**

If, from the terms of the will and the circumstances attending its making, it does not appear that the words "dies without issue" are intended to mean death before testator or the first taker, they will be construed to mean death either before or after that event.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171-1176; Dec. Dig. § 545.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2059-2061.]

**7. WILLS (§ 545\*)—SURVIVORSHIP—"DIES WITHOUT ISSUE."**

A will created in testator's wife and eldest son an estate for the wife's life in a farm constituting the bulk of his estate. It then provides that on the wife's death the farm "vests absolutely in and is the property of" the son, and in case said son "dies without issue his property herein specified becomes the property of" a second son, and at his death goes to a daughter. When the will was made, the eldest son was a bachelor 42 years old, while the daughter had three young children. *Held*, that testator intended to preserve the estate for his daughter, and hence the words "dies without issue" will be construed as meaning death at any time, and not death in the lifetime of the wife in order to effectuate that intent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171-1176; Dec. Dig. § 545.\*]

Angellotti, Melvin, and Sloss, JJ., dissenting.

In Bank. Appeal from Superior Court, Sacramento County; J. W. Hughes, Judge.

In the matter of the estate of Andrew Carothers, deceased. From an order John E. Witherspoon, administrator, and others, appeal; Earl D. White being the respondent. Reversed.

White & Miller, Richards & Carrier, and Devlin & Devlin, for appellants. William M. Sims, R. C. Van Fleet, and W. B. Treadwell (Snook & Church, of counsel), for respondent. Charles A. Bliss, amicus curiae.

SHAW, J. This is an appeal from an order of partial distribution of the estate of Andrew Carothers, deceased, to the respondent, Earl D. White.

The decision of the case depends on the meaning and effect of the last will of the deceased. After a clause giving certain specific personal property to his son, William P. Carothers, to his wife, Eleanor Carothers, and to one Joseph A. Lowry, respectively, the will proceeds with the portions here involved, which are as follows:

"I also give and bequeath to my wife and William P. Carothers my entire farm with all improvements thereon located in the county of Sacramento county, state of California, during the lifetime of my said wife, and at her death said land with all the improvements and proceeds thereof vests absolutely in and is the property of said William P. Carothers, that in case said William P. Carothers dies without issue his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon.

"I further direct at the death of my said wife my daughter Elizabeth Witherspoon shall receive one thousand dollars proceeds from said property and May H. Lowry five hundred dollars."

The testator died on December 13, 1876, leaving surviving as his heirs at law his wife, Eleanor, and three children, namely, William P. Carothers, John Thomas Caroth-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ers, and Elizabeth Witherspoon. Eleanor, the wife, died on February 24, 1897. On February 14, 1898, William P. Carothers executed a deed purporting to convey an undivided one-half interest in the farm to said John Thomas Carothers. On March 11, 1899, John conveyed to his wife, Kate A. Carothers, all of his right, title, and interest therein. On September 15, 1904, Kate conveyed to J. J. Burke a part of said farm, a small tract of four acres. This is the land in controversy. The respondent, Earl D. White, is the successor of Burke, and the undivided one-half of the four acres was distributed to him, subject to a charge for the legacies to Elizabeth Witherspoon and May H. Lowry, in case they had not been paid previously. The claim of the respondent is that by the terms of the will, upon the death of the testator's wife, Eleanor, William P. Carothers became vested of the farm in fee, that his deed to John carried the undivided one-half thereof to John in fee, and that by the subsequent transfers the respondent became vested of the fee in the undivided half of the four acres.

The appellants are the children of Elizabeth Witherspoon. She died in the year 1881. John Thomas Carothers died in the year 1899. William P. Carothers died on June 2, 1902, without issue. The claim of the appellants is that by the will William P. Carothers was given, first, an estate in common with Eleanor Carothers for and during the lifetime of Eleanor, and, secondly, a contingent remainder in fee; the condition being that in case he should die without issue the property should go to John Thomas Carothers for his life and that at the death of John it should go to Elizabeth Witherspoon. Their theory is that the estate of William terminated upon his death without issue, carrying with it all the subordinate estates conveyed by him, including that of John's wife and that of the respondent, and that as John died before the death of William, upon the death of the latter the entire estate in the farm became vested in the appellants as the heirs of Elizabeth Witherspoon, to whom the will in that event had devised it.

[1] In case of uncertainty arising upon the face of a will, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made. Civ. Code, § 1318. Assuming that the will is uncertain, the circumstances to be considered in this case are as follows: At the time he executed the will the testator was 74 years of age. He was then very sick, confined to his bed, and his death was expected soon. It was executed on December 7, 1876, and he died six days afterward. Eleanor Carothers was his childless second wife. She was then aged 56 years. William P. Carothers was a bachelor, then aged 42 years, John was 39 years old, and had one child then living. She after-

wards died before the death of John. Elizabeth Witherspoon was then 46 years old, was married, and had three young children. The farm was his place of residence. It contained 158 acres and comprised the bulk of his estate. The will appointed William P. Carothers and Eleanor Carothers as executor and executrix, without bonds.

[2] The respondent's theory is that the clause in the will which reads as follows: "That in case said William P. Carothers dies without issue his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon"—refers solely to the death of William without issue in the lifetime of the widow, Eleanor, so that when he survived Eleanor he became vested of an unconditional and unqualified fee. Upon this theory a complete and accurate statement of the intention of the testator would have required the interpolation of an additional phrase, so as to express it thus, the interpolated words being italicized: "that in case said William P. Carothers dies without issue *during the lifetime of my said wife*, his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon."

The respondent, in support of this construction, advances two propositions which he states substantially as follows: (1) A clear devise of a fee will not be cut down by other expressions or clauses contained in the will which do not with reasonable certainty indicate the intent of the testator to cut it down, and if such intent is not thus shown the subsequent clause will be construed so as to make it consistent with the positive devise, or, if necessary, entirely disregarded. (2) Where a devise is made to one in fee, with a devise over in case of his death without issue, the words "death without issue" are to be taken as relating solely to his death in the lifetime of the testator, or, if the fee is in remainder after the termination of an estate for life or years, then to his death prior to the ending of the particular estate, so that if he survives thereafter he will take an absolute fee.

1. The first proposition is embodied in section 1322 of our Civil Code: "A clear and distinct devise or bequest cannot be affected \* \* \* by any other words not equally clear and distinct." The words, "and at her death said land with all the improvements and proceeds thereof vests absolutely in and is the property of said William P. Carothers," considered separately, clearly give William a fee-simple estate. They are immediately followed, however, as part of the same sentence, separated only by a comma, by the words, "that in case said William P. Carothers dies without issue his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon." Passing the second proposition and assuming that this refers to

the death of William at any time, this passage, so far as it imposes a limitation upon the fee, is as clear and distinct as the previous devise of the fee to William.

[3] The word "that" beginning the clause is obviously used in the sense of "but" or "provided that." The testator's intention is unmistakably declared to be that in the contingency mentioned—that is, William's death without issue—the farm should go to John and Elizabeth successively. The rule contended for, as in case of all other rules of interpretation, is designed to aid in arriving at the intention of the testator as expressed in his will, and it must yield to that intention when it appears with reasonable clearness from the words used. The subsequent words are sufficiently clear to meet the condition of the rule, and they must be taken as providing a conditional limitation upon the fee previously devised, as they were manifestly intended to do.

[4] It is suggested that these words are not sufficiently certain to comply with the rule because, when taken literally, they appear to give the entire fee in remainder to John, and it is insisted that if John had the fee it would go to his heirs at his death and not to Elizabeth. We do not think there is any foundation for this objection. While the form of the provision is not elaborate and the language is not particularly well chosen, its effect is plain if the entire clause is considered together. It can mean nothing else than that, upon the death of William without issue, John should take, for and during his own life, whatever estates were given to William by the previous clauses, and that upon John's death the entire remainder would vest in Elizabeth, or her heirs if she were not then living. If William's death had occurred during Eleanor's lifetime, of course the estates of John and Elizabeth, respectively, would have been in the undivided one-half only, while Eleanor lived.

[5, 6] 2. The second proposition is expressed in the Civil Code as follows: "Words in a will referring to death or survivorship, simply, relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession." Section 1336. In this case William's possession of the fee was postponed until the death of Eleanor, and therefore, if this rule should be applied, the words relating to his death would be taken to mean his death in the lifetime of Eleanor. This section of the Code expresses what appears to be the general rule upon the subject at common law. The respondent relies upon the following statement of the rule by Mr. Underhill: "The intention of the testator in providing for a devise over after giving a fee in absolute terms is most likely to prevent a lapse; and, if the devisee shall survive the testator, he will take an absolute fee simple in the property devised to him, which will not be defeasible on his subse-

quent death without issue, and the limitation over will be disregarded." 1 Underhill on Wills, § 347. The author, in the next section, materially modifies this statement of the rule by the following language: "The rule is extremely technical in its character. It does not apply where there are indications, however slight, that the testator indicated a death without issue occurring subsequent to his death. The rule which construes death without issue to mean death without issue prior to that of that testator is not favored by the courts. The ages and conditions of the primary devisees may be material in determining whether the testator meant death without issue before or subsequent to his death. \* \* \* In such a case, particularly where at the date of the execution of the will any of the primary devisees are unmarried, it may fairly be presumed that the testator had in contemplation a future marriage and birth of issue, and that, intending to keep the property in his family, he meant a death without issue to take place after his death. If, therefore, the primary devisees survive him, they take an estate in fee which is defeasible upon their subsequent death without issue." Section 437. In both these passages the author is discussing the effect of a devise over upon death without issue in cases where there is no intervening life estate to postpone the possession of the contingent remainder, and hence he speaks only of the effect of a death without issue before and after the testator's death. But manifestly, where there was such postponement, the same considerations would apply as to the effect of such death before and after the ending of the life estate. It is contended by both parties here that there is an irreconcilable conflict in the decisions of other jurisdictions upon the question whether words in a will referring to death *without issue* relate to the time of the testator's death or of actual possession if there is a postponement by reason of an intervening particular estate, or whether they relate to a death after the devise vests in possession, as well as before, and each claims that the weight of authority is in his favor. We have no decision on the subject in this state.

It is important to notice that the rule as stated in the Civil Code applies only where there are words "referring to death or survivorship, *simply*." The will of Carothers does not refer to the death of William "simply." It refers to his death "without issue," a contingency which might never happen. We have no provision of our Code declaring what the rule should be where the words refer to death upon a contingency. With respect to cases of this kind, speaking of those in which possession is postponed by a particular estate, Mr. Underhill says: "The general rule is that, in the absence of clear evidence of a contrary intention, a devise over in case of death without issue in the case of a remainder, as with an immediate

estate or interest, means a death *at any time, and not a death without issue during the life tenancy*. The devisees therefore take a remainder, whether vested or contingent, upon the death of the testator, but which becomes vested in possession and enjoyment only upon the death of the life tenant, and which is then defeasible on their subsequent death without issue." Volume 1, § 346, p. 465. The italics are the author's. Mr. Jarman treats the subject at length by classes or heads. In one part he considers cases where the reference is to death "simply"; in another a class which he designates by the title, "Death, with Contingency," in which he includes the words "death without issue." This latter class he again divides into those where the estate is to vest immediately upon the death of the testator, and those where the original gift is postponed to take effect after an intervening estate for life or years. Speaking of those vesting immediately, he says: "The general rule is that, where the context is silent, the words referring to the death of the prior legatee in connection with some collateral event apply to the contingency happening as well after as before the death of the testator." 2 Jarman on Wills (6th Ed.) 719, \*p. 1596. And in reference to the case of a postponed gift to one, with a devise over in case of his death on a contingency, he says: "It is settled, however, that in this case, as well as where the original gift is immediate, the substituted gift will *prima facie* take effect whenever the death under the circumstances described occurs." *Id.* 725, \*p. 1603. In view of this well-known classification of the different varieties of testamentary gifts where death is referred to, it is at least clear that in adopting section 1336 there was no intention to provide a statutory rule for the cases where the reference was to death with a contingency. We are therefore left to construe the words of this will with the aid of such light as the authorities afford.

A large number of cases are cited by the respective counsel upon the question of the proper application of the words "dies without issue." We do not deem it advisable to review them. The above quotations from Jarman and Underhill show that the text-writers who have given close consideration to the subject favor the theory that they should be held to refer to death after as well as before the death of the testator or life tenant, unless the context or circumstances show the more limited meaning. A reading of the cases cited rather leads to the conclusion that, after all that may be said, the only rule truly applicable to such expressions is that the intention of the testator is the primary object of search, and that it is to be ascertained by considering the whole will in connection with the nature and character of the testator's estate and the part of it affected, and such of the surrounding circumstances known to him as

may tend to illustrate his meaning. If all these indicate that the reference is to a death without issue before some particular time or event, effect must be given to the will accordingly. If, on the contrary, they show an intention that death at any time was to bring about the result stated, then that effect must be given to the words. If there is nothing to indicate either, then the ordinary meaning of the words is that the reference is to death at any time it may occur, and that the happening or not happening of the contingency is to determine the result. Nearly all of the cases cited fall within one or the other of the first two of the alternatives just stated, and they were, for the most part, really decided in that way; but in some of them the decision is reached by the arbitrary application of what was considered the correct rule of construction. This would probably account for much of the conflict.

[7] Applying the principles of interpretation above stated, we find little difficulty in ascertaining the testamentary intent. When the testator gave William the remainder after the death of Eleanor, and then proceeded to declare what should become of the property if William should die without issue, he must have had in mind the fact that William was a bachelor 42 years old and the possibility of his future marriage and the birth of children. It is more reasonable to suppose that he intended to preserve the estate to Elizabeth Witherspoon or her children, in case William left no issue, than that he merely desired to avoid a lapse if William died before Eleanor. If the former was his purpose, there can be no doubt that the qualifying clause was intended to limit the fee devised to William and referred to his death at any time.

We have also, in the will itself, more than a mere death upon contingency to point out the testator's meaning. The clause immediately preceding the reference to William's death on its face gave William a remainder in fee in the farm. The farm was therein "specified" as William's property, to become "his" in possession upon the death of Eleanor. Knowing William's age and unmarried state, he then came to consider that William might die without issue after coming into possession of the fee. To provide for this apprehended contingency, he proceeded to declare that if William should die without issue "his property herein specified" should go to John for his life and then to Elizabeth. The provision would doubtless have been construed to apply to and include the unexpired life estate as well as the fee in remainder, in case William had died before Eleanor; but it also shows that the testator was thinking of the property which would be "his"—that is, William's—and referred to the death of William after the death of Eleanor and after he had come into possession of the remainder "specified" as

his in the preceding clause of the sentence, as well as to his death before that event.

It is suggested that the last paragraph of the will, which gives legacies to Elizabeth Witherspoon and May H. Lowry payable at the death of Eleanor out of the proceeds of the farm, shows that the testator supposed that William, if he were living, would then have an indefeasible fee, and that he must have intended that result. The argument is that the payment of these legacies out of a mere defeasible fee would have been a burden on William greater than the testator can be supposed to have intended. We cannot see that this argument is of any force. When the testator made the will, all the future possibilities were before him. If William had died without issue before Eleanor, leaving John surviving, John would have had a vested life estate in the remainder, beginning, as to one-half, with the death of Eleanor. At her death the legacies would be payable, and the burden upon John, if he survived her, would assuredly be as great as it would have been upon William, had he survived Eleanor.

Our conclusion is that the estate of William was a fee defeasible upon his death without issue, and that as that event has occurred, and John is also dead, the farm is now vested in the heirs of Elizabeth Witherspoon.

Upon a former submission of this cause, the foregoing opinion was filed, and the order, accordingly, reversed. Upon petition of the respondent, the judgment of reversal was vacated and a rehearing ordered for the purpose of giving further consideration to the questions involved. The cause was thereupon reargued and again submitted. Upon the further consideration we are satisfied with the opinion and conclusions heretofore announced, and we again adopt the aforesaid opinion as that of the court.

The order appealed from is reversed.

We concur: BEATTY, C. J.; HENSHAW, J.; LORIGAN, J.

ANGELLOTTI, J. (dissenting). This appeal was first decided in the District Court of Appeal for the Third Appellate District, where judgment was rendered affirming the order appealed from. Accompanying the judgment was the following opinion prepared by Mr. Justice Burnett:

"This is an appeal from a decree of partial distribution to one Earl D. White of the estate of Andrew Carothers, deceased.

"Andrew Carothers died on or about the 13th day of December, 1876, and on January 8, 1877, his will was admitted to probate and his son, William P. Carothers, was appointed executor of the estate. By his last will and testament said Andrew Carothers disposed of the real estate herein involved as follows: 'I also give and bequeath to my wife and William P. Carothers my entire farm with

all improvements thereon located in the county of Sacramento, state of California, during the lifetime of my said wife, and at her death said land with all improvements and proceeds thereof vests absolutely in and is at said death the property of said William P. Carothers, that in case said William P. Carothers dies without issue his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon.' The said wife, Eleanor A. Carothers, died on the 24th day of February, 1897. On the 14th day of February, 1898, said William P. Carothers conveyed by a good and sufficient deed to John T. Carothers an undivided one-half interest in said property. The latter, on the 11th of March, 1899, conveyed the same to his wife, and she to J. J. Burke, on September 15, 1904. The said Burke died, and on the 6th day of September, 1907, in the superior court of the county of Alameda, a decree of distribution was made and entered by which all of the interest of said Burke was distributed to said Earl D. White. On the 31st day of October, 1904, the said Burke had filed in the superior court of Sacramento county his petition for the distribution to him of the undivided one-half interest in this real property belonging to the estate of said Andrew Carothers, deceased. His death occurred before the hearing of said petition, and his successor, the said Earl D. White, was regularly substituted, and to the latter the distribution was made. The said John Thomas Carothers died testate in the year 1899, without leaving issue; his said surviving widow, Kate A. Carothers, being the sole devisee of his estate. William P. Carothers was never married and never had any issue. He died intestate on June 2, 1902. The said petition for distribution was contested by John E. Witherspoon, as administrator with the will annexed of the estate of said Andrew Carothers, deceased, and by John E. Witherspoon, Andrew H. Witherspoon, and Emma Witherspoon, the heirs at law and successors in interest of Elizabeth Witherspoon, a deceased daughter of the said Andrew Carothers, deceased. The position of respondent is that the fee, subject only to the life estate of the said Eleanor, vested in William at the death of the testator, and that the provision in reference to the said John Thomas and Elizabeth are substitutionary only, or, at least, that at the death of said Eleanor the said William became entitled to the fee simple absolute. To the contrary, it is insisted by appellants that the estate of said William P. Carothers was terminated by reason of his death without issue, and that therefore the alternative provisions of the will to take effect in case of the happening of the contingency became operative. Hence the claim of appellants to the fee as heirs of said Elizabeth, whose death antedated that of the said William P. Carothers.

"Many questions of law suggested by the

language of the will are discussed with great learning by the counsel for both parties. Their investigations have taken a wide range, and it would seem that no relevant authority worthy of consideration has escaped attention. We deem it unnecessary, however, to follow the discussion in all its ramifications, as the determination of the controversy really hinges upon the construction of the phrase 'dies without issue,' or rather upon the question whether that contingency is limited to any particular time.

"Respondent's position is stated as follows: 'Our contention is that after devising the property absolutely to William P. Carothers, and carving out of it a life estate for his wife, he bethought himself that in case William P. Carothers died in his own lifetime or in the lifetime of his wife there would occur a lapse, and so he provided the substitutionary scheme. This is the only way in which the intention of the testator to convey an absolute interest in the property to the first taker can be possibly carried out.' In support thereof it is submitted: '(1) A devise of testator's real estate to a person absolutely carries the fee simple absolute. A devise of the proceeds, rents and profits without limit passes the absolute fee. (2) A clear devise or bequest will not be cut down by other expressions or clauses contained in the will which do not with reasonable certainty indicate the intent of the testator to cut it down. The court will, when in doubt, justly prefer that construction of any subsequent clause which will make it consistent with the plainly expressed intention to devise or bequeath an absolute estate. (3) Under section 1336 of the Civil Code words in a will referring to death or survivorship relate to the time of the testator's death, unless possession is actually postponed, when they must be referred to the time of possession. This is the rule which must govern the construction of Andrew Carothers' will.'

"As opposed to this view, it seems clear to appellants that: 'The testator intended that William P. Carothers should have the remainder in the property after the expiration of the life estate, but that he would not have the same absolutely so that he could dispose of it to others. The testator wanted to keep the property in the family. If William had issue, the property was to stay in his family. If he had not, it was to go to the other children of testator.' The reasons for this conclusion are summarized as follows: '(1) The natural meaning of the words "die without issue" is a death at any time. (2) The context of the will shows an intention to keep the property in his family, and this can best be done by so construing the words. (3) The surrounding circumstances show that the testator must have intended the words to refer to death at any time. (4) Respondent's construction is based not on the testator's intention, but on harsh and technical

rules of construction. That even in those states, which have adopted it, it is according to respondent's own authority, Underhill, regarded as highly technical, often defeating the intention of the testator, not favored by the courts and departed from on indications however slight.'

"The fact is, however, that there is no difference of opinion—and there can be none—between counsel, that the court's duty is to ascertain, if possible, from an inspection of the will, the intention of the testator, and to give effect to such intention if not in contravention of the law, and that rules of construction are prescribed to aid, and not to embarrass or retard, the court in its effort to determine such intention. The rules of construction suggested by counsel, indeed, are provided by the Code, and the only question can be as to their application to the will in controversy. Section 1818, Civil Code, is: 'In case of uncertainty arising upon the face of a will as to the application of any of its provisions, the testator's intention is to be ascertained from the words of the will, taking into view the circumstances under which it was made exclusive of his oral declarations.' Of course, the surrounding circumstances are to be resorted to only in case of uncertainty in the language used and for the purpose of ascertaining what the testator intended by the words of the will. Estate of Tompkins, 132 Cal. 173, 64 Pac. 268. The question as to the period of time to which the words 'die without issue' should be referred seems to be within the purview of the phrase 'as to the application of any of its provisions,' and if it does not appear from the language of the will, in view of other rules of construction, what the testator intended by said contingency, the surrounding circumstances, if of any significance to remove the uncertainty, may be considered and accorded the weight to which they seem to be entitled. In re Mackay, 107 Cal. 308, 40 Pac. 558.

"Again, in section 1322 we have the rule upon which respondent relies with such confidence expressed as follows: 'A clear and distinct devise or bequest cannot be affected by any reasons assigned therefor, or any other words not equally clear and distinct or by inference or argument from other parts of the will or by an inaccurate recital of or reference to its contents in another part of the will.' But appellants contend that equal effect must be given to section 1321, providing that 'All the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole; but, where several parts are absolutely irreconcilable, the latter must prevail.' And also to section 1329, that 'a devise of real property passes all the estate of the testator, unless otherwise limited.'

"In Estate of Marti, 132 Cal. 672, 61 Pac. 966, the importance of said section 1322 is considered, and it is therein said: 'The tes-

tator had, by a previous clause in his will, given and bequeathed to his wife "all the other property, real and personal, and wherever situated of which I may die possessed." This gift is explicit and without any words of limitation or qualification. Considered by themselves, they create in her an absolute estate in the property given by him. The authorities all agree that, when an absolute estate has been conveyed in one clause of a will, it will not be cut down or limited by subsequent words except such as indicate as clear an intention therefor as was shown by the words creating the estate. Words which merely raise a doubt or suggest an inference will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of the estate first conveyed. This rule of construction controls the rule that an interest given in one clause of a will may be qualified or limited by a subsequent clause—citing cases.

"There is no room for controversy as to the foregoing, unless possibly as to the accuracy of the statement that one rule 'controls' the other. The fact seems to be that in the case discussed by Mr. Justice Harrison the rule as to qualification or limitation has no application. Nor is there any inconsistency between the various sections of the Code to which we have referred. If A. in one part of his will by language free from uncertainty devises real estate to B. absolutely, and in a subsequent portion uses language of an uncertain import, but which might be construed as a limitation or qualification of the fee, no one would contend that B. is entitled to less than the entire estate in said property. But if A. should devise real estate to B. and qualify the devise by an equally clear declaration that B. should have only a life estate, there would be no hesitation in giving effect to the subsequent limitation. It follows necessarily from the principle that certainty is preferred to uncertainty and that the intention of the testator should be rendered operative as far as possible.

"In the light of the foregoing familiar principles, what estate was devised to the said William P. Carothers? There is no uncertainty as to the significance of this language: 'I also give and bequeath to my wife and William P. Carothers my entire farm with all improvements thereon during the lifetime of my said wife, and at her death said land with all improvements and proceeds thereof vests absolutely in and is at said death the property of said William P. Carothers.' The words seem to have been chosen carefully with a view of giving the wife and William a joint life estate and of vesting the fee beyond controversy in the latter. The legal effect of the words used, irrespective of the context, would not be changed as far as vesting the fee is concerned, if 'absolutely' and the phrase 'and is at said

death the property of' had been omitted (section 1329, Civ. Code); but they are important as manifesting the intention of the testator to vest without qualification the complete title in William, postponed, however, as to its enjoyment until the death of the wife. An absolute estate is one 'that is free from all manner of condition or incumbrance.' It means 'Complete, final, perfect, unconditional, unrestricted.' *Rap. & L. Law Dictionary*. 'The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws.' Section 679, Civ. Code. 'The term "absolute ownership" hardly needs definition. An ownership liable to be divested by any contingency arising by any instrument creating the ownership is not absolute.' *In re Howland's Will*, 75 App. Div. 207, 77 N. Y. Supp. 1025.

"We must presume that the testator used language advisedly, in view of its universally accepted significance. And as a bequest to a person necessarily implies the condition that the devisee shall be alive at the time the bequest is to take effect, we find the testator expressing his intention that, if the said William P. Carothers shall be alive at the time of the death of Eleanor, he shall be vested with the absolute dominion over said property, not liable to be divested by any contingency that may arise, provided if he dies without issue the property becomes the property of John Thomas Carothers. Is it not, therefore, the natural construction, to limit the operation of the qualifying contingency at least to the period prior to the death of said Eleanor? At any rate, there is some uncertainty as to whether the testator meant death 'without issue' at any time, and hence to give effect to the rule as to a clear devise we reach the conclusion that the testator had in view a substitutionary provision in case William should die before the testator or the said Eleanor.

"Again, the contrast between the perspicuous words of devise in reference to William P. Carothers and the somewhat obscure phraseology as to John Thomas Carothers and Elizabeth Witherspoon is worthy of notice. In the first instance there can be no doubt as to the testator's intention. He uses language apt and ample to vest in William the entire estate: 'I also give and bequeath.' But in case of William's death without issue 'his property herein specified becomes the property of John Thomas Carothers, and at his death goes to Elizabeth Witherspoon.' While the words 'becomes' and 'goes,' unembarrassed by the consideration of the clear devise of the fee to William, would probably be held sufficient to express the intention of the testator that the property 'becomes' the property of John Thomas and at his death 'goes' to Elizabeth, yet it is manifest that in one case the intention is entirely free from doubt, but in the other, at least somewhat



obscure and uncertain. I think it is reasonably clear that the testator had in view the death of Eleanor as the point of time when all uncertainty should be removed as to the character of the estate vested in the devisee. This conclusion seems to be confirmed by the last devise of \$1,000 to Elizabeth Witherspoon and \$500 to May H. Lowry to be received 'at the death of my said wife.'

"If we had no other guide than the decisions of the courts to prescribe the limits of the phrase 'death without issue,' it would be difficult to reach a conclusion. The expression has indeed received judicial exposition in many jurisdictions. It is asserted in one of the briefs that more than 100 cases dealing with this question have been cited by each party herein. Many of these decisions are irreconcilably conflicting. In some instances, however, the phraseology is somewhat different, and the conflict is, therefore, more apparent than real. For example, sometimes the devise is to A., and in case of his death to B. Death is not a contingency, but a certainty, and, as it is apparent in such a case that the testator had in view a possible contingency, it is hardly open to controversy that he contemplated the death of A. in his lifetime. But 'death without issue' introduces an additional element and renders the question less free from doubt, although the difference is ignored in some of the decisions.

"But confining our attention to the expression before us, it is apparent that the cases are hopelessly at variance, as may be seen by a reference to the following from the many that have been examined.

"The question is elaborately and learnedly discussed and many authorities reviewed in *Fowler et al. v. Duhme et al.*, 143 Ind. 248, 42 N. E. 623, wherein it is declared: 'Another rule is that the law so favors the vesting of estates and is so adverse to the postponement thereof that they will be held to vest at the earliest possible period in the absence of a clear manifestation of the intention of the testator to the contrary. While this rule has usually been declared with reference to the vesting of remainders, it is nevertheless declaratory of the policy of the law which would prefer certainty rather than contingencies, and which would deny force and effect to an uncertainty raised by doubtfully expressed contingencies instead of resorting to slight circumstances and rendering them effective to defer the vesting of estates or make their vesting contingent. This policy should not be relaxed when inquiry is directed to the force of words asserted to dismantle an estate in fee devised by apt words. \* \* \* Another rule, and that which is of the greatest significance in the construction of the will before us, is, as said in *Wright v. Charley*, 129 Ind. 257, 28 N. E. 706: "That where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the

testator coupled with a devise over, in case of his death without issue, the words refer to a death without issue during the lifetime of the testator and that the primary devisee surviving the testator takes an absolute estate in fee simple." This rule may be said to be almost, if not entirely, free from conflict in the decisions, and there is no doubt of its adoption in this state and that it is supported by the vast weight of authority'—citing on page 261 of 143 Ind., on page 627 of 42 N. E., a long list of cases.

"On the other hand, the view urged by appellants is strongly upheld by the Supreme Court of the United States in *Britton v. Thornton*, 112 U. S. 532, 5 Sup. Ct. 294, 28 L. Ed. 816, in the following language: 'When indeed a devise is made to one person in fee and "in case of his death" to another in fee, the absurdity of speaking of the one event which is sure to occur to all living as uncertain and contingent has led the courts to interpret the devise over as referring to death in the testator's lifetime. 2 Jarman on Wills, c. 48; *Briggs v. Shaw*, 9 Allen (Mass.) 516; Lord Cairns in *O'Mahoney v. Burdett*, L. R. 7, H. L. 388, 395. But when the death of the first taker is coupled with other circumstances which may or may not ever take place, as, for instance, death under age or without children, the devise over, unless controlled by other provisions of the will, takes effect according to the ordinary and literal meaning of the words upon death under the circumstances indicated, at any time, whether before or after the death of the testator.'

"The question has been brought to the attention of our Supreme Court several times, but I think it can hardly be said to have been positively adjudicated.

"In *Jewell v. Pierce*, 120 Cal. 82, 52 Pac. 133, it is said: 'The construction which these words in a will should receive has been decided differently in different states, but has never been determined in this state.' The court, however, declined to decide the question, holding that it was not necessary to a decision of the cause.

"The language construed in *Estate of Alexander*, 149 Cal. 146, 85 Pac. 308, involves a different contingency from the one before us. The court, though, refers to a limitation over in case of death as follows: 'A devise to A. with a limitation over in case of his death vests an absolute estate in A., unless he dies during the testator's lifetime—citing cases. Similarly a gift to various persons "or the survivors of them" refers to those surviving at the death of the testator. The Civil Code of this state provides (section 1336) that "words in a will referring to death or survivorship, simply relate to the time of the testator's death, unless possession is actually postponed when they must be referred to the time of possession." But the above authorities as well as many more that might be cited show that the same rule exists universally irrespective of any statute.'

Whether the court would have made any distinction between a limitation over 'in case of death' and one 'in case of death without issue' does not appear, nor was it necessary to decide the question, although some of the cases cited with approval hold that the phrase 'death without issue' relates to death in the lifetime of the testator. Moreover, for other reasons stated in the opinion, it seems clear that the testator intended the conditional limitation 'if she remains unmarried' to apply at the time of the testator's death.

"In the Estate of Barclay, 152 Cal. 753, 93 Pac. 1012, allusion is made to the subject as follows: 'The only provision in the will under which S. C. Blackinton could possibly be deprived of this property was one to the effect that in case one or more of the children should die their share was to be divided among the remaining children "unless they have heirs." This provision apparently referred only to such a death as might occur before the death of the testator (Civ. Code, § 1336); but in any event it could not apply to S. C. Blackinton's interest, for she left a child surviving her as well as her husband.'

"I think, therefore, that respondent is not justified in saying that by the foregoing decisions in this state the question is foreclosed as to whether the words 'dying without issue' are substitutionary merely or that the issue here is determined by said section 1336, but gathering the intention of the testator from the whole instrument, the only reasonable construction, in my opinion, is opposed to the theory that death at any time without issue was contemplated.

"Appellants also contend that an important feature here is the precedent life estate in favor of the said William P. Carothers. This would be of moment if it were not followed by the devise to him of the absolute fee.

"The said provisions in reference to William and Eleanor express as clearly as language can the intention that they should have the life estate until the death of Eleanor and then the fee should vest in William. Of course, no one would contend that William's life estate would continue after he was vested with the fee. Therefore appellants make a wrong application of the quotation from *Fowler v. Ingersoll*, 127 N. Y. 472, 28 N. E. 471, to the effect that: 'This rule (holding that the words of contingency are substitutionary merely) has no application when the first devisee or legatee takes a life estate and is applied only when the prior gift is absolute and unrestricted. \* \* \* And many cases could be cited where the courts, having construed the prior estate to be less than the absolute fee have held that the words of contingency referred to a death whenever it may happen.'

"Instead of devising a life estate to said William, the testator, after using language

that carries such an implication, hastens to express in the most positive and unequivocal manner his purpose to vest the entire estate in William, subjecting its possession, as we have seen, to the life interest of Eleanor.

"The fact that the testator died within a week after the execution of the will is not of sufficient moment to affect the result. The argument is that since he must have been under a sense of impending death, and William was of the age of 42 and unmarried, it is most improbable that the contingency mentioned could have been contemplated as occurring prior to the testator's death. But the force of the contention is entirely nullified by the construction which refers the said contingency to the time of the death of Eleanor. Besides, there is no positive evidence that the testator believed that he was about to die. It is true that he was quite ill. He was suffering from an ailment that had afflicted him periodically for ten years. But at any rate, conceding that he felt that the end was near, this is only a circumstance to be considered with other circumstances in case of doubt, and in view of the language of the will expressing so emphatically the purpose to vest an unqualified estate in William, should not be given the weight claimed by appellants.

"As we construe the will there is no occasion for the application of the rule preferring the latter in case of conflicting provisions. Holding that there is a clear devise of the fee to William and that the contingency is confined either to the death of the testator or of Eleanor, we find harmony rather than inconsistency in the provisions in controversy."

I believe that this opinion correctly disposes of the questions presented on this appeal, and that the order should be affirmed for the reasons therein stated. I therefore dissent from the judgment.

We concur: SLOSS, J.; MELVIN, J.

# INYO CONSOL. WATER CO. v. JESS et al (L. A. 2,638.)

(Supreme Court of California. Dec. 11, 1911.  
Rehearing Denied Jan. 10, 1912.)

## 1. WATERS AND WATER COURSES (§ 17\*)—DIVERSION—NOTICE—RIGHTS—CONSTRUCTION OF WORKS—TIME—EXTENSION.

Civ. Code, § 1416, prior to its amendment in 1907, provided that a claimant of water must begin diversion works within 60 days after the posting of notice and diligently pursue the same to completion. Section 1419 declared that failure to comply with such requirement forfeited the claimant's rights as against a subsequent complying claimant, but section 1422 provided that if the proposed place of diversion, or any part of the diverting canal, was within the United States forest reserve, or other public land, the claimant might commence his works within 60 days after a license from the proper officers to use the reserved

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

lands provided he began steps to secure such license within 60 days after posting the notice of appropriation. *Held*, that where plaintiff's notice of appropriation alleged that the places of its intended diversion and part of the route of its conduit were within the Sierra forest reserve of the United States, plaintiff having diligently prosecuted its application for use of the public land, the right of diversion was not subject to adverse appropriation until 60 days after the application to use the public land had been acted on.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 17.\*]

**2. WATERS AND WATER COURSES (§ 33\*)—"INTEREST IN REAL PROPERTY"—WATER APPROPRIATION.**

An appropriator's right pending the determination of his application to use public lands was an "interest in real property" which he was entitled to protect by a suit to determine conflicting claims to real property authorized by Code Civ. Proc. § 738.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Dec. Dig. § 33.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3692-3709; vol. 8, p. 7631.]

In Bank. Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by the Inyo Consolidated Water Company against Stoddard Jess and others. Judgment for defendants, and plaintiff appeals. Reversed.

Hunsaker & Britt, P. W. Forbes, and Andrew H. Rose, for appellant. Leslie R. Hewitt, City Atty., Ben. H. Yandell, and W. B. Mathews, for respondents.

**SHAW, J.** The court below sustained a general demurrer to the second amended complaint. Plaintiff refused to amend further. Thereupon judgment was given for defendants. Plaintiff appeals.

The first count of the complaint purports to allege a cause of action, under section 738 of the Code of Civil Procedure, to determine the alleged conflicting claims of the plaintiff and defendants, respectively, to the right to use the waters of Cottonwood creek, in Inyo county, and to the right to divert such waters for use. The complaint alleges that the city of Los Angeles has a prior right to divert and use 180 miners' inches of said waters. The alleged conflicting claims do not relate to that water, but solely to the excess of the stream above that quantity. It appears from the briefs that the demurrer to this count was sustained upon the theory that it does not show that the plaintiff owns or possesses any subsisting interest in, or right to, the water or the use thereof. This constitutes the question to be determined.

The plaintiff claims its right under and by virtue of five notices of appropriation posted and recorded by George Chaffey, as provided in section 1416 of the Civil Code. Plaintiff has succeeded to Chaffey's rights. Two of the notices were posted on June 24, 1905; the other three on July 31, 1905. The notices state, and the fact is, that the places of

intended diversion, and part of the route of the conduit to be constructed to convey it to the place of use, are and then were within the Sierra forest reserve of the United States. No diversion works or dams had been built or begun in pursuance of the notices, or either of them, at the time the action was commenced, which was on July 16, 1907. In excuse for this delay the plaintiff relies on the extensions of time to begin that work given by section 1422 of the Civil Code, and by the amendment of March 21, 1907, to said section 1416. The amendment took effect on May 20, 1907 (Stat. 1907, p. 780).

[1] Section 1416, as it stood prior to 1907, provides that a claimant must begin the diversion works within 60 days after the notice is posted and diligently pursue the same to completion. There are certain exceptions not necessary here to notice. By section 1419 a failure to comply with this requirement forfeits claimant's right, as against a subsequent claimant who does comply. Section 1422, in effect, is that if the fact is, and the notice so states, that the proposed place of diversion or any part of the diverting canal is within a forest reserve or other United States government reservation of public land, the claimant may commence the diversion works within 60 days after he shall have received a grant of license from the proper public officers to occupy and use such reserved lands for that purpose, provided that, within 60 days after the posting of the notice of appropriation, he shall have begun the necessary surveys required to precede the application for such license, and shall have diligently prosecuted such surveys to completion, and, upon such completion, shall have also applied to the proper officer for such license and prosecuted such application with reasonable diligence. Facts are alleged showing that the provisions of this section have been fully complied with, and that the applications for said licenses or grants of authority to occupy and use said reserved lands are now being considered by the officers of the United States authorized to make such grants, but that they have not yet been determined, and, consequently, that plaintiff is unable to proceed with said diversion works.

The effect is that plaintiff is relieved from the requirement of sections 1416 and 1419 that such works must be commenced within 60 days after the posting of the notices of appropriation in order to preserve the claimant's statutory rights under the notice. As to these claims, the time limited has been extended and has not yet expired. The plaintiff's rights to begin and complete the diversion works are the same as they would be if the original 60 days had not expired. His present right to maintain this action is also the same.

[2] Respondents contend that this right is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

not a vested right, that it is not property, and that it cannot be protected against adverse claimants by a suit to determine conflicting claims. In this behalf they cite *Kelly v. Natoma Water Co.*, 6 Cal. 105; *Maeris v. Bicknell*, 7 Cal. 261, 68 Am. Dec. 257; *Kimball v. Gearhart*, 12 Cal. 50; *Nevada, etc., Co. v. Kidd*, 37 Cal. 309; and *Mitchell v. Amador, etc., Co.*, 75 Cal. 482, 17 Pac. 248. These cases all involve water rights existing prior to the enactment of the Code in 1872, prescribing a statutory mode of acquiring a right to the use of running water. They lay down the rule that a right to the use of running water does not vest in possession at common law, until there has been an actual diversion and beneficial use of the water. But they all recognize, and some of them declare, that, before any actual diversion or use of the water, a claimant may acquire an incipient, incomplete, and conditional right to the future use of the water, by beginning the construction of the works necessary for such diversion and use, and, in good faith, diligently prosecuting the same to completion.

Thus, in *Nevada, etc., Co. v. Kidd*, supra, on page 310, referring to such an embryo claim to water and to a hostile use before its completion, the court says: "There is, in fact, as yet, no present water right to be affected. The party has merely acquired the possession and site for his dam and canal, and a *right*, by diligently pursuing his object, to *acquire a future right* to the possession of the water, which, when acquired, shall, for the purposes of priority and of redressing any injuries that may thereafter accrue, date by relation from the first act in selecting the location and making the claim." (Italics ours.) Such claimant had no immediate right to the control or use of the water, because he was not yet ready to take it. And he had no right to damages from any one who used the water while he was making his dam and ditch. It does not follow, from this, that he had no right at all. On the contrary, it was declared that as soon as he began work on his dam and ditch, with the avowed intent thereby to take and use the water, he acquired a prior right respecting the water. In *Maeris v. Bicknell*, supra, the facts were that plaintiffs' grantors, not intending to use the water, but for the purpose of draining it away from their mining claims, had constructed a ditch, which carried the water away, but they had made no actual use of it. Meantime, defendants diverted the water above plaintiffs' ditch and had used it. The court said: "Unless the grantors of plaintiff had constructed their ditch with the intention of using the water for mining or other useful purposes, or after its construction they had actually so applied it, the defendants could not know that they ever would so apply it, or intended so to apply it. If, at the time plaintiff's ditch was made, such *intention had existed and been avowed*, and after-

wards carried out in good faith within a reasonable time, considering all the circumstances, then defendants could not, by any act of theirs, rightfully appropriate any water in the ravine, necessary to fill the ditch of plaintiff." (Italics ours.) There is no case, arising prior to the enactment of the Code, which holds that the party, who thus in good faith began and diligently prosecuted the work on a dam and ditch for the diversion and use of water, could not protect his incipient right to the water, against the hostile diversions and claims of others, by an appropriate suit for that purpose. It is obvious that this could not be so. Such visible act and avowed intent gave him a conditional right to the future use of the water, prior to its actual use; the condition being that he should thereafter diligently continue the work to completion and then divert the water and apply it to a useful purpose, failing which his right would cease. Upon the performance of these conditions, his title to such use would become complete and perfect. In the meantime, however, he had an existing conditional right, manifested by actual visible possession of the works. It would be clearly a property right, and, it being incidental and appurtenant to land, it was real property. Civ. Code, § 658.

The purpose of the Code was to afford a more perfect protection for such rights and to facilitate the subsequent acquisition of the title to the use. Previously, the incomplete right could be acquired only by some open visible work to that end, upon the ground, accompanied by a declaration of the intent. Disputes would naturally arise as to priority between different diversions from the same stream at places far apart. The Code endeavors to avoid this by providing for the posting of a notice at the proposed dam, and declaring that such notice secures a prior right, without any work, for the period of 60 days thereafter. *Wells v. Mantas*, 99 Cal. 586, 34 Pac. 324. Thus there is given that which it is said did not exist before (*Kelly v. Natoma Water Co.*, supra), a constructive right to the use of the water, a right existing only by publicly declared intent, and which may be made a perfect and complete title, as against all except prior users and riparian owners, by beginning the work within 60 days, diligently prosecuting it to completion, and thereupon actually using the water. This incomplete right, although not as yet a title, is an interest in the realty. Under section 738, Code of Civil Procedure, the person who has an interest in real property may maintain an action to determine the validity of a conflicting claim which is adverse to his own claim. It follows that the first count states a cause of action and that the general demurrer thereto should have been overruled.

The objection to the second count is wholly technical, and, as it may be obviated by amendment, it is not necessary to consider it.

The briefs discuss at length the effect of

the amendment of 1907 to section 1416 of the Civil Code, and of an amendment of 1911 (Stats. 1911, p. 1419) to the same section. The latter omits the amendments of 1907, in effect repealing them. The amendment of 1907 purported to give one who had posted such notice, in a case where there were "conflicting claims to the waters so appropriated," a right to begin a suit to determine such claims within 60 days from the time of posting, and it extended the time for beginning the work to 60 days after final judgment in such suit, provided it was diligently prosecuted. A field of inquiry is thus presented upon which we will not enter. Does this apply to notices posted prior to the passage of the amendment? Does it apply where the so-called conflicting claim is a mere assertion, or must there be a physical exercise of the right claimed, and one of such a character that it actually prevents or interferes with the beginning of diversion works under the notice? And must all this be alleged? Does the repeal of these provisions, after this suit was begun, terminate the extension of time thereby granted? These are interesting questions; but as the plaintiff's time appears to be still running by virtue of the extension provided in section 1422, which is not repealed, we deem it unnecessary to determine them.

The judgment is reversed.

We concur: ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.; LORIGAN, J.

KELLOGG v. MALLORY et al. (Sac. 1,909.)  
(Supreme Court of California. Dec. 13, 1911.  
Rehearing Denied Jan. 12, 1912.)

**1. APPEAL AND ERROR (§ 1010\*)—QUESTIONS REVIEWABLE—FINDINGS—CONCLUSIVENESS.**

Where an appeal is taken too late to allow a review of the findings on the ground that they are not supported by evidence, such findings as are responsive to the issues are conclusive.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1010.\*]

**2. VENDOR AND PURCHASER (§ 185\*) — CONTRACTS—TIME OF THE ESSENCE—FORFEITURE.**

Where a contract for the sale of real estate, stipulating for payment in installments, made time of the essence, and the purchaser made default, and the vendor did not acquiesce therein, and no equitable ground for relief was shown, the contract was terminated.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 369-372; Dec. Dig. § 185.\*]

**3. VENDOR AND PURCHASER (§ 3\*) — CONTRACTS—CONSTRUCTION.**

A complaint alleged that plaintiff was indebted to defendant for \$438.13 for money received to make the first payment on a proposed purchase of land from a third person, which land plaintiff was about to purchase; that the third person, at plaintiff's request, contracted to sell the land to defendant for \$1,220.85, payable in cash and in annual installments; that

on the same day defendant contracted to sell the same to plaintiff for \$1,659.03, which was the aggregate of the sum to be paid by defendant to the third person and the sum which plaintiff owed to defendant. The complaint did not allege that the latter sum had been paid by defendant to the third person on account of the purchase of the land or that the full price, so far as the third person was concerned, was more than \$1,220.85. *Held*, that defendant's agreement with plaintiff was simply one for the sale by defendant to plaintiff of the land, and defendant did not hold the land in trust for plaintiff.

[Ed. Note.—For other cases, see Vendor and Purchaser, Dec. Dig. § 3.\*]

Department 1. Appeal from Superior Court, Kings County; John G. Covert, Judge.

Action by H. E. Kellogg against H. Mallory and another. From a judgment for defendants, plaintiff appeals. Affirmed.

W. R. McQuiddy and Frank E. Kilpatrick, for appellant. O. L. Abbott, for respondents.

ANGELLOTTI, J. This is an appeal from a judgment in favor of defendants in an action brought by plaintiff to obtain specific performance of a contract between himself and defendant Mallory relative to certain land in Kings county, Cal.

[1] The appeal was taken nearly six months after the entry of judgment, and more than four months after the statement on appeal was settled. It is admitted by plaintiff, in accord with the claim of defendants, that the appeal was taken too late to allow a review by this court of any exception to the decision of the trial court on the ground that it is not supported by the evidence. Such findings of the trial court as are responsive to the issues made by the pleadings are therefore conclusive upon us.

[2] Considering the action as one for the specific enforcement of a contract for the sale of certain land by Mallory to plaintiff, which was apparently the theory of the framers of the complaint, we are satisfied that the judgment is fully supported by the pleadings and the findings on such issues as were made thereby. Substantially, the facts thus established are as follows: On December 3, 1906, Mallory and plaintiff entered into a written agreement, whereby Mallory agreed to sell and convey the property to plaintiff for \$1,659.03, \$211.63 thereof being paid in cash, and the remaining \$1,447.40 being payable in yearly installments on October 1st of each year to and including the year 1914; all of said deferred payments being evidenced by promissory notes of the same date, bearing interest at the rate of 8 per cent. per annum, payable annually. By the terms of said agreement plaintiff was entitled to the possession of the property. It was provided in such agreement as follows: "It is understood and agreed that time is of the essence of this agreement and in each and every one of the terms, conditions and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

provisions hereof, and that the terms hereof shall bind the heirs, successors and assigns of the parties hereto. It is understood and agreed that if at any time the second party shall be in default in the performance of any of the terms, covenants and provisions of this agreement that all of his rights hereunder shall be forfeited and at an end, \* \* \* and all payments made under this agreement shall be deemed full compensation for the use, rent and occupation of said land during the time the second party shall have remained in possession thereof under this agreement; provided, that whenever the second party shall be in default in any of the terms and conditions of this agreement, if allowed to remain upon said premises by the first party he shall hold and occupy the same as the tenant of the first party subject to the right of the first party to demand and receive immediate possession thereof from the second party as such tenant."

Plaintiff neglected and refused to pay to Mallory the sum of \$177.17 due on October 1, 1909, evidenced by promissory note maturing that day, and also neglected and refused to pay \$51.27 interest due on that day on that and five remaining installments evidenced by notes maturing respectively on October 1st of the years 1910 to 1914, both inclusive, and defendant did not consent to nor acquiesce in such neglect and refusal. So far as the complaint shows, it was not until November 29, 1909, that plaintiff notified Mallory that he was desirous of paying any additional money on the contract, and on that date he notified him in writing that he would pay all amounts remaining due on December 8, 1909, at a specified place; but Mallory, who in the meantime had transferred his interest in said land to defendant Abbott, never consented to receive the same or in any way waived the default of plaintiff in the matter of the payments due October 1, 1909. Nothing is alleged in the complaint tending to excuse the failure of plaintiff to comply with the contract in the matter of such payments, or tending to show any equitable grounds for relieving him from the effect of such failure, or tending to show any reason why Mallory should be held to have consented to delay in the matter of payments or estopped to claim that the contract was terminated by such failure. These are the material facts established by the pleadings and certain findings within the issues. Plaintiff's claim as to what the evidence introduced on the trial showed in this behalf cannot be considered on this appeal, in view of the fact that the appeal was taken too late to allow us to consider the question of the sufficiency of the evidence to support the findings. We know of no rule of law that would authorize a court to enforce against the vendor a contract for the sale of real estate where, by the express provisions of the contract, all of the rights of the vendee have

terminated by reason of his failure to make certain payments at a specified time, and there has been no consent to, waiver of, or acquiescence in, such failure by the vendor, or any pretense of facts excusing such failure of the vendee for tending to show equitable ground for his relief. Under its express provisions, the contract of sale is terminated. Such is the case before us, as shown by the pleadings and findings.

[3] Plaintiff claims in his briefs presented on this appeal that facts alleged in the complaint and admitted by the answer show that the relation between him and Mallory was in reality not that of mere vendor and vendee under a contract for the sale of real estate. It was alleged in the complaint that on December 8, 1906, plaintiff was indebted to Mallory in the sum of about \$438.13 for money had and received by him to make the first payment on account of a proposed purchase of these lands from The Laguna Lands, a corporation, the owner thereof, which said lands "plaintiff then desired and was about to purchase"; that said corporation, on December 8, 1906, at plaintiff's request, entered into a contract whereby it agreed to sell such lands to Mallory, for \$1,220.85, payable \$305.21 in cash and \$915.64 in annual installments on October 1st of each of the years 1907 to and including 1914, with interest at the rate of 8 per cent. per annum; that on the same day plaintiff and Mallory entered into the contract of sale hereinbefore described; and that the full consideration specified therein, \$1,659.03, was the aggregate amount of the sum agreed to be paid by Mallory to The Laguna Lands for the land, and the sum of \$438.13 owed by plaintiff to Mallory. It was not alleged that such \$438.13 so received by plaintiff from Mallory had been paid by him to The Laguna Lands on account of the purchase price of such land, or that the full price of the land, so far as the owner was concerned, was more than the amount stated in the contract with Mallory, viz., \$1,220.85. Upon these allegations alone, it is now claimed that the transaction between plaintiff and Mallory was simply one by which Mallory was to take the agreement from the owner as security for the payment to him by plaintiff of the purchase price, which he was to advance to the owner for the plaintiff, and that in accord with the doctrine of such cases as *Campbell v. Freeman*, 99 Cal. 546, 34 Pac. 113, plaintiff was the real purchaser, and Mallory occupied the relation to him of trustee of the legal title and mortgagee for such money as might be advanced by him for its purchase and for the additional indebtedness referred to. It may be conceded that the facts so alleged would afford strong grounds for a conclusion by a court sustaining allegations of a complaint declaring some understanding between Mallory and plaintiff by which Mallory was to advance the purchase money for plaintiff

and take the title to the land as security. But the difficulty with plaintiff's claim in this behalf is that there is nothing in the nature of such an allegation. We have stated all the allegations that bear upon this matter. While not inconsistent with the present claim of plaintiff that Mallory was to pay the purchase price to the owner for plaintiff, and take the title in his own name as security, they are likewise not necessarily inconsistent with the theory that there was no such understanding between Mallory and plaintiff, and that the two contracts, that between the owner and Mallory and that between Mallory and plaintiff, were entirely separate and distinct transactions, in the former of which plaintiff had no interest whatever, and there is no allegation or pretense of allegation of the ultimate fact of such an understanding as is, under these circumstances, essential to a maintenance of plaintiff's claim. So far as appears from the complaint, the two contracts were absolutely separate and distinct, and Mallory's arrangement with plaintiff was simply one for the sale to him of certain real property. We are aware of no case in which one who has in fact paid the purchase money for real estate conveyed to him has been held to be the trustee of another on the ground that he so paid it on behalf of another who was the real purchaser, in the absence of allegation that he did pay it for such other person, or where one holding the legal title to land has been held to be only the mortgagee thereof in the absence of allegation that the legal title has been conveyed to him as security for an indebtedness. It seems clear that the complaint before us presented no such case as is now urged, but that it was solely a complaint for the specific performance of a contract between Mallory and plaintiff for the sale of real estate by Mallory to plaintiff. This was doubtless the theory of the judge of the trial court.

The judgment is affirmed.

We concur: SHAW, J.; SLOSS, J.

#### BROADBENT v. KEITH (Civ. 1,036.)

(District Court of Appeal, Second District, California. Nov. 7, 1911.)

#### ELECTIONS (§ 305\*)—CONTESTS—APPEAL—DISMISSAL.

It appearing on appeal in a municipal election contest that respondent has resigned the office, and appellant has been appointed thereto to fill a vacancy, and that the public has no interest in the appeal, it is properly dismissed on agreement of the parties.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 305.\*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Election contest by Andrew E. Broadbent against John M. Keith. Judgment for plaintiff, and defendant appeals. Appeal dismissed.

See, also, 15 Cal. App. 382, 114 Pac. 996.

Shaw, Ross & Dyke, for appellant. Conkling & Brown, for respondent.

PER CURIAM. This is an election contest involving the office of marshal of the city of Imperial, Cal. It appears from a statement in writing, filed by the attorneys for appellant herein, that plaintiff and respondent has voluntarily resigned the office of marshal of the city of Imperial, to which he was declared elected, and that defendant and appellant has been appointed by the board of trustees of said city of Imperial to fill said vacancy, which office he now holds, and it appearing by reason of the facts recited the public can have no interest in the result of said appeal, and the appellant having consented thereto.

It is therefore ordered that the appeal herein be, and the same is, dismissed.

#### PEOPLE v. TATE. (Cr. 162.)

(District Court of Appeal, Third District, California. Nov. 4, 1911.)

#### CRIMINAL LAW (§ 1109\*)—APPEAL—DISMISSAL.

Where there is no evidence in the record of an appeal from the judgment or from an order denying a motion for a new trial, if such order was made, and no briefs have been filed, the record will be stricken from the files.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2897-2902; Dec. Dig. § 1109.\*]

Appeal from Superior Court, San Joaquin County; C. W. Norton, Judge.

James Tate was convicted of an offense, and he appeals. Record stricken from files.

Charles de Legh and Fred A. Copestake, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, for the People.

HART, J. This cause was on the October, 1911, calendar of this court, and submitted on the record.

There is no evidence in the record of an appeal having been taken from the judgment or an order denying the defendant a new trial, if such an order was made. Obviously, therefore, this court has not acquired jurisdiction to review the record. Moreover, there are no briefs filed in the cause, and, if an appeal had been taken, the same would have to be dismissed for a failure of appellant to file a brief, assuming that he would have omitted to do so, had he taken an appeal, either from the judgment or the order denying him a new trial, if a motion of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that character was made and denied. *People v. Perry*, 117 Pac. 1038.

For the foregoing reasons, the record will have to be stricken from the files of the court, and it is so ordered.

We concur: CHIPMAN, P. J.; BURNETT, J.

**ERVING v. NAPA VALLEY BREWING CO.**  
(CHURCHILL and JAS. H. GOODMAN  
& CO. BANK, Interveners).  
(Civ. 871.)

(District Court of Appeal, Third District, California. Nov. 4, 1911.)

**1. COURTS (§ 212\*)—JURISDICTION—AMOUNT IN CONTROVERSY.**

Where appellate jurisdiction depends on the amount in controversy, the ad damnum clause of the complaint is the sole test.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 511-516; Dec. Dig. § 212.\*]

**2. COURTS (§ 212\*)—JURISDICTION—AMOUNT IN CONTROVERSY.**

Under Const. art. 6, § 4, providing that the District Courts of Appeal shall have jurisdiction in cases at law, where the demand does not exceed \$2,000, an appeal in an action to recover property alleged to be of the value of \$6,000, and demanding judgment for that sum, if a delivery could not be had, should be taken directly to the Supreme Court.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 511-516; Dec. Dig. § 212.\*]

Appeal from Superior Court, Napa County; H. C. Gesford, Judge.

Action by W. F. Erving against the Napa Valley Brewing Company and E. W. Churchill and Jas. H. Goodman & Co. Bank, interveners. Judgment for plaintiff, and the Brewing Company appeals. Transferred to the Supreme Court.

See, also, 116 Pac. 331.

N. F. Coombs, John T. York, and F. L. Coombs, for appellant. T. L. Coombs, for interveners. F. E. Johnston, H. L. Johnston, and L. E. Johnston, for respondent.

**HART, J.** This is a direct appeal to this court from the judgment on the judgment roll alone. The complaint alleges that the property, for the recovery of which the action was brought, is of the value of \$6,000, and demands judgment for that sum in case a delivery thereof cannot be had.

[1] It is the settled rule in this state that, "where jurisdiction depends on the amount in controversy, the ad damnum clause of the complaint is the sole test." *Henigan v. Ervin*, 110 Cal. 37, 42 Pac. 457.

[2] This court has appellate jurisdiction in such cases at law only where "the demand, exclusive of interest, or the value of the property in controversy, amounts to three

hundred dollars, and does not amount to two thousand dollars." Article 6, § 4, Const.

The cause was therefore erroneously brought to this court by direct appeal and will have to be transferred to the Supreme Court.

Such is the order.

We concur: CHIPMAN, P. J.; BURNETT, J.

**PEOPLE v. BARLOW. (Cr. 215.)**

(District Court of Appeal, Second District, California. Nov. 6, 1911.)

**1. CRIMINAL LAW (§ 1159\*)—APPEAL—REVIEW—QUESTION OF LAW.**

On an appeal by defendant in a criminal case, the appellate court will reverse the judgment because unsupported by the evidence only where there is an entire absence of evidence to support the verdict, under the rule that on such appeals only questions of law will be considered, since, if the evidence against accused considered without regard to conflicting evidence tends to support the verdict, the question is one of fact on which the determination of the jury and the trial court is conclusive.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3074-3083; Dec. Dig. § 1159.\*]

**2. ASSAULT AND BATTERY (§ 89\*)—ABUSING CHILDREN—EVIDENCE.**

In a prosecution for abusing a female child eight years of age, her evidence that defendant met her for the first time on a sidewalk near a roller coaster at an amusement park, gave her oranges and a sandwich, and told her to go down under the coaster, and that he would meet her there, that she did as requested, and that defendant shortly after joined her, but that she could not remember whether defendant put his hands on her, or what he did while they were down under the coaster, was admissible to show that the defendant and the witness prior to the meeting were strangers.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 128; Dec. Dig. § 89.\*]

**3. ASSAULT AND BATTERY (§ 92\*)—ABUSING FEMALE CHILD—EVIDENCE.**

Evidence held to warrant a conviction of abusing a female child eight years of age.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 137-139; Dec. Dig. § 92.\*]

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

George Barlow was convicted of committing lewd and lascivious acts on a female child, and he appeals. Affirmed.

Tom L. Johnston, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

**SHAW, J.** Defendant was convicted upon an information charging him with the offense defined in section 288 of the Penal Code. He appeals from the judgment and an order of court denying his motion for a new trial.

[1] Appellant's sole contention is that the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



evidence was insufficient to justify the verdict of the jury. The rule is well settled that upon an appeal by a defendant in a criminal case this court will pass only upon questions of law, and it is only where there is an entire absence of evidence to support a verdict that a question of law is presented. "If the evidence which bears against the defendant, considered by itself, and without regard to conflicting evidence, tends to support the verdict, the question ceases to be one of law—of which alone this court has jurisdiction—and becomes one of fact, upon which the decision of the jury and the trial court is final and conclusive." *People v. Saunders*, 13 Cal. App. 746, 110 Pac. 825. Under this rule, the question is whether the evidence offered by the prosecution—none whatever being adduced by the defendant—tended to support the verdict.

[2] The facts which the evidence tends to establish are as follows: That defendant for the first time met the prosecutrix, a girl of eight years of age, upon the sidewalk near what is known as the roller coaster at Long Beach; that he gave her some oranges and a sandwich, and told her to go down under the roller coaster, stating that he would meet her there. She did as requested, and defendant shortly afterwards joined her. She testified that she could not remember whether defendant put his hands upon her, or what he did, while they were down under the roller coaster. Nevertheless the child's testimony was material, in that it tended to prove the relation existing between herself and defendant prior to the meeting to be that of strangers.

[3] An officer connected with the police force saw defendant sitting with the girl under the roller coaster, which was to some extent at least protected from the view of passersby and others in the vicinity, and from a place of concealment 50 or 60 feet distant he watched them. His testimony was that defendant, among other things done by him, pulled the child's dress up above her knees, and repeatedly placed his hand up as far as he could get it under her dress. While he could not and did not state that the defendant placed his hand upon her privates, nevertheless, there could be no doubt from his testimony, if the jury believed it, as to the fact that defendant did commit lewd and lascivious acts with the child, as charged in the information, nor as to the intent with which the acts were done.

The jury appears to have been prompt in reaching a verdict of defendant's guilt, and, under the evidence, this court cannot say that it was not justified in its conclusion.

The judgment and order appealed from are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

HARVEY et al. v. MEIGS et al. (Civ. 850.)  
(District Court of Appeal, Third District, California. Oct. 31, 1911.)

1. CORPORATIONS (§ 190\*)—ACTION BY STOCKHOLDERS—MISAPPROPRIATION OF FUNDS—PLEADING—COMPLAINT.

Where a complaint by stockholders of a corporation alleges that the defendants have standing in their names on the books of the corporation more than a majority of its outstanding shares, and have combined and conspired to accomplish unlawful purposes, and to that end have elected directors subservient to their wishes who had no interest in the corporation except to work out the will and interests of defendants as their implements and representatives, and the defendants have, at all times mentioned in the complaint, dictated and do now dictate all the acts of the directors of the corporation; that the defendants "have, by virtue of their control of such corporation and its board of directors," appropriated and converted money belonging to it, and through such control of the board of directors have created a fictitious indebtedness against said corporation and in favor of defendants, etc.—although it does not show who were the directors or directly aver that directors were chosen at the organization of the corporation, or that they or their successors continued to act as such throughout the times mentioned in the complaint, such facts appear inferentially, and as it clearly appears that the defendants worked their purposes through the directors, it presents sufficient facts to constitute a cause of action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 730; Dec. Dig. § 190.]

2. CORPORATIONS (§ 190\*)—ACTIONS BY STOCKHOLDERS—MISAPPROPRIATION OF FUNDS—PARTIES—DIRECTORS.

In an action by minority stockholders against the majority stockholders for wrongful acts and misuse of corporate funds, alleged to have been consummated with the aid and through the board of directors, the directors should have been made parties in order that complete relief might be afforded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 729; Dec. Dig. § 190.\*]

3. PLEADING (§§ 192, 356\*)—DEMURRER—SCOPE—DEFECTS APPARENT ON FACE.

That an amended complaint was filed without previous leave of court obtained is a question which cannot be raised by demurrer, which goes only to the defects apparent on the face of the pleading; the proper method of raising the question being by motion to strike it.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 426, 1111; Dec. Dig. §§ 192, 356.\*]

4. ACTION (§ 38\*)—MISJOINDER OF CAUSES—ACTION BY STOCKHOLDERS.

Though a complaint in an action by stockholders of a corporation alleges a conspiracy on the part of majority members in control of the corporation and in pursuance thereto the misappropriation of the money of the corporation, the fraudulent issue of stock to the same parties charged with the misappropriation, and other acts of a similar nature, the acts are a part of a general design, and equity will relieve all in the same action, so that the complaint is not open to the objection that several causes of action have been improperly joined.

[Ed. Note.—For other cases, see Action, Cent. Dig. § 549; Dec. Dig. § 38.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**5. CORPORATIONS (§ 190\*)—ACTIONS BY STOCKHOLDERS—MISAPPROPRIATION OF FUNDS—RIGHT TO SUE.**

Minority stockholders may bring an action against the majority members for the misappropriation of corporate funds, though plaintiffs became stockholders after such misappropriation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 723; Dec. Dig. § 190.\*]

**6. CORPORATIONS (§ 190\*)—ACTIONS BY STOCKHOLDERS—MISAPPROPRIATION OF FUNDS—PLEADING.**

A complaint by minority stockholders against the majority members charging a misappropriation of corporate funds is not ambiguous, though it does not show that the defendants were stockholders and owning a majority of the stock at the time of the alleged commission of the acts set forth therein, where it is alleged that defendants appeared on the books of the corporation to be the owners of such stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 730; Dec. Dig. § 190.\*]

**7. CORPORATIONS (§ 190\*)—ACTIONS BY STOCKHOLDERS—MISAPPROPRIATION OF FUNDS—PLEADING.**

Where a complaint in an action by minority stockholders against the majority members for a misappropriation of corporate funds alleges that the defendants, who appeared as majority stockholders on the books of the corporation, controlled the board of directors at all times since the corporation was organized, it is immaterial who were the board of directors, as the action is against the defendants, and the complaint is not ambiguous for failing to allege who were directors constituting a majority of the board at the time of the alleged commission of the acts complained of.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 730; Dec. Dig. § 190.\*]

**8. CORPORATIONS (§ 190\*)—ACTIONS BY STOCKHOLDERS—MISAPPROPRIATION OF FUNDS—PLEADING.**

Where a complaint by minority stockholders charges the majority members, who appear to practically constitute its managing body, with a misappropriation of the funds, an allegation that during the times mentioned the defendants have withdrawn and taken a certain sum of money belonging to the corporation, and have converted and appropriated the same to their own use and benefit, avers with sufficient certainty the manner and times of the alleged appropriation and conversion.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 730; Dec. Dig. § 190.\*]

Appeal from Superior Court, City and County of San Francisco; Geo. A. Sturtevant, Judge.

Action by T. Norman Harvey and another against F. M. Meigs and others. From a judgment for defendants, on demurrer to an amended complaint, plaintiffs appeal. Reversed.

Charles C. Boynton, for appellants. J. C. Campbell and R. G. Hudson, for respondents.

CHIPMAN, C. J. A general and special demurrer to the fourth amended complaint was sustained without leave to amend, and defendants had judgment that plaintiffs take nothing by the action. The appeal is from the judgment.

In their said amended complaint the plaintiffs allege that they bring the action "on behalf of the said Carisa Chemical Company, and on behalf of themselves and all other stockholders of said Carisa Chemical Company; that the said company has been a corporation ever since the month of August, 1904, with a capital of 1,000,000 shares of the actual value of \$1 each at the time of issue, and that the number of directors is and at all times has been 5; that plaintiff Harvey is and ever since a date prior to the commencement of the action has been a bona fide owner and holder of 100 shares of the stock of said corporation, and plaintiff Benedict is and ever since the month of February, 1906, has been the owner and holder of 1,900 shares of the capital stock of said corporation; that defendants F. M. Meigs and A. W. Meigs are, and at all times mentioned in the complaint have been, copartners under the name of Meigs & Co." (The original complaint was filed November 7, 1908.) It is then alleged that the individual defendants named "acquired, and at all times since the organization of the defendant corporation have controlled, and are controlling, and have, and have had, standing in their names on the books of said corporation a majority of the outstanding stock of said corporation, and said defendants at all said times have combined and conspired together to accomplish the unlawful and fraudulent acts and purposes herein alleged, and to that end to elect the directors and dictate the acts of the directors of said corporation and the acts of said corporation, and said defendants have at all said times, for the purpose of consummating the ends of said conspiracy, caused to be elected men constituting a majority of the board of directors of said corporation in every way subservient to the wishes and will of said defendants, and men who had no interest in the management and conduct of the affairs of said corporation except as the implements and representatives of the interests and will of said defendants, and at all said times defendants dictated, and do now dictate, all the acts of the directors of said corporation and all of the acts of said corporation."

It is then averred that by reason of the foregoing facts it "has been futile and useless for plaintiffs to make any demand upon the said corporation or its directors to commence this, or any, action against defendants," and that during the times mentioned in the complaint over \$135,000 came into the ownership and possession of the corporation, and the defendants "have, by virtue of their control of said corporation and its board of directors, fraudulently and wrongfully taken and withdrawn from said corporation, and have appropriated and converted to their

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own use and benefit, without any consideration or benefit to the said corporation, in excess of ninety-four thousand dollars (\$94,000) of said money of said corporation, which said money said defendants now retain and claim as their own property, and deny that said corporation has any interest in or right thereto."

It is further averred that defendants, "as part of said conspiracy, and with intent to defraud said corporation and its board of directors, have sought and endeavored to create an indebtedness, and have created a fictitious and fraudulent indebtedness against said corporation and in favor of defendants" (other than defendant Upham). "That said defendants have caused such fictitious indebtedness to be inscribed on the books of the defendant corporation as an indebtedness of said corporation under and as of date August 31, 1908, and as on said day pretended balances appear on said books to the credit of the following-named firm and persons, and the amount to the credit of any firm or person immediately follows the name of the firm or person in whose favor said credit appears, as follows, to wit:" (Then follow the items aggregating over \$49,000.) "That the fact is, there is not due, owing, and unpaid to F. M. Meigs, A. W. Meigs, R. L. Meigs, Meigs & Co., E. C. Dudley, L. Raymond Dudley, W. I. Wilcox, Charles L. Morgan, or any of them, from said corporation, nor was there due, owing or unpaid at such date as said balances appear, or at any prior date, or at all, to said persons, or any of them, any sum of money whatsoever from said corporation; and any indebtedness appearing upon the books of said corporation as due from said corporation to said persons, or either of them, is and has been at all times, fictitious, fraudulent and void, and without consideration, and has been created by said defendants for the purpose of transferring the assets of the corporation from the defendant corporation to themselves, with the purpose of enriching themselves, and that said defendants threaten to, and will, unless restrained, withdraw such sums appearing in said credits, and cause same to be paid to themselves, and will thereby injure the defendant corporation to an amount exceeding forty-nine thousand dollars (\$49,000).

"(7) That said defendants, other than defendant corporation, with intent to defraud the defendant corporation, have claimed, and do now claim, to be the owners of, and have, by virtue of their said control of said corporation, caused themselves to appear upon the books of said corporation as the owners of more than four hundred thousand (400,000) shares of the subscribed and outstanding stock of the defendant corporation, and they do now appear as such owners, whereas the total subscribed and outstanding stock of said corporation does not exceed six hundred and eighty-two thousand and fifty-five

(682,055) shares; that of said four hundred thousand more than three hundred and fifty thousand (350,000) shares have been issued fraudulently and without any consideration whatsoever to said corporation; that such improper issues of stock were made directly to these defendants, and were so made as to enable, and did enable, these defendants to control and manage the affairs and business of said corporation, and to continue in such control and management for the purpose of carrying out the fraudulent acts and the conspiracy herein alleged to the grievous injury of these plaintiffs and of the defendant corporation; that the value of said three hundred and fifty thousand (350,000) shares of stock fraudulently appropriated by said defendants and their agents was at the time of said appropriation three hundred and fifty thousand dollars (\$350,000)."

It is then alleged that "plaintiffs herein and their transferrers, until within one month prior to the time of commencing this action, had no knowledge, nor ever had knowledge, of the acts, transactions and attempted transactions herein complained of; that they never authorized them or any part of them; that they never consented to them or any part of them; \* \* \* that they have no redress through the corporate management, and that they are without any plain, adequate, certain and speedy remedy at law."

An accounting to the corporation by the defendants is prayed for; that a discovery be had of the amount of damage to said corporation; that defendants be compelled to refund to the corporation the money misappropriated by them, to wit, \$94,000, with interest; that the alleged fraudulent credits appearing on the corporation books to defendants be canceled, that the alleged fraudulent shares, namely, 350,000 shares, of the said capital stock be canceled, or that defendants be required to pay to the corporation its value; that defendants be enjoined from paying to themselves, or causing to be paid to them, the said sums standing on the books of the corporation to their credit; also from voting said shares of stock alleged to have been fraudulently issued to them; from disposing of any of the money or property of the corporation; from acting in any trust capacity in the management of said corporation and for general relief.

Defendants not only challenge the sufficiency of the alleged facts but they assign numerous defects in the complaint which may be thus summarized: (1) That there is a misjoinder of parties, in that plaintiff Benedict was joined as plaintiff without leave of court, and, for like reason, defendants R. L. Meigs, Dudley, and Wilcox were joined as defendants. (2) That several causes of action are improperly united, namely, a cause of action for conspiracy; for moneys fraudulently appropriated and converted; for cancellation of fraudulent issues of stock; for an accounting and injunction. (3) That

the complaint is ambiguous in that it cannot be ascertained therefrom whether plaintiffs Harvey and Benedict were stockholders at the time the alleged wrongful acts were committed; or that the defendants were stockholders of a majority of the stock at such time; or who were directors or a majority of the board at such time; or whether the alleged conspiracy was consummated by defendants as stockholders or as directors or officers of the corporation; or in what manner plaintiffs have been injured by any of the alleged wrongful acts of defendants; or in what manner or at what time defendants are alleged to have appropriated and converted the sum of \$94,000 as alleged. Like grounds are set forth as showing the uncertainty and unintelligibility of the complaint.

We are without any assistance from the respondents, no brief having been filed by them. One of two inferences might seem to follow; either that the complaint is so obviously insufficient as to call for no explanation of its defects, or that, as obviously, its sufficiency is apparent. And yet we are not at liberty to indulge either inference. I take this opportunity to remark that it is due to the reviewing court that counsel should extend to it all possible assistance in its endeavor to reach right conclusions in cases brought before it. Briefs of counsel have a double value in that they serve to lighten the labor of the reviewing court, thus facilitating the decision of cases, and in that they often present points of view which might otherwise be overlooked. For myself, I may say that rarely, if ever, have I found a brief without value in the determination of the case in which it is filed, and I am glad to acknowledge the great service to the court which counsel generally extend by their presentation of points and authorities. I desire to add that where a plaintiff is sent out of court on his pleading, without a hearing on the merits of his case, the adversary party should support the grounds of his assault and not throw all responsibility upon the appellate court unaided.

[1] Passing for the moment the alleged imperfections of the complaint suggested by the special demurrer, I think enough appears in the complaint to withstand the general demurrer.

It appears from the amended complaint: That plaintiff Benedict was, in 1906, and ever since has been, a stockholder of the corporation, and plaintiff Harvey was such stockholder prior to and at the commencement of the action. That the Carlsa Chemical Company became a corporation in 1904 with a capital stock of \$1,000,000, of like number of shares of the value of \$1 each, and that each share thereof at the time of issue had an actual value of \$1. That the persons named as defendants have had standing in their names on the books of the corporation more than a majority of its out-

standing shares ever since the organization of the corporation, and have combined and conspired to accomplish the unlawful purposes alleged, and to that end have elected directors subservient to their wishes who had no interest in the corporation except to work out the will and interests of defendants as their "implements and representatives," and the defendants have, at all times mentioned in the complaint, "dictated and do now dictate, all the acts of the directors of said corporation and all the acts of the said corporation. That during the times mentioned in the complaint the corporation came into the possession and ownership of the sum of \$135,000, and that defendants "have, by virtue of their control of said corporation and its board of directors, fraudulently and wrongfully taken and withdrawn from said corporation, and have appropriated and converted to their own use and benefit, without any consideration or benefit to said corporation, in excess of \$94,000 of said money," and still retain the same. That "as a part of said conspiracy and with intent to defraud said corporation," through their said control of its board of directors, defendants have created "a fictitious and fraudulent indebtedness against said corporation and in favor of defendants (naming all the defendants except defendant Upham), and in the execution of said fraudulent design have caused said fictitious indebtedness to be entered on the books of the corporation so as to show credits to certain named defendants, amounting to over \$49,000, whereas in fact no such sum or any sum is due or owing to said defendants, but that the said credit entries are fraudulent and were made by defendants without any consideration to the corporation, and for the sole purpose of "enriching themselves" to the extent of such credits. That the entire issued shares of said corporation do not exceed 682,035 shares, of which defendants "caused themselves to appear on the books of said corporation as owners" of 400,000 shares, but that 350,000 of said shares have been issued fraudulently and without any consideration whatsoever to said corporation." That said shares were issued to defendants "so as to enable and did enable these defendants to control and manage the affairs and business of said corporation, and to continue in such control and management for the purpose of carrying out the fraudulent acts and the conspiracy herein alleged to the grievous injury of these plaintiffs and of the defendant corporation." That "the value of said 350,000 shares of said stock so fraudulently appropriated by said defendants and their agents was at the time of said appropriation \$350,000."

It does not appear who were the directors, nor does it appear by direct averment that directors were chosen at the organization of the corporation, or that they, or their successors continued to act as such throughout the times mentioned, although these latter

facts appear inferentially. As the business of the corporation could only be transacted through its directors the acts complained of could not have been consummated otherwise than by the aid of the directors, and it does appear very clearly that the defendants worked their purpose through the directors, from all which appearing in the complaint it may be inferred from the complaint that directors were in fact elected and were acting, during the period mentioned. The demurrer admits the truth of the facts pleaded and it seems to me that sufficient facts are sufficiently pleaded to constitute a cause of action for appropriate relief.

[2] I think, however, that the directors of the corporation should have been made parties to the action and as the personnel of the board has not changed so far as appears, complete relief cannot be afforded without their being brought in as codefendants. The special demurrer is next to demand notice.

[3] 1. A question is raised as to the right to include new parties plaintiff and defendant in an amended complaint under a claim that it was done without previous leave of court obtained. The answer to this objection raised by the demurrer is that the reviewing court deals only with the amended complaint, which it must be presumed was filed by leave of court, otherwise the proper proceeding on defendant's part was by motion to strike out. In *Beattie Mfg. Co. v. Gerardi*, 168 Mo. 142, 65 S. W. 1035, the court said: "When the amended petition was filed, the one of which it was amendatory was suspended; and as a demurrer goes only to some defect apparent upon the face of the pleading demurred to, this ground was in any event unavailing, and the question could only have been raised by motion to strike out."

[4] 2. It is claimed that several causes of action have been improperly united. The alleged conspiracy is not of the gist of the action; it is the acts done pursuant to the alleged confederation that constitute the cause of action. I can see no reason why a court of equity may not in the same action grant relief against the fraudulent misappropriation of money of the corporation, inquire into the fraudulent issue of stock to the same parties charged with such misappropriation, take an accounting to determine the extent of any misappropriation, and also grant an injunction if necessary to prevent similar acts. Especially must this be so when it appears that all the acts complained of are part of a common design. *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491; *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788. Said the court in the case last cited: "It is often necessary, in order that the plaintiff may obtain full justice, that the relief granted him be as varied and diversified as the means that have been employed by the de-

fendant to produce the grievance complained of."

3. It is next claimed that it cannot be seen from the complaint that plaintiffs were stockholders at the time of the alleged commission of the acts therein set forth. The complaint shows that one of the plaintiffs (Harvey) was a stockholder at the commencement of the action, which was November 7, 1908, and that the other, Benedict, was a stockholder in February, 1906. Whether plaintiff Harvey became a stockholder by purchase from one who was a holder of shares at the time of the alleged fraudulent transaction, or whether he became a stockholder by subscription to the stock, does not appear. Mr. Morowitz says that "less the plaintiff's right of action, if he have any, is derived by purchase and transfer from the former holder of the shares." Morowitz on Corporations, § 265. He further says: "It has been pointed out that the estate of a corporation is to be treated as that of a continuing institution, irrespective of the members at any particular time composing it. Each share represents an interest in the entire concern, and the several holders are entitled to equal rights irrespective of the time when they acquired their shares. Causes of action belonging to the corporation increase the value of the corporate estate and must be treated like other assets. When enforced they inure to the benefit of all the stockholders without distinction." Section 265. I cannot reconcile this statement with the author's other statement that "a shareholder who has acquired his shares after an unauthorized transaction has taken place certainly cannot base his complaint on the ground that he has suffered a wrong, or that his equitable rights have been infringed."

[5] However this may be, both plaintiffs in any view have, on the showing made in the complaint, a right to prevent the payment of the fraudulent credits shown to stand on the company's books in favor of defendants. And if the defendants have without consideration and fraudulently appropriated \$94,000 of the corporate funds which should be restored to its treasury, I fail to see why they have not a cause of action to compel such return even though they acquired their shares after such misappropriation. See the question fully considered in *Just v. Idaho Canal & Irr. Co.*, 16 Idaho, 639, 102 Pac. 381, 133 Am. St. Rep. 140.

[6] 4. Ambiguity is alleged also because the complaint does not show that defendants were stockholders "and owning a majority of the stock at the time of the alleged commission of the acts set forth." It does appear that at all times since the organization of the defendant corporation the defendants have had standing in their names on the books of the corporation a majority of the shares, and that they have controlled the directors and the corporation. The complaint

does not allege that defendants were the owners of these shares, but it alleges that they appear on said books to be the owners. Their relation to the corporation and the means of their control over it sufficiently appear.

[7] 5. It is alleged that the complaint is ambiguous because it cannot be ascertained therefrom who were directors constituting a majority of the board at the time of the alleged commission of the acts complained of. It does appear that defendants controlled the entire board at all times since the corporation was organized and so far as defendants are concerned it is not material who were directors, for the action is against the defendants and not against the directors. As already intimated the directors should be made parties, for complete relief cannot be had otherwise.

6. It sufficiently appears how and in what manner plaintiffs are being and have been injured by the alleged wrongful acts of the defendants.

[8] 7. The complaint is sufficiently certain in its averments as to the manner and times defendants appropriated and converted to their own use the \$94,000 alleged to have been wrongfully withdrawn from the corporation by them. In *Schaake v. Eagle Automatic C. Co.*, 135 Cal. 472, 63 Pac. 1025, 67 Pac. 759, the court said: "Faults consisting in ambiguities and uncertainties should be viewed, to a certain extent, in the light of the situation of the parties as to their knowledge of the facts; that is, as to facts of which the plaintiff cannot, from their nature, have as full information as the defendant. Less certainty is required in the allegations of the complaint, partly because a desirable degree of certainty may be impossible, and partly because the facts being known to the defendant he is not likely to be embarrassed or injured." The case here is one where the defendants practically constituted the managing body of the corporation, and must have had full knowledge of all the facts which they insist that plaintiffs must have alleged, though in no position to know or ascertain them.

I am unable to discover sufficient support for the judgment, and it is therefore reversed.

We concur: HART, J.; BURNETT, J.

**BRANDT v. SALOMONSON.** (Civ. 843.)  
(District Court of Appeal, Third District, California. Nov. 8, 1911. Rehearing Denied by Supreme Court Jan. 5, 1912.)

**1. PARTNERSHIP (§ 327\*)—DISSOLUTION—ACCOUNTING—COMPLAINT.**

A complaint, in an action for the dissolution of a firm and for an accounting, which alleges that defendant applied to his own use,

from the profits of the business, money greatly exceeding the proportion thereof to which he was entitled, in the aggregate \$3,000, more or less, and tools, building material, and machinery of the firm, to which he was not entitled, aggregating in value \$3,000, more or less, proceeds on the theory that defendant has appropriated \$3,000, more or less, more than he is entitled to, but states only an approximation of his appropriation, and does not preclude the court from finding the exact condition of the account.

[Ed. Note.—For other cases, see *Partnership*, Dec. Dig. § 327.\*]

**2. APPEAL AND ERROR (§ 173\*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN TRIAL COURT.**

Where, in an action for the dissolution of a firm and for an accounting, evidence of the amount appropriated by defendant was received without objection, it was too late for defendant on appeal to urge that plaintiff was limited to a judgment in a less sum, in view of the allegations of the complaint.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1079-1120; Dec. Dig. § 173.\*]

Appeal from Superior Court, City and County of San Francisco; Thos. F. Graham, Judge.

Action by M. Brandt against Chris Salomonson. From a judgment for plaintiff, defendant appeals. Affirmed.

Austin Lewis, for appellant. F. V. Meyers, for respondent.

**BURNETT, J.** The action was for dissolution of partnership and for an accounting. The only controversy relates to the finding of the court that: "Defendant has taken and appropriated to his own use, and against the wish and without the consent of plaintiff, of the moneys and property of said partnership, exceeding the proportion thereof to which he was or is entitled, all as alleged in plaintiff's said complaint, money and property aggregating in value four thousand five hundred and thirty-four dollars and seventy-three cents."

[1, 2] The contention of appellant is that plaintiff has alleged in his complaint that defendant appropriated \$6,000 belonging to the firm, and, since he was entitled to one-half of it as an equal partner, plaintiff is limited to a judgment for the recovery of only \$3,000 against defendant. But in this appellant is in error. The allegation of the complaint is that: "The defendant applied to his own use, from the receipts and profits of said business, large sums of money, greatly exceeding the proportion thereof to which he was entitled, to wit, in the aggregate, the sum of \$3,000, more or less, \* \* \* and tools, building material, and machinery belonging to said partnership, to which he was not entitled, aggregating in value the sum of \$3,000, more or less." As far as the allegation concerning the money is concerned, it is thus to be seen that the theory of the complaint is that defendant has appropriated \$3,000, more or less, more than he is entitled

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tled to, or, in other words, to which plaintiff is entitled. Conceding that the averment as to the tools, etc., should be interpreted as claimed by appellant, it would leave \$1,500 of their value to be paid to plaintiff, which, with the other \$3,000, would be substantially the amount of the judgment in favor of plaintiff. But it is apparent that the amount stated in the complaint is intended to be only an approximation of the indebtedness of defendant, and the allegations should not be held to preclude the court from finding the exact condition of the account. Indeed, it is too late for appellant to make the point, since the evidence as to the whole amount appropriated by defendant was received without objection, and respondent points out in the record substantial support for the conclusion that the amount unaccounted for by defendant is \$9,833.65 and by plaintiff the sum of \$739.04. The aggregate is \$10,572.69. Of this it is apparent that each is entitled to \$5,286.34. Subtract this last sum from the sum unaccounted for by defendant, and the balance is \$4,547.31, which defendant should pay to plaintiff to equalize the account. Respondent's figures are not disputed by appellant, and, upon an examination of the transcript, we cannot say that they are incorrect.

The judgment is affirmed.

We concur: CHIPMAN, P. J.; HART, J.

**DYER LAW & COLLECTION CO. v. SALISBURY et al (Civ. 1,051.)**

(District Court of Appeal, Second District, California. Nov. 7, 1911.)

**APPEAL AND ERROR (§ 596\*)—TAKING APPEAL—REQUISITES—STATUTES.**

Code Civ. Proc. § 953a, provides that any person desiring to appeal from the superior court to the Supreme Court or any of the District Courts of Appeal, in lieu of preparing and settling a bill of exceptions pursuant to section 650, may file with the clerk of the court from whose judgment the appeal is taken a notice of intent to appeal, and requesting that a transcript of the testimony and all rulings, etc., be prepared, which notice must be filed within 10 days after notice of entry of the judgment, order, or decree. *Held* that, in the absence of filing of such notice and request, no duty devolves on the clerk to prepare and send up the judgment roll, without which, or printed transcript of the papers required, authenticated under the rules of the appellate court, there is no record showing that any judgment has been rendered or order made from which an appeal will lie, or, if rendered or made, that any appeal has been taken therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 596.\*]

Appeal from Superior Court, Los Angeles County; George E. Church, Judge.

Action by the Dyer Law & Collection Company against E. A. Salisbury and others.

Judgment for plaintiff, and defendants appeal. Dismissed.

George L. Sanders, for appellants. Cleveland Schultz and Trusten P. Dyer, for respondent.

SHAW, J. Sections 950, 951, and 952, Code of Civil Procedure, designate the papers which the appellant is required to furnish the court upon an appeal. The only papers filed herein as constituting the record on appeal consist of a typewritten transcript of the evidence taken at the trial, certified by the trial judge to be correct, together with loose copies of the complaint and answer, attested by the clerk. It was doubtless appellants' intention, in lieu of preparing and settling a bill of exceptions pursuant to the provisions of section 650, Code of Civil Procedure, to be used on appeal, to avail themselves of the provisions of section 953a of said Code, which provides that: "Any person desiring to appeal from any judgment, order or decree of the superior court to the Supreme Court or any of the District Courts of Appeal, may, in lieu of preparing and settling a bill of exceptions pursuant to the provisions of section six hundred and fifty of this Code, file with the clerk of the court from whose judgment, order or decree said appeal is taken, or to be taken, a notice stating that he desires or intends to appeal, or has appealed therefrom, and requesting that a transcript of the testimony offered or taken, evidence offered or received, and all rulings, instructions, acts or statements of the court, also all objections or exceptions of counsel, and all matters to which the same relate, be made up and prepared. Said notice must be filed within ten days after notice of entry of the judgment, order or decree." So far as shown by the record, no attempt was made by appellants to comply with the provisions of the section with reference to the filing of the notice and request for a transcript of the evidence and papers necessary to be used on appeal. In the absence of the filing of such notice and request, as prescribed by section 953a (and assuming that the judgment roll, as defined by section 670, Code of Civil Procedure, need not be printed), no duty devolved upon the clerk to prepare, authenticate, and send up the judgment roll, without which, or a printed transcript of the papers required for use on appeal, authenticated as required by the rules of this court, there is no record showing that any judgment was rendered or order made from which an appeal would lie, or, if rendered or made, that any appeal was taken therefrom.

For the reasons given, the attempted appeal is dismissed.

We concur: ALLEN, P. J.; JAMES, J.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**GREGORY v. LANTZ (Civ. 989.)**

(District Court of Appeal, Second District, California. Nov. 7, 1911.)

**1. EVIDENCE (§ 99\*)—RELEVANCY TO ISSUE.**

Where defendant, in an action for the rental on a lease of personal property, offered a writing, claimed by him to have been signed by plaintiff when the lease was made, but which was not pleaded, and there was nothing in it or in the evidence offered tending to show that it had any connection with the transaction, or was relevant to the issue involved, it was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 137-143; Dec. Dig. § 99.\*]

**2. APPEAL AND ERROR (§ 1002\*)—REVIEW—FINDINGS—CONFLICTING EVIDENCE.**

The Supreme Court cannot say that findings on conflicting evidence were without sufficient support.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Appeal from Superior Court, Los Angeles County; W. R. Herve, Judge.

Action by William Gregory against Charles Lantz. Judgment for plaintiff, and defendant appeals. Affirmed.

Walton J. Wood and Charles Lantz, for appellant. Tipton & Callor, for respondent.

**SHAW, J.** Action to recover the balance of an amount agreed to be paid by defendant to plaintiff pursuant to the terms of a lease of personal property. Judgment went for plaintiff, from which, and an order denying his motion for a new trial, defendant appeals.

The lease, set out in the complaint in *hac verba*, is for one 5 horse power White & Middleton engine No. 1891, one pump jack, 80 feet of 7-inch casing, 45 feet of 4-ply belting and fittings, etc., which the lessor agreed to furnish for the term of 6 months from July 9, 1908, for the use of which defendant covenanted and agreed to pay plaintiff the sum of \$580, payable \$250 cash upon delivery, and the balance in installments, as therein specified. It was further provided that, should suit be brought to enforce any covenant contained therein, defendant should pay a reasonable attorney's fee in such suit. The lease contains no covenants on the part of the lessor, other than an option therein given to purchase, for a stipulated sum, the leased property at any time during the term of the lease, provided the specified rental shall have been paid at the times and in the manner therein contained. The complaint alleges delivery of the property to defendant and the performance of all the covenants thereby imposed upon plaintiff, but that defendant, retaining possession of the leased property, has paid the sum of \$139.37 only, leaving a balance of \$440.63 unpaid, and which he refuses to pay. It also alleged that plaintiff had employed attorneys to prosecute the suit, on

account of which he had incurred a liability in the sum of \$75 for attorney's fees. Defendant answered, admitting the execution of the lease, but denying that any sum was unpaid thereon, or that plaintiff had been compelled to employ attorneys, as alleged. By separate answer and cross-complaint, he alleged that by said contract of lease plaintiff was to install the property so leased, so that the same could be used for the pumping of water for the summer irrigation of 1908, and that he neglected and failed to do so until December, 1908, by reason whereof he was damaged.

It is not alleged that the contract as executed was other than what the parties intended it to be; hence the only question is whether plaintiff performed the covenants thereby imposed upon him. The court upon ample evidence found that he did. Measuring the rights of the parties by the terms of the contract, no duty devolved upon plaintiff to install the pumping plant for use in the summer of 1908, or at any other time, or at all. He simply leased the property to defendant, and if plaintiff installed it such act, so far as shown by the record, was voluntary and without consideration, or by virtue of some agreement not pleaded. Neither did plaintiff make any covenant of warranty as to the capacity of the engine or pump when installed; hence, if it be true, as claimed by appellant, that the plant when installed failed to do the work which he expected it to do, he cannot now complain, since he did not exact any covenant from plaintiff with regard to the efficiency of the engine or capacity of the pump.

Appellant claims there was a failure on the part of plaintiff in complying with the terms of the contract in this: That whereas, he agreed to deliver 80 feet of casing, he furnished but 60 feet. While we think that under the circumstances disclosed by the record the delivery of the 60 feet of casing would constitute a substantial compliance with the contract, the evidence clearly shows that plaintiff delivered the full 80 feet, and defendant retained and used the same for about 5 months—almost the entire term of the lease—when, owing to the fact that the plant failed to work satisfactorily, plaintiff, at defendant's request, undertook to remedy the trouble, and removed from the well 20 feet of the casing installed therein, for the reason that it was thought the reduction in the length of the casing placed in the well would increase the efficiency of the plant. The removal of the 20 feet of casing was in the nature of repairs, and it does not appear that defendant objected to the change until January 11, 1909, which was after the expiration of the term of the lease. While plaintiff may be liable to defendant for the conversion of the 20 feet of casing, it cannot be said that such conversion 5 months after

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep.'s Indices



the delivery thereof showed a lack of substantial compliance with the contract.

[1] During the trial, defendant offered in evidence a writing, claimed by him to have been signed by plaintiff at the time the contract here sued upon was executed. Plaintiff's objection to its reception in evidence was sustained. The instrument was not pleaded by defendant, and there is nothing in the writing itself, nor in the evidence offered, tending to show that it had any connection with the transaction, or was relevant to the issue involved. There was no error in excluding it from the evidence.

[2] The theory of defendant seems to have been that, by the terms of the contract, plaintiff agreed to install the plant and guaranteed a certain degree of sufficiency. While there is nothing in the record upon which to base such theory, nevertheless, if it should be adopted, we could not, owing to a conflict of evidence, say the findings were without sufficient support.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; JAMES, J.

#### PEOPLE v. HAROLD. (Cr. 337.)

(District Court of Appeal, First District, California. Nov. 9, 1911.)

#### LARCENY (§ 14\*)—FALSE PRETENSES—EVIDENCE.

Prosecutor was induced by the fraud, trick, and device of defendant to agree to purchase from D. moving picture films of little or no value for \$150. Prosecutor went with defendant to D.'s room to complete the purchase, and there handed defendant \$145 to be paid to D. for the films. Defendant handed some of the money to D., but put the balance in his pocket. It appeared that defendant and D. were operating together to defraud prosecutor, and that, when defendant obtained and received the same, he intended to steal it. Held sufficient to show larceny, and not obtaining money by false pretenses, though prosecutor testified that when he delivered the money to D. he intended to part with it in payment for the films.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 34-38; Dec. Dig. § 14.\*]

Appeal from Superior Court, Alameda County; John Ellsworth, Judge.

Arthur R. Harold was convicted of grand larceny, and he appeals. Affirmed.

P. M. Walsh, for appellant. Attorney General Webb, for the People.

HALL, J. This is an appeal from a judgment and order denying defendant's motion for a new trial. Defendant was convicted upon a charge of grand larceny for the stealing of \$145 from one W. H. Ranes. The only point urged for a reversal is that the evidence establishes a case of obtaining money by false pretenses rather than a case of larceny.

There is no merit in appellant's conten-

tion. The evidence shows that through the fraud, trick, and device of defendant the prosecutor was induced to agree to purchase from one Davidson certain moving picture films of little or no value for \$150. The prosecutor went with appellant to a room occupied by said Davidson to complete the purchase, and there the prosecutor handed to appellant the sum of \$145 to be paid to Davidson for the films. Appellant handed some of the money to Davidson, but put the balance, probably half of it, in his own pocket. The evidence justifies the conclusion that appellant and Davidson were fellow conspirators operating together to fleece the prosecutor out of his money, and that when appellant obtained and received the money from the prosecutor he intended to feloniously steal the same. The claim of appellant that title passed when the prosecutor handed the money to appellant is based principally upon the answer made by the prosecutor to a question put to him upon cross-examination. He was asked, "You intended at the time you transferred this \$145 to transfer the money to Davidson in payment of the films, didn't you?" to which he answered "Yes."

Undoubtedly such was his general intention; that is, he intended that title to the money should be finally transferred to Davidson. But the answer must be understood in the light of the circumstances shown to exist by the whole record. The prosecutor was not buying films from appellant, and handed the money to appellant only that appellant might hand the same to Davidson in payment for the films which the prosecutor had agreed to buy from Davidson. Appellant purported to be acting with and for the prosecutor. So long as the money remained in the hands of appellant, it was the money of the prosecutor. There is no pretense that the evidence shows that the prosecutor intended to transfer title to the money to appellant. The evidence shows without doubt that appellant intended when he obtained possession of the money to steal it, and accomplished his purpose.

The facts in this case are entirely similar to the facts in *People v. Arnold*, 118 Pac. 729, and *People v. Delbos*, 146 Cal. 737, 81 Pac. 131, where it was held that convictions for grand larceny were sustained by the evidence.

The judgment and order are affirmed.

We concur: LENNON, P. J.; KERRIGAN, J.

#### PEOPLE v. LEDERER. (Cr. 214.)

(District Court of Appeal, Second District, California. Nov. 6, 1911.)

#### 1. FRAUDULENT CONVEYANCES (§ 331\*)—CRIMINAL RESPONSIBILITY—INTENT.

In a prosecution for fraudulently conveying and concealing property with intent to de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fraud creditors, evidence *held* to show that defendant's intent in holding an auction sale of his stock and making promises to pay in the future, which he did not keep, was to dispose of his stock and leave the creditor without means of satisfying the debt.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 1019-1024; Dec. Dig. § 331.\*]

## 2. FRAUDULENT CONVEYANCES (§ 329\*)—CRIMINAL RESPONSIBILITY—TRANSFER.

Where, notwithstanding an alleged transfer of a jewelry business from defendant to his father, defendant continued to conduct the business in his name and for his own benefit, and it appeared that prosecutor, a creditor, looked to him for the payment of his account for merchandise sold, though such account was kept on prosecutor's books in the name of the father, such alleged transfer was no defense to a prosecution of defendant for fraudulently conveying, assigning, and concealing the property with intent to defraud prosecutor.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 1016-1018; Dec. Dig. § 329.\*]

## 3. CRIMINAL LAW (§ 1122\*)—APPEAL—RECORD—QUESTIONS PRESENTED—INSTRUCTIONS.

Where there is no evidence in the record of the existence of an alleged fact, the court on appeal cannot consider whether there was error in the instructions given referring to such fact.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2940-2945; Dec. Dig. § 1122.\*]

## 4. CRIMINAL LAW (§ 543\*)—EVIDENCE—TESTIMONY ON PRELIMINARY EXAMINATION—ABSENT WITNESS.

A witness who had testified on preliminary examination was not present at the trial, and the sheriff testified that he had made a search for him, and had been unable to find him. There was evidence that he had not been seen in the county for several weeks prior to the trial, and had announced his intention to go to the Philippine Islands. An acquaintance produced a letter to which was attached the witness' initials, which appeared to have been posted from a town in Ohio some days prior to its receipt, containing references to a business matter about which the absent witness had talked with the addressee about three weeks previously. *Held* that, though the handwriting of the letter was not identified as that of the absent witness, still the letter, in connection with the other testimony, afforded some ground to sustain a finding that the witness could not, with due diligence, be produced on the trial, so as to authorize the admission of the reporter's record of the testimony of the witness at the preliminary examination.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. § 1236; Dec. Dig. § 543.\*]

## 5. CRIMINAL LAW (§§ 543, 1153\*)—APPEAL—REVIEW—MATTERS OF DISCRETION.

Pen. Code, § 686, provides that the testimony of a witness, taken at a preliminary examination, may be read at the trial on its being satisfactorily shown to the court that he is dead, or insane, or cannot with due diligence be found within the state. *Held*, that whether the showing of due diligence is sufficient to lay a foundation for the admission of the record of the testimony of an absent witness on the preliminary examination is within the discretion of the trial judge, the exercise of which will not be reviewed, if there is any evidence to support the conclusion reached.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1236, 3066; Dec. Dig. §§ 543, 1153.\*]

## 6. CRIMINAL LAW (§ 1169\*)—APPEAL—REVIEW—PREJUDICE.

In a prosecution for fraudulently disposing of a stock of goods with intent to defraud creditors, defendant was not prejudiced by evidence of an auctioneer employed by defendant to sell a large part of the stock at auction that, while he was engaged in selling the stock, defendant had a conversation with a traveling salesman, and finally adjusted it by giving the salesman a check, "dated ahead," which was objected to as allowing parol evidence of the contents of a written instrument.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3137-3143; Dec. Dig. § 1169.\*]

## 7. CRIMINAL LAW (§ 1172\*)—APPEAL—HARMLESS ERROR.

Where, in a prosecution for fraudulently conveying a stock of goods with intent to defraud creditors, there was ample proof of defendant's indebtedness to prosecutor, and uncontradicted evidence that when a statement was presented to defendant, showing the total amount of its indebtedness, he did not question its correctness, but promised to secure funds to satisfy it, defendant was not prejudiced by an objectionable instruction as to the character of evidence which a promissory note furnishes of the debt which it represents.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3154-3163; Dec. Dig. § 1172.\*]

Appeal from Superior Court, San Luis Obispo County; E. P. Unangst, Judge.

H. C. Lederer was convicted of fraudulently conveying and concealing property with intent to defraud, and he appeals. Affirmed.

L. A. Enos and Carpenter & Gibbons, for appellant. U. S. Webb, Atty. Gen., and George Beebe, Deputy Atty. Gen., for the People.

JAMES, J. Defendant was convicted of fraudulently conveying, assigning, and concealing his property with intent to defraud Nordman Bros. Company, which was then his creditor in a large sum of money, as that crime is described in section 154 of the Penal Code. He was sentenced to pay a fine in the sum of \$1,005, from which judgment, and from an order made by the trial court denying his motion for a new trial, he has appealed.

[1] From the reporter's transcript of the testimony, it appears that the defendant was in charge of a jewelry store in the city of San Luis Obispo for at least 1½ years prior to the date of his arrest, and that he assumed to be the owner thereof; his name appearing upon signs placed about the place of business and upon a large safe which he kept in the store for the purposes of that business. The complaining creditor had furnished merchandise to the amount of more than \$2,000 in value for the defendant's use. A short time prior to the date of defendant's arrest, a representative of this creditor called upon defendant at his place of business, and made known the state of his account with the complainant. This account

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

was then in the form of a book charge in part, and in part was evidenced by two promissory notes, signed by the defendant and one Charles F. Lederer, the father of defendant. When the representative of the creditor made the request upon defendant that he discharge at least a part of the indebtedness, defendant promised to do so within a short time, which promise, and several others of like intent, he utterly failed to keep. Shortly before his arrest, he employed an auctioneer to sell off the stock of jewelry, and sales were had during several days until the merchandise on hand was reduced to an amount which represented but a small part of the stock theretofore kept on hand. None of the money received from these sales did the defendant apply upon his indebtedness. Again a representative of the creditor called upon him and requested payment of the account, and again defendant promised that he would obtain some money. He told the creditor's agent at the time of the latter's last visit that he had made an arrangement with a bank to obtain money, and that if he would call later in the day he expected to have it ready for him. This agent discovered that defendant had made no arrangement with the bank to obtain any money. After this last conversation with this agent, defendant left his store and prepared immediately to take the afternoon train for Los Angeles, telling an employé to say to the agent when he inquired for him that he (defendant) had gone to the country to obtain \$1,000 or \$1,500, which he intended to pay over to the creditor. The defendant was arrested at the railway depot when about to take the train to leave San Luis Obispo. Considering all of the facts and circumstances shown in evidence, it was very clearly established that the intent of the defendant was to dispose of the jewelry stock and leave his creditor without any means of satisfying the debt.

[2, 3] While it does appear that the charge account kept by Nordman Bros. Company was carried upon their books in the name of Charles F. Lederer, it is equally clear that the defendant was conducting the jewelry business at San Luis Obispo in his own name and for his own benefit, and that the creditor looked to him for payment of the account. Moreover, it appears further that the defendant at no time questioned the correctness of the account as to its amount or his own responsibility as to the payment thereof. An attempt was made on the part of the defense to show that in July, 1909, defendant and one Curtis transferred the jewelry business to Charles F. Lederer, father of defendant. Defendant testified that on a certain day in the month mentioned he executed a notice of intention to sell and a bill of sale. It appears that this notice of intention to sell was intended to be given to satisfy the requirements of section 8440 of the Civil Code, but we are left altogether in the dark

as to what its contents were; for, while the record shows that it was read in evidence, it is not brought before this court in any way, and by stipulation entered into between counsel it constituted one of the exhibits which it was agreed should not be set out in the transcript. There is therefore no testimony shown from which we can properly infer that a notice of intention to sell the jewelry business was ever executed, or that the bill of sale which was said to have been made referred in any wise to the business then being engaged in by the defendant. For this reason, it is not proper for us to consider as to whether the court erred in giving any of the instructions which referred to the matter of the alleged sale of the jewelry stock and business in 1909 to Charles F. Lederer. In addition to all of this, as we have before noted, it appeared without contradiction that the defendant, from July, 1909, down to the date of his arrest, had conducted the business in his own name, that he assumed to be the sole proprietor thereof, and that the complaining creditor looked to him for the payment of its debt.

[4] It is argued that the trial court erred in admitting the reporter's record of the testimony of a witness named Lamphere, which was taken in due form at the preliminary examination of the charge against defendant. This witness was not present at the trial, and there was evidence before the court that he had not been seen in San Luis Obispo for several weeks prior to the date of the trial, and that he had theretofore announced it as his intention to leave the state and go to the Philippine Islands. An acquaintance of his, who was sworn as a witness, produced a letter to which was attached the name and initials of Lamphere; this letter appearing to have been posted from a town in the state of Ohio some days prior to its receipt. The handwriting appearing in the letter was not identified as being that of Lamphere, but the letter contained references to a business matter about which Lamphere had talked with the witness who received the missive, about three weeks prior thereto. Lamphere had been served with a subpoena early in April, 1911, to attend on May 16th at the trial. Before May 16th arrived, the district attorney and defendant agreed to continue the trial to May 31st, which continuance was ordered by the court. While it was not shown that Lamphere had notice of this continuance, it was testified to by another witness that he (Lamphere) had never reported at the courthouse in response to the subpoena; and the sheriff of San Luis Obispo county testified that after the commencement of the trial he had made a search for Lamphere at San Luis Obispo and had failed to find him. Under the circumstances, we think that, while the handwriting in the letter was not identified as being that of Lamphere, still that document, in connection with the other testimony referring to his

then absence from the city, afforded some ground upon which the trial court might properly base its conclusion that the witness could not, with due diligence, be produced at the trial.

[5] Section 686 of the Penal Code provides that the testimony of a witness taken at a preliminary examination may be read at the trial, "upon it being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state." It has been held that under the provisions of this section the trial judge has discretion in determining whether or not a sufficient foundation has been laid, entitling such testimony to be read in evidence, and that, where there is any evidence to support the conclusion affecting that matter, the ruling cannot be disturbed on appeal. *People v. Nelson*, 85 Cal. 421, 24 Pac. 1006; *People v. Witty*, 138 Cal. 576, 72 Pac. 177; *People v. Lewandowski*, 143 Cal. 574, 77 Pac. 467.

[6] The alleged error complained of, arising upon the ruling of the court allowing the auctioneer employed by defendant to state his recollection as to the date appearing upon a check given by defendant to a traveling salesman, seems to us to have been without prejudicial effect upon the rights of the defendant. The auctioneer was allowed to testify, against objection made by defendant, that, while he was engaged in selling the jewelry stock, defendant had some controversy with a traveling man, and that finally the controversy was adjusted, and that defendant had delivered to the traveling salesman a check which was, as the witness said, "dated ahead" about 10 days. Apparently defendant was owing money to the employer of the traveling salesman, and he settled his debt by giving a check dated as the witness described. We do not understand how the jury could have reasonably drawn any inference from this occurrence unfavorable to defendant; and therefore the ruling of the court in allowing oral testimony of the contents of a written instrument, if erroneous, was without prejudice.

[7] The instruction given by the trial judge as to the character of evidence which a promissory note furnishes of the debt which it represents appears to be properly subject to the criticism which counsel urge against it. Whether the instruction was erroneous or not seems immaterial in the face of the uncontradicted testimony going to show the existence of the debt itself. As we have before stated, not only was there ample proof of the amount of the debt which was owing to the complaining creditor at and prior to the arrest of defendant, but there was the further testimony, which stood uncontradicted, that when a statement was presented to defendant, showing the total amount of his indebtedness, he made no question as to the correctness of that state-

ment, but promised and agreed that he would secure funds with which to satisfy it. In our opinion, defendant was convicted upon sufficient evidence, and no errors were committed by the trial court such as to warrant an order of reversal.

The judgment and order are affirmed.

We concur: ALLEN, P. J.; SHAW, J.

# WAGNER v. EL CENTRO SEED & NURSERY CO. (Civ. 1024.)

(District Court of Appeal, Second District, California. Nov. 7, 1911.)

## 1. TRIAL (§ 395\*)—FINDINGS—SUFFICIENCY.

Where the findings determined that the amount for which judgment was entered was due prior to the commencement of the action, defendant could not complain because of a want of a specific finding of the exact date of the maturity of the debt.

[Ed. Note.—For other cases, see Trial, Dec. Dig. § 395.\*]

## 2. SALES (§ 365\*)—ACTIONS—FINDINGS—INCONSISTENCY.

Where, in an action for the price of merchandise, defendant relied on a counterclaim, a finding that the merchandise was sold at a price agreed on between the parties, and a finding covering the issue presented by the counterclaim that the seller was to receive a specified per cent. of the wholesale price of the entire amount of the merchandise, without finding the amount of the wholesale price at the date of delivery, were not inconsistent, but the ultimate facts proposed by the pleadings were sufficiently determined to support a judgment for the seller.

[Ed. Note.—For other cases, see Sales, Dec. Dig. § 365.\*]

## 3. TRIAL (§ 404\*)—FINDINGS—CONSTRUCTION.

The findings must be so construed as to support the judgment, if possible, and any apparent inconsistency between different parts of them must be reconciled so as to give effect to the judgment where the same can be done on any reasonable construction of the language used.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.\*]

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by A. F. Wagner against the El Centro Seed & Nursery Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Conkling & Brown, for appellant. D. V. Noland, for respondent.

JAMES, J. Appeal by defendant from a judgment entered against it in favor of plaintiff for the sum of \$471 and costs. The appeal is presented on the judgment-roll.

In plaintiff's complaint it was alleged: "That within two years last past, to wit, between the 1st day of October, 1910, and the 1st day of February, 1911, said defendant became and was indebted to said plain-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tiff, upon an account for goods, wares, and merchandise, to wit, nursery stock and nursery pots, sold and delivered to said defendant within two years last past, in the city of El Centro, county of Imperial, state of California, in the sum of \$583; that said nursery stock was sold to said defendant by said plaintiff at defendant's instance and request; that said defendant agreed to pay plaintiff the sum of \$583 for said nursery stock and pots. That the said amount became due and payable on the 11th day of January, 1911; that no part of said sum has been paid, except the sum of \$97; that there is still due, owing and unpaid from said defendant to said plaintiff upon said account the sum of \$486." Defendant denied all of the material allegations of the complaint, and set up by way of counterclaim an alleged cause of action growing out of the transaction upon which the action was brought. The trial court found the facts to be as alleged in plaintiff's complaint, except that the amount found due to plaintiff was the sum of \$471.

[1] There was no finding as to the particular day when this sum became due, but the finding of the court sufficiently determined that the amount for which judgment was entered had become due prior to the commencement of the action. This being true, no complaint can be made by the defendant because of the want of a specific finding fixing the exact date when the debt became due and payable.

[2] It is contended by defendant that there is an inconsistency in the findings of the court, inasmuch as in that part of the findings which covers issues presented by the counterclaim it was determined that plaintiff was to receive 60 per cent. of the wholesale price of the entire amount of nursery stock delivered, and the court failed to find what the amount of the wholesale price was at the date of delivery. We think that the findings as made are not inconsistent, and that the ultimate facts proposed by the pleadings of the parties were all fully and legally determined. The court did find clearly and unmistakably that the merchandise was sold at a price agreed upon between the parties, and if this price was the wholesale price of the stock, it was, nevertheless, the price agreed to be paid by defendant.

[3] It is a familiar rule, too well settled and fixed to require citation of authority to sustain it, that the findings of a trial court must be so construed as to support the judgment, if possible, and that any apparent inconsistency between different portions of such findings must be reconciled in such a way as will give effect to the judgment, where this can be done upon any reasonable construction and interpretation of the language used. In this case we think that

the findings fully sustain the judgment and that the objections made thereto by the appellant are without merit.

The judgment is therefore affirmed.

We concur: ALLEN, P. J.; SHAW, J.

LAURELLE v. BUSH, Tax Collector.  
(Civ. 972.)

(District Court of Appeal, First District, California. Nov. 8, 1911.)

1. THEATERS AND SHOWS (§ 3\*)—LICENSES—ORDINANCES—CONSTRUCTION—"PANORAMA"—"KINETOSCOPE."

While a city ordinance imposing a license fee on and prescribing the location of museums, panoramas, cycloramas, kinetoscope, or phonograph parlors, does not specifically refer to the motion picture business, it is sufficiently covered by the words, "panorama" and "kinetoscope," and must be held to be within the contemplation of the ordinance.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 3; Dec. Dig. § 3.\*]

For other definitions, see Words and Phrases, vol. 5, p. 3934.]

2. THEATERS AND SHOWS (§ 1½.\* New, Vol. 12, Key No. Series)—"PANORAMA"—NATURE.

A "panorama" is a picture which, representing scenes too extended to be seen at once, is exhibited a part at a time by being unrolled continuously before the spectators.

3. THEATERS AND SHOWS (§ 1½.\* New, Vol. 12, Key No. Series)—"KINETOSCOPE"—NATURE.

A "kinetoscope" is a machine for producing animated pictures, a mechanical contrivance involving, among other things, a transparent or translucent narrow film on which a series of photographs consecutively represent the continuous development of movement or action in the persons or things which are the subject of such photographs.

4. MUNICIPAL CORPORATIONS (§ 116\*)—ORDINANCES—IMPLIED REPEAL.

Where a city ordinance imposing a license fee upon the owners of museums, panoramas, cycloramas, kinetoscopes, or phonograph parlors and its amendment requiring a permit from the board of police commissioners for, and prohibiting the location of, such exhibitions within certain limits, is not repealed expressly by a later ordinance which made it unlawful to conduct a moving picture exhibition without first receiving a permit from the board of police commissioners, and as such later ordinance does not purport to fully cover the subject-matter of nor appear to be a substitute, but merely adds additional requirements, it cannot be held to repeal it by implication.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 268-271; Dec. Dig. § 116.\*]

5. LICENSES (§ 7\*)—ORDINANCES—VALIDITY.

A general grant of power unaccompanied by specific directions as to the manner of exercise implies the right and duty to adopt and employ such means and methods as may be reasonably necessary, so that a city ordinance providing for licensing moving picture exhibitions is not invalid because it vests in police commissioners power to grant or refuse a permit for the conduct of the business which is arbitrary and dependent solely upon their whim

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

or caprice, because it does not restrict the power or prescribe methods for its application.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15; Dec. Dig. § 7.\*]

**6. MUNICIPAL CORPORATIONS (§ 603\*)—ORDINANCES—VALIDITY—REASONABLENESS.**

In view of the danger of fire and panic from the close proximity of moving picture exhibitions to schools or churches, a city ordinance which prohibits the future location of such exhibitions within 200 feet of a church or school-house is not invalid as prescribing unreasonable or unnecessary conditions upon the business.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1334; Dec. Dig. § 603.\*]

**7. LICENSES (§ 7\*)—ORDINANCES—VALIDITY—REASONABLENESS.**

Where a city ordinance provides for the licensing of moving picture exhibitions, etc., and prohibits the location of such businesses within certain districts, a requirement therein that the applicant for a permit to engage in such business shall specify by street and number the precise premises in which he desires to locate is reasonable and necessary to an intelligent and effective enforcement of the ordinance, and will not render it invalid as prescribing unreasonable or unnecessary conditions.

[Ed. Note.—For other cases, see *Licenses*, Cent. Dig. §§ 7-15; Dec. Dig. § 7.\*]

**8. MUNICIPAL CORPORATIONS (§ 591\*)—DELEGATION OF POWER.**

Where a city ordinance provides that a license to run moving picture exhibitions shall be granted only when a permit therefor has been granted by the board of police commissioners, but directs that no other restriction than as to the location of such places shall be considered by such board, the restriction is mandatory, and imposes upon the board the duty of granting a permit upon ascertaining that the conditions precedent have been complied with, and, as the refusal of a permit in such case would be an abuse of power, rather than the exercise of a discretion, which could be reached and remedied by mandamus, the ordinance is not invalid as a delegation of power.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1310; Dec. Dig. § 591.\*]

**9. MANDAMUS (§ 14\*)—GRANTING OF LICENSE—COMPLIANCE WITH CONDITIONS.**

Where an ordinance regulating moving picture exhibitions, etc., provides that a permit therefor be obtained from the board of police commissioners, and that the right to have such a permit shall be absolute upon compliance with certain conditions as to the location of the business, issuance of the permit is a condition precedent to the granting of the license, and the determination as to whether the premises comply with the requirement is for the board, not for the applicant, so that a petition for mandamus to require the issuance of a license by the license collector which alleges that the premises comply with the requirement of the ordinance is insufficient; the only right to relief by mandamus being upon a showing that the board ignored the petition for a permit entirely, or arbitrarily refused a permit in the face of the undisputed or established fact that the specified restrictions did not apply.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. §§ 44-46; Dec. Dig. § 14.\*]

Appeal from Superior Court, City and County of San Francisco; George A. Sturtevant, Judge.

Mandamus by Otis Laurelle against David Rush, Tax Collector. From a judgment

for plaintiff, defendant appeals. Reversed, with directions.

Percy V. Long, City Atty., and J. F. English, Asst. City Atty., for appellant. Edgar C. Levey and George M. Lipman, for respondent.

LENNON, P. J. The plaintiff in the above-entitled proceeding petitioned the superior court for a writ of mandate, requiring and compelling the defendant, as the tax collector and ex officio license collector of the city and county of San Francisco, to issue to plaintiff a license to engage in the moving picture business. The petition for the writ in the main alleged that on the 3d day of March, 1911, the plaintiff tendered to defendant in his official capacity as tax and license collector the sum of \$25, the amount fixed by ordinance as a license fee for opening and operating a moving picture exhibition. Thereupon plaintiff demanded of defendant a license to carry on said business at the premises known and designated as No. 452 Castro street in said city and county. It was further alleged in the plaintiff's petition that said premises were not within a distance of 200 feet from the front line of any church or school, or within 100 feet of the property line of the sides or rear of any church or school, that the defendant refused to issue said license, and that by reason thereof plaintiff is prohibited from engaging in a lawful and useful business.

The plaintiff in his petition, and here, bases his claim of right to the license in question solely upon the provisions of Ordinance No. 777 of the city and county of San Francisco, which requires, in substance, that every person, firm, or corporation maintaining or conducting any museum, panorama, cyclorama, kinetoscope, or phonograph parlor, wherein an admission fee is charged, and operated for the entertainment or amusement of the public, shall pay a license fee of \$25, per quarter. The ordinance provides, further, that the tax collector shall not issue a license to any person, firm, or corporation to conduct such business unless the applicant therefor shall have first obtained from the board of police commissioners a permit to conduct the same, and that the board of police commissioners shall not issue any permit to any person who proposes to maintain said business within a distance of 200 feet from the front line of any church or school, or within 100 feet of the property line of the sides or rear of any church or school. Provision is then made that these restrictions shall not apply to buildings already erected or in course of construction, and especially designed to be used for kinetoscope or other similar exhibitions, and that no other restrictions as to the location of such business shall be considered by the board of police commissioners.

Although plaintiff's petition makes specific reference by title and number to the ordinance just referred to, no mention is made of the fact that the ordinance requires a permit from the board of police commissioners before the defendant is authorized to issue a license. In this connection it appears that Ordinance No. 777, which was enacted and approved in 1903, related only to the imposing of a license fee upon the owners of "museums, panoramas or cycloramas or any kinetoscope or phonograph parlor," and did not purport to regulate the conduct or restrict the location of such business. In the year 1908 this ordinance was amended solely by including within its provisions the clauses which required a permit from the board of police commissioners and prohibited the location of the designed exhibitions within the limits hereinbefore specified.

It should be noted in passing that the board of supervisors in 1906, by a supplementary ordinance known as "No 761, New Series," made it unlawful for any person to conduct or carry on any "moving picture" exhibition without first making application for and receiving a permit from the board of police commissioners. The only additional requirement of this ordinance, in so far as the procurement of a permit is concerned, is that the applicant must file his application in writing, which shall be signed by him, give his address, and specify by street and number the place where the proposed "moving picture" exhibition is to be located. Other provisions of the ordinance give immediate supervision and censorship of all pictures which may be exhibited, after a permit is granted and a license issued, to the police commissioners, and provision is also made for the revocation of permits in the event of a violation of certain prescribed rules not mentioned in the first ordinance, which are intended to keep the moving picture business within the limits of ordinary decency and morality. The validity of those rules is not assailed in this proceeding, and therefore they need not be further mentioned or considered.

The answer of the defendant set out in *hæc verba* the original ordinance relied upon by the plaintiff, together with the amendatory and supplementary ordinance just referred to, and then pleaded as a defense to the action that the plaintiff at no time obtained the required permit in writing to engage in the kinetoscope or any similar business, and that for this reason alone the defendant refused to issue a license to plaintiff. The plaintiff interposed a demurrer to the defendant's answer upon the ground that the facts therein stated did not constitute a defense. This demurrer was sustained without leave to amend. Thereupon judgment for plaintiff was entered in effect upon the pleadings, and the mandate of the court issued compelling the defendant to

grant the license prayed for. The defendant appeals from the judgment.

The trial court, in sustaining the demurrer to the defendant's answer, proceeded presumably upon the theory advanced by plaintiff that the ordinances in question are unconstitutional, in this: (1) That they are unreasonable, discriminatory, and oppressive, and an unlawful interference with and an unnecessary restraint of a useful and lawful occupation; and (2) that they attempt to delegate legislative powers and functions from the board of supervisors, a legislative body, to the police commissioners, an administrative board.

[1] In support of this theory, it is assumed by plaintiff's counsel that the ordinances under consideration do not attempt in any way or form to regulate or restrict the business of exhibiting moving pictures, and therefore it is argued that the ordinances are but the grant of an arbitrary power to the police commissioners, whereby they are given the sole and unrestricted authority to grant or refuse any application for the permit required by the ordinances.

If the assumption upon which this argument is founded were true, the result contended for might follow as a matter of law; but, as we read and understand the several ordinances, they are not susceptible of any such construction. "Moving picture" exhibitions are not specifically designated in the category of amusements required to be licensed by Ordinance No. 777, nor is any mention made of "moving pictures" in so many words by the amendment thereto, which purports to regulate "cycloramas, kinetoscope" and other similar entertainments.

[2] A "panorama," however, is defined to be "a picture which, representing scenes too extended to be seen at once, is exhibited a part at a time by being unrolled continuously before the spectator."

[3] A "kinetoscope" is defined to be "a machine for producing animated pictures" (Webster's Dict.), and has been judicially described as "a mechanical contrivance involving, among other things, a transparent or translucent narrow film of very great length, on which a series of photographs consecutively represent the continuous development of movement or action in the persons or things which are the subjects of such photographs. This film by a photographic device is caused to pass with great rapidity by a set of lenses, through which, by use of a powerful electric light, the scenes which are the subject of the series of photographs are much enlarged and thrown upon a white screen. As one picture of the scene photographed succeeds another upon the screen with great rapidity, the impression produced upon the retina of the eye by the preceding picture continues longer than does the existence on the screen of the picture which produces the impression. As a result

the impression produced by one picture lasts approximately until the impression produced by the next succeeding picture occurs. The result is substantially that one sees a continuous moving picture, reproducing the action and movement of the scenes photographed upon the film." *Barnes v. Miner* (C. C.) 122 Fed. 480, 487. It must be conceded, therefore, that the character of the business contemplated by the plaintiff and for which he seeks a license comes as directly within the provisions of the original ordinance and its amendment as if "moving pictures" had been definitely named and described therein.

[4] In our opinion Ordinance No. 777, as originally enacted and subsequently amended, is still in force, and full effect may and should be given to its several requirements, notwithstanding the enactment and existence of Ordinance "No. 761, New Series." The last-mentioned ordinance does not purport to fully and completely cover the subject-matter of, or appear to be a substitute for, the earlier ordinance. The two ordinances are not in any wise conflicting. One does not purport to repeal the other either expressly or by implication. On the contrary, they are in complete harmony; and, as the last ordinance appears to be purely an auxiliary of the original ordinance, both must be read and construed together. When so read and construed, it is manifest that they formulate a reasonable, harmonious, municipal regulation of all forms of panoramic, kine-scope, and moving picture exhibitions, not only in regard to the location and character of the buildings in which such exhibitions may be given, but in regard as well to the kind and character of pictures which may be produced.

[5] The contention of plaintiff's counsel that the power to grant or refuse a permit for a license is arbitrary and dependent solely upon the mere whim and caprice of the police commissioners is readily refuted by a casual reading of the ordinances. It is a well-recognized rule of statutory construction that a general grant of power, unaccompanied by specific directions as to the manner in which the power is to be exercised, implies the right and duty to adopt and employ such means and methods as may be reasonably necessary to a proper exercise of the power. 2 *Lewis' Sutherland*, Statutory Construction, § 508; *DuPage County v. Jenks*, 65 Ill. 275; *Ex parte McManus*, 151 Cal. 331, 90 Pac. 702.

If, therefore, the ordinances under consideration did no more than denounce the issuance of a license without the previous procurement of a permit from the board of police commissioners, this in itself would imply and require an inquiry as to the propriety of granting a permit in any given case. *Goytino v. McAleer*, 4 Cal. App. 655, 88 Pac. 991.

Tested by this rule, it cannot be said that

the board of police commissioners is vested with an undefined and whimsical discretion in the matter of granting or refusing a permit. It is not necessary, however, to invoke this rule in aid of the validity of the ordinances here assailed, for they in express terms prescribe and limit the conditions under which a permit for a license may be applied for and granted.

[6] Neither can it be said that the conditions to be complied with are unreasonable or unnecessary. The manifest menace of fire and panic likely to result to school children and church congregations from the close proximity of kine-scope exhibitions is a valid and commendable reason for the proviso found in the amended ordinance prohibiting such exhibitions within 200 feet of a church or school unless at the time of the passage of such amended ordinance they were housed in buildings already erected or in the course of erection, and specially designed for that purpose; and the requirement of the supplemental ordinance that the applicant for a permit to engage in such business shall specify by street and number the precise premises in which he desires to locate is a reasonable and necessary expedient plainly intended and devised to aid in an intelligent and effective enforcement of the ordinance.

[7] These conditions apply equally and uniformly to all persons alike, and the direction that "no other restriction of such places as to the location of such places shall be considered by the board of police commissioners \* \* \*" is mandatory, and clearly contemplates that no discretion is given to withhold a permit if it be found that the location or building selected for the proposed enterprise conforms to the requirements of the ordinance. In other words, the ordinances impose upon the board of police commissioners the plain duty of granting a permit upon ascertaining that the conditions precedent to the performance of such duty exist; and the refusal of a permit in such a case would be an abuse of power rather than the exercise of a discretion, which could be reached and remedied by mandamus. *Ex rel. Coffey v. Chittenden*, 112 Wis. 575, 88 N. W. 587; *Reed v. Collins*, 5 Cal. App. 494, 90 Pac. 973; 2 *Abbott's Municipal Corp.* 985.

[8] The contention of plaintiff that the ordinance violates the rule of law which prohibits the delegation of legislative powers is untenable. As heretofore indicated, it is clear that the ordinances designate all of the conditions under which a permit for a license may be issued, and the requirement that a license shall issue only after a permit therefor has been granted by the board of police commissioners confers no power upon that board to determine the necessity for a license, or legislate as to the terms and conditions upon which it may be issued by the defendant as license collector. The require-



ment is but a preliminary step in the procedure prescribed for the procurement of a license, and in no sense can it be said to be an improper delegation of power. In re Guerrero, 60 Cal. 99, 10 Pac. 261; In re Bickstaff, 70 Cal. 39, 11 Pac. 393; Ex parte Fiske, 72 Cal. 125, 13 Pac. 310; In re Flaherty, 105 Cal. 564, 38 Pac. 981, 27 L. R. A. 529; County of Los Angeles v. Spencer, 126 Cal. 673, 59 Pac. 202, 77 Am. St. Rep. 217; Ex parte Quong Wo, on Habeas Corpus, 118 Pac. 714.

[8] It may be true, as plaintiff alleges in his petition, that the premises selected by him are not within 200 feet of a church or school; but the determination of this fact is vested in the board of police commissioners, and not in the plaintiff; and if it be true, as alleged in the answer of the defendant, that the plaintiff has ignored the provisions which require a permit as a condition precedent to the issuance of a license, the defendant cannot by mandamus be coerced into doing that which his plain duty under the law prohibits him from doing. The plaintiff, before he will be accorded any relief, must first submit to the jurisdiction of the board of police commissioners; and even then will not be heard to complain except upon a showing that the board ignored his petition entirely, or arbitrarily refused him a permit in the face of the undisputed or established fact that the specified restrictions did not apply to his case.

The judgment is reversed, and the lower court directed to overrule the plaintiff's demurrer to the answer of the defendant, and then proceed to a trial and determination of the issues raised by the pleadings in the case.

We concur: HALL, J.; KERRIGAN, J.

**WILSON et al. v. FIRST NAT. BANK OF LONG BEACH.** (Civ. 1,047.)

(District Court of Appeal, Second District, California. Nov. 7, 1911.)

**1. MUNICIPAL CORPORATIONS (§ 353\*)—IMPROVEMENT CONTRACTS—ASSIGNMENT—LIABILITY OF ASSIGNEE.**

That a municipal contractor assigned his contract to defendant bank, upon its agreement to collect the money to become due thereon, to pay the materialmen and subcontractors from the proceeds, and to apply the balance to the contractor's debt to the bank, requires the bank to satisfy claims of materialmen and subcontractors before applying any of the proceeds to its own claim.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 885; Dec. Dig. § 353.\*]

**2. MUNICIPAL CORPORATIONS (§ 376\*)—MUNICIPAL CONSTRUCTION CONTRACTS—ACTION AGAINST ASSIGNEE—PLEADING.**

A complaint, stating that a municipal contractor assigned a contract to defendant bank, on its agreement to pay materialmen and subcontractors from the proceeds, and to apply

the balance to the contractor's debt to the bank, that plaintiffs, as subcontractors, refused to proceed until assured by defendant that it would pay over to plaintiffs moneys falling due under the contract, etc., which defendant did, whereupon plaintiffs performed their work should be construed to charge the defendant as assignee, and not as guarantor.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 376.\*]

**3. PLEADING (§ 406\*)—UNCERTAINTY—WAIVER OF OBJECTION.**

An objection to a complaint for uncertainty is waived by failure to demur on that ground.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1355-1359; Dec. Dig. § 406.\*]

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Earl A. Wilson and others, partners as the Electric Supply & Fixture Company, against the First National Bank of Long Beach. Judgment for defendant, and plaintiffs appeal. Reversed.

Denio & Hart, for appellants. John E. Daly, for respondent.

JAMES, J. [1] A general demurrer to an amended complaint, filed by plaintiffs, was sustained, and leave to further amend was denied. Thereupon judgment was rendered for defendant, from which plaintiffs appeal. In this amended complaint it was alleged that one E. L. Plantico, on August 1, 1906, entered into a contract with certain property owners of the city of Long Beach, wherein it was agreed that Plantico was to construct certain bulkheads and sidewalks and erect electrical street lamps along a boulevard in front of the property of the other contracting parties; that Plantico then engaged plaintiffs, as subcontractors, to do certain of the electrical work, and that, before plaintiffs entered upon the doing of this work, Plantico assigned the main contract, which he had made with the property owners, to the defendant bank. Plaintiffs then allege, on information and belief, that the assignment so made by Plantico to the bank was "upon the consideration and understanding that said defendant corporation would hold said contract and collect the moneys to become due thereunder from the respective property owners as the same became due under the terms of said contract, and pay materialmen and subcontractors from the proceeds thereof, and apply the balance, if any, to certain obligations owed by said E. L. Plantico to said defendant bank." This allegation follows: "That thereafter, and before commencing work under their said contract with said E. L. Plantico, these plaintiffs went to said defendant corporation, and refused to proceed with said work, except upon the condition that said defendant corporation collected the moneys to become due under the terms of said contract, and would pay over to these plaintiffs the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

moneys to become due to them upon the completion of said contract by them, made with said E. L. Plantico, as aforesaid, and were assured by said defendant corporation that it would do the same; that upon such assurance plaintiffs thereupon commenced work under their said contract, made with said E. L. Plantico, as aforesaid, and completed the same according to its terms." There was the further allegation that the amount which had become due to plaintiffs under their contract was the sum of \$2,465.84, and that of this amount \$1,240, and no more, had been received by way of credit from defendant bank, and that the defendant had refused to make further payments thereon. It was also alleged on information and belief that the defendant bank had collected on account of money due under the contract assigned to defendant by Plantico more than enough money to pay all claims of subcontractors and materialmen. Under the alleged terms of the assignment made by Plantico to the bank, the latter became charged with the responsibility of satisfying the claims of the materialmen and subcontractors before applying any of the proceeds received upon that contract to its own account.

[2] As we view the amended complaint, sufficient facts are stated to constitute a cause of action, although there appears to be some uncertainty as to whether plaintiffs intended to rely upon the assurance of the bank that it would see them paid, as a distinct and original contract on the part of the bank, or upon the agreement of the bank, which formed a part of the consideration for the assignment made by Plantico, that moneys collected upon the main contract should be first applied in extinguishment of the claims of the materialmen and subcontractors. We think, however, that the pleading is reasonably susceptible of the construction that plaintiffs did not intend to allege a separate contract on the part of the bank, made with them by way of guaranty, but that, all of the allegations considered, the pleading should be construed as intending to set forth only the cause of action based upon the liability of the bank under the assignment of Plantico, which was made in part for the benefit of these plaintiffs. Construed in that way, no other effect need be given to the allegations, referring to the assurance given by the bank to plaintiffs, that it would see them paid, than to treat that allegation as meaning only that the defendant assured plaintiffs that it would comply with the terms of its agreement with Plantico to first pay out of moneys collected on the contract assigned to it the demands of the materialmen and subcontractors.

[3] A demurrer for uncertainty might properly have been urged against the complaint, but no such ground of demurrer was made

by the defendant, and that objection must therefore be deemed to have been waived. We think that the demurrer should have been overruled.

The judgment is reversed.

We concur: ALLEN, P. J.; SHAW, J.

#### RIDDER v. MORGAN.

(Supreme Court of Oklahoma. Nov. 16, 1910.  
Rehearing Denied Dec. 19, 1911.)

(Syllabus by the Court.)

#### 1. CONTRACTS (§ 170\*)—CONSTRUCTION—PRACTICAL CONSTRUCTION BY PARTIES.

Where the meaning of the terms used in a written contract is not clear, the subsequent acts of the parties showing the construction they have put upon the agreement themselves are to be looked to by the court.

[Ed. Note.—For other cases, see Contracts. Cent. Dig. § 753; Dec. Dig. § 170.\*]

#### 2. CONTRACTS (§ 176\*)—CONSTRUCTION—QUESTION OF LAW OR FACT.

The determination of the meaning of a written contract is ordinarily a question of law for the court, and not one of fact for a jury, but, where the construction depends upon extrinsic facts as to which there is a dispute, its construction is a mixed question of law and fact, and is for the jury under proper instructions from the court.

[Ed. Note.—For other cases, see Contracts. Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097; Dec. Dig. § 176.\* Trial, Cent. Dig. § 326.]

(Additional Syllabus by Editorial Staff.)

#### 3. EVIDENCE (§ 450\*)—PAROL EVIDENCE AFFECTING WRITINGS—ADMISSIBILITY.

A written agreement reciting that plaintiff pays the defendant a certain sum and agrees to pay a further sum when S. and L. by his guardian or otherwise, are placed in possession of their allotments of land in Chickasaw Nation, Ind. T., and that the defendant agrees to represent S. and L., or the guardian of L., in the matter of placing them in possession of their allotments, and in securing lawful leases from the guardian and having them approved by the United States court, is so ambiguous as to authorize the admission of evidence that plaintiff insisted that by the terms of the contract defendant was to secure him a lease on the allotments of S. as well as on the allotment of L., and that defendant so understood the contract and took some steps toward carrying his understanding into effect by entering into a compromise with a certain party with a view to procuring a lease on the allotments for the plaintiff.

[Ed. Note.—For other cases, see Evidence. Dec. Dig. § 450.\*]

Turner, J., dissenting.

Error from District Court, Marshall County; D. A. Richardson, Judge.

Action by E. A. Morgan against G. E. Ridder. Judgment for plaintiff, and defendant brings error. Affirmed.

J. O. Minter and Isaac O. Lewis, for plaintiff in error. J. W. Harreld and Chas. A. Coakley, for defendant in error.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Index

KANE, J. This was an action commenced by the defendant in error, plaintiff below, to recover from the plaintiff in error, defendant below, the sum of \$250. The petition alleged, in substance, that said plaintiff and defendant entered into a certain written contract whereby the defendant undertook and agreed to secure to the plaintiff a valid lease contract for five years on the allotments of land belonging to or owned by Sallie Sealy and Josiah Lewis, for which undertaking by said defendant said plaintiff agreed to pay said defendant the sum of \$500. Said defendant did obtain a lease contract on the allotment of Josiah Lewis' land, and plaintiff paid said defendant \$250, and also executed to said defendant his promissory note for the sum of \$250, payable on the 8th day of October, 1905, upon the condition that said defendant was to proceed to secure to said plaintiff a valid lease on the allotment owned by Sallie Sealy; that said defendant wholly failed and refused to secure for said plaintiff a valid lease on said allotment of Sallie Sealy; that said defendant before maturity for a valuable consideration sold said note for \$250 to the First National Bank of Madill, Ind. T., and said bank being an innocent purchaser said plaintiff was required to pay said note, which he did. That by reason of said defendant failing to procure the said lease of said land owned by said Sallie Sealy, the consideration of said note wholly failed, wherefore said plaintiff prayed judgment for \$250 and interest. The answer admitted the execution of said note and a written instrument, and alleged that by the terms of said written instrument said defendant undertook and agreed to secure to the plaintiff a valid lease contract for five years on the allotment of Josiah Lewis, but that he did not agree to secure a lease on the allotment of Sallie Sealy. Upon the issues thus joined the cause was tried to a jury, which returned a verdict in favor of the plaintiff, upon which judgment was duly entered. To reverse this judgment, this proceeding in error was commenced.

[3] The contract over which the controversy arose reads as follows: "Madill, I. T., December 19, 1904. This memorandum of agreement entered into by and between E. A. Morgan and G. E. Rider, witnesseth: That said Morgan pays the said Rider on this date, December 19, 1904, one hundred dollars, and agrees to pay him \$150.00 more when Sallie Sealy and Josiah Lewis, by his guardian or otherwise, is placed in possession of their allotments of land in the Chickasaw Nation, I. T., and to give the said Rider a note at said time said \$150 is paid for \$250 more, due November 1, 1905; and that said Rider in consideration of said sums of money agrees to represent said Sallie Sealy and Josiah Lewis, or the guardian of said Josiah, in the matter of placing them in possession of their allotments, and in securing lawful leases from said guardian and having same

approved by the United States court for the Southern District of Indian Territory. Witness our hands this December 19, 1904. [Signed] Geo. E. Rider, E. A. Morgan." The plaintiff introduced this contract in evidence and further testified that he was put in possession of the allotment of Josiah Lewis, mentioned therein, but that he had never had executed to him a lease of the Sallie Sealy land. The plaintiff then testified, over the objection and exceptions of the defendant, that subsequent to the execution of said contract, to wit, at the time of the execution of the promissory note for \$250 herein involved, he insisted that by the terms of said contract the defendant was to secure him a lease on the allotment of Sallie Sealy, as well as on the allotment of Josiah Lewis, and that said defendant so understood said contract and took some steps toward carrying this understanding into effect by entering into a compromise with one Holmes Willis who previously had lease contracts on both allotments, with a view to procuring leases thereon for the plaintiff. It was upon the introduction of this evidence that the main question argued by counsel in their briefs arose. To the introduction of this evidence the defendant objected, for the reason, "that the basis of this action is a written contract, as evidenced by the plaintiff's complaint herein; that the cause of action alleged by plaintiff in said complaint is one growing out of the breach, by defendant, of the terms of said alleged written contract; that the plaintiff has introduced in evidence a written contract covering the same subject-matter as the purported oral contract which he now seeks to establish; and that because the contract sued upon in this action is alleged by plaintiff to have been a written contract that the defendant is taken by surprise by the offering of evidence to prove an oral contract."

We do not believe it was error to let this evidence go to the jury. Section 1109, Compiled Laws of Oklahoma 1909, provides that, "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." It cannot be said that the contract introduced in evidence is entirely free from ambiguity. The name of Sallie Sealy figures in it as conspicuously as that of Josiah Lewis and practically in the same sense. We know of no valid reason why the appearance of her name and the reference to her allotment in the contract may not be explained by oral evidence, the language of the contract leaving this matter uncertain. To our mind the whole contract is so vague and uncertain that it would require some oral evidence to make entirely clear that by its terms defendant agreed to perform for the plaintiff the services he understands constitute complete performance.

[1] It is a well-settled rule that where the meaning of the terms used in a written contract are not clear, the subsequent acts of the parties, showing the construction they have put upon the agreement themselves, are to be looked to by the court. 9 Cyc. 588, and cases cited. We think the evidence objected to was competent for the purpose of showing the construction the parties themselves put upon their agreement.

[2] It is true that the determination of the meaning of a written contract is ordinarily a question of law for the court and not one of fact for a jury, but where the construction depends upon extrinsic facts as to which there is a dispute, its construction is a mixed question of law and fact, and is for the jury under proper instructions from the court. 9 Cyc. 591.

As the contract was ambiguous, and the evidence as to whether the defendant was to procure a lease to the Sallie Sealy allotment conflicting, the question was properly submitted to the jury, and, as there was evidence reasonably tending to support their verdict, it will not be disturbed. The judgment of the court below is affirmed.

DUNN, C. J., and WILLIAMS and HAYES, JJ., concur. TURNER, J., dissents.

MAYO et al. v. MILLS et al.  
(Supreme Court of Oklahoma. Dec. 12, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 773\*)—DISMISSAL—FAILURE TO FILE BRIEFS.

Where plaintiff in error fails to comply with the rules of this court, requiring him to serve a brief on counsel for defendant in error within 40 days after filing his petition in error, and at the same time to file 15 copies of his brief with the clerk of this court, his case, on being reached for submission, will be dismissed (Davis v. Elliott, 25 Okl. 483, 106 Pac. 838).

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3108; Dec. Dig. § 773.\*]

Commissioners' Opinion, Division No. 1. Error from District Court Sequoyah County; John H. Pitchford, Judge.

Action by James M. Mayo and John R. Mayfield, of the firm of Mayo & Mayfield, against Thomas Mills and Lucy Mills. Judgment for defendants, and plaintiffs bring error. Dismissed.

Robert E. Jackson, for plaintiffs in error. W. H. Browne, for defendants in error.

ROBERTSON, C. The petition in error and case-made in this appeal were filed in this court on January 11, 1910. No brief, as required by rule 7 (95 Pac. vi) of this court has been filed, and no excuse has been offered for the failure to so file, and by authority of Davis v. Elliott, 25 Okl. 483,

106 Pac. 838, the plaintiffs in error have waived their right to have the appeal heard in this court and the same is hereby dismissed.

PER CURIAM. Adopted in whole.

ALLEN v. KENYON.

(Supreme Court of Oklahoma. Dec. 12, 1911.)

(Syllabus by the Court.)

1. APPEAL AND ERROR (§ 1001\*)—REVIEW—SUFFICIENCY OF EVIDENCE.

Where a question of fact is submitted to a jury upon issues joined by the pleadings, and there is evidence reasonably tending to support the verdict, it will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3922, 3928; Dec. Dig. § 1001.\*]

2. PRINCIPAL AND AGENT (§ 124\*)—AUTHORITY OF AGENT—QUESTION FOR JURY.

The apparent authority of an agent is to be gathered from all the facts and circumstances in evidence, and is a question of fact for the jury.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 724; Dec. Dig. § 124.\*]

Commissioners' Opinion, Division No. 1. Error from Grant County Court; H. H. Rogers, Judge.

Action by Emma C. Allen against Blon F. Kenyon. Judgment for defendant, and plaintiff brings error. Affirmed.

J. B. Drennan, for plaintiff in error. F. G. Walling, for defendant in error.

ROBERTSON, C. This action was originally begun in the justice court of Grant county, on September 12, 1908, by Emma C. Allen, to recover \$25.76, alleged to be due as a balance on a promissory note, together with a \$15 attorney's fee and interest. Judgment was rendered in the justice court in favor of the plaintiff, but on appeal to the county court the defendant obtained a verdict.

It appears from the record, without dispute, that on June 6, 1903, Kenyon made a note, payable to plaintiff, in the sum of \$95, and delivered the same to her agent. The transaction was between Kenyon and plaintiff's father, who was duly authorized by the plaintiff to represent her in the deal. Several partial payments were made thereafter on said note by Kenyon, all of which were made to plaintiff's father or brother, except one of \$15, which was paid to her attorney. Throughout the entire transaction she was represented by an agent, either her father, brother, or an attorney, and at no time were there any transactions between plaintiff and defendant. The agency of the various parties was admitted by plaintiff in her testimony and was at no time denied by her, except as to the two last payments.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The defense of payment was interposed by Kenyon, although no written pleadings were filed by him in either the justice or the county court. Trial was had to a jury in the county court, and instructions to the jury and argument of counsel were waived.

[2] It plainly appears from the evidence that full payment of the note sued on had been made by the defendant, the only question being that the payments had been made to plaintiff's agents, instead of to plaintiff, and she, at the time of the trial for the first time denied the authority of her father or brother to accept payment for her, although she admitted their agency in the matter of several partial payments theretofore made, and also the agency of the father in taking the note in the first instance. The issues, on account of lack of pleading by the defendant and instructions by the court, were not well defined, and the jury in returning its verdict for the defendant found that the father and the brother in accepting the payments on the note as made by the defendant, acted as agent for the plaintiff, and that she had ratified their said acts, and that full payment had been made of the note sued on. The case, therefore, presents simply two controverted questions of fact, i. e., payment and agency. The authority of the agent is to be gathered from the facts and circumstances in evidence, and is a question of fact for the jury. *Minneapolis Threshing Machine Company v. Humphrey*, 27 Okl. 394, 117 Pac. 203; *Port Huron Eng. & Thresher Co. v. Ball*, 118 Pac. 393.

[1] The jury could not have decided the case any other way than that registered by their verdict, and the rule is well settled in this state that, where an issue of fact has been properly submitted to the jury, the verdict will not be disturbed if the evidence reasonably tends to support the finding. *Bennett v. Goodman*, 28 Okl. 776, 116 Pac. 180.

Finding no error in the record, the judgment of the county court of Grant county should therefore be affirmed.

PER CURIAM. Adopted in whole.

ATCHISON, T. & S. F. RY. CO. v. STATE  
et al.

(Supreme Court of Oklahoma. Dec. 5, 1911.)

(Syllabus by the Court.)

1. COURTS (§ 240½, \* New, vol. 8, Key No. Series)—JURISDICTION—SUPREME COURT—CONTEMPT OF CORPORATION COMMISSION.

Section 3 of an act of the Legislature, approved May 29, 1908, entitled, "An act providing for the punishment of any corporation, person or firm for contempt for violation of any order or requirement of the Corporation Commission" (Sess. Laws 1907-08, p. 228), allows an appeal to the Supreme Court by any person, firm, or corporation adjudged guilty of con-

tempt by the Corporation Commission for the violation of its orders.

2. COURTS (§ 240½, \* New, vol. 8, Key No. Series)—JURISDICTION—SUPREME COURT—APPEAL FROM CORPORATION COMMISSION.

Said statute was not repealed by act of the Legislature, entitled, "An act creating a Criminal Court of Appeals and defining the jurisdiction of said court" (Sess. Laws 1907-08, p. 201), nor by act of March 2, 1909, entitled, "An act perpetuating the Court of Criminal Appeals," etc. (Sess. Laws 1909, p. 170).

Appeal from the State Corporation Commission.

Proceedings by the State and J. F. McFadden against the Atchison, Topeka & Santa Fé Railway Company. From an order of the Corporation Commission adjudging the railway guilty of contempt, it appeals. Jurisdiction of the Supreme Court determined.

Cottingham & Bledsoe, for appellant. Chas. West, Atty. Gen., Chas. L. Moore, Asst. Atty. Gen. (C. J. Davenport, of counsel), for appellees.

HAYES, J. This is an appeal from an order of the Corporation Commission adjudging appellant guilty of contempt, and fining it for violation of one of the orders of the commission. In considering the questions raised on the merits of the appeal, the question of this court's jurisdiction suggested itself to the court; and, by request of the court, counsel for both parties have filed briefs herein upon the question of jurisdiction. Counsel for both appellant and appellees agree in the view that the court has power to hear and consider this cause, and, after consideration of their briefs, we have reached a like conclusion; but, since the question has been suggested and deemed by the court of sufficient importance to consider it separately, before considering the case upon its merits, we have decided to express our decision in writing for future guidance.

The ground upon which doubt as to the jurisdiction of this court first arose was that this is a criminal proceeding, and that the act perpetuating the Criminal Court of Appeals and conferring jurisdiction upon it in certain causes repealed the statute authorizing appeals from orders of the Corporation Commission fining persons or corporations for contempt for the violation of any of the orders of the commission. There cannot be any doubt that section 3 of the act of the first Legislature, approved May 29, 1908, entitled, "An act providing for the punishment of any corporation, person or firm for contempt for the violation of any order or requirement of the Corporation Commission of this state," etc. (Sess. Laws 1907-08, p. 228), allows an appeal from judgments of the commission adjudging any person or corporation guilty of contempt for violation of its orders, and confers upon this court jurisdiction to hear and determine

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes  
119 P.—61

same. It has been suggested that such right and jurisdiction existed without said act and were conferred by that part of section 2, art. 7, Const., reading as follows: "The appellate jurisdiction of the Supreme Court shall be coextensive with the state, and shall extend to all civil cases at law and in equity, and to all criminal cases until a Criminal Court of Appeals, with exclusive appellate jurisdiction in criminal cases, shall be established by law."

It has been suggested that by this provision of the Constitution appellate jurisdiction is conferred upon the Supreme Court, and the right of appeal thereto is granted to litigants in all cases, civil or criminal, until exclusive appellate jurisdiction in criminal cases is vested in a Court of Criminal Appeals, established by law. For the purposes of this case, it is unnecessary, as it will appear later, to determine whether a proceeding before the Corporation Commission against a person to punish a person for violation of an order of the commission is a criminal action, for, if we assume it to be such, we do not think that the foregoing provision of the Constitution conferred jurisdiction upon this court to entertain an appeal from a judgment rendered by the commission in such an action. This constitutional provision constitutes a part of the chapter of the Constitution establishing the judicial department and defining the jurisdiction of the various court constituting that department. The character of cases therein contemplated are those that arise and are determined by the inferior courts of the state, created and organized by virtue of the Constitution, or by law enacted in pursuance thereof. While the Corporation Commission may and does possess some powers judicial in character, it is primarily a commission of legislative and administrative powers, and is not a part of the judicial department of the government.

Another section of the Constitution is devoted to providing for appeals from certain orders of the Corporation Commission and regulating the procedure thereof. Section 20, art. 9, Const. This section, among other things, provides that from any action of the commission prescribing rates, charges, or classifications of traffic or affecting the train schedule of any transportation company or requiring additional facilities, convenience, or public service of any transportation or transmission company, or refusing to approve a suspending bond, or requiring additional security thereon, an appeal may be taken by the persons therein designated to this court, and that such appeal shall be taken unless otherwise provided by law in the same manner in which appeals may be taken from the district courts. Applying the familiar principle, *ex pressio unius exclusio alterius*, appeals from orders of the commission adjudging persons guilty of contempt not being included among the cases in which ap-

peals are specifically authorized, the right to appeal therein is excluded.

Said section also provides that: "The Legislature may also by general laws provide for appeals from any other action of the commission, by the state, or by any person interested, irrespective of the amount involved." By this clause of the section we think it is made evident that it was intended that there should be appeals only in the actions specifically mentioned, for it authorizes the Legislature to provide for appeals from any other action of the commission, referring evidently to other actions than those enumerated in the preceding part of the section. This must have been the interpretation of these provisions by the Legislature; for, if the right of appeal in contempt proceedings before the commission is conferred by section 2, art. 7, Const., then the act of May 29, 1908, *supra*, in so far as it provides for appeals in such cases, was useless. That act authorizes an appeal to be taken in such cases to the Supreme Court, which court, under the limitations of section 20, was probably the only court to which the Legislature was authorized to provide for appeals from any action of the commission; for said section also provides immediately following the sentence quoted above that: "All appeals from the commission shall be to the Supreme Court only, and in all appeals to which the state is a party, shall be represented by the Attorney General or by his appointed representative." The legislative act providing for appeals to this court in contempt proceedings before the commission contained the emergency clause, and became effective on the date of its approval, to wit, May 29, 1908. On May 18th theretofore there was approved an act by the same Legislature creating and establishing a Criminal Court of Appeals and defining its jurisdiction. Sess. Laws 1907-08, p. 291. This act did not carry the emergency clause, and hence did not become effective until a time subsequent to the foregoing act, allowing appeals in contempt proceedings before the Corporation Commission. Section 2 of the act creating the Criminal Court of Appeals and defining its jurisdiction provides that it "shall have exclusive appellate jurisdiction in all criminal cases appealed from the county and district courts of this state." This language defining the court's jurisdiction is specific, and includes only cases arising in the district and county courts of the state; and there are no general terms in the act granting jurisdiction which could include proceedings before the Corporation Commission.

Again, these two acts, having been enacted almost contemporaneously by the same Legislature, if there were any doubtful conflict between them, ought to be construed so as to permit both of them to stand. The act of May 29, 1908, therefore, providing for appeals to the Supreme Court in contempt proceedings before the commission, was not

repealed by the act creating the Criminal Court of Appeals.

On March 2, 1909, there was approved an act by the Legislature entitled, "An act perpetuating the Criminal Court of Appeals, defining its duties, powers and jurisdiction." Sess. Laws 1909, p. 170. This act contains two different sections in which the limits of the jurisdiction of the court perpetuated by the act is defined. The seventh section thereof reads: "The Criminal Court of Appeals shall have exclusive appellate jurisdiction in all criminal cases appealed from county and district courts in this state, and such other courts as may be established by law." It will be noted that this section confines the appellate jurisdiction of this court to criminal cases from certain specific courts now existing in the state, and from such other courts as may be established by law. It does not include, either by specific terms or in general terms, cases from the Corporation Commission. Section 9 of the act provides: "The Criminal Court of Appeals shall have exclusive appellate jurisdiction co-extensive with the limits of the state in all criminal cases, in the manner and under such regulations as may be prescribed by law." We do not think that the purpose of this section was to extend the jurisdiction of the court to any other classes of cases than those enumerated and provided for in section 7. It is true that the terms of section 9, in that it provides that the court created by the act shall have exclusive appellate jurisdiction, coextensive with the limits of the state in all criminal cases, standing alone, might be more comprehensive than the language of section 7; but we think the purpose of the ninth section was to prescribe the manner and under what regulations the court should exercise its jurisdiction, rather than to define or extend that jurisdiction as defined by section 7, and that the general terms of the latter are to be construed as limited and restricted by the specific terms of the former section. "The application of the words of a single provision may be enlarged or restrained to bring the operation of the act within the intention of the Legislature, when violence will not be done by such interpretation to the language of the statute." 2 Lewis' Sutherland Stat. Construction, p. 665. And "general words in one part may be controlled and restrained by particular words in another, taken as expressing the same intention with more precision." *Id.* p. 666.

We think, therefore, the general terms of section 9, conferring exclusive appellate jurisdiction coextensive with the state upon the Criminal Court of Appeals in all cases, is to be construed in connection with and as limited by the specific terms of said section 7, and as not including such cases as may be criminal or of a criminal character arising

before boards or commissions of the character of the Corporation Commission. That act contains no clause specifically repealing any statute. Observing the well-established principle that repeals by implication are not favored, and assuming that the proceeding in this case is a criminal action, we think the statute conferring jurisdiction in such cases upon this court has not been repealed.

We have avoided deciding whether this proceeding is a criminal action or a civil action, because whichever it may be could not affect the conclusion we have reached upon the question of jurisdiction. A decision upon that question may become of importance in the application of the principles of the law to the merits of the case or of similar cases hereafter arising; and we have preferred to postpone our decision upon it until it shall be necessarily involved in determining some question before us.

TURNER, O. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

SAUNDERS et al. v. MULLEN et al.  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

APPEAL AND ERROR (§ 336\*)—DEFECT IN PARTIES—DISMISSAL.

Dismissed for failure to join necessary parties, upon the authority of *Strange et al. v. Crismon*, 22 Okl. 841, 98 Pac. 937, and other cases cited.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1870; Dec. Dig. § 336.\*]

Error from District Court, Stephens County; Frank M. Bailey, Judge.

Action by J. S. Mullen and others against S. F. Saunders and others. Judgment for plaintiffs, and defendants bring error. Dismissed.

Gilbert & Bond, for plaintiffs in error. H. A. Ledbetter, for defendants in error.

KANE, J. This cause comes on to be heard upon the motion of defendants in error to dismiss the appeal, based upon several grounds, one of which, at least, we think is well taken. The third ground for dismissal is that: "This court is without jurisdiction to entertain this appeal, for the reason that all the parties against whom judgment was rendered in the trial court have not been made party plaintiffs in error on appeal." The record shows that judgment was rendered below against S. F. Saunders, A. O. Mallory, Cassie Pritchard, D. L. Brewer, T. Maynard, J. H. Jennings, and Newt Singleton, O. M. Nichols, N. B. Woolsey, R. E. Faris, Henry Pruitt, and W. N. Brown, and that Saunders, Mallory, Pritchard, Brewer, Maynard, Jennings, and Singleton joined as plaintiffs in error, making Mullen and Rob-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

berson defendants in error, eliminating as parties in this court Nichols, Woolsey, Farris, Pruitt, and Brown. The point is made by counsel for plaintiffs in error that as part of the judgment debtors who are omitted as parties were merely sureties that they could not be affected by a reversal of the judgment; and therefore the appeal ought not to be dismissed on that ground.

This contention cannot be sustained. The judgment is joint in form, and it is impossible to distinguish the case at bar from *Strange et al. v. Crismon*, 22 Okl. 841, 98 Pac. 937, where the parties omitted from the record were sureties, and the appeal was dismissed upon the authority of a long line of Oklahoma Territory cases. This court has followed *Strange et al. v. Crismon*, supra, in *Weisbender et al. v. School District No. 6, Caddo County*, 24 Okl. 173, 103 Pac. 639; *John v. Paulin et al.*, 24 Okl. 636, 104 Pac. 365; *Hughes v. Rhodes*, 25 Okl. 172, 105 Pac. 650; *Selbert v. First National Bank of Okeene*, 25 Okl. 778, 108 Pac. 628; *Continental Gin Co. v. Huff et al.*, 25 Okl. 798, 108 Pac. 369; *First National Bank of Holdenville v. Jacobs*, 26 Okl. 840, 111 Pac. 303; *Vaught v. Miners' Bank of Joplin*, 27 Okl. 100, 111 Pac. 214.

The appeal must be dismissed. All the Justices concur.

**CITY OF WOODWARD et al. v. RAYNOR.**  
(Supreme Court of Oklahoma. Oct. 17, 1911.)

*(Syllabus by the Court.)*

**1. MUNICIPAL CORPORATIONS (§ 867\*)—BONDS—DETERMINATION AS TO ISSUANCE—SUBMISSION TO POPULAR VOTE—"APPRISED."**

A proposition, referring to the qualified property taxing voters of a city whether said city shall be allowed to become indebted for the purchase, construction, or repair of public utilities under section 27, art. 10, of the Constitution, was set forth in the ballot title used in the election held for the purpose of voting on the proposition, which read: "Shall the city of W., V. county, Oklahoma, incur an indebtedness by issuing its negotiable coupon bonds to the amount of \$30,000.00 for the purpose of providing funds for the construction for an electric light plant in and to be owned exclusively by said city? \* \* \*." Held that, by thus notifying him that the kind of public utility proposed was "an electric light plant to be owned exclusively by the city," the voter was sufficiently apprised of the nature of such utility, within the contemplation of said section of the Constitution and the rule laid down in *Coleman v. Frame*, 26 Okl. 193, 109 Pac. 928, 31 L. R. A. (N. S.) 556.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1841; Dec. Dig. § 867.\*]

For other definitions, see *Words and Phrases*, vol. 1, p. 465.]

**2. INJUNCTION (§ 136\*)—TEMPORARY INJUNCTION—ACTUAL OR ANTICIPATED INJURY.**

A temporary injunction should never be granted because of the mere apprehension of the petitioner that injury may be done. And where

such injunction is granted upon the allegations of the petition, based upon such grounds, the same will be reversed on appeal.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 305, 306; Dec. Dig. § 136.\*]

Error from District Court, Woodward County; R. H. Loofbourrow, Judge.

Suit by John Raynor against the City of Woodward and others. From an order granting a temporary injunction, defendants bring error. Reversed and remanded, with directions to dismiss petition.

Fred M. Elkins, Chas. R. Alexander, and Chas. A. Loomis, for plaintiffs in error. David P. Marum and Devereux & Hildreth, for defendant in error.

**TURNER, C. J.** From an order granting a temporary injunction, entered in the district court of Woodward county, November 11, 1910, restraining them from issuing a certain \$30,000 worth of municipal electric lighting bonds described in plaintiff's petition, and enjoining defendants from doing any act imposed by law tending to subject the property of plaintiff to the payment of taxes assessed to pay interest thereon and create a sinking fund, plaintiffs in error, defendants below, bring the cause here.

It is assigned that the court erred in overruling the demurrer, in that the petition fails to state facts sufficient to constitute a cause of action. The petition is filed by plaintiff, John Raynor, a resident taxpayer of said county and the city of Woodward, who, after alleging the corporate existence of said city, and that defendants Frank K. Tucker and W. H. Wilcox are, respectively, the duly elected county clerk and county treasurer of said county, further alleges that, pursuant to ordinance No. 88 of the city council of said city, passed and approved July 8, 1910, entitled "An ordinance relative to the construction of an electric light plant and additions, extensions and repairs to a system of waterworks in and to be owned exclusively by the city of Woodward, Woodward county, Oklahoma, and calling an election for the purpose of submitting to the qualified property taxing voters of said city the proposition of issuing negotiable coupon bonds of said city of the sum of \$65,000.00 for said public utilities, being \$30,000.00 for the construction of said electric light plant, and \$35,000.00 for the construction of said addition, extension and repairs to the said system of water works"—and pursuant to a proclamation of the mayor of said city calling the same, an election of the resident taxing voters of said city was held on August 17, 1910, whereat there was submitted to said voters, pursuant to article 10, § 27, of the Constitution, the proposition indicated on the ballot prescribed by said ordinance and set forth in said proclamation and used at said election, which read: "Shall the city

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



of Woodward, Woodward county, Oklahoma, incur an indebtedness by issuing its negotiable coupon bonds to the aggregate amount of \$30,000.00 for the purpose of providing funds for the construction of an electric light plant in and to be owned exclusively by said city; and levy and collect an annual tax upon all of the taxable property in said city sufficient to pay the interest on said bonds as it falls due, and also to constitute a sinking fund for the payment of the principal thereof, within 25 years from their date, said bonds to be dated September 1st, 1910, and to become due and payable at such time or times but not more than 25 years from their date, as the council may prescribe, and to bear interest at the rate of not to exceed six per cent. per annum, payable semiannually? ( ) Yes. ( ) No." That at said election there was cast for the proposition 178 votes and against the proposition 59 votes, making a majority of 114 votes in favor of the bonds for the construction of the electric light plant. (There is no controversy over the waterworks bonds.) That, by virtue of said ordinance and vote, said city is "now proposing and intending and, unless prohibited by the order and injunction of this court, will issue bonds for the establishment of said light plant to the amount of \$30,000, and will levy a tax on all the property in the city of Woodward, and on the property of this plaintiff, among others, to establish a sinking fund to pay the principal at maturity," all of which, he says, will be a cloud on his property in said city. He alleges that said ordinance and proclamation are indefinite and uncertain, "in that said proclamation and ballot title do not apprise the voters of said city of the extent of the alleged utility therein proposed, in that the said proclamation and ballot title leave it indefinite and uncertain as to whether it was the intention to submit a proposition to the people, limiting the proposed electric light plant for public use only, or whether it was intended to maintain and operate a mercantile electric plant"; and "that said submission and ballot title are void, because, he says, they do not specifically and definitely apprise the voter of the nature of the public utility sought to be constructed, as required by the Constitution and laws of the state.

He further alleges that on January 19, 1906, the defendant city entered into a contract with the Woodward Cotton Company, a domestic corporation, whereby it was agreed that said company would furnish to said city for a term of 20 years such arc lights as it might need to light its streets and public places at \$10 per arc light per month (setting forth the contract); that said franchise granted by the city to said company on September 29, 1905, by ordinance No. 54, set forth in the petition, was duly accepted by said company, which said franchise was to run for 20 years; that in a

certain action in the Circuit Court of the United States for the Western District of Oklahoma, wherein said company was plaintiff and said city was defendant, it was alleged by plaintiff that said city intended to furnish all the lights for the lighting of its streets and public places by the municipal lighting plant provided for in said ordinance No. 88; that said city therein denied that it intended to violate said contract set forth in plaintiff's bill of complaint, and denied that it intended to refuse to allow plaintiff to furnish said city 10 arc lights mentioned in said contract, and further denied that defendant was threatening and intending to abrogate said contract, but stated that it had never taken any action in reference to or concerning said contract, other than to approve, allow, and pay the monthly bill presented thereunder by plaintiff; that by reason of said pleadings (set forth verbatim), duly verified, said city expressly states and avers that it does not intend to make use of its municipal lighting plant provided for in said ordinance No. 88 for the purpose of lighting the streets and public places of said town, but that it does intend for 14 years to come to pay to said company the sum of \$10 per month for arc lights for lighting the streets and public places of said city; that, by reason of the concealment of those facts from the voter, and leading him by the proclamation and ballot title to suppose otherwise, the proposition contained in the ballot title was so unfairly and fraudulently submitted as to render the election illegal and void; that, unless restrained, said city "will erect an electric lighting plant, under said ordinance and vote, for mercantile purposes, and for the purpose of furnishing electricity at a profit to the private individuals and corporations; and this plaintiff says that he is informed and believes, and so charges, that an electric lighting plant for mercantile purposes, and for the purpose of selling electricity for private use at a profit, is not a public utility, and that the issuance of bonds and the levy of tax on the property of this plaintiff and others, for such purpose, is not authorized by the laws of the state of Oklahoma, and is illegal and void"—and prays that the city be restrained from issuing said bonds, etc., and for general relief.

[1] There is no question that the bonds carried, and were properly so declared. Against the demurrer, it is urged that the ballot title is insufficient to warrant the issuance of the bonds and the levying of the taxes, in that: "Nothing is said in this proposition as to how this lighting plant is to be operated, or for what it is to be used; the voter is left in the dark as to whether the city intends to operate this light plant itself, or whether it intends to use it as a mercantile plant and to sell electricity at a profit. Nothing is said in the ballot title that the money to be raised by the issuing of these bonds and the levying of this tax

is to be used solely for the purpose of constructing and operating an electric light plant; its manner of operation is left out entirely. The extent and size of the electric light plant is not mentioned. Nothing is said in this ballot title and there is no restriction on the use of the money, and before taxes can be levied and the money of the citizen taken, under section 27, art. 10, it is necessary to submit the question to the people in such a way that the funds arising from the indebtedness incurred may not be used for any other purpose."

The only authority cited in support of this proposition is *Coleman v. Frame*, 26 Okl. 193, 109 Pac. 928, 31 L. R. A. (N. S.) 556, and the rule there laid down is invoked that: "A proposition of attempting to refer to the qualified property taxpaying voters of a city whether said city shall be allowed to become indebted for the purchase, construction, or repair of public utilities, under section 27, art. 10, of the Constitution, must be stated in such specific language as to apprise the voter of the nature of the public utility the city wishes to purchase, construct, or repair."

When the ballot title submitted at said election, as it did, the proposition of the incurring of an indebtedness by the city of \$30,000 for the purpose of providing funds "for the construction of an electric light plant to be owned exclusively by said city," the same was sufficiently specific, as to the nature of the public utility the city wanted to construct, to fall squarely within the rule laid down in that case. The requirement to apprise the voter of the "nature" of the public utility meant that the ballot title should in specific language notify him only of the kind, sort, or character of such public utility. In *State v. Murphy*, 23 Nev. 390, 48 Pac. 628, following *State v. Birchim*, 9 Nev. 95, the word "nature," when used in a statute requiring a recognizance in a criminal case to state the nature of the offense of which the defendant was charged, was held to mean the sort, kind, character, or species of the offense. See, also, *Web. Inter. Dict.*

In *State ex rel. Edwards v. Millar, Mayor*, etc., 21 Okl. 448, 96 Pac. 747, we held that: "The term 'for the construction of waterworks in said city, to be owned and operated by said city,' printed on the ballot used at an election held for the purpose of submitting to the qualified electors of a municipality the question of incurring indebtedness for the construction of public utilities, under section 27, art. 10, of the Constitution, is sufficiently comprehensive to include such work as re-equipping and making extensions to an existing waterworks system." Hence, by notifying him that the kind of public utility proposed was "an electric light plant, to be owned exclusively by the city," the voter was sufficiently apprised of the nature of such utility, within the contemplation of

the rule in the *Frame Case* and said section of the Constitution.

[2] It is next urged that the question: "Is a municipality authorized to issue bonds and to support by taxation an electric light plant for the purpose of selling electricity to private persons at a profit, and, if they are, can they do so without appropriating in the ordinance ordering the election the net income to the payment of the interest and principal on the bonds? is presented on the face of the petition; that the court in overruling the demurrer thereto and granting the injunction answered it in the negative; and that in so doing the court was right. We cannot concede the major premise, for the reason that the petition fails to state facts sufficient to show a threatened injury, and, in effect, no reasonable ground for apprehending that the city contemplated or was proposing to issue the bonds in question "to support by taxation an electric light plant for the purpose of selling electricity to private persons at a profit." To restrain on that ground, the petition must state facts sufficient to show that reasonable grounds existed for apprehending that the threatened injury was about to be attempted. This was not done, even by fair intendment. The petition states no more than a bare apprehension of injury. On this point, after alleging the ballot title to be so indefinite and uncertain as to leave it doubtful whether it was thereby intended to submit to the voters the propositions limiting the proposed electric light plant to public use only, or whether it was intended to maintain and operate it as a "mercantile electric plant," the petition seeks in vain to work out an inferential threat of injury on the part of the city to use it for the latter purpose, and for "selling electricity to private persons at a profit," by further alleging, in effect, that the city was under contract with a certain company, whereby the former agreed to accept and the latter agreed to furnish, as we read the contract, 10 electric arc lights at so much per light per month for 20 years, during which the city had granted and said company had accepted a franchise to construct, operate, and maintain an electric light plant in said city; that in a certain cause theretofore pending in a certain court between said company and the city the former pleaded that the latter intended to furnish its own light by the municipal lighting plant, to pay for which the bonds in question are sought to be issued; that the city denied it sought to violate or was threatening to abrogate the said contract with said company, and that it refused to allow said company to furnish the lights it agreed to accept under said contract; and that it had never taken any action on the same, other than to live up to said contract.

From this the pleader then deduces, but not to our satisfaction, and charges that

the city does not intend to keep its contract with said company or make use of its said proposed lighting plant for lighting its streets and public places; and hence, although the petition does not so charge, the pleader would have us infer, which we cannot fairly do, a threatened injury, to wit, that the city must be intending to use said plant for "selling electricity to private persons at a profit." And, without alleging any other ground upon which to base a threatened injury, or, indeed, without alleging that any threat of injury was ever made, the pleader draws the conclusion, amounting to no more than the mere apprehension of an injury, not even threatened, that the city, unless restrained, "will erect an electric lighting plant, under said ordinance and vote, for mercantile purposes, and for the purpose of furnishing electricity at a profit to the private individuals and corporations; and this plaintiff says that he is informed and believes, and so charges, that an electric lighting plant for mercantile purposes, and for the purpose of selling electricity for private use at a profit, is not a public utility, and that the issuance of bonds and the levy of tax on the property of this plaintiff and others, for such purpose, is not authorized by the laws of the state of Oklahoma, and is illegal and void."

Where there exists, as here, no reasonable grounds for apprehending that the injury sought to be enjoined will be attempted, a temporary injunction should not be granted, or, if granted, should be dissolved. This was our holding in *Hodgins v. Hodgins*, 23 Okl. 625, 103 Pac. 711. This was an appeal in a divorce suit from an order of the district court of Comanche county dissolving a temporary injunction obtained on the allegations of defendant's cross-petition, which was sworn to, and in substance charged plaintiff with cruelty and nonsupport; that, by reason of financial assistance from her father, plaintiff was able to provide a home for defendant and her children, and bought a relinquishment to a certain tract of land therein described, whereon he made homestead entry. She further alleged: "That it is the present intention of plaintiff, as she believes, to wholly deprive her and her children of their said home, and that her father has given her, and to appropriate same to his own use and benefit; \* \* \* that if defendant be not restrained he will relinquish title to the above tract of land, the title to which is still in the government, back to the government, or sell the same and the improvements thereon, and deprive defendant of the benefits thereof." She prayed for and obtained a temporary injunction, restraining plaintiff from relinquishing said homestead entry. In passing we said: "To entitle defendant to a temporary injunction, it was necessary for her to show clearly and by proper averment in her cross-pe-

tition that plaintiff had done, or was threatening to do, some act which would produce irreparable injury to her, and that such act would in all probability be committed, unless restrained. 16 Am. & Eng. Law, 360, 361." And speaking to the allegations of the cross-petition: "Such allegations expressed nothing more than a bare apprehension of injury, which, so far as the face of the petition shows, is groundless, and which, it is well settled, is not sufficient, as courts cannot grant injunctive relief to allay the fears and apprehensions of individuals. 16 Am. & Eng. Enc. Law, 361"—and affirmed the judgment of the trial court. In support of this doctrine, we cited *Lutheran Church v. Maschop*, 10 N. J. Eq. 63; *Penn. Ry. Co. v. National Docks & C. Co.*, 52 N. J. Eq. 555, 30 Atl. 580; *Goodwin v. N. Y., N. H. & H. Ry. Co.*, 43 Conn. 494; *Sherman v. Clark*, 4 Nev. 138, 97 Am. Dec. 516; *Home Ins. Co. v. Nobles et al.* (C. C.) 63 Fed. 642; *Mariposa Co. v. Garrison*, 26 How. Prac. (N. Y.) 448.

In *Lutheran Church v. Maschop*, supra, appellant was a religious corporation and appellee its pastor. He had been deposed for misconduct by a vote of the members of its congregation, acting under rules and regulations adopted for its government, but sought to officiate in spite of such deposition. In passing on a bill, sought to enjoin him, the court denied relief, and said: "The bill further alleges that Mr. Maschop intends to take measure to deprive such members as are opposed to him of their right to vote, and compel such members to take pews and contribute to his support, or else to be disfranchised of any right to vote in matters affecting the church property, and so to depose the present trustees, and thereby obtain undisputed possession of the church for his own purpose. The court is asked to interfere to prevent this. From anything that appears upon the face of this bill, these apprehensions of the complainants are entirely groundless. The court cannot grant an injunction to allay the fears and apprehensions of individuals. They must show the court that the acts against which they ask protection are not only threatened, but will in probability be committed, to their injury."

In *Goodwin v. N. Y., N. H. & H. Ry. Co.*, supra, an order and decree of the superior court, dismissing the bill, was brought to the Supreme Court of Errors. Among other things, petitioner, in substance, on oath, as to defendant, alleged: "That it had theretofore issued free passes to the members of the General Assembly; that he was apprehensive that the present officers would issue free passes to the said members, to be elected after the date of his petition, and prayed that it be restrained from doing so." On the petition, so verified, the court issued the injunction as prayed, and at a subsequent term made findings of facts and dis-

missed the bill. The Supreme Court of Errors affirmed the judgment of the superior court, and in passing said: "The only remaining clause in the finding which has a bearing on the question in hand, and on which any claim can be made for a judgment in favor of the petitioner, is this: That the petitioner was apprehensive, from the previous course of the company's business, and from the position taken by some of the officers at the last meeting of the stockholders of the company, that the present officers would issue complimentary tickets to members of the General Assembly to be elected after the date of his petition. No court of equity should ever grant an injunction merely because of the fears or apprehensions of the party applying for it. Those fears or apprehensions may exist without substantial reasons; indeed, they may be absolutely groundless. Restraining the action of an individual or a corporation by injunction is an extraordinary power, always to be exercised with caution, never without the most satisfactory reasons. Not the applicant only, but the court, must be satisfied that a wrong is about to be done, or an injury is about to be sustained, which, practically, will be irreparable, before resort should be had to this extreme power. This record shows no such state of things. Certain reasons, indeed, are given why the petitioner entertained apprehensions as to the course which those respondents in the future might pursue; but the record is silent as to whether those apprehensions were well or ill founded. There is no finding by the court that the respondents contemplated doing, or proposed doing, any act which the petitioner sought to restrain them from doing, and so the case stands merely on the apprehensions of the petitioner—quite too narrow a basis to support an injunction."

Taking this view of the cause, it would be unprofitable to discuss, assuming that it was properly pleaded that the city contemplated and was threatening to construct and use said plant for selling electricity to private persons at a profit, whether the city could be enjoined from so doing in view of article 18, § 6, of the Constitution, giving to every municipality within the state the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation, etc.

We are therefore of opinion that, as the petition failed to state facts sufficient to constitute a cause of action, in that it failed to state more than a bare apprehension of injury, which on the face of the petition appeared to be groundless, the court erred in granting the temporary injunction complained of, and for that reason the cause is reversed and remanded, with directions to dismiss the petition. All the Justices concur.

**PIONEER TELEPHONE & TELEGRAPH CO. v. GRANT COUNTY RURAL TELEPHONE CO. et al.**

(Supreme Court of Oklahoma. July 11, 1911.)

(Syllabus by the Court.)

**TELEGRAPHS AND TELEPHONES (§ 55\*)—RECEIVING MESSAGES OF RURAL TELEPHONE COMPANY—ORDER OF CORPORATION COMMISSION.**

The G. C. Rural Telephone Company petitioned the Corporation Commission for an order requiring the P. T. & T. Company to receive and transmit its messages without delay or discrimination, and to make connection with its line under proper rules and regulations. The Commission entered an order requiring such physical connection, and the transmission of messages. This order, as modified, is affirmed.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 55.\*]

Appeal from the State Corporation Commission.

Petition of the Grant County Rural Telephone Company and others to compel the Pioneer Telephone & Telegraph Company to physically interconnect its plant with that of petitioner. From an order of the Corporation Commission granting the petition, the Pioneer Telephone & Telegraph Company appeals. Modified and affirmed.

Hunt Chipley (Edward P. Meany, Henry E. Asp, and S. H. Harris, on the brief), for appellant. Chas. West (C. J. Davenport, on the brief), for appellees.

**WILLIAMS, J.** This is an appeal from the order of the Corporation Commission, made and entered on the 13th day of August, 1909, in which the appellant is directed to physically interconnect its telephone plant with that of the appellee company, and thereafter to receive and transmit its messages without delay and discrimination.

The appellant is engaged in a general public telephone business throughout the state, furnishing exchange telephone service from various exchange plants located in many cities and towns within the state, including the city of Pond Creek, and also furnishing toll or long-distance service over its toll or long-distance lines constructed generally throughout the state, including toll or long-distance service to and from the city of Pond Creek.

At the time of the hearing before the Commission, the appellee company had about 71 telephones in the city of Pond Creek and 14 rural telephone lines diverging therefrom and extending over Grant and Garfield counties. By connections with the appellant, the appellee, for its members, could obtain connections for long-distance purposes.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

M. D. Sullivan, a witness on the part of the appellee, testified in part as follows: "Q. How many phones have you in the town of Pond Creek? A. Seventy-one, and I expect in a few days to have 20 or 25 more. Q. What are the rates you are charging there? A. \$1 for business phones, and 50 cents a month for residence phones. Q. What are you charging for your rural line? A. Twenty-five cents a month. Q. How many subscribers have you on those lines? A. All the way from 10 to 30. Q. And that number can be handled in a proper manner by making this long-distance connection which you are requesting the Commission to give you? A. Yes, sir; I am satisfied it can. \* \* \* Q. Now, what do you charge for the same? A. One dollar for business and 50 cents for residence phones. That is to the stockholders of the company. Q. Supposing a man is not a stockholder, then what? A. The company has refused to furnish phones as yet; but we have put in 3 or 4 phones. If a man will purchase a phone, we will install. \* \* \* The phone will cost him \$10. Q. Then the rates of the two phones are considerably different? A. Oh; yes. Q. That is the idea I wanted to get into my head. It is the plan to refuse, except to the stockholders? A. Why, I have got by-laws of this company in my pocket. When we organized this company, there were 75 business men and residents that agreed to subscribe \$25 towards poleing and wiring the town. That is pole and wire the town, and meet the rural lines at the city limits. \* \* \* Q. Up to date, the town subscribers in your company have paid \$12 in subscriptions and \$25 in stock for telephones? A. I do not understand your question. Those who subscribe pay \$25; business men pay \$1 for phone and private residents, 50 cents. Q. If they have stock in the company, they get their business phone for \$1 and residence phone for 50 cents? A. Yes, sir. Q. So, for the first year, it will cost them only \$18 for their houses and offices, plus \$25 for the stocks? A. Yes, sir."

Section 5, art. 9, of the Constitution, is as follows: "All telephone and telegraph lines, operated for hire, shall each respectively receive and transmit each other's messages without delay or discrimination, and make physical connections with each other's lines, under such rules and regulations as shall be prescribed by law, or by any commission created by this Constitution, or any act of the Legislature for that purpose."

Section 2 of the same article also provides: "Every railroad, oil pipe, car, express, telephone or telegraph corporation or association organized or authorized to do a transportation or transmission business under the laws of this state for such purpose, shall, each respectively, have the right to construct and operate its line between any points in this state, and as such to connect at the

state line with like lines; and every company shall have the right with its road or line, to intersect, connect with, or cross any railroad or such line."

A telephone company is a transmission company. Section 34, art. 9, of the Constitution.

Section 18 of article 9 of the Constitution, in part, provides: "The Commission shall have the power and authority to be charged with the duty of supervising, regulating and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses and preventing unjust discrimination and extortion by such companies; and to that end the Commission shall, from time to time, prescribe and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications, of traffic, and rules and regulations, and shall require them to establish and maintain all such public service, facilities, and conveniences as may be reasonable and just, which said rates, charges, classifications, rules, regulations, and requirements, the Commission may, from time to time, alter and amend, \* \* \* and shall, from time to time, make and enforce such requirements, rules and regulations as may be necessary to prevent unjust or unreasonable discrimination and extortion by any transportation or transmission company in favor of, or against any person, locality, community, connecting line, or kind of traffic, in the matter of car service, train or boat schedule, efficiency or transportation, or transmission, or otherwise, in connection with the public duties of such company."

1. It is insisted by the appellant that the appellee telephone company is not operated for hire, and for that reason the Commission has not jurisdiction to make the order complained of. In *Hine v. Wadlington et al.*, 26 Okl. 389, 109 Pac. 301, it is said: "The only character of telephone line, whether owned by an individual, company, or corporation, excluded from the jurisdiction of the Corporation Commission is that not operated for hire."

In *Twin Valley Telephone Co. v. Mitchell et al.*, 27 Okl. 388, 113 Pac. 914, it is said: "Only telephone lines 'operated for hire' are placed by article 9 of the Constitution under the jurisdiction of the Corporation Commission. Rural or farmers' lines operated on the mutual plan, without any charges or toll for use of the line, are not subject to regulation by the commission."

This exemption was inserted at the instance of the representatives of the mutual companies which had been organized in rural communities, not for the purpose of profit, but for the mutual conveniences of the members thereof. If the appellees' telephone company is operated for hire, it then be-

comes subject to the control of the Commission, where it may be required to furnish reasonable conveniences and facilities for a fair and just compensation to the patronizing public. The appellee in its complaint does not claim to be in that class of telephone companies operated for hire. Nor are we satisfied from the evidence that it comes within such class. If so, every person desiring service, conveniences, and facilities can require the company to furnish the same, without discrimination, for a fair and just compensation. But the Commission certainly has jurisdiction over the appellant telephone company, and may require it to furnish all reasonable public service, conveniences, and facilities to the patronizing, or would-be patronizing, public at a fair and just charge or remuneration. The appellee telephone company, if operated for hire, under section 5, *supra*, is entitled to physical connection as prayed for, but if not, as contended by the appellant, still it would be entitled to have the appellant to furnish to it all public service, facilities, and conveniences for a just and fair consideration or remuneration, as much so as any other patron.

Suppose a firm engaged in any business authorized by law, composed of 12 partners having their offices in 12 different places, should make application to the appellant for long-distance service and for phone connections with its long-distance lines, in order that such service might be afforded to said firm and all of its members, could it be successfully contended that the Commission did not have power and authority to require such service, conveniences, and facilities to be afforded by appellant to such patrons for a fair and just remuneration? We think not. What is the difference between a mutual telephone company in point of fact and such firm? A mutual telephone company is composed of many members, and when it makes application to the appellant for long-distance service for each of its members, said mutual company to pay for such service, facility, and convenience, we think the Commission has the authority to require such connection to be made, and for such service to be performed at all times, the appellant, however, to have just and fair compensation for the service to be performed and the facilities or conveniences furnished.

The order of the Commission, however, required the installation of all necessary equipment for the connection of the office of the appellee telephone company with the long-distance office of the appellant telephone company, and that said appellee should bear the cost of such apparatus installed in its office, and the appellant to pay for the installation of the necessary apparatus in its office for the connection between the two offices. This order must be modified to the extent that the appellee tele-

phone company be required to pay all the expenses of the installing of said equipment, whether in the office of the appellee or the appellant telephone company, but in all other respects, where the order of the Commission is in accordance with this opinion, it must be affirmed. See, also, *Corporation Commission v. Southern Ry. Co.*, 153 N. C. 550, 69 S. E. 621.

The control of telephone companies has been the source of litigation in other jurisdictions. See *Central Union Telegraph Company v. Falley*, 118 Ind. 194, 19 N. E. 604, 10 Am. St. Rep. 114; *Billings Mutual Telephone Co. v. Rocky Mountain Bell Telephone Co.* (C. O.) 155 Fed. 207; *Cumberland Telephone & Telegraph Co. v. Kelly*, 160 Fed. 316, 87 C. C. A. 268, 15 Am. & Eng. Ann. Cas. 1210.

2. It is insisted that the order of the Commission constitutes the taking of the property of the appellant without just compensation, and without due process of law, and denies it the equal protection of the laws, and is in contravention of the Constitutions of Oklahoma and of the United States. The order of the Commission is, in part, as follows:

"The Commission finds from the evidence that to connect the exchange of complainant with that of the defendant would require some additional equipment for that purpose, and would incur some expense. The complainant, it appears, is willing to bear this expense necessary for the furnishing of reasonable equipment for the service desired. The complainant further concedes that all reasonable rules of the defendant in the transaction of its business should be complied with, and that the defendant should receive from the subscribers of the complainant the same amount of consideration for the transmission of long-distance messages that it receives from the subscribers of its own exchange at Pond Creek. The Commission finds from the evidence that physical connection between the exchange of complainant and defendant can be made without impairing the service of the defendant's local exchange or long-distance lines; that the circuit may be installed, one terminus being in the exchange of the defendant, and the other terminus in the exchange of complainant, with proper equipment supplied in both exchanges. The Commission finds from the evidence that the supervision of the traffic can best be handled at the defendant's exchange, and that such rules and methods for handling such traffic as now prescribed by the defendant are not unreasonable. It is therefore ordered that the defendant, the Pioneer Telephone & Telegraph Company, install in the exchange of complainant and its own exchange, in the town of Pond Creek, such special apparatus as may be necessary for the operation and interchange of service, and construct between the said exchange a

line to connect said apparatus, and immediately upon completion of same shall receive and transmit long-distance messages for the subscribers of the complainant and those having connection with the exchange of the complainant over the lines of the defendant to any point reached by the defendant's toll lines or connections; that said equipment shall be installed on or before the 15th day of September, 1909; and that the complainant shall pay the actual cost of the material and the installation of this connection for all apparatus used in complainant's exchange, and the defendant shall supply and install, at its own expense, all apparatus necessary to make the proper connection in its own exchange, and the complainant shall pay for the installation and wire between the exchanges. After this connection shall have made, any gross, inadequate, or willful refusal to serve the patrons of those calling for long-distance connections through the exchange of the complainant will be considered by the Commission a violation of this order, and all rules and regulations imposed by the defendant upon the complainant shall be subject to the approval of the Commission before the complainant will be bound thereby, being understood that the present operating rules of the defendant are considered reasonable and binding, and the above has reference only to changes made in the regular system now in force."

The Commission, under the provisions of sections 2, 5, and 18 of article 9 of the Constitution of Oklahoma, is authorized to make such order as heretofore indicated by us, provided it is reasonable and just. The rules and charges of the appellant theretofore in force are continued by this order. Certainly the appellant cannot be heard to complain, when the rules and charges applied by it to the public generally are made by the Commission to also apply to appellee. The appellee must pay all these charges for its different members, just as a firm must pay the charges for its different members. As to whether the different members of the firm make a contribution into the partnership fund by way of reimbursement, or whether the members of the mutual company make a contribution into the general fund by way of reimbursement, with that the appellant has no concern. The fact that the appellee company is composed of many citizens, who formed a co-operative or mutual plan, by which they maintain their lines to and from their residences or places of business to a common point, and there have an agent or operator representing them, and cause connections to be made with appellant's long-distance line for the convenience of said members of this company, but not for hire or profit, is not just ground for complaint on the part of appellant. However, the appellee company must pay a just and

fair charge for all service, and compensate for all facilities and conveniences. The appellant company being a domestic corporation, every provision of sections 2, 5, and 18 of article 9 of the Constitution becomes a part and a condition of its charter. *Noble State Bank v. Haskell*, 22 Okl. 48, 97 Pac. 590; *Missouri, Oklahoma & Gulf R. Co. v. State et al.*, 119 Pac. 117, recently decided by this court, but not yet officially reported; *Hammond Packing Co. v. Arkansas*, 81 Ark. 519, 100 S. W. 407, 1199, 126 Am. St. Rep. 1047; *Id.*, 212 U. S. 322, 29 Sup. Ct. 370, 53 L. Ed. 530; *Ozan Lumber Co. v. Biddle*, 87 Ark. 587, 113 S. W. 796; *Leep v. Railway Co.*, 58 Ark. 407, 25 S. W. 83, 23 L. R. A. 264, 41 Am. St. Rep. 109; *Union Sawmill Co. v. Felsen-thal*, 85 Ark. 346, 108 S. W. 217; *Arkansas Stave Co. v. State*, 94 Ark. 27, 125 S. W. 1001, 27 L. R. A. (N. S.) 255, 140 Am. St. Rep. 103; *New York Cent. & H. R. R. Co. v. Williams*, 199 N. Y. 108, 92 N. E. 404, 139 Am. St. Rep. 850.

In *Norfolk & Portsmouth Belt Line Co. v. Commonwealth*, 103 Va. 289, 49 S. E. 39, it is said:

"The principle upon which the state assumes authority to control and regulate the affairs of railroads and other public service corporations rests largely upon the doctrine of agency. Such corporations are founded by the Legislature for public purposes, and are clothed with authority, subject to state regulation and control, to exercise important governmental functions. By their charters, they are granted privileges which may not be exercised by private persons, whether individuals or corporations, but always with the reservation, express or implied, that such privileges are subject to reasonable governmental control. *Cal. v. Pac. R. R. Co.*, 127 U. S. 40, 8 Sup. Ct. 1073, 32 L. Ed. 150. This right of control is part of the police power of the state.

"As was said by this court in the *City of Petersburg v. Petersburg Aqueduct Co.*, 102 Va. 654, 47 S. E. 848: 'Bearing in mind the distinction between public and private corporations in the matter of public control, that the former are regarded as instrumentalities of the state, and liable to visitation and regulation, while the charters of the latter are contracts, within the meaning of the contract clauses of the state and federal Constitutions, the obligation of which, in the sense of those clauses, cannot be impaired, \* \* \* nevertheless the police power of the state is a governmental function, the exercise of which neither the Legislature nor any subordinate agency thereof, upon which part of its authority may have been conferred, can alienate or surrender by grant, contract, or other delegation. *Richmond, etc., Co. v. Richmond*, 87 Va. 83, s. c., 96 U. S. 521, 24 L. Ed. 734; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25, 24

L. Ed. 989; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Butchers' Union Slaughter House, etc., Co. v. Crescent City Live Stock Landing, etc., Co.*, 111 U. S. 746, 4 Sup. Ct. 652, 28 L. Ed. 585; *Powell v. Pennsylvania*, 127 U. S. 678, 8 Sup. Ct. 902, 32 L. Ed. 253. \* \* \* It follows, as a necessary consequence from the foregoing statement of the law, that there is an implied reservation of the police power of the state in every public charter granted by the Legislature.'

"Governmental powers are conferred upon the state primarily by the people, in trust for the benefit of all of its citizens; and whether exercised by the government directly through its own officials, or indirectly through the agency of corporations chartered by the state, must be exercised impartially, and without discrimination, for the benefit of all the people. This is the basic principle upon which our government is founded, and the philosophy of the constitutional provision securing to every one the 'equal protection of the law.'

"A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents acting under such conditions and regulations as the government may impose in the public interest.' *Cal. v. Pac. R. R. Co.*, supra.

"Railroads are public highways, and in this age of advanced civilization are as essential to the life of the state as ordinary roads and streets are to the existence of rural and urban communities. The very existence of public corporations, as well as their power to exact fares and freights, is derived from the state; and it cannot be deprived of its superintending power over them. *Cherokee Nation v. Kansas R. R. Co.*, 135 U. S. 657, 10 Sup. Ct. 905, 34 L. Ed. 295; *L. & N. R. R. Co. v. Kentucky*, 161 U. S. 696, 16 Sup. Ct. 714, 40 L. Ed. 849; *Smyth v. Ames*, 169 U. S. 544, 18 Sup. Ct. 418, 42 L. Ed. 819; *Wis., etc., Co. v. Jacobson*, 179 U. S. 297, 21 Sup. Ct. 115, 45 L. Ed. 194.

"In *Lake Shore, etc., R. R. Co. v. Ohio*, 173 U. S. 302, 19 Sup. Ct. 405, 43 L. Ed. 702, it was said: 'In the recent case of *Jones v. Brim*, 165 U. S. 180, 17 Sup. Ct. 282, 41 L. Ed. 677, it was adjudged that embraced within the police power of the state was the establishment, maintenance, and control of public highways there, and under such power reasonable regulations incident to the right to establish and maintain such highways could be established by the state.'

"In this commonwealth, the State Corporation Commission, created by constitutional authority, is the instrumentality through which the state exercises its governmental powers for the regulation and control of

public service corporations. For that purpose, it has been clothed with legislative, judicial, and executive powers. Subsection 'b' of section 156 of the Constitution [Code 1904, p. cclii] declares that 'the commission shall have the power, and be charged with the duty, of supervising, regulating and controlling all transportation and transmission companies doing business in this state, in all matters relating to the performance of their public duties and their charges therefor, and of correcting abuses therein by such companies; and to that end the Commission shall from time to time prescribe, and enforce against such companies, in the manner hereinafter authorized, such rates, charges, classifications of traffic, and rules and regulations, and shall require them to establish and maintain all such public service facilities and conveniences, as may be reasonable and just, which said rates, charges, classifications, rules, regulations and requirements the commission may from time to time alter and amend.' \* \* \*

"If the power of the commission is limited merely to fixing the rate for carriage, and it is without authority to so regulate that service as to render it effective, it is obviously wholly inefficacious with respect to this large class of consignees and shippers."

In that case the order of the State Corporation Commission of Virginia, fixing the charge for placing cars in position to be weighed on the consignees' or shippers' individual track scales, located on sidings leading to industries along the line of appellant's railroad, at 25 cents per car for each car, loaded or empty, so placed in position and weighed, was assailed by the railroad company, on the ground that the Commission had no authority to fix the charge. The court held that the service in question was cognate to and so intimately connected with the public service involved in the carriage and delivery of freight by the railroad company to patrons along its route as to constitute a part of such service, and consequently subject to governmental control. And, further, that wherever the service required fell within the category of a public service, within the meaning of the provisions of said Constitution, which are a prototype of the public service corporation provisions of our Constitution, the Corporation Commission had authority to regulate the same. It was further declared that the duties of a common carrier may arise out of usage, as well as from statutory enactments, and when once established the obligation of such carriers to perform them is as binding in the one case as the other, and that in that case the evidence showed that it was the custom of the appellant, as well as other railroad companies, under similar conditions, to ren-



der such service for their customers as an incident to the carriage and due delivery of their freight.

Under the provisions of the Constitution of this state, the appellant telephone company is a public service corporation, subject to the same regulations as a railroad company. It is common usage for appellant, and other telephone companies in this state, to place telephone booths and switchboards in hotels and other places, where there is sufficient demand for long-distance service. The fact that the appellee telephone company, not organized for profit or hire, but for the convenience of rural residents, in order that they may as cheaply as possible have telephone connections with the urban and commercial world, may result in curtailing the field for appellant's operation and gain is no reason why the service, facilities, and conveniences shall not be afforded to said appellee for a fair and just compensation. When appellant procured its charter and its franchise to engage in this public service business, it did it with the full knowledge that it thereby became an agency of the state, subject to its control and regulation, under the exercise of its police power, for the comfort and convenience of the citizens of the state (31 Cyc. 902), subject to the condition that appellant's property should not be taken, except by due process of law. When a fair and just compensation is afforded for such convenience, facility, and service, that constitutional requirement is satisfied. The order of the Commission, as modified, must be affirmed.

TURNER, C. J., and DUNN, HAYES, and KANE, JJ., concur.

# WESTERN COAL & MINING CO. et al. v. OSBORNE.

(Supreme Court of Oklahoma. Sept. 26, 1911.)

## (Syllabus by the Court.)

### 1. REMOVAL OF CAUSES (§ 89\*)—PROCEEDINGS FOR REMOVAL—EFFECT.

When a petition for removal to the proper court of the United States is filed in a state court, accompanied by the proper bond, only a question of law as to the sufficiency of the petition for removal is presented to the state court.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 193; Dec. Dig. § 89.\*]

### 2. REMOVAL OF CAUSES (§ 89\*)—PROCEEDINGS FOR REMOVAL—EFFECT.

Where the right of removal arises out of the facts averred in the petition for removal, that issue cannot be tried in the state court.

but must be heard in the federal court to which removal is sought.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 193; Dec. Dig. § 89.\*]

### 3. REMOVAL OF CAUSES (§ 89\*)—PROCEEDINGS FOR REMOVAL—EFFECT.

Where a suit is brought against a foreign corporation and one of its resident employees alleging the joint negligence of both as the cause of the injury suffered by the plaintiff, and the corporation files a petition for removal, setting up that its employé had no duty to perform and did nothing with reference to the alleged negligent acts, but that he was joined for the fraudulent purpose of preventing a removal to the United States Circuit Court, the petition for removal should be granted by the state court and the question of fact involved left for the determination of the Circuit Court of the United States.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 195; Dec. Dig. § 89.\*]

### 4. REMOVAL OF CAUSES (§ 86\*)—PETITION—VERIFICATION.

While it is good practice to verify a petition for removal, such verification is not a necessity and defects alleged to exist are not material.

[Ed. Note.—For other cases, see Removal of Causes, Dec. Dig. § 86.\*]

### 5. REMOVAL OF CAUSES (§ 94\*)—WAIVER OF OBJECTIONS—PROCEEDINGS AT TRIAL.

After a petition for removal has been overruled by the state court and an exception saved, the error, if any, is not waived by proceeding to trial and in doing so filing a motion requiring the plaintiff to furnish security for costs.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 203; Dec. Dig. § 94.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Coal County; A. T. West, Judge.

Action by William F. Osborne against the Western Coal & Mining Company and another. Judgment for plaintiff, and defendants bring error. Reversed and remanded, with instructions.

Ira D. Oglesby, for plaintiffs in error. D H. Linebaugh, for defendant in error.

AMES, C. This action was brought in the district court of Coal county by William F. Osborne, the defendant in error, against the Western Coal & Mining Company and Dave Stoddard, the plaintiffs in error, to recover damages sustained by the plaintiff while employed in a mine belonging to the defendant the Western Coal & Mining Company. The Mining Company filed its petition for removal, which was overruled by the district court, and thereafter the case proceeded to trial, resulting in a verdict in favor of the plaintiff and against the defendants, who bring the case here by petition in error. At the threshold of the case we are confronted with the question of the court's jurisdiction to proceed after the filing of the petition for removal, and if the cause should have been removed it is unnecessary to consider the other assignments of error.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

The plaintiff was injured while driving a car through a door, or brattice, in a mine operated by the Mining Company. The allegations of his petition are to the effect that the defendant Stoddard was employed by the Mining Company as "air boss," and that it was his duty, among other things, to supervise the ventilating apparatus in the mine, to see that the doors were properly placed and hung and to keep the same in repair, and that the particular door by which the plaintiff was injured was negligently erected and was in an unsafe condition and negligently equipped with an unsafe prop to hold it open while the plaintiff was driving through it, and that these conditions were brought about by the negligence of both Stoddard and the Mining Company.

[1] There are certain settled principles governing removals, which are stated by Mr. Justice Day in his dissenting opinion in *Illinois Central Railroad Company v. Sheegog*, 215 U. S. 308, 324, 30 Sup. Ct. 101, 105 (54 L. Ed. 208), as follows:

"When the petition for removal is filed in the state court, accompanied by the proper bond, a question of law as to the sufficiency of the petition for removal only is presented to that court. *National S. S. Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58, 27 L. Ed. 87; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; *Carson v. Hyatt*, 118 U. S. 279, 6 Sup. Ct. 1050, 30 L. Ed. 167; *Burlington, C. R. & N. R. Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262, 30 L. Ed. 1159; *Crehore v. Ohio & M. R. Co.*, 131 U. S. 240, 9 Sup. Ct. 692, 33 L. Ed. 144; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 193 U. S. 239, 25 Sup. Ct. 251, 49 L. Ed. 462.

[2] "It is equally well settled, and is a result of the principle just stated, that where the right of removal arises because of certain facts averred in the petition, that issue cannot be tried in the state court, but must be heard in the federal court, which alone has jurisdiction to determine such issues of fact. *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, 30 L. Ed. 992; *Burlington, C. R. & N. R. Co. v. Dunn*, and *Crehore v. Ohio & M. R. Co.*, supra; *Kansas City, Ft. S. & M. R. Co. v. Daughtry*, 138 U. S. 298, 11 Sup. Ct. 306, 34 L. Ed. 963; *Madisonville Traction Co. v. St. Bernard Min. Co.*, supra."

It is true that these principles are quoted from the dissenting opinion, but the court in the majority opinion concedes these to be correct, and in considering the question involved these principles may be taken as the settled law applicable.

[3] It follows, therefore, that for the purpose of determining whether the petition for removal should have been granted, we cannot consider the events transpiring at the trial, so that we must disregard the fact that at the trial there was testimony tending to show that Stoddard did have a duty to perform with reference to the door in

controversy, and that he did perform it negligently, and that the verdict was against him as well as the Mining Company, but we must determine the question upon the petition of the plaintiff and the petition for removal, taking as true the facts alleged by the defendant in the petition for removal. The facts so alleged are as follows: "That said complaint, if it states a cause of action, states one wholly against this defendant for negligence in the manner in which it operated its coal mine, and for its failure to perform duties imposed upon it by law and does not show any personal negligence or personal acts of the other defendant, Dave Stoddard, by which he is liable to plaintiff nor does the said complaint show such facts as makes the defendants jointly liable. If any joint liability is alleged and shown by said complaint the alleged joint liability does not in fact exist, and the said allegations and attempt to show joint negligence of defendant and said Dave Stoddard as defendant herein and making him defendant of this suit were for the sole purpose of defeating defendant's right to remove this cause to the United States Circuit Court, and the said Stoddard was fraudulently made defendant for this purpose and no other. Defendant alleges that the codefendant, Dave Stoddard, had no personal connection with the action complained of by plaintiff and he did nothing and omitted to do nothing which in any way contributed to the accident, and at the time thereof it was not his duty to see that the door mentioned in plaintiff's complaint was properly placed and properly hung, nor was it his duty to keep same in repair and all allegations of personal negligence of the said Dave Stoddard are untrue."

The defendant relies primarily upon *Wecker v. National Enameling & Stamping Company*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, while the plaintiff relies primarily upon *Illinois Central Railroad Company v. Sheegog*, 215 U. S. 308, 30 Sup. Ct. 101, 54 L. Ed. 208. In the *Wecker* case the plaintiff sued the Stamping Company and one Wettengel, alleging that Wettengel as an employé of the Stamping Company was charged with the superintendence and oversight of the plaintiff in the performance of his duty as well as with the duty of superintending and properly planning the construction of a furnace and providing suitable safeguards for the protection of plaintiff while working thereon. The Stamping Company in its petition for removal alleged that Wettengel was not charged with the superintendence and oversight of the plaintiff, or with the duty of properly planning the construction of the furnace or any of the safeguards connected therewith, and that he was merely a draftsman or clerk whose sole duty was to draw plans according to instructions, and that the plaintiff at the time of filing the suit well knew the

facts, and that Wettengel was joined merely for the purpose of preventing a removal to the United States court. Upon this petition the case was removed into the Circuit Court, and there the question of fact was tried out, and the Circuit Court found on the evidence that the averments of the petition for removal were true, and that the case therefore was properly removable. This is substantially identical with the case at bar, the only difference being that in the case at bar the petition for removal does not allege that the plaintiff at the time of filing his petition actually knew that Stoddard had nothing to do with the construction or maintenance of the door, but it does allege that this was the fact, and that Stoddard was fraudulently joined in order to defeat a removal.

In the Sheegog Case the plaintiff sued the Illinois Central Railroad Company as the lessee, the Chicago, St. Louis & New Orleans Railroad Company as the lessor, and the conductor of the train, in the operation of which, as engineer, the plaintiff's intestate was injured. The suit was brought in Kentucky. The Illinois Central was an Illinois corporation, while the other defendants were citizens of Kentucky. The petition for removal averred that the averments of the plaintiff's petition were falsely made in order to prevent a removal to the federal court, but removal was denied by the trial court and this action was affirmed by the Supreme Court of Kentucky as well as by the Supreme Court of the United States. To a certain extent the case turned upon the question of the joint liability of the lessor and lessee railroad companies, and the majority of the court, in an opinion delivered by Mr. Justice Holmes, held that, as under the Kentucky law the lessor railroad company was liable with the lessee either jointly or severally, there could not be a fraudulent joinder as to the lessor unless the suit was fraudulently brought as to the lessee, and that upon this point the plaintiff had a right to select the court in which he would litigate. In the opinion it is said: "Of course, if it appears that the joinder was fraudulent, as alleged, it will not be allowed to prevent the removal. *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176, 27 Sup. Ct. 184, 51 L. Ed. 430, 9 Am. & Eng. Ann. Cas. 757. And, further, there is no doubt that the allegations of fact, so far as material, in a petition to remove, if controverted, must be tried in the court of the United States, and therefore must be taken to be true when they fail to be considered in the state courts. *Crehore v. Ohio & M. R. Co.*, 131 U. S. 240, 244, 9 Sup. Ct. 692, 33 L. Ed. 144, 145; *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 29 Sup. Ct. 430, 53 L. Ed. 765. On the other hand, the mere epithet 'fraudulent' in a petition does not end the matter. In the case of a tort which gives rise to a joint

and several liability, the plaintiff has an absolute right to elect, and to sue the tortfeasor jointly if he sees fit, no matter what his motive, and therefore an allegation that the joinder of one of the defendants was fraudulent, without other ground for the charge than that its only purpose was to prevent removal, would be bad on its face. *Alabama G. S. R. Co. v. Thompson*, 200 U. S. 206, 26 Sup. Ct. 161, 50 L. Ed. 441, 4 Am. & Eng. Ann. Cas. 1147; *Cincinnati, N. O. & T. P. R. Co. v. Bohon*, 200 U. S. 221, 26 Sup. Ct. 166, 50 L. Ed. 448, 4 Am. & Eng. Ann. Cas. 1152. If the legal effect of the declaration in this case is that the Illinois Central Railroad Company was guilty of certain acts and omissions by reason of which a joint liability was imposed upon it and its lessor, the joinder could not be fraudulent in a legal sense on any ground except that the charge against the alleged immediate wrongdoer, the Illinois Central Railroad itself, was fraudulent and false."

It is true that in this state, under the facts as alleged in the petition, Stoddard and the Mining Company were jointly liable. *Coalgate Co. v. Bross*, 25 Okl. 244, 107 Pac. 425, 188 Am. St. Rep. 915. But if the facts as set out in the petition for removal are true, Stoddard was not liable at all, and his joinder was purely fictitious. As we understand, the gravamen of the decision in the Sheegog Case is that, by virtue of the relation between the two railroads there was a joint liability, and as both were liable as a matter of law, there could not be a fraudulent joinder as a matter of fact, and this view of the Sheegog Case finds support in the later case of *Chicago, Burlington & Quincy Railway Company v. Willard* (decided April 10, 1911) 220 U. S. 413, 31 Sup. Ct. 460, 465, 55 L. Ed. 521, where in an opinion delivered by Mr. Justice Harlan, who dissented in the Sheegog Case, it is held that a cause could not be removed to the federal courts where the lessor railroad and the lessee railroad as a matter of state law were jointly liable, because under such conditions the fraudulent joinder was in fact impossible, and cited the Sheegog Case as authority for that position, as shown by the following quotation from the opinion: "It results that, upon the face of the record, the action throughout was proceeded in as a joint action, and that there was no separable controversy in such an action entitling the Iowa corporation, as matter of law, to remove the case from the state court. And it cannot be predicated of the plaintiff that he fraudulently and improperly made the Illinois corporation a codefendant with the Iowa corporation when such a charge is negatived, as matter of law, by the fact that the plaintiff was, as we have seen, entitled under the law of Illinois, where the cause of action originated and within which the road in question was located, to bring a joint action against the Illinois and Iowa

companies. *Illinois C. R. Co. v. Sheegog*, 215 U. S. 308, 316, 30 Sup. Ct. 101, 54 L. Ed. 208, 211."

[4] The plaintiff objects to the petition for removal on account of an alleged insufficient affidavit, but a verification is not required by the statute, although it is good practice to verify. 4 Fed. St. Ann. 349, 358 (U. S. Comp. St. 1901, p. 508).

[5] The plaintiff argues that the defendant waived its right to a removal by filing a motion in the state court to require the plaintiff to secure the costs, and in support of this cites *Denning v. Kelly*, 9 Ark. 435. In that case, however, the defendant, before raising objections to the jurisdiction of the court, filed its motion to require the costs to be secured and the court held that this was an appearance. We do not think that case applies, both for the reason stated and for the further reason that there the question involved was one of jurisdiction over the defendant, while here the question involved is not one of jurisdiction at all, but of the defendant's right to remove the cause from one court having jurisdiction to another court having jurisdiction.

The cause, for the reasons stated, should be reversed and remanded to the trial court with instructions to grant the petition for removal, but, of course, we do not mean to intimate any opinion as to the action that should be taken by the Circuit Court of the United States in the event of a motion to remand.

PER CURIAM. Adopted in whole.

### BURRUS v. FUNK.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

#### 1. JUSTICES OF THE PEACE (§ 36\*)—JURISDICTION—TITLE TO PROPERTY.

In forcible detainer before a justice of the peace, the introduction by defendant of evidence, in effect, that plaintiff's grantor, at the time of the execution of the deed under which plaintiff claims possession, was a minor, where the evidence relative thereto is conflicting, is not sufficient to oust the court of jurisdiction to try the right of possession.

[Ed. Note.—For other cases, see *Justices of the Peace*, Cent. Dig. §§ 83-97; Dec. Dig. § 36.\*]

#### 2. APPEAL AND ERROR (§ 754\*)—ASSIGNMENTS OF ERROR—DENIAL OF NEW TRIAL.

Where the appellant fails to assign as error the overruling of a motion for a new trial in the petition in error, no question is properly presented in this court to review errors alleged to have occurred during the progress of the trial in the court below.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3086-3089; Dec. Dig. § 754.\*]

Error from Wagoner County Court; W. T. Drake, Judge.

Action by W. A. Funk against J. D. Burrus. Judgment for plaintiff, and defendant brings error. Affirmed.

Robert F. Blair, for plaintiff in error.  
Chas. G. Watts, for defendant in error.

TURNER, C. J. This is an action for unlawful detainer originally commenced by defendant in error as plaintiff before a justice of the peace in and for Wagoner township and county to recover of plaintiff in error, as defendant, possession of certain real estate. For answer defendant denied plaintiff to be the owner of the land, that he was entitled to possession, and the jurisdiction of the justice to try the cause. There was judgment for plaintiff, and again on trial anew in the county court to which the case was appealed. Defendant brings the case here.

[1] The evidence discloses that defendant was in possession under a lease from the former owner which had expired, and was seeking to retain possession by holding over under an alleged new lease which he set up. Assailing plaintiff's title which was a deed from his landlord, and introduced for the purpose of proving plaintiff's right of possession, defendant sought to show that the same was void because of the alleged minority, when made, of plaintiff's grantor; and the issue of fact being determined against him, now claims that the title to the land being thus involved the justice, and, on appeal, the county court, was ousted of jurisdiction to try the cause. Such not being a proper subject of trial, the jurisdiction of neither court was affected thereby. In *Vansellous v. Huene*, 26 Okl. 243, 108 Pac. 1102, the situation was strikingly similar. There, as here, defendant was in possession under a lease, and after the expiration of his term refused to deliver possession to the purchaser. The court said: "The next objection raises the question of the sufficiency of the deed to the plaintiff, and puts in issue the title to the property. We do not deem this a proper subject for trial in the present case. 'Forcible entry and detainer,' or 'forcible entry and unlawful detainer,' is a proceeding at law, and the right to possession is the sole question involved, and evidences of title are only material in so far as they tend to show right of possession, and no equities of parties can be determined. *Anderson v. Ferguson*, 12 Okl. 307, 71 Pac. 225. There are a great many other cases to the same effect in this jurisdiction; but the question is so well settled here and elsewhere that we do not deem it necessary to cite them." See, also, *Powers v. Meyers*, 25 Okl. 165, 105 Pac. 674.

[2] We are therefore of opinion that both courts had jurisdiction; that as the action of the trial court in overruling the motion

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

for a new trial is not assigned as error, neither in the petition in error nor the briefs of plaintiff in error, and the only remaining errors assigned are those alleged to have occurred in the trial of the cause, and hence we cannot consider them (*Douglas Co. v. Sparks*, 7 Okl. 259, 54 Pac. 467; *Beall v. Life Ins. Co.*, 7 Okl. 285, 54 Pac. 474; *Oil Co. v. Bank*, 12 Okl. 169, 70 Pac. 205; *DeVitt v. City of El Reno*, 28 Okl. 315, 114 Pac. 253; *Kimbriel v. Montgomery*, 28 Okl. 743, 115 Pac. 1013), the judgment of the lower court must be affirmed. It is so ordered. All the Justices concur.

### NATION v. PLANTERS' & MECHANICS' BANK.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(*Syllabus by the Court.*)

#### 1. ESTOPPEL (§ 22\*)—RECITALS IN MORTGAGE—PRIOR INCUMBRANCES.

One who takes a conveyance, absolute or conditional, which recites that it is second or subordinate to some other mortgage or lien, is not the purchaser of the entire thing conveyed thereby. He purchases only the surplus or residuum after satisfying the other incumbrances, and is estopped to deny the existence of the prior mortgage or the validity of the lien, although it be not acknowledged, recorded, or filed as required by the statutes.

[Ed. Note.—For other cases, see *Estoppel*, Cent. Dig. §§ 27-51; Dec. Dig. § 22.\*]

#### 2. SET-OFF AND COUNTERCLAIM (§ 33\*)—ACTION IN TORT—SET-OFF ON IMPLIED CONTRACT.

A claim or demand on an implied contract is not allowable to a defendant as a set-off in an action brought by a plaintiff sounding in tort for the conversion of goods by the defendant.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. § 54; Dec. Dig. § 33.\*]

Error from Oklahoma County Court; Sam Hooker, Judge.

Action by W. E. Nation against the Planters' & Mechanics' Bank. Judgment for defendant, and plaintiff brings error. Affirmed.

W. A. Smith, for plaintiff in error. John H. Wright, for defendant in error.

DUNN, J. This case presents error from the county court of Oklahoma county, having been begun on January 18, 1908, by W. E. Nation, as plaintiff, against the defendant in error, to recover \$350 damages for the value of two black mares alleged to have been converted by the defendant. The plaintiff claimed to own or have a special interest in the property by virtue of a certain chattel mortgage on the animals executed October 5, 1907, by one W. H. West, and filed for record October 11, 1907. He alleged that, while his mortgage was still unsatisfied, on or about the 1st of January, 1908, he found the animals mentioned at a sales stable,

and learned that the defendant was advertising said property for sale under a chattel mortgage which it claimed to hold on the same. Thereupon plaintiff caused a notice to be served on the bank that he claimed a first lien on the property, and that he would hold the bank liable for conversion if it should sell the same. The bank proceeded, however, and sold the mares, taking the proceeds therefor. The defendant answered, alleging it held a prior mortgage covering the same property; that its mortgage bore the date of July 11, 1907, having been given by said West and one Phillips. Defendant also filed a cross-petition, asking judgment against the plaintiff, and alleging that he had converted to his use two certain mules on which the defendant claimed a first mortgage, bearing the date of June 24, 1907. The case was tried to the court without a jury, which made certain findings of fact and conclusions of law finding against plaintiff on its cause of action, and rejecting the defendant's demands set forth in its cross-petition on the ground that it was not a proper set-off to plaintiff's petition. The mortgage given on the mares to the plaintiff contained in its body the statement that the same was "subject to the prior mortgage on same property for \$1,300." Plaintiff filed his mortgage of record prior to any filing of the mortgage of the defendant, and claims that he had no actual knowledge of the clause above quoted. The court found from the evidence that the mortgage to the bank was included in the sum of \$1,300 mentioned. Counsel for plaintiff insists that, under these facts, plaintiff should have recovered; that the fact that his mortgage was filed of record first, and that he lacked actual knowledge of this particular clause in his mortgage, relieved him of being chargeable therewith; and that, even though knowledge thereof might have been imputed to him, still it was insufficient to render his mortgage subject to the claims included in the \$1,300. With counsel's contention in this regard we are unable to agree. The doctrine of notice whether applied to mortgages of real or personal property is the same.

[1] No distinction is made in the application of the doctrine between the two classes. *Jones on Mortgages* (5th Ed.) § 308; *Wade on Notice* (2d Ed.) § 77. This court in the recent case of *Creek Land & Imp. Co. v. Davis*, 28 Okl. 579, 115 Pac. 468, held that the words "subject to contract" in the following line, "\$235.00 (subject to contract) in hand paid," was sufficient without actual knowledge thereof to put a prudent man on inquiry which, if prosecuted with ordinary diligence, would have led to actual notice of the rights of the parties claiming under the said contract, and held a subsequent grantee bound by the notice therein given. Text-writers and courts without dissent

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes  
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seem to accept as the correct rule the doctrine that where one who takes a conveyance absolute or conditional reciting that it is second or subordinate to some other mortgage or lien is not the purchaser of the entire thing conveyed hereby, but that he purchases only the surplus or residuum after satisfying the other incumbrances, and that he is estopped to deny the existence of a prior mortgage or the validity of the lien, although it be not acknowledged, recorded, or filed as required by the statutes. 2 Cobby on Chattel Mortgages, § 1039; 5 Am. & Eng. Ency. Law, 1015, and authorities cited under notes 3 and 4; 6 Cyc. 1076, and authorities cited under note 35; Tolbert v. Horton et al., 81 Minn. 518, 18 N. W. 647; Eaton v. Tuson, 145 Mass. 218, 13 N. E. 488; Pecker et al. v. Silsby, 123 Mass. 108; Young et al. v. Evans-Snyder-Buel Commission Co., 158 Mo. 395, 59 S. W. 113; Ghlo v. Byrne et al., 59 Ark. 280, 27 S. W. 243; Flory v. Comstock, 61 Mich. 522, 28 N. W. 701; First Nat. Bank of Corning v. Reid et al., 122 Iowa, 280, 98 N. W. 107; Citizens' Coal & Coke Co. v. Stanley, 6 Colo. App. 181, 40 Pac. 693; Wells Fargo & Co. v. Alturas Commercial Co., 6 Idaho, 506, 56 Pac. 165; Clapp Bros. & Co. v. Halliday Bros., 48 Ark. 258, 2 S. W. 853.

The remaining proposition in the case is presented by the cross-petition of the defendant, wherein it brings for review in a cross-petition in error the action of the court in rejecting its set-off involved in its charge that plaintiff had converted a team of mules to which defendant had a prior claim. It will thus be noticed that the claims of both parties grow out of an alleged conversion of personal property and the question presented for our consideration is, May one conversion be set off against another? Under our Code, any cause of action arising on contract, whether for a liquidated or unliquidated demand, may constitute a set-off, and be pleaded as such in any action founded upon contract. *Challiss v. Wylie*, 35 Kan. 506, 11 Pac. 438. And it appears to be settled that, whenever one party commits a tort against the estate of another with the intention of benefiting his own estate, the law will at the election of the party injured imply a contract on the part of the wrongdoer to pay to the party injured the damages which would be due thereunder. *Fanson v. Linsley*, 20 Kan. 235. And a cause of action founded upon such an implied contract may be pleaded in set-off as well as if the same were express. *Challiss v. Wylie*, supra; *Stewart v. Balderston*, 10 Kan. 106; *Stevens v. Able*, 15 Kan. 584.

At common law, where the form made clear the character of action brought, whether on tort or contract, it was not difficult to determine whether in conversion the pleader relied upon the damages for a breach of the implied contract or sued on account of the wrong committed. Under the reformed

procedure, however, this is not always so easy of determination for in the statement of all causes of action the facts constituting the same are pleaded, and in conversion these facts, whether the party relies upon the wrong done by the tort or the damages occasioned by the failure to comply with the terms of the implied contract, are the same unless the pleader specifically states his election, or in some other way indicates it. The principal difference would arise when the measure of damages was applied. "The detriment caused by the wrongful conversion of personal property is presumed to be, first, the value of the property at the time of the conversion, with the interest from that time; or, second, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and, third, a fair compensation for the time and money properly expended in pursuit of the property" (section 2910, Comp. Laws Okla. 1909)—while the measure of damages for a breach of an obligation arising from contract is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby or which in the ordinary course of things would likely result therefrom (section 2888, Comp. Laws Okla. 1909). And in such cases, if the cause of action as set forth is doubtful or ambiguous as to whether the allegations set out present an action in contract or tort, every intentment will be given to construe the cause as in contract and not in tort. 4 Ency. P. & P. 754, and authorities cited under note 2; *Smith v. McCarthy*, 39 Kan. 308, 18 Pac. 204. And, in order to determine the question of whether the action sounds in tort or contract, the measure of damages, the demand for judgment, and prayer may be consulted with a view of ascertaining and making the same certain. 4 Ency. P. & P. 754, and authorities cited under note 1. With these rules in mind, therefore, we observe that plaintiff's petition sets forth and claims damages, not only for the value of the property taken, but for money properly expended in the pursuit thereof as well as for attorney fees, and also specifically avers conversion of the property by the defendant from which in our judgment plaintiff's cause of action is one sounding strictly in tort. The defendant's cross-petition, however, while charging plaintiff with converting the mules and some other items, prays judgment solely for the detriment proximately caused thereby, to wit, the value of the said property, and in our judgment should be construed as sounding in contract and not tort. See *Smith v. McCarthy*, supra. This being true, the question presented is, May damages sustained by the violation of an implied contract growing out of the appropriation of personal property be set off in an action

brought to recover damages in tort for conversion of plaintiff's property by the defendant? Our statute (section 5634, Comp. Laws Okl. 1909) provides: "The defendant may set forth in his answer, as many grounds of defense, counterclaim, set-off, and for relief, as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both."

[2] Paraphrasing the same it would read: The defendant may set forth in his answer as many grounds of set-off as he may have, and frankly, aside from the difficulties presented by the measure of damages noted above, and which do not appear to us should have been considered insurmountable, we can see no good reason why defendant's claim set forth in his cross-petition ought not to be allowed except that the universal holding of the courts seems to be against it. 34 Cyc. 658, and authorities cited under note 12; Abbott's Trial Brief, § 477, and authorities cited under note 1; Hillman v. Edwards, 74 S. W. (Tex. Civ. App.) 787; Arthur et al. v. Sylvester et al., 105 Pa. 233; Comer v. Board of Com'rs, 32 Ind. App. 477, 70 N. E. 179; Boll et al. v. Simms, 60 Ind. 162; Barrow v. Mallory Bros. & Co., 89 Ga. 76, 14 S. E. 878; Goldberger v. Leibowitz, 42 Colo. 99, 93 Pac. 1108; Caldwell v. Ryan, 210 Mo. 17, 108 S. W. 533, 16 L. R. A. (N. S.) 494, 124 Am. St. Rep. 717; Smith v. McCarthy, supra; Stevens v. Able, supra.

It will therefore be seen that the conclusion to which we have come on both propositions is in accord with that of the trial court, and its judgment is accordingly affirmed.

TURNER, C. J., and KANE and HAYES, JJ., concur. WILLIAMS, J., not participating.

SMITH et al. v. LAFAYETTE & BRO.  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

1. CHATTEL MORTGAGES (§ 97\*)—RECORD—TIME FOR FILING.

A renewal affidavit filed on January 15, 1907, pursuant to Mans. Dig. § 4751 (Ind. T. Ann. St. 1899, § 3062), is filed within 30 days next before the expiration of one year from the filing of a chattel mortgage filed on January 15, 1906, pursuant to the preceding section.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 177; Dec. Dig. § 97.\*]

2. CHATTEL MORTGAGES (§ 47\*)—VALIDITY—DESCRIPTION OF PROPERTY.

A description in a chattel mortgage, which is sufficient to put a third person upon inquiry which, when pursued, will enable him to ascertain the property intended to be included in said mortgage, is good.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 96-103; Dec. Dig. § 47.\*]

3. CHATTEL MORTGAGES (§ 48\*)—VALIDITY—DESCRIPTION OF PROPERTY.

Where, on January 14, 1906, the mortgagor, living on the W. H. farm, executed a chattel mortgage which was duly filed for record, on "all of 50 or more acres of cotton, and all of 15 or more acres of corn to be planted, grown, and cultivated by me or any one working for or under me during the year 1906, on farm of W. H. [describing it] or on any other farm for the year 1906"; also on "the entire product of the above or any other farm cultivated by me during 1906, 1907, and each succeeding year" until the debt thereby secured was paid; and afterwards held over during the year 1907 and raised the crop attached—held, that said description was sufficient as against a subsequent mortgagee of the same property.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 93-95; Dec. Dig. § 48.\*]

(Additional Syllabus by Editorial Staff.)

4. CHATTEL MORTGAGES (§ 12\*)—VALIDITY—PROPERTY COVERED.

Under Mans. Dig. § 4749 (Ind. T. Ann. St. 1899, § 3060), providing that all mortgages on crops already planted or to be planted, shall have the same force and effect to bind such crops and their products as other mortgages have to bind property already in being, a mortgage executed January 15, 1906, on a crop to be grown in 1907 is valid, though the mortgagor was in possession under a parol agreement good for one year only if he held over and raised a crop in 1907.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 59, 60; Dec. Dig. § 12.\*]

Error from District Court, McIntosh County; Preslie B. Cole, Judge.

Action by Ben. F. Lafayette, doing business as Lafayette & Bro., against John R. Smith and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Charles R. Freeman, for plaintiffs in error. J. B. Lucas, for defendant in error.

TURNER, C. J. On October 1, 1907, defendant in error, Ben. F. Lafayette, in business as Lafayette & Bro., sued John R. Smith and John Storms, plaintiffs in error, in the United States Court for the Indian Territory, Western District, at Eufaula, for the balance on a certain promissory note of \$214.58, due plaintiff from Smith, and to foreclose a chattel mortgage on a certain crop of corn and cotton to secure the payment thereof. The complaint, after making said note and mortgage exhibits, further alleged that defendant Storms claimed title to the property in virtue of a chattel mortgage subsequently executed to him by Smith on the same and other property, and had taken possession thereof, and was about to sell it pursuant to the terms of his mortgage, and, after further proper allegations, prayed judgment for \$146.80, and for an order of specific attachment, which issued and was levied upon said crop described in the writ to be "20 acres of cotton and 5 acres of corn grown on the William Hughes place by the defendant Smith for the year 1907." After Smith had

answered, in effect, denying the lien of plaintiffs' mortgage and Storms, in effect, the same thing and also asserting a lien upon the attached property in virtue of his mortgage, there was a reference and report of the facts and conclusions of law thereon, upon the coming in of which the court, in effect, sustained the former, but overruled the latter, and rendered and entered judgment for plaintiff and defendants bring the case here. It is claimed that in this the court erred.

The undisputed facts are that on January 14, 1906, defendant executed to plaintiff his note for \$214.58 and a chattel mortgage to secure the payment thereof on "all of 50 or more acres of cotton, and all of 15 or more acres of corn to be planted, grown, and cultivated by me or any one working for or under me during the year 1906 on farm of Wm. Hughes, located about 5 miles east of south of Checotah, I. T., or on any other farm for the year 1906," and other personal property, it being the intention to convey to the mortgagee "the entire products \* \* \* of the above or any other farm cultivated by me during the years 1906, 1907, and each succeeding year" until the debt thereby secured was paid; that the same was duly filed with the recorder the next day, pursuant to Mans. Dig. § 4750 (Ind. T. Ann. St. 1899, § 3061); that later, by sale of said other property, the indebtedness was reduced to \$148.81; that at the time said mortgage was executed Smith's right to occupy the Hughes farm for the year 1906 was by virtue of a parol agreement with his landlord so to do with no agreement for the year 1907; that, holding over until 1907, he, on March 2, 1907, executed to Storms the chattel mortgage under which he claims the property, thereby conveying as security for his debt all the crops grown by Smith on said place for the year 1907 including other personal property, which was duly filed for record; that about the last of September, 1907, Smith turned over all the cotton and corn so grown that year to Storms in payment of said debt, whereupon plaintiff attached the same as stated, after which defendants executed bond to perform the judgment of the court and have since retained possession of the property.

[1] It is assigned that the court erred when he held, in effect, the lien of plaintiffs' mortgage to be superior to that of defendant Storms'. It is urged that if a lien accrued in virtue of the filing of plaintiffs' mortgage of January 15, 1906, that the same, not being renewed by proper affidavit until January 15, 1907, became void as against the mortgage of Storms because not done within 30 days next before the expiration of one year from such filing, in conformity to Mansfield's Digest, § 4751. Applying the general rule that, in computing time, the first day is excluded,

this year in this instance would end with January 15, 1907. That being true, the filing of the renewal affidavit on that day would be within the statutory time.

[4] It is next contended that as the mortgage was executed January 15, 1906, at which time the mortgagor was in possession under a parol agreement good for one year only, that he had no potential interest at that time in the crop to be grown thereon during the year 1907, and hence, although he held over, his mortgage to plaintiff of his crops to be grown thereon during the years 1906 and 1907 was void as to the crop of 1907. Not so, for the reason that Mans. Dig. § 4749, in force in that jurisdiction at the time said mortgage was executed and which reads: "All mortgages executed on crops already planted, or to be planted, shall have the same force and effect to bind such crops and their products as other mortgages have to bind property already in being"—was intended to and did render nonessential to the validity of the mortgage the potential existence contended for. Prior to its passage a conflict of authority existed. Some courts, including the Supreme Court of Arkansas (Tomlinson v. Greenfield, 81 Ark. 557), holding a mortgage on an unplanted crop to be void; others holding the same to be good and enforceable in equity where there was at the time of its execution such potential existence. In view of this conflict, said statute was passed placing on a parity the validity of the lien of all mortgages executed on crops planted or to be planted, and making them alike enforceable, and that, too, whether there was a potential existence of the crop at the time they were executed or not.

[2, 3] It is next contended that said mortgage is void for uncertainty in that it "undertakes to bind the crops to be raised on the William Hughes farm during the year 1906, 'or any other farm for the year 1906' which John R. Smith may cultivate, and in the event the indebtedness was not paid, then said mortgage was to cover all crops to be produced 'on the above or any other farm cultivated by me during the years 1906, 1907, and each succeeding year until the above and any and all other indebtedness due Lafayette & Brother shall have been paid in full.' " We do not think so, but are of opinion that said description was sufficient, aided by extrinsic evidence, to put Storms on his guard, and enable him to ascertain at the time he took his mortgage that the property in controversy was covered by the prior mortgage of defendant in error. First National Bank of Bristow v. Rogers, 24 Okl. 357, 103 Pac. 582, and cases cited.

There is nothing in the remaining assignments of error.

The judgment of the trial court is affirmed. All the Justices concur.



WESTERN UNION TELEGRAPH CO. v.  
ALLEN.

(Supreme Court of Oklahoma. Sept. 26, 1911.)

(Syllabus by the Court.)

1. TELEGRAPHS AND TELEPHONES (§ 37\*)—  
OPERATION—FAILURE TO DELIVER MESSAGE  
—LIABILITY.

Allen directed Moore, as his agent, to see if he could purchase land for \$1,600, and, if so, to wire him in Iowa, when he would send the money to pay for it. Moore sent the wire by the telegraph company pursuant to Allen's instruction. The telegraph company failed to deliver the message, and subsequently Moore bought the land himself. *Held*, that the telegraph company was liable for damages.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 37.\*]

2. TELEGRAPHS AND TELEPHONES (§ 37\*)—  
FAILURE TO DELIVER MESSAGE—LIABILITIES.

When a principal instructs his agent to communicate with him by wire and the agent does so, the telegraph company becomes the principal's agent for the transmission of the message, and its neglect, as between the principal and agent, is the neglect of the principal, and the agent is not bound to seek some other method of communication where he has no knowledge of the nondelivery of the message.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Dec. Dig. § 37.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Bryan County; D. A. Richardson, Judge.

Action by Charles R. Allen against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Utterback & Hayes, Shartel, Keaton & Wells, and George H. Fearons, for plaintiff in error. Hatchett & Ferguson, for defendant in error.

AMES, C. This is an action brought by Charles R. Allen, as plaintiff, against the Western Union Telegraph Company, as defendant, to recover damages for failure to deliver a telegram sent to Allen at Hawarden, Iowa, by one Moore from Pauls Valley, Okl. The plaintiff recovered judgment in the trial court, and the defendant brings the cause to this court by petition in error.

[1] The facts are substantially as follows: About the 1st of August, 1908, the plaintiff, who was then a resident of Hawarden, Iowa, was in Pauls Valley, Okl., where he met E. M. Moore, a real estate agent of that city, and was shown, amongst others, a tract of land known as the "Hull land." The plaintiff told Moore that he would pay \$1,600 for this land, and if Moore ascertained that it could be bought for that price to wire him at Hawarden and he would send the money. Later in the month, Moore ascertained that he could procure the land at the agreed price, and on August 24th sent the following telegram by the Western Union Telegraph Company to plaintiff: "Pauls Valley, Okla. Aug. 24, 1908. To Chas. R. Allen, 1st Natl.

Bank, Hawarden, Iowa. Have closed deal on Hull land sixteen hundred; wire amount to Natl. Bank of Commerce or instructions." This telegram was never delivered to the plaintiff or to the bank. A day or two afterwards Moore entered into the following contract with Hull: "This agreement made and entered into this 25th day of August, 1908, by and between William Hull of White Bear, Oklahoma, and E. M. Moore, of Pauls Valley, agent for Chas. R. Allen, of Sioux City, Iowa, the said Hull constituting the first party, and E. M. Moore the agent for Allen, the party of the second part. The first party has this day bargained and sold to said second party, or agent for whom, 100 acres of land, more or less according to the government survey, same being located in the county of McClain, Oklahoma, and more fully described as follows: The west half of the northwest quarter of sec. 1, and the east half of the southeast quarter of the northeast quarter of sec. 2, T. 6 N., R. 3 W. The said Charles Allen being in Iowa the first party agrees to grant a reasonable time in which to close deal, and also agrees to take immediate steps to have abstract of title gotten up, and to execute a warranty deed to same. Should there be any default upon the part of the party of the second part, then party of the first part hereby agrees that E. M. Moore shall take place of second party, said Moore to assume and comply with all requirements as specified by Chas. R. Allen, or his agent. As consideration for the above 100 acres of land the second party will pay \$1,000, when first party shall furnish a perfect abstract, and shall deposit deed properly executed in the National Bank of Commerce. Second party also deposits in escrow \$200 in National Bank of Com. in same to be forfeited to said first party in case of a noncompliance by party of the second party. Signed this Aug. 26, 1908. William Hull, First Party. Chas. R. Allen, Second, by E. M. Moore, Agent."

Not hearing from Allen, Moore bought the land himself, as provided in the contract, and after holding it a few weeks sold it for a profit of \$800, and it was agreed at the trial that in the event that plaintiff was entitled to recover the amount of his recovery should be \$800. Some time after Moore had sold the land Allen was again in Pauls Valley, and in conversation with Moore learned for the first time that the telegram had been sent him. Thereafter he brought suit against the telegraph company for the damage sustained by its failure to deliver the message. And after judgment was rendered against the defendant it brought the case to this court by petition in error.

In the brief of the plaintiff in error it is said: "We think that the following points may be taken as established: (1) That Moore was acting as the agent of the plaintiff Al-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

len; that both had examined the land and Allen had agreed to take the land for \$1,600. (2) That the company received the message in question at Pauls Valley, on the evening of August 24th, and was negligent in the delivery of the same at Hawarden, Iowa. (3) That if the message had been received, plaintiff would have at once accepted the land at the price offered. (4) That the land in question was shortly afterwards worth \$800 in advance of the price paid. (5) That on August 26th a contract was consummated, and the agent Moore took the title in himself and paid for the same. (6) That, after sending the telegram, the agent, Moore, made no further effort to communicate with his principal, and did not see him or communicate with him until several weeks later when Allen returned to that section."

While conceding that it was negligent in not delivering the message to Allen, the telegraph company insists that the plaintiff should not have recovered, because Moore, as Allen's agent, was bound to follow up this first telegram by a second, or by a letter, or by some other method of communication, and that as Moore was Allen's agent and purchased the property in his own name, that this purchase inured to the benefit of Allen, and that, therefore, Moore held the title in trust for Allen; and, further, that the property was first deeded to Allen and his interest could not have been divested except by his own acts; and lastly, the court erred in refusing instructions which it requested and in giving those contained in the charge. It seems to us that if Moore discharged his duty under the law to Allen, that this is decisive of the case, and that all of the errors assigned depend upon the correct answer to this inquiry.

[2] It will be observed from the contract that Moore described himself as Allen's agent, that he deposited \$200 of his own money, to be forfeited in the event the land was not purchased, and that it was expressly provided that, in the event Allen should default, Moore might take his place and purchase the property himself. It is, of course, true that an agent is charged with the exercise of good faith in dealing with his principal, and that if at the instruction of his principal he acquires property he does so for the benefit of the principal. *Rose v. Hayden*, 35 Kan. 106, 10 Pac. 554, 57 Am. Rep. 145; *Chastain v. Smith*, 30 Ga. 96. But this is true when the agent violates his duty to his principal.

In the case at bar, however, Moore's duty to plaintiff was a matter of agreement between them, and when parties have made their own agreements it is the function of the courts to enforce them, and the extent of their rights then becomes a matter of agreement and not a matter of duty imposed by law. It is an established and conceded fact that the plaintiff chose his own method by which Moore was to communicate with

him, namely, the telegraph, and when Moore sent the telegram he did exactly what Allen had directed him to do, and we cannot say that it was Moore's duty to do more than both he and Allen had agreed should be done.

It is a well-settled principle of law, both in this country and in England, that where a party making an offer of a contract has stipulated the method of acceptance, he is bound by an acceptance in that method whether he receives it or not. If, for instance, an offer is made by mail with directions to accept by mail, the posting of the letter of acceptance completes the contract. *Taylor v. Merchants' Fire Ins. Co.*, 9 How. 390, 18 L. Ed. 187; *Mactier v. Frith*, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; *McClintock v. South Penn. Oil Co.*, 146 Pa. 144, 23 Atl. 211, 28 Am. St. Rep. 785; *Northampton Ins. Co. v. Tuttle*, 40 N. J. Law, 476. The rule is the same with reference to the telegraph. *Minnesota Oil Co. v. Collier*, 4 Dill. 431, Fed. Cas. No. 9,635; *Brauer v. Shaw*, 168 Mass. 198, 46 N. E. 617, 60 Am. St. Rep. 387; *Trevor v. Wood*, 36 N. Y. 307, 93 Am. Dec. 511; *Haas v. Myers*, 111 Ill. 421, 53 Am. Rep. 634. In *Household Fire Insurance Co. v. Grant*, 4 Ex. D. 216, the Court of Appeals, as quoted in section 40 of *Anson on Contracts*, say: "As soon as the letter of acceptance is delivered to the post office the contract is made as complete and final and absolutely binding as if the acceptor had put his letter into the hands of a messenger sent by the officer himself as his agent to deliver the offer and receive the acceptance."

The reason of the rule applies to the case at bar. The plaintiff had chosen the telegraph company as his agent through which the notice from Moore was to be transmitted. When Moore delivered the message to the telegraph company at Pauls Valley, as between him and Allen it was a delivery to Allen's agent, and therefore a delivery to Allen himself, and it was not necessary for Moore to use some other method than that which Allen himself had selected. As Allen, in law, received the message, so far as his rights against Moore are concerned, it was not necessary for Moore to repeat it, or communicate in some other way which had not been agreed upon, and as Allen did not accept the proposition, did not send instructions, and did not send the money to the bank as requested, Moore had a right to purchase the land for himself, and the telegraph company having failed to perform its duty in the matter, is liable to Allen for the damages which he sustained, and, as the amount of the damages was agreed upon, there is no question in the case affecting the measure of damages.

Several cases are cited by the plaintiff in error, holding that it is the duty of one who has sent a telegraph message to use reasonable care to mitigate the damages which he may sustain by reason of its nondelivery, but in some of those cases the sender knew

of the nondelivery, and in the others the fundamental fact in this case was not presented—that is, there was no question of a notice being given in the manner agreed upon by the parties.

All of the errors assigned relate back to this fundamental proposition, except that the deed from Hull to Moore was delivered and passed title. On this point, however, the evidence does not sufficiently show that the deed was delivered.

We think the judgment of the trial court should be affirmed.

PER CURIAM. Adopted in whole.

HEWITT et al. v. GOLDSBOROUGH et al.  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

IMPROVEMENTS (§ 4\*)—COMPENSATION—PERSONS ENTITLED.

Where, in a suit commenced March 28, 1904, to cancel the deed to a homestead, executed by plaintiff to defendant February 18, 1897, defendant died in possession pending the submission and before the decision of the cause in this court, and where the mandate sent down was recalled, and as again sent down ordered, among other things, the deed set aside and plaintiff put in possession, but left open the question of the rights of occupying claimants, held, that defendant, if living, or his heirs, if dead, in quiet possession of the land from the date of said deed, should be permitted to come in and assert their rights as occupying claimants pursuant to section 6128 and 6130 of Snyder's Stats. of Okla.

[Ed. Note.—For other cases, see Improvements, Cent. Dig. §§ 4-26; Dec. Dig. § 4.\*]

Error from District Court, Kingfisher County; A. H. Huston, Judge.

Action by W. H. Goldsborough and another against Robert Hewitt. On the death of defendant, J. A. Hewitt and others filed a petition in intervention. From a judgment for plaintiffs, the interveners bring error. Reversed and remanded.

P. S. Nagle, for plaintiffs in error. F. W. Jacobs, for defendants in error.

TURNER, C. J. This case has come to this court on several different phases (Goldsborough et al. v. Hewitt, 23 Okl. 60, 99 Pac. 907, 138 Am. St. Rep. 795; Goldsborough et al. v. Hewitt, 26 Okl. 859, 110 Pac. 906; State of Oklahoma ex rel. W. H. Goldsborough v. A. H. Huston, Judge, etc., 28 Okl. 718, 116 Pac. 161). In the cause reported in 23 Okl. 60, 99 Pac. 907, 138 Am. St. Rep. 795, we held the deed from William H. Goldsborough to Robert Hewitt, dated February 18, 1897, to the homestead in controversy, without consideration and void, and reversed and remanded the cause. After the mandate had gone down, it appearing that Robert Hewitt had died after the submission and before said cause was decided by this court,

we recalled the mandate, and, after setting aside said decision and rendering the same and filing the opinion therein as of the day of the submission, we reversed and remanded the cause not for a new trial, but with direction to the trial court to set aside the deed complained of, put plaintiff in possession of his homestead under proper process, and quiet the title thereto in him as prayed. On the coming down of the mandate to this effect the same was spread of record in the trial court and judgment entered accordingly, save and except that no process was directed to issue to put plaintiff in possession. This for the reason that at the time of entering judgment on the mandate the heirs of said Hewitt, plaintiffs in error here, to wit, J. A. Hewitt, Amanda Hewitt, Blanche Hewitt, and Lula Hewitt, filed in said court in said cause, with notice to said Goldsborough, in effect a petition in intervention, pursuant to article 24 of the Code of Civil Procedure (Comp. Laws 1909) of the state of Oklahoma, known as the "Occupying Claimant's Act," setting up that their father, said Robert Hewitt, had been in quiet possession of said land for 15 years up to date of his death, during which time and since, they say, they have been in quiet possession thereof; that said Hewitt was holding said land under the deed set aside, and had made thereon lasting and permanent improvements (describing them), and prayed that an entry be made upon the journal of the date for the trial of their rights as occupying claimants under said act, which said petition the court denied, and rendered and entered judgment accordingly. To reverse said judgment, after superseding the same, this proceeding in error was commenced.

Since we have already held in State of Okl. ex rel. Goldsborough v. A. H. Huston, supra, that "the district court may hear and determine any matters left open by the mandate of this court," being of opinion that the subject-matter thus proposed by said heirs to be litigated was left open by the mandate in Goldsborough et al. v. Hewitt, 26 Okl. 859, 110 Pac. 906, the only question for us to determine is whether said heirs had a right to thus come in and claim the benefit of said act. They had.

Snyder's Statutes of Oklahoma, section 6128, which they invoke, reads: "In all cases any occupying claimant being in quiet possession of any lands or tenements for which such person can show a plain and connected title in law or equity, derived from the records of some public office, or being in quiet possession of and holding the same by deed, devise, descent, contract, bond or agreement from and under any person claiming title as aforesaid, derived from the records of some public office \* \* \* shall not be evicted or thrown out of possession by any person

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

or persons who shall set up and prove an adverse and better title to said lands until said occupying claimants, his, her or their heirs, shall be paid the full value of all lasting and valuable improvements made on such lands by such occupying claimant, or by the person or persons under whom he, she or they may hold the same, previous to receiving actual notice by the commencement of suit on such adverse claim by which eviction may be effected."

Section 6130: "The court rendering judgment in any case provided for by this article against an occupying claimant shall, at the request of such occupying claimant, for the benefit of the provisions of this article, cause an entry to be made upon the journal of such request and shall at once set a date for the trial of the right of such occupying claimant to compensation for all lasting, valuable and permanent improvements made by such occupying claimant, or those under whom he claims, upon the premises prior to the issuing of summons in the cause, and at such trial each party shall produce his evidence relating to such improvements," etc.

As the record discloses that defendant Robert Hewitt, the ancestor of petitioners, was, for years prior to and at the time of his death, in quiet possession of the homestead in controversy claiming under deed from William H. Goldsborough, dated February 18, 1897, which was afterwards held void on suit commenced against him in the district court by said Goldsborough March 23, 1904; we are of the opinion that as Hewitt, on the coming down of the mandate, if living, would have had the right to invoke said act in aid of a recovery of the lasting and valuable improvements placed by him on said land between those dates, so we are further of opinion that on his death the right so to do would survive to his heirs under the express terms of said act, and that the court erred in refusing to grant the prayer of their petition and set their claim down for hearing.

The cause is therefore reversed and remanded to be proceeded with in accordance with this opinion. All the Justices concur.

#### SAWYERS v. SCHULER et al.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

REPLEVIN (§ 88\*)—PROCEEDINGS—DEMURRER TO EVIDENCE.

Evidence examined, and held that the court erred in overruling a demurrer thereto.

[Ed. Note.—For other cases, see Replevin, Dec. Dig. § 88.\*]

Error from District Court, Pittsburg County; Preslie B. Cole, Judge.

Action by Antone Schuler and another

against R. C. Sawyers. Judgment for plaintiffs, and defendant brings error. Reversed.

E. Allan Boyd and W. H. Moore, for plaintiff in error. Wallace Wilkinson, for defendants in error.

TURNER, C. J. This is a suit in replevin, brought originally before a United States commissioner in the Indian Territory, for a set of butcher tools of the value of \$70.90. There was judgment for plaintiffs before the commissioner and in the district court of Pittsburg county, to which it was appealed. Defendant brings the case here.

As the first assignment is that the court erred in the admission of testimony, over objection, we cannot consider it, for the reason that said assignment fails to comply with rule 25 of this court.

The next is that the court erred in overruling defendant's demurrer to the evidence. There is no dispute as to the essential facts. On this point the evidence discloses that on August 27, 1904, Antone Schuler and Louisa Schuler, defendants in error, plaintiffs below, were the owners of a small home and a butcher shop, which they ran, in McAlester, then Indian Territory; that on said day they entered into a written agreement with R. C. Sawyers, plaintiff in error, to sell the same to him for \$1,450 and take cattle in payment, less \$700 due on a mortgage outstanding against the home, which Sawyer agreed to pay out of the proceeds of certain of the cattle which he was authorized to sell, and less \$25 per month for eight months thereafter, during which it was agreed they might remain in possession and until the purchase price was paid; that, pursuant to said agreement, they made to Sawyer a deed to the realty, which, together with a bill of sale of said tools, they placed in escrow, with the understanding that the same should there remain until the purchase price was paid; that, pursuant to said agreement, Sawyers sold part of the cattle, paid off said mortgage, and delivered six head of said cattle to plaintiffs, but refused to deliver more, whereupon they declared the contract at an end, and notified the escrow not to deliver said papers, but found that the same had already been done; that thereupon plaintiffs sued defendant for the balance of the purchase price of all the property, including the tools, and to enforce a vendor's lien against the realty, and defendant sued plaintiffs for the possession of the realty; that, pending these suits, plaintiffs loaned the tools to a neighbor, whereupon defendant, by displaying his bill of sale therefor and claiming to be the owner, got possession of them; that thereafter, on November 15, 1905, it was agreed in writing between plaintiffs and defendant, in effect, that said suits "be and are hereby settled and compromised."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Sawyer thereby agreeing to pay "\$1,040.75 on or before the first day of December, 1905," which he did, and by which, when paid, it was further agreed, "all matters in reference to said suits are hereby settled in full," each suit to be dismissed by plaintiff therein at his own cost, which was done. Thereafter this suit was brought.

In passing, in determining the legal effect of said compromise agreement, it was the duty of the trial court to ascertain from the pleadings in both cases, introduced in evidence, precisely what was involved therein, and whether it appeared therefrom that the suit of the Schulers embraced the balance of the purchase price of all the property sold, including said tools. If it did, it is apparent that when Sawyers agreed to pay \$1,040, and plaintiffs agreed to accept the same in full of "all matters in reference to said suits," that the tools, being in controversy, were settled and paid for, and the title thereto passed to Sawyers by virtue thereof. As there was no contention that he had since parted with the title thereto, the demurrer to the evidence should have been sustained.

Reversed. All the Justices concur.

SHAWNEE FIRE INS. CO. v. THOMPSON  
& ROWELL et al.,

(Supreme Court of Oklahoma. Dec. 12, 1911.)

(Syllabus by the Court.)

1. INSURANCE (§ 335\*)—PROMISSORY WARRANTIES—VALIDITY.

A stipulation in a fire insurance policy that the insured shall make and keep inventories and a set of books and keep them in a fireproof safe at night and at all times when the building mentioned in the policy is not open for business, or, failing in this, to keep such inventories and books at night and at all such times in some place not exposed to fire which would ignite or destroy said building, and in case of loss to produce such books and inventories for the inspection of the insurer, in the event of failure on the part of the insured to produce such books and inventories, for the inspection of the insurer, that the entire policy shall be null and void, is a reasonable and competent provision to insert and attach to the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 335.\*]

2. INSURANCE (§ 335\*)—PROMISSORY WARRANTIES—PERFORMANCE—"INVENTORY."

An inventory which bunches merchandise together without itemizing same, such as, "Xmas Goods, \$784.39; Clothing, \$1,500.00; Racket Goods, \$900.00; Stone, J., \$145.00; Glass, J. and Silver, \$190.00; Enamel Ware, \$674.00; Tinware, and Glass, \$187.00; Semi Porcelain Ware, \$387.00; Chinaware and Silver, \$847.75, etc." is not such an inventory as was required by the terms of the insurance policy sued on in this case.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 335.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3754-3755.]

3. INSURANCE (§ 335\*)—PROMISSORY WARRANTIES—"INVENTORY."

An inventory, in the sense used in the insurance policy sued on, means an itemized list or enumeration of property, article by article, and is not intended merely to show the gross value of the property insured, but is for the purpose of enabling the parties to ascertain the different articles which go to make up the entire stock in order that the insurance company may test the correctness of the claim for damages in two respects: First, whether the articles composing the stock belong to the class of property covered by the policy; second, whether the valuation attached to the different items is reasonable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 335.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3754-3755.]

4. INSURANCE (§§ 173, 335\*)—CONSTRUCTION—GENERAL RULES.

The "three-fourths value" and "iron-safe" clauses attached to and forming a part of the contract of insurance should be interpreted according to the same rules by which other contracts are construed, and a substantial compliance therewith is sufficient. The evidence in the case examined, and held not to show a substantial compliance with said provisions.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 358, 853; Dec. Dig. §§ 173, 335.\*]

5. INSURANCE (§ 335\*)—PROMISSORY WARRANTIES—INVENTORIES—SUFFICIENCY.

The provision of a fire insurance contract which requires that the insured will keep such books and inventory securely locked in a fireproof safe at night, etc., is a promissory warranty, and is not substantially complied with by producing an inventory made one month prior to the fire, where it is shown that the inventory made within 12 calendar months prior to the issuance of the policy had been negligently allowed to remain out of the fireproof safe, and, together with the books, be destroyed, especially when the last inventory was not made in compliance with the terms of the policy, the goods not being itemized, but mere summaries of the amounts and values being given.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 335.\*]

6. INSURANCE (§ 335\*)—PROMISSORY WARRANTIES—KEEPING OF BOOKS.

Books showing "all purchases and sales, both for cash and credit" within the meaning of a warranty in a policy of insurance, requiring the insured to keep a set of books showing a complete record of business transactions including all such purchases or sales, need only be such as will show these matters to a man of ordinary intelligence, but plaintiff's Exhibit D, which was a small private pocket ledger, showing the amount of cash deposited in the bank, after deducting all expenses of the business, and covering a period of three weeks preceding the fire, is not a substantial compliance with said warranty, especially in view of the fact that the insured negligently permitted his books, including the cashbook, to remain without the fireproof safe and be destroyed by fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. § 335.\*]

7. TRIAL (§ 150\*)—TAKING CASE FROM JURY—DEMURRER TO EVIDENCE.

When the evidence, with all the inferences that can be properly drawn from it, is insuffi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

cient to support a verdict, it is error to overrule a demurrer thereto.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 346-348; Dec. Dig. § 150.\*]

Commissioner's Opinion, Division No. 1. Error from District Court, Pawnee County; L. M. Poe, Judge.

Action by Thompson & Rowell and another against the Shawnee Fire Insurance Company. Judgment for plaintiffs, and defendant brings error. Reversed, with instructions.

Crane & Crane and Fred S. Liscum, for plaintiff in error. W. L. Eagleton and Sam K. Sullivan, for defendants in error.

ROBERTSON, C. Thompson & Rowell were engaged in the retail mercantile business at Ralston, and on October 22, 1907, secured a policy of insurance from the defendant, on their stock of merchandise, in the sum of \$2,000, paying therefor a premium of \$86. On October 30th, eight days thereafter, the stock was consumed by fire. In addition to the \$2,000 policy, plaintiffs had \$11,500 insurance on their stock, making a total of \$13,500 insurance. After the loss, Thompson & Rowell assigned the policy, which defendant issued, to E. A. Bullock, as trustee for certain creditors. Thereafter on March 7, 1908, plaintiffs filed suit in the district court of Pawnee county against defendant on said policy, alleging that defendant, although liable for said amount, refused to pay the same or any part thereof, and that plaintiff performed all the conditions of their said contract, etc. A copy of the policy was attached to plaintiff's petition and made a part thereof.

Defendant answered, admitting the execution of the policy sued on, whereby it insured plaintiffs subject to the limitations, conditions, agreements, and warranties in said policy contained. It admitted that the property was destroyed by fire as alleged; admitted the partnership; admitted that a proof of loss was furnished; but pleaded that the policy, among other things, contained the following conditions and stipulations, known as the "three-fourths value" clause, and the "iron-safe" clause, the former in the following language, to wit: "In consideration of the rate of premium at which this policy is written, it is a condition of this insurance that in the event of loss or damage by fire to the property described herein, this company shall not be liable for an amount greater than three-fourths of the cash market value of each item of the same, not exceeding the amount of the said policy at the time immediately preceding such loss or damage; and in the event of other insurance on the property described herein, then this company shall be liable only for its proportion, three-fourths of such cash market

value at the time of the fire, other concurrent insurance permitted, but total insurance shall at no time exceed three-fourths of the value of each item of property described herein."

And the latter as follows: "The following covenants and warranties on the part of the assured, and conditions on the part of the Shawnee Fire Insurance Company, are hereby made a part of the policy to which this clause is attached.

"First. The assured will take an itemized inventory of stock hereby insured at least once in each calendar year, and unless such inventory shall have been taken within the twelve calendar months prior to the date of this policy, the same shall be taken in detail within thirty days after said date, or this policy shall be null and void from and after the expiration of the said thirty days, and upon demand of the insured within three months from the date of this policy the unearned premium for the unexpired terms of this policy shall be returned.

"Second. The assured shall keep a set of books which shall clearly and plainly present a complete record of the business transacted, including all purchases, sales and shipments of such stock, both for cash and credit, from the date of the inventory provided for in the first section of this clause and during the continuance of this period.

"Third. The assured will keep such books and inventory and also the last preceding inventory securely locked in a fire-proof safe at night, and at all times when the building mentioned in this policy or the portion thereof, containing the stock described therein, is not actually open for business, or failing in this the assured will keep such books and inventories at night and all such times in some place not exposed to fire which would ignite or destroy the aforesaid building, and in case of loss the assured specifically warrants, agrees and covenants to produce said books and inventories for the inspection of said company; and in the event of a failure on the part of the assured to keep such books and inventories for the inspection of the said company, this entire policy shall become null and void and such failure shall constitute a perpetual bar to any recovery thereon."

The policy also contained a nonwaiver stipulation, which provided that none of the conditions of said policy could be waived by any agent, except by written agreement, attached to the policy, forming a part thereof. The answer set up the breach of these clauses in that plaintiffs had not taken an itemized inventory of the stock covered by the policy, within the 12 calendar months, prior to the date of the policy, and that they had not taken one within 30 days after said date, and that insured had not kept a set

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of books which clearly and plainly presented a complete record of the business transactions, including all purchases, and sales and shipments, of all such stock both cash and credit, from the date of the inventory, for which said policy provided and during the continuance thereof; that they kept no books or records of all purchases made by them; that they kept no record of sales and shipments of such stock, either for cash, or credit, from the date of the inventory, during the continuance of said policy. The answer also charges that Thompson & Rowell further breached the conditions and terms of said policy, in that they did not keep said books and inventory locked in a fireproof safe at night, or in some place not exposed to fire, and that they failed to produce said books and inventories after said loss, although defendant demanded that the same be produced. Defendant, after thus answering, tendered into court the amount of the premium paid by the insured for said policy, and in addition to the above it is urged by the defendant that the policy contained the following clauses, to wit:

"The insured as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof, if originals be lost, at such reasonable place as may be designated by this company or its representative and shall permit extracts and copies thereof to be made."

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal or to any examination herein provided for."

It was alleged that the stock of merchandise burned did not exceed the value of \$13,500, and that therefore the same was insured for more than three-fourths of its value and the policy was therefore void; and, further, that said policy contained a warranty to the effect that subsequent insurance should be allowed to the extent of making the total amount of insurance equal three-fourths of the value of the stock; and further, that in case there was fraud, or false swearing by the insured, touching any matter relating to the insurance, or subject thereof, either before or after loss, the policy should be void. That some time in December, after the fire, plaintiffs presented a sworn statement signed by E. G. Rowell, one of the plaintiffs, and a member of the firm of Thompson & Rowell, in which a claim was made that the loss and damages was \$13,407, which defendant alleges was a false and untrue statement.

Plaintiffs replied by general denial, and also alleged that at the time of the issuance of said policy and at various times thereafter defendant waived the right to insist that said policy was not properly issued, and also that by its said acts it has waived any breach in said contract, by ratifying the acts and statements of its agent (who, by the way, was H. E. Thompson, one of the insured) receiving the premium on said policy, and by demanding after the fire that plaintiffs produce their books and inventory, and by demanding invoices of goods purchased by said plaintiffs.

Defendant on February 3, 1909, filed its motion to require plaintiffs to make their reply more definite and certain in various particulars, which motion was by the court overruled and exception allowed. Thereafter trial was had to a jury, and a verdict for \$2,000, was rendered in favor of plaintiffs, and against defendants, upon which judgment was entered. Motion for new trial was duly filed, presented, overruled, exceptions taken, and defendant prosecutes this appeal to reverse said judgment.

Many alleged errors are relied upon by the insurance company, but the principal reason assigned, and seemingly depended upon by it for a reversal, is the overruling, by the trial court, of defendant's demurrer to the evidence offered by plaintiffs in support of the allegations of their petition. The consideration of this assignment, in our opinion, will dispose of the case, and the other errors raised in the brief and relied upon will not therefore be further considered.

[1] The contract, or policy, which is the basis of this suit, provided, as has been seen, that the insured would make an itemized inventory of the entire stock covered by the policy at least once in every calendar year, and unless such inventory shall have been taken within 12 calendar months prior to the date of the policy, then one shall be taken within 30 days after its date, or the policy should become null and void. It also provided that the insured should keep a set of books which should clearly and plainly present a complete record of business transactions, including purchases, and sales, and shipment of such stock, both for cash and credit, from the date of the inventory provided for in the first section of said clause, during the continuance of said policy; and also that these books and this inventory, and the last preceding inventory, should be kept securely locked, in a fireproof safe at night, and at all times when the store was not open for business, or that they should be kept in some other safe place, and should be produced for inspection, by the defendant company, and in the event that they should not be so produced, the policy would be void, and no recovery could be had thereon.

These provisions in policies of insurance,

commonly known as "iron-safe" and "three-fourths value" clauses are common to nearly all fire insurance contracts, and the provisions are substantially the same in all policies. That they are reasonable and enforceable is no longer an open question, and it is a proper method of providing for evidence in case of loss to determine the actual damage, and their validity is determined according to the same rules by which other contracts are measured and construed. In this case the policy was written on the 22d day of October, 1907, and the loss occurred on the 30th day of the same month; the testimony shows, without dispute, that insured took an inventory of their stock in January, 1907, within the 12 calendar months before the policy was issued; the evidence further shows that the insured took what they claimed to be an inventory on or about the 1st of October, 1907. Defendant, however, denies that this was an inventory within the meaning of the clause therein set out. The evidence further shows that the insured kept books in which they attempted to show the amount of their purchases and sales from the date of the January, 1907, inventory; this January inventory, together with the books showing the record of the cash sales from January, 1907, to October, 10, 1907, were not kept in an iron safe at night, but were destroyed by the fire that destroyed the stock of goods, as was also the bills and invoices of goods sent by the wholesale houses from whom the goods were purchased. It was shown that the books purporting to show the amount of goods purchased did not contain a complete record, there being several thousand dollars worth of goods bought according to the evidence of which no record was kept.

Under the demurrer to the evidence five points are raised and discussed by the parties, as follows: First, the destruction of the cashbook by fire, containing the record of cash sales from January 1, 1907, to October 10, 1907, at a time when the store was not open for business, and the failure to preserve the same for defendant's inspection was a legal bar to a recovery according to the terms of the policy; and, second, the failure to preserve the inventory of January, 1907, for defendant's inspection and examination, and its loss by fire in the building containing the stock, was an effective bar to plaintiffs' right to recover; and, third, the admitted failure to keep a complete record of all purchases made by plaintiffs was a complete bar to plaintiffs' right to recover; and, fourth, an inventory being an itemized list or enumeration of property, article, by article, the invoice, sometimes denominated inventory, taken by plaintiffs from October 1, to October 10, 1907, did not constitute an inventory within the meaning of the policy, because the same was not itemized as by the policy required; and, fifth, the little pocket private ledger of E. G.

Rowell, called by him the cashbook, did not show the complete record of cash sales from the date of the issuance of the policy until the fire, nor from the date of the taking of the last invoice until the fire, it containing only a statement of the amount of cash collected during each day from all sources including previous credit sales, less all the expenses paid during each day. Let us examine and consider these various points in their order.

[2] It is admitted that the cashbook, and the January, 1907, inventory, were not kept in an iron safe; and it is also admitted that they were destroyed by fire in the building in which the stock of goods burned, and by the same fire. The insured contend that the burning of the January inventory was a matter of no consequence, for that they had taken another, subsequent to said date, and had presented the same to the defendant. But defendant does not admit that this is a substantial compliance with the terms of said clause for that, first, the October inventory was not such an inventory as was required under the terms of the policy; and, second, that even though it had been intended as an inventory, it was not itemized as required of inventories under that clause of the policy set up in the answer. The objections to the sufficiency of the October inventory warrants an investigation of that subject. Plaintiff's Exhibit C, case-made, pages 483 to 498, inclusive, is a copy of the October inventory. It is in the usual form of inventories, except under the head of "Hose, Vests, Pants and Handkerchiefs," we find the following:

10 doz. at 25.....	\$30 00
5 doz. at 30.....	18 00
3 1/2 doz. at 30.....	12 60
11 doz. at 35.....	46 20
3 doz. at 35.....	12 60
5 doz. at 15.....	9 00
10 doz. at 15.....	18 00
14 doz. at 15.....	21 00
7 doz. at 25.....	4 10
10 doz. at 15.....	18 00
10 doz. at 15.....	18 00
6 doz. at 25.....	18 00
4 doz. at 20.....	9 50
12 doz. at 10.....	14 50
7 doz. at 20.....	16 80
8 doz. at 15.....	14 40
2 doz. wool at 15.....	3 60
1 doz. bats at 25.....	3 00
1 doz. bats at 20.....	2 40
3 doz. bats at 15.....	1 85

Also on page 493 of the same case-made the following:

Xmas goods job lots Fris.....	\$ 784 39
Clothing just received.....	1500 00
Racket goods by lot.....	900 00
Stone, J.....	145 00
Glass, J. and Silver.....	100 00
Enamel ware.....	674 00
Tin ware and glass.....	187 00
Semi porcelain ware.....	387 00
Chinaware and silver.....	847 85

Thus it is seen that at least one-third of the entire stock inventoried was bunched



together without being itemized. It is seen also that there is one item of clothing amounting to \$1,500, without any attempt to itemize the same. Mr. Thompson, one of the plaintiffs, attempted (Record, pp. 70, 71, 72) to explain why the clothing was inventoried in this manner, but the explanation offered is anything but satisfactory. In answer to a question as to when the clothing was purchased he said it was not procured until after the invoice was completed; that he could not tell from whom it was purchased; that the books saved from the fire would show when the same was received, but when asked to take the books and ascertain that fact he evaded that question and answered, "I can answer that question, if I remember there was \$1,500 worth of clothing stored in a ware room," thereafter he said that it had been stored there subsequent to the completion of the invoice. He said he was well acquainted with the business and was in the store every day. The duplicate invoice of this large bill of clothing was not produced, although several months intervened between the time of the fire and the filing of the suit. Neither was there any reasonable explanation offered as to why the other large sums were included in this October inventory without being itemized. So it seems to us that mere summaries, such as is found on page 493 of the inventory, aggregating nearly \$6,000 worth of goods, without attempting to itemize, is not such an inventory as the insured agreed to make and keep for the defendant company. "A fire policy provides that, unless a complete inventory of the stock covered had been taken within 12 months prior to its issue, one should be taken within 30 days, or it would be void. The only inventory taken included such items as: 'Hardware, \$25.00; Marble City Drug Co., \$22.50; bill from Houston Drug Co., \$53.65;' etc. Held, not a compliance with the policy; it being impossible to determine either the quantity, the number of items included in the summarized entry, the value per item, the reasonableness of the valuation, or whether the articles were within the purview of the policy." *Fire Ass'n of Philadelphia v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. 153.

In *Niagara Fire Ins. Co. v. Forehand*, 169 Ill. 626, 48 N. E. 830, it is said: The provisions of a fire insurance policy upon a stock of goods that the insured shall take inventories, and keep correct books showing purchases and sales, and keep the inventories and books in a place secure from fire, when the store is closed, is a reasonable provision." See, also, *Gish et al. v. Insurance Co.*, 16 Okl. 59, 87 Pac. 869, 13 L. R. A. (N. S.) 826; *Insurance Co. v. Fuller*, 26 Okl. 728, 110 Pac. 763.

[3] The question of the sufficiency of an inventory such as the one offered is settled by the case of *Assurance Company v. Kem-*

*enedo*, 94 Tex. 373, 61 S. W. 1102. In that case it was held that the object of an inventory in insurance cases was not to ascertain the gross value of the property insured, but to ascertain the different articles which went to make up the stock in order that the insurance company might test the correctness of the claim in two respects: First, whether the articles composing the stock belonged to the class of property covered by the policy; second, whether the valuation attached to the different items was reasonable. The ordinary and accepted meaning of the word "inventory" is "an itemized list or enumeration of property, article by article." *Roberts, Willis & Taylor Co. v. Sun Mutual Ins. Co.*, 19 Tex. Civ. App. 338, 48 S. W. 559; *Assurance Co. v. Master-son*, 25 Tex. Civ. App. 518, 61 S. W. 962. No discussion is needed to demonstrate that the inventory in question fails to meet the requirements of this definition. From the items given it is impossible to ascertain either the quantity, the number of items included in the summarized entry, the value per item, the reasonableness of the gross valuation, or whether they were properly within the purview of the policy. The inventory furnishes nothing upon which to base a calculation. The items to which we have especially referred comprise from one-third to one-half of the stock of goods, and even if it should be conceded that the remainder of the stock was properly inventoried, the objectionable part appears so large a proportion to the full amount that it can not be held to be a substantial compliance with the requirements of the insurance contract.

It was to obviate such conditions that the defendant and insured contracted in the policy that an itemized inventory and a complete record of goods received and sold, should be kept in an iron fireproof safe. It has been held by our Supreme Court that such stipulations are valid, and if that be true they should, like other contracts, be enforced. To be sure, a substantial compliance therewith would be sufficient, but in this particular instance there was no substantial compliance with the terms of said contract. Counsel for plaintiffs insist that there has been, but we think otherwise. Here it is shown that in some instances the itemized invoices of certain job lots of goods had been taken, but strange to say, they had been placed within the boxes containing the goods, and had been nailed up and stored away, and were burned with the goods; the inventory should have been kept in the iron fireproof safe or in some other place of safety. The improbable story that of a stock of goods worth from \$15,000 to \$16,000, a member of the firm could not tell when a \$1,500 purchase of clothing was made, or when it was received, whether before or after the October inventory, or from whom

it was purchased, and that the original invoice had burned, and that no attempt was made to secure a duplicate thereof, marks this phase of the case as most unusual, and aids materially in rendering the October inventory worthless, as a substantial compliance with the terms of the contract. In *Gish et al. v. Insurance Co. of North America*, 16 Okl. 59, 87 Pac. 869, 13 L. R. A. (N. S.) 826, it was held that these identical clauses in a fire insurance contract were reasonable and valid, and paragraph 1 of the syllabus in that case reads as follows: "A stipulation in a fire insurance policy that the insured shall make and keep inventories and books, and keep them in a fireproof iron safe in some place not exposed to fire which would ignite or destroy the building in which the property insured is situated, and, in case of loss, to produce such books and inventories for the inspection of the insurer, and in the event of failure on the part of the insured to produce such books and inventories, for the inspection of the insurer, that the entire policy shall be null and void, is a reasonable and competent provision to insert in and attach to the policy." "A fire policy required insured to keep books showing a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, which should be securely locked in a fireproof safe at night. Insured kept books as required, but on the day before the night of the fire, took the cash book home to make some entry, and, when he came back, left it in the pocket of his coat, lying on the counter. He then went on an errand, and did not return that afternoon; and the book accordingly was not put in the safe, and was destroyed in the fire. Held, that the policy was breached; the loss of the cashbook being due to insured's negligence." *Fire Ass'n of Philadelphia v. Calhoun*, 28 Tex. Civ. App. 409, 67 S. W. 153. Then if the October, 1907, inventory was not a compliance with the terms of the contract and no substantial excuse having been offered for the failure of the insured to keep the January inventory, together with the books, in a fireproof iron safe, we must hold that there was no such compliance with the terms of said contract, on the part of the insured, as would warrant a recovery or sustain a judgment on said policy. On the contrary, the policy became void by reason of the noncompliance with its terms by the insured.

[5] As to the second point raised, by the demurrer, the reasons as applied to the first will effectually dispose of it, but as to the third point, we are compelled to say that even though the October inventory was a substantial compliance or even a strict compliance with the terms of the contract as set up in item 3 of the iron-safe clause, supra, which reads as follows: "The assured will keep such books and inventory *and al-*

*so the last preceding inventory* securely locked in a fireproof safe at night and at all times when the building mentioned in this policy or the portion thereof containing the stock described therein, is not actually open for business, or, failing in this, the assured will keep such books and inventories at night and at all such times in some place not exposed to fire which would ignite or destroy the aforesaid building, and in case of loss the assured specifically warrants, agrees and covenants to produce said books and inventories for the inspection of such company; and in the event of the failure on the part of the assured to keep such books and inventories for the inspection of said company, this entire policy shall become null and void, and such failure shall constitute a perpetual bar to any recovery thereon"—yet, it is seen that it was not only necessary to preserve the inventory on hand at the date the policy was issued, it having been issued within 12 calendar months, but that it was also necessary to preserve the *next preceding inventory as well*. Therefore, no matter how the October inventory is treated, whether sufficient or not, according to the plain terms of the policy, the insured were bound to produce the preceding inventory, or to show good reason for not doing so. No reasonable excuse has been offered, and no substantial compliance with the terms of the policy has been had in that regard. However, we hold that the October inventory was not a sufficient compliance with the terms of the policy as to excuse the production of the January inventory, especially when it is admitted by the plaintiffs that such an inventory had been taken, but was negligently permitted by them to remain, together with all the other necessary books, and papers, without the iron safe, and thus be destroyed by the fire which destroyed the stock, and thereby prevented the defendant from securing that evidence as to the actual loss of the insured, which the very terms of the contract which they now seek to recover under, provided should be done. That the requirement with reference to the keeping of the inventory was in no sense substantially complied with is, we think, equally plain. The argument of counsel, that inasmuch as the policy was written on October 22, and provided that the insured should have 30 days in which to make an inventory, and that only eight days of that time had elapsed at the time of the fire, the terms of the policy had not been breached, in that respect, even though it should be held that the October inventory was sufficient, is, in our opinion, untenable when we remember the provisions of section 3 of the "iron-safe" clause which provides, that the insured "will keep such books and inventory, and also *the last preceding inventory*, securely locked, etc. \* \* \* and agrees and covenants to produce said books and inventories," etc.

[4] The "iron-safe" and "three-fourths value" clauses are subject to the same rules of construction as other contracts, and had there been a substantial compliance with their terms we would be bound to uphold the contentions of the insured, but there was no compliance, substantial or otherwise, as has already been seen. *Brown v. Insurance Co.*, 89 Tex. 590, 35 S. W. 1060. In *Insurance Co. v. Kenedo*, 94 Tex. 373, 61 S. W. 1102, it is said, in speaking of the iron-safe clause: "The true doctrine upon that question is expressed in the case of *Insurance Co. v. Kearney & Wyse*, 180 U. S. 132 [21 Sup. Ct. 326, 45 L. Ed. 460], in the following language: 'We are of opinion that the failure to produce the books and inventory referred to in the policy means a failure to produce them if they are in existence when called for, or if they have been lost or destroyed by the fault, negligence or design of the insured. Under any other interpretation of the policy the insured could not recover if the books and inventory had been stolen, or if they had been destroyed in some other manner than by fire, although they had been placed in some secure place, not exposed to fire that would reach the store.' Applying the rule of this case, if the inventory was not produced because it was lost or destroyed by some means not constituting fault, negligence or design on the part of the insured, or his employes, and if the insured used ordinary care to preserve the inventory in accordance with the terms of the contract, then the failure to produce would not work a forfeiture of the insurance policy."

In *German-American Ins. Co. v. Fuller*, 26 Okl. 728, 110 Pac. 765, Mr. Justice Kane, in speaking for the court in discussing a similar proposition said: "It is not quite clear upon what ground counsel for defendant in error justified noncompliance with that part of the third paragraph of the 'warranty to keep the books and inventories and to produce them in case of loss,' which required him to keep such books, inventories, etc., as he had, securely locked in a fireproof safe at night. It is quite clear that this had not been done. In the case of *Southern Ins. Co. v. Parker* [61 Ark. 207, 32 S. W. 507] supra, Mr. Justice Riddick, said for the court: 'This court in *Western Assurance Co. v. Althelmer*, 58 Ark. 575, 25 S. W. 1069, said of a similar provision that "the stipulation of the 'iron-safe' clause constituted an express promissory warranty in the nature of a condition precedent," and that a strict compliance with it was necessary. In his work on Insurance, Mr. Wood also says that such promissory warranties must be strictly performed, "and that, too, without reference to the question whether they were material to the risk. The insurer is permitted to judge for himself upon what conditions he will assure a risk, and what is material thereto. The assured cannot defend against a breach

thereof upon that ground. \* \* \* The assured has no election, but must stand upon his performance of them." 1 Wood on Fire Insurance, p. 448. \* \* \* However inconvenient it may have been he had expressly agreed that the saloon books should be kept in a fireproof safe at night, or in some place secure from a fire that might destroy the house where the insured goods were kept; and he should have complied with his contract. He failed to do so, and as a result of that failure the books were destroyed by the fire that burned the house. For this reason the judgment against the appellant company cannot be sustained.'"

In the case at bar no excuse is offered for the failure to comply with the terms of the policy in regard to keeping the books and inventory in the iron safe. Instead the so-called October inventory, and the little private ledger (plaintiff's Exhibit D) are offered as substitutes and as a substantial compliance with the terms of the policy. The duty of the insured under these clauses has been defined by the Supreme Court of the United States in *Insurance Co. v. Kearney & Wyse*, supra, and from a careful examination of all the facts and circumstances of the instant case we feel that the construction thus placed upon these provisions of the policy, are reasonable, and conclusive on us. We are impressed with the argument of able counsel, that a strict compliance with the terms and conditions of this contract would work unnecessary hardships on the public, etc., but there is another phase of the question, aside from this, that appeals to us, and demands our consideration. No plea of mistake or ignorance on the part of the insured as to the terms of the contract has been made. On the contrary they admit the very facts, relied upon by the defendant to avoid the policy, but urge as an excuse that a substantial compliance with the requirements thereof have been made. This, as has been seen, has already been disposed of adversely to the contention of the insured. When we consider the nature of the insurance business, the dependency of the public on the protection secured thereby, the reliance placed in the companies by the business men of every community, the demands of modern commercial methods, and the ultimate fact that the insured in the end must pay (by his legitimate premiums) not only all losses that occur, together with the cost of operating the business, but also the profits of the stockholders as well, and when we realize that the business offers the greatest opportunities for fraud and deceit, which frequently appeals to the cupidity of unprincipled men, and also that insured, to a very great extent, controls the evidence upon and by which proofs of damage and loss must be ascertained, then we can readily see the reasonableness of these provisions of the contract, and the necessity which requires the insured to protect and preserve

the documentary evidence, all made by him, in the first instance, and always in his possession, which will enable the parties to determine, with accuracy, the amount and character of the loss sustained. In the instant case the insured contracted to keep a set of books, which among other things should show the amount of sales and purchases made. No reasonable man could object to such requirement.

[8] They also agreed to keep a cashbook, showing the amount of money taken in, the source from whence it came, and the object and purpose of its expenditure, yet nothing of the kind was preserved, but instead is plaintiff's Exhibit D, a small pocket ledger, showing the net amount, banked for a few days prior to the fire; this, too, after payment of the expense of the business, with other expenditures paid out, over the counter, not explained or accounted for in any wise.

There was an attempt on the part of the insured to show a waiver by the defendant of some of the requirements of the contract, but the effort failed completely. There was also an attempt on the part of the defendant to show that there had been false swearing on the part of one of the insured, and, in passing, we may safely say that there was not, in the sworn statement made in December by one of the insured, such regard to facts as was demanded, but we agree with counsel for insured that it was necessary to show that the statements were not only false, but were known to be false by the insured when they were made. This was not shown. The evidence as to the value of the stock burned is very unsatisfactory. The testimony of the witness Robertson in our opinion should have been stricken from the record, and taken from the consideration of the jury, as being wholly incompetent, especially in view of his statement to the jury that the stock was worth \$18,500, without showing himself qualified to testify, and when interrogated concerning it said he could prove it by the books, and, when handed the books in the presence of the jury, and requested to show that fact by them, failed to do so, and on objection by the insured the court refused to require him to do so.

As was said, the entire testimony relative to the value of the stock damaged is of doubtful value. However these matters do not require our attention, inasmuch as the case must be reversed for other reasons hereinbefore enumerated. It is with some regret that we arrive at this conclusion. However, there is no escape therefrom. In the language of *Assurance Co. v. Kemenedo*, supra: "The facts of this case show that there may be a very great hardship resulting from this determination between the parties, but it has been said that 'hard cas-

es make bad law.' It is not the province of the court to adjust the construction and enforcement of a contract to the result which may be produced upon the parties, but it is better that those who make hard contracts shall suffer the result than that the law shall be so warped and distorted as to disturb the business of the country, and to render the power of contracting uncertain and unreliable."

For the reasons given, the judgment of the district court of Pawnee county should be reversed, and the cause remanded, with instructions to enter judgment for defendants in error in the sum of \$86, as tendered by the Insurance Company in the court below, all costs to be taxed against defendants in error.

PER CURIAM. Adopted in whole.

### ROLATER v. STRAIN.

(Supreme Court of Oklahoma. Nov. 14, 1911.  
Rehearing Denied Dec. 12, 1911.)

#### (Syllabus by the Court.)

#### 1. APPEAL AND ERROR (§ 2\*)—STATUTORY PROVISIONS—RETROACTIVE OPERATION.

As a general rule, the right of appeal is governed by the law applicable thereto in force when the final judgment is rendered, and, unless it is evident from the terms of the statute which gives, modifies, or takes away the right of appeal that it was intended to have a retrospective effect, it has no application to causes in which final judgment had been rendered prior to the time the act in question was passed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 2.\*]

#### 2. APPEAL AND ERROR (§ 338\*)—TIME FOR TAKING PROCEEDINGS—STATUTORY PROVISIONS—RETROACTIVE OPERATION.

The amendment to section 574, c. 66, Gen. St. Okl. 1893, provided for in chapter 18, Sess. Laws Okl. 1910-11, p. 85, reducing the time allowed for appeal from a judgment from one year to six months, does not operate, retrospectively, nor apply to judgments entered before its passage, but is limited in its operation to judgments thereafter entered. Therefore proceedings in error taken within one year from the entry of a judgment of a date prior to the passage of such amendment, even though more than six months has expired, will not be dismissed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 338.\*]

Error from District Court, Oklahoma County; G. W. Clark, Judge.

Action by J. B. Rolater against Mattie Inez Strain. From the judgment, Rolater brings error. Motion to dismiss denied.

Flynn, Ames & Chambers and Russell G. Lowe, for plaintiff in error. E. G. McAdams and A. F. Moss, for defendant in error.

DUNN, J. [2] This case presents error from the district court of Oklahoma county. November 18, 1910, the jury in the trial

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

court returned its verdict, and on December 10, 1910, judgment was duly entered thereon. July 1, 1911, plaintiff in error filed his petition in error and case-made in this court. July 24, 1911, counsel for defendant in error filed their motion to dismiss the appeal, and as ground therefor assert that this court is without jurisdiction to hear and determine the cause, for the reason that the judgment of the lower court from which the appeal is sought to be taken was rendered and entered on December 10, 1911, and that the cause was not filed in this court until July 1, 1911, 6 months and 21 days from the rendition of the judgment in the lower court. To support their motion, counsel for defendant in error rely upon the provisions of chapter 18, p. 35, Sess. Laws Okl. 1910-11, which act is amendatory of section 574, c. 66, Gen. St. Okl. 1893. The original act to which the section relied upon is an amendment, providing that proceeding for reversing, vacating, or modifying judgments or final orders should not be begun unless within one year after the rendition of the judgment or making of the final order complained of, etc. The amendment referred to reduces the time so allowed from one year to six months within which such proceedings were required to be begun, and it is the contention of the counsel that, in view of the fact that this judgment was rendered more than six months prior to the time when the proceedings for reversing it were begun in this court, it was brought too late, and hence no jurisdiction exists to entertain the same. In this contention we are unable to agree. Counsel for neither party have briefed the proposition involved, and, although as a general rule this court renders no opinion where motion to dismiss is denied, the importance of this question and the likelihood of its recurrence has induced us to investigate it and write an opinion declarative of our views thereon.

[1] There is no language in the act itself to cause us to believe that it was the design and intent of the Legislature that the same should be retroactive in its operation, and the general rule under such circumstances is that it is to have a prospective operation only. *Good et al. v. Keel et al.*, 116 Pac. 777, an opinion of this court delivered July 11, 1911, but not yet officially reported; 2 *Lewis' Sutherland, Statutory Construction* (2d Ed.) § 642. The same question which is presented here has been frequently presented in other states, and the almost uniform holding of the courts has been in accord with the conclusion to which we have come, and the rule may be stated generally to be that a statute reducing the time for taking an appeal does not apply to proceedings in which a judgment has been previously rendered, and that the right of appeal is governed by the provisions of law applicable thereto in force

at the time when the judgment was rendered. 2 *Standard Ency. of Procedure*, 136, and cases cited; 2 *Cyc.* 520; *O'Bannon v. Ragan*, 30 Ark. 181; *Rankin v. Schofield*, 70 Ark. 83, 66 S. W. 197; *Pignax v. Burnett et al.*, 119 Cal. 157, 51 Pac. 48; *Melde v. Reynolds*, 120 Cal. 234, 52 Pac. 491; *Carr v. Miner*, 40 Ill. 33; *City of Davenport v. D. & St. P. R. Co.*, 37 Iowa, 624; *Rivers v. Cole*, 38 Iowa, 677; *Sammis v. Bennett*, 32 Fla. 458, 14 South. 90, 22 L. R. A. 48; *Davis v. Pender, Minor (Ala.)* 57; *Kerlinger v. Barnes et al.*, 14 Minn. 528 (Gil. 398); *Gompf et al. v. Wolfinger et al.*, 67 Ohio St. 144, 65 N. E. 878; *Trustees of Canaan Township v. Board of Infirmary Directors*, 46 Ohio St. 694, 23 N. E. 492.

The motion to dismiss is accordingly overruled.

TURNER, C. J., and WILLIAMS, KANE, and HAYES, JJ., concur.

CHICAGO, R. I. & P. RY. CO. v. WALKER.  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

CARRIERS (§ 177\*)—CONNECTING CARRIERS—LIABILITIES.

Syllabus same as 2 of syllabus in *St. L. & S. F. R. R. Co. v. McGivney*, 19 Okl. 361, 91 Pac. 693.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 775-803; Dec. Dig. § 177.\*]

Error from Coal County Court; R. H. Wells, Judge.

Action by T. J. Walker against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

C. O. Blake, H. B. Low and R. J. Roberts, for plaintiff in error.

HAYES, J. Defendant in error, herein after called plaintiff, originally brought this action to recover damages for delay in the transportation of a cultivator from the town of Heavener to the town of Tupelo in this state. By his agent, plaintiff delivered the cultivator on the 21st day of March to the Kansas City & Southern Railway Company at Heavener, consigned to himself at Tupelo. In being transported from Heavener to Tupelo, it was necessary for the cultivator to pass over the line of the Kansas City & Southern Railway to Howe, and over the Chicago, Rock Island & Pacific Railway Company's line from Howe to Lehigh, and from Lehigh to Tupelo, either over the Missouri, Kansas & Texas Railway Company's line or over the line of the Oklahoma Central Railway Company. Plaintiff received a bill of lading from the Kansas City & Southern Railway Company at Heavener, and the consignment was routed on the way-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

bill from Lehigh over the Oklahoma Central Railway Company's line to Tupelo. The entire transportation of this consignment occurred within the state, and is therefore an intrastate shipment. The Chicago, Rock Island & Pacific Railway Company, hereinafter called defendant, was the connecting carrier. It received the shipment from the Kansas City & Southern Railway Company at Howe, about the 23d day of March, and transported the same over its line to Lehigh, and promptly delivered it to the Oklahoma Central Railway Company, the delivering carrier, to be transported to its destination; and at the same time delivered to the agent of that company the bill of lading and papers pertaining to the shipment. For some reason, which the evidence fails to disclose, the Oklahoma Central Railway Company failed to forward the shipment, and it remained at the depot of that company in Lehigh until the 5th day of May, 1908, at which time plaintiff came to Lehigh, paid the freight charges, and took it from the depot of the Oklahoma Central Railway Company and transported it over the Missouri, Kansas & Texas Railway to Tupelo.

Plaintiff alleges in his petition, and introduced evidence to prove, that by reason of the delay in shipment he was deprived of the use of the cultivator in planting and cultivating his crops, and that because of the loss of its use, he was unable to cultivate properly his crops, and that the fair value of the use of said cultivator was from \$5 to \$10 per day. There was no claim for damages because of breakage or other damages done to the cultivator in shipment or because of depreciation in value or intrinsic deterioration. There was a verdict and judgment for plaintiff in the sum of \$75. We have not been aided by any brief from plaintiff. The foregoing statement of facts constitutes substantially the evidence as stated in the abstract in plaintiff in error's brief, and as we gather it from reading the record itself.

Defendant asked for a directed verdict in its favor, which was denied. In this the trial court committed error.

Section 514, Comp. Laws 1909, in force in the Oklahoma Territory at the time of the admission of the state, and thereupon extended in force in the state, provides: "If a common carrier accepts freight for a place beyond his usual route, he must, unless he stipulates otherwise, deliver it at the end of his route in that direction to some other competent carrier, carrying to the place of address or connected with those who thus carry, and his liability ceases upon making such delivery."

If this statute has been repealed or modified by any act of the Legislature subsequent to the admission of the state, such act has not been called to our attention, and we

know of none. It seems applicable to the facts in this case, and to determine the liability of defendant. The delay did not occur on defendant's line of railway but occurred after delivery by it to the delivering carrier. Under the foregoing statute, the Territorial Supreme Court held that the liability of an initial carrier ceased when it delivered the freight to a competent connecting carrier in direction of the destination thereof. *St. L. & S. F. R. R. Co. v. McGivney*, 19 Okl. 361, 91 Pac. 693. The damages plaintiff alleges he has sustained, and for which he seeks to recover, are not shown by the evidence to have resulted from the negligence of defendant in transporting the consignment over its line of railway or in delivering it to the connecting carrier, but to have occurred at a time when its liability had ceased. Defendant, therefore, was entitled to an instructed verdict.

There are other errors in the record that would require a reversal of the cause, but, since the one already considered disposes of the case, it will be unnecessary to discuss them.

The judgment of the trial court is reversed and the cause remanded, with instructions to enter judgment in favor of defendant.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

YEAGER v. SHELTON et al., County Election Board.  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

MANDAMUS (§ 16\*)—NATURE AND GROUNDS OF REMEDY—MANDAMUS INEFFECTUAL.

Where, on account of the lapse of time, the questions raised on an original proceeding in mandamus become abstract or hypothetical and disconnected from the granting of any actual relief, or from the determination of which no practical results can flow, the case will not be determined by this court, but will be dismissed.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 48; Dec. Dig. § 16.\*]

Original petition in mandamus by P. J. Yeager against D. C. Shelton and others, as the County Election Board of Tulsa County. Writ denied.

Davidson & Williams, for plaintiff.

TURNER, C. J. This being, as it is, an original proceeding by petition, filed in this court March 25, 1911, by P. J. Yeager against the defendants, "as and constituting the county election board of Tulsa county," praying a peremptory writ of mandamus, requiring said board and its secretary to accept and file petitioner's nominating petition and place his name upon the official ballot to be used at an election to be held April 4,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

1911, as an independent candidate for mayor of said city, the writ will not issue, and said petition is dismissed, for the reason that, the time for holding said election having passed, the questions of law presented have become purely abstract or hypothetical, from a determination of which no practical results can flow. *Reece v. Chaney et al.*, 28 Okl. 501, 114 Pac. 608. It is so ordered. All the Justices concur.

# ROBINSON v. OWEN et al.

(Supreme Court of Oklahoma. Dec. 12, 1911.)

(*Syllabus by the Court.*)

## 1. INDIANS (§ 1\*)—LANDS—ALLOTMENTS—PERSONS ENTITLED.

A petition, alleging that plaintiff's father was a free colored person, residing in the Cherokee country at the commencement of the War of the Rebellion, but who left during the war, and did not return within six months after the adoption of the treaty of 1866, but, who, notwithstanding the fact, had been recognized as a freedman by the Cherokee Nation, and the Secretary of the Interior, and had been enrolled on what is known as the Wallace roll, as well as the Kerns-Clifton roll, and had been accorded all the rights of citizenship, and had selected land in said nation as allotments for himself and children, and had been permitted to place tentative filing on such land so chosen by him as such allotment, but who, when the Dawes Commission was authorized and directed to determine the citizenship of said nation and prepare a new roll, made application for himself and his children, including the plaintiff in this case, to be enrolled as citizens, was, on March 11, 1904, denied citizenship, by reason of the fact that the father, after leaving the said Cherokee country during the war, had not returned thereto within six months from the date of the adoption of the treaty of 1866, and the tentative filing on the land selected as allotments thereafter having been canceled by the Secretary of the Interior, and patent issued to said land to another allottee now in possession, does not state facts sufficient to constitute a cause of action in favor of the plaintiff as against the said allottee, declaring the latter to hold the legal title to said land in trust for the benefit of the plaintiff.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

## 2. INDIANS (§ 27\*)—ALLOTMENTS—JURISDICTION—PATENT TO WRONG PERSON.

A court of equity has power to grant relief in a case where the Dawes Commission or the Secretary of the Interior were induced to cause to be issued a patent to land to the wrong person, where the issuance of such patent was occasioned by an erroneous view or construction of the law applicable, or to a gross or fraudulent mistake of facts; and in such a case the patent may be canceled and the allottee held to be the trustee of the legal estate of such land for the use and benefit of the one entitled thereto, and in such case the courts of this state have jurisdiction.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. §§ 57-59; Dec. Dig. § 27.\*]

## 3. INDIANS (§ 1\*)—LANDS—ALLOTMENTS.

Under the facts alleged in the petition, and as stated in the opinion, the plaintiff is not entitled to the relief prayed for.

[Ed. Note.—For other cases, see *Indians*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Washington County; John J. Shea, Judge.

Action by William D. Robinson, a minor, by his father and next friend, W. H. Robinson, against Charles Owen, individually and as administrator of the estate of Oscar Parsons, deceased, and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Joseph Porter, for plaintiff in error. George, Campbell & Ray, for defendants in error.

ROBERTSON, C. The court below sustained a demurrer to the petition. Plaintiff elected to stand on the petition, and refused to plead further, and judgment was rendered against him, dismissing the petition and dissolving the temporary injunction that had heretofore been granted, and for costs.

The petition shows that plaintiff, William D. Robinson, a minor, is a son of W. H. Robinson, who describes himself as "free colored person, residing in the Cherokee country, now Oklahoma, at the commencement of the War of the Rebellion." Said plaintiff's rights, whatever they may be, are derived as son and descendant of his said father, W. H. Robinson. During the war, the father left the Cherokee country, but claims to have returned in time to save his rights under article 9 of the Cherokee treaty of 1866 (act July 19, 1866, 14 Stat. 801), which article reads as follows: "All freedmen who have been liberated by the voluntary acts of their former owners, or by law, as well as all free colored persons, who resided in the Cherokee country at the commencement of the War of the Rebellion and were residents therein at the date of said treaty, or who had returned thereto within six months of said last mentioned date, and their descendants, were admitted into and became a part of the Cherokee Nation and entitled to equal rights and to participate in the Cherokee funds and common property in the same manner as Cherokee citizens of Cherokee blood." But in the decision of the Commission to the Five Civilized Tribes, which is set up as an exhibit (Record, page 26), this allegation appears to be untrue.

The Cherokee National Council, by Acts of November 26, 1866, November 25, 1890, and May 3, 1894, restricted the distribution of funds derived from the sale of public domain of the nation to citizens of the nation, by blood, thus discriminating against plaintiff's father, which, he contends, was a violation of his treaty rights.

[1, §] By virtue of an act of Congress of March 2, 1889, a commission was appointed to prepare a roll of freedmen, and to enable the Nation to determine who were the individual freedmen entitled to participate in the funds of the Nation. Said commission pre-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

pared a roll, known as the Wallace roll, and plaintiff's father, W. H. Robinson, was placed on this roll, and was thereby accorded by the Secretary of the Interior and the Cherokee Nation, all the rights of a Cherokee citizen. Thereafter, by agreement of the Cherokee Nation and the freedmen, the Wallace decree, which the United States Court of Claims had entered in a case reviewing the Wallace bill, was set aside, and a substitute decree was entered, and established what is known as the Kerns-Clifton roll, and forever enjoined, restrained, and prohibited the United States or the Cherokee Nation from in any manner discriminating against the freedmen. This Kerns-Clifton roll, as thus established, was duly approved by the Secretary of the Interior, with the name of plaintiff's father, W. H. Robinson, and his children thereon, and by virtue thereof they claim all the rights and privileges accorded other Cherokee citizens of Cherokee blood. Plaintiff was born after the Kerns-Clifton roll was made. After said roll had been made and approved, with W. H. Robinson and his children's names thereon, said W. H. Robinson purchased from a registered Delaware Indian, under the Cherokee laws then in force, a large tract of land, with right of possession, with the view of allotting himself and children thereon, and which tract included the land involved in this controversy. The Dawes Commission, by act of Congress June 28, 1898, among other things, was authorized and directed to make a roll of the Cherokee freedmen in strict compliance with the decree of the Court of Claims, heretofore mentioned. Plaintiff's father made application to the Commission to have his name and those of his children transferred from the old Kerns-Clifton roll to the new roll, then being prepared by the Dawes Commission, and to add thereto the name of the plaintiff, William D. Robinson, a son born since the Kerns-Clifton roll had been made. This the Dawes Commission refused to do, which act of the Commission was thereafter approved by the Secretary of the Interior, and thereby plaintiff's said father and children were not placed upon the new roll made by the Dawes Commission. Later, however, the Secretary of the Interior ordered the Dawes Commission to reverse its decision and to enroll these applicants, but, for reasons not set out, the said Commission refused to do so, presumably, however, because the act of June 10, 1896 (chapter 398, 29 Stat. 339), required all appeals from decisions of the Commission to the Five Civilized Tribes, affecting claims of citizenship, to be taken to the United States District Court.

Thereafter the Secretary of the Interior and the Cherokee Nation conveyed the title to the land claimed by plaintiff by patent to one Oscar W. Parsons, and plaintiff claims that such patent is a cloud upon his title to the land in question, which he had, long prior

to said adverse decisions, selected as his allotment, and which he at one time filed upon, but which filing had been canceled by the Secretary of the Interior and the Dawes Commission. Later Parsons died, and the defendant Owen, as administrator, sold his estate, and passed the legal title thereto to parties unknown to this plaintiff at the time of filing this suit, except the record in the office of the register of deeds of Washington county, Okla., shows that Charles Owen was the owner by warranty deed from the defendant Connelly and wife of an undivided one-half interest in said land, which said deed was filed February 25, 1909, and, as plaintiff avers, is a cloud upon his title. January 2, 1908, the defendant Connelly, claiming to be the owner of said land, commenced an action of unlawful detainer before a justice of the peace of Washington county, against plaintiff's father, said W. H. Robinson, and on January 21, 1909, on appeal to the county court, a default judgment was rendered in said cause against plaintiff's father, and ordering restitution of said land to said Connelly, and for damages for the unlawful detention.

In addition to the foregoing, it is shown by the petition that plaintiff claims his right to be enrolled by virtue of the fact that his father's name was upon the Wallace roll, and also upon the Kerns-Clifton roll, notwithstanding he was left off the roll prepared by the Commission to the Five Civilized Tribes. He charges also that the latter roll was not prepared according to law, and especially in accordance with the terms of the agreed decree of the Court of Claims; his idea seeming to be that the decree validated the former rolls, and secured full citizen's rights to all persons whose names appeared thereon. This decree (Record, page 23) does acknowledge all names on the authenticated Cherokee roll of 1880, and provides that they and their descendants should be enrolled as Cherokee freedmen; and the first paragraph of said decree, as found on page 22 of the record, also adjudges that all freedmen who had been liberated by voluntary acts of their former owners, or by law, as well as all free colored persons, who were in the Cherokee country at the commencement of the War of the Rebellion, and who were residents therein at the date of said treaty, and who should return to said Cherokee country within six months thereafter, and their descendants, should be enrolled.

The treaty of 1902 (Act July 1, 1902, c. 1375, 32 Stat. 716) with the Cherokee Nation provided that the Commission to the Five Civilized Tribes should prepare another and final roll in strict compliance with section 21 of the Curtis act (Act June 28, 1898, 30 Stat. 495), which provides that the roll should be made under the terms of the decree of the Court of Claims, made on February 3, 1898. By authority of this act, the Com-



mission to the Five Civilized Tribes investigated the status of plaintiff's father as a citizen, and denied him enrollment, on March 11, 1904, in the following language: "The evidence shows that the said William H. Robinson and son were free colored persons, residing in the Cherokee Nation at the commencement of the Rebellion; that they went to Kansas during the Rebellion, and that they did not return to and establish their residence in the Cherokee Nation within the time specified in the decree of the Court of Claims, rendered on February 3, 1896, in the case of Moses Whitmore, Trustee, v. The Cherokee Nation et al., and for the return of freedmen to said nation. It further appearing that all the other applicants herein were born since 1866, and are the respective descendants of, and claim their rights to enroll through, \* \* \* William H. Robinson and his wife, Millie Robinson, the latter claiming only as a Cherokee freedman by intermarriage; and that such descendants have no greater rights to enrollment than said ancestors, through whom they claim. None of the applicants herein can be identified on the 1880 authenticated Cherokee roll. It is therefore the opinion of this Commission that the applications for the enrollment of Wm. H. Robinson \* \* \* and Wm. D. Robinson \* \* \* as Cherokee freedmen should be denied, under the provisions of section 21 of the act of Congress, approved June 28, 1896, and it is so ordered."

It further appears that plaintiff had made application to file on land in controversy, but after said decision the said application was canceled by the Commissioner of Indian Affairs on February 12, 1907, and the land was allotted to Oscar W. Parsons, now deceased, but of whose estate the defendant Charles Owen is administrator.

It also appears that the Cherokee Nation made up a roll in 1880, from which was excluded the names of plaintiff's father, and other like claimants, which roll was referred to in the decree of the Court of Claims as the "Authenticated Cherokee Roll," which roll was deposited with and recognized by the Secretary of the Interior, and which the Commission to the Five Civilized Tribes followed in making the final roll.

The prayer of the petition in the case at bar asks that said defendants Owen and Connelly be adjudged to be the trustees of the legal title to plaintiff's allotment, as described, and that they hold it for the use and benefit of plaintiff, and that he be adjudged to be the legal owner of the same, free and clear from all incumbrances, and that the county judge and sheriff of Washington county, and each of said defendants, and their agents, servants, and employes, be forever enjoined from in any manner interfering with plaintiff's possession.

The rights, therefore, which this plaintiff claims are those only which he may have by

virtue of his claim to citizenship in the Cherokee Nation. Article 9 of the treaty, supra, provided, among other things, that only those freedmen who had been liberated by the voluntary acts of their former owners, or by law, as well as all free colored persons, who resided in the Cherokee country at the commencement of the Rebellion, and were residents therein on the date of said treaty, or who had returned thereto within six months of last-mentioned date, and their descendants, were entitled to participate in the distribution of the Cherokee national funds, and the other common property of the nation, and, notwithstanding the fact that plaintiff's father had been enrolled as a citizen on the Wallace roll, also the Kerns-Clifton roll, the Commission to the Five Civilized Tribes, under the authority of the act of Congress of June 10, 1896, having the question of citizenship of plaintiff's father and his descendants under consideration, on March 11, 1904, decided that, while William H. Robinson was a free colored person, residing in the Cherokee Nation at the commencement of the Rebellion, yet he went to Kansas during the Rebellion, and did not return to and establish his residence in the Cherokee Nation within the time provided in the decree of the Court of Claims, as rendered on February 3, 1896; that therefore he was not entitled to enrollment as a freedman of the Cherokee Nation.

The act of Congress of June 10, 1896, provides, among other things: "That said Commission is further authorized and directed to proceed at once to hear and determine the application of all persons who may apply to them for citizenship in any of the said nations, and after such hearing that it determine the right of such applicant to be so admitted and enrolled. \* \* \* Provided, however, that in determining all such applications said Commission shall respect all laws of the several nations or tribes, not inconsistent with the laws of the United States, and all treaties with either of said nations or tribes, and shall give due force and effect to the rules, usages and conditions of each of said nations or tribes." 3 Fed. Stat. Ann. 431.

Said act further provided that if the tribe, or any person, be aggrieved by the decision of the tribal authorities, or the Commission provided for in this act, it, or he, may appeal from such decision to the United States District Court. It does not appear that plaintiff or his father was aggrieved by the decision of the Commission to the Five Civilized Tribes, as to the disposition of the question of their citizenship, as made and entered on March 11, 1904, for no appeal was taken from said decision, notwithstanding the fact that, prior to said date, the father had been recognized as a citizen by the Cherokee Nation and by the Secretary of the Interior; yet the authority of the Commission,

as conferred by the Curtis act (Act Cong. June 28, 1908, 30 Stat. 495), was sufficient to take away any such claims as he may have had to citizenship in said Nation prior to the decision of said Commission. The question of citizenship, which, prior to the passage of the Curtis act, supra, was controlled exclusively by the Cherokee Nation, was thereby taken from it by virtue of the superior might of the United States, and the power to determine who their citizens were was vested in the Commission to the Five Civilized Tribes and the United States Court.

In *Wallace v. Adams*, 143 Fed. 716, 74 C. C. A. 540 et seq., this subject is thoroughly discussed by Circuit Judge Sanborn, in the following language: "The United States, by its superior might, took from the Choctaw and Chickasaw Nations the power to determine who their citizens should be, which had been repeatedly guaranteed to them by treaties, and authorized the Dawes Commission and the United States Court in the Indian Territory to decide this issue by the act of June 10, 1896. *Here is the origin of every right of the defendant involved in this action.* The maintenance by him of any claim in any court necessarily concedes the power of the legislative department to the government to create or revive, and to enforce his demand for citizenship, because, without that concession, the provisions of the act of June 10, 1896, in this regard are void, and the defendant's claim is conclusively adjudged to be baseless by its rejection by the Choctaw Nation. But, if the legislative department of the United States had the constitutional power to create or revive the defendant's claim and to enforce it, it necessarily had the same power to determine whether or not it would revive or enforce it, and to select its own method of deciding these questions. It might have determined this issue itself, and have declared by direct enactment that the defendant Hill was a citizen of the Choctaw Nation. It might have empowered a committee, an Indian agent, a commission, a board, or a court to examine and determine that question on its behalf, and, as the determination of the question of citizenship was a *purely legislative and administrative function, and not a judicial one*, Congress necessarily had the authority, under the Constitution, at any time before an allotment of land under its previous acts had been finally made to the defendant, and his right to the land thereby become vested, to repeal its previous legislation, to change its method of determining the issue, to strike down any decision that had been made under its previous acts, to prescribe a new method of deciding the question, or to refuse to determine it altogether."

While the facts in the *Wallace-Adams Case* are different from those of the case at bar, yet the principle involved is the same, and the law, as enunciated in that decision, is applicable to and controlling of the question in the case at bar.

Thus it is seen that the question of determining citizenship was purely legislative and not judicial, and had been taken away from the Five Civilized Tribes by the Congress of the United States. Under that act, Congress assumed the power and claimed the right to determine who were citizens of the various tribes, and, in exercising this power, acted through the Commission to the Five Civilized Tribes, reserving the right to review all its decisions, by those aggrieved, in the United States courts, and in speaking of this phase of the subject, Judge Sanborn, in *Wallace v. Adams*, supra, 143 Fed. on page 726, 74 C. C. A. on page 550, uses the following language: "The suggestion that the citizenship court was a commission, and not a judicial tribunal, is immaterial, because the power of the legislative department of the government to authorize the review of the judgments of citizenship by a *commission, a committee, or an agent* was as complete as it was to authorize that review by a court. It had plenary authority to review the judgments itself, or to create or select a tribunal to its liking for the purpose. \* \* \* The power conferred upon the Dawes Commission and the United States courts in the Indian Territory by the act of June 10, 1896, and upon the Supreme Court by the act of July 1, 1898, to determine who are citizens of the Choctaw and Chickasaw Nations, was *legislative and not judicial*; and all judgments and proceedings thereunder were subject to any subsequent legislation of the United States, respecting the question of citizenship, which was enacted before allotments of land were made to the successful litigants under the previous legislation. Claimants of citizenship who secured judgments in their favor which were final under the acts of 1896 and 1898, when they were rendered, and took possession of, and demanded suitable tracts of, land as their allotments, before their judgments were made reviewable, acquired no vested rights therein against subsequent legislation enacted before the lands were allotted to them. The judgments of citizenship rendered by the courts were conclusive upon the parties to them, in the absence of subsequent legislation; but, though final when rendered, they were voidable and reviewable by subsequent acts of Congress passed before allotments of land were made under them."

Counsel for plaintiff contends that, inasmuch as the Commission to the Five Civilized Tribes permitted plaintiff to make his selection of allotment, and place thereon his tentative filing, it must be taken as proof that the Commission found that he was the son and descendant of W. H. Robinson, and therefore had a right to take under his father; and at the same time plaintiff insists that, after having permitted the tentative filing, the Commission and the Secretary of the Interior had no power to cancel the same, because, as he contends, this was

a judicial act, which neither the Commission nor the Secretary had the power to perform; that having been settled by the decree of the Court of Claims.

The decree of the Court of Claims, which counsel for plaintiff seemingly relies upon, was entered in a suit brought for the purpose of testing the legality of the so-called "Blood Laws" of the Cherokee Nation, which prohibited freedmen from participating in the distribution of certain funds arising from the sale of land, commonly known as the Cherokee Outlet. This decree holds that these laws violated the treaty of 1866, because they made no distinction between those citizens who were residents of the Cherokee Nation at the time the treaty was signed, or who returned within six months after the adoption of the treaty, and those who lost their citizenship by a failure to comply with the terms of the treaty. The decree decided only as to the freedmen who instituted that suit, and as to them it holds that they were entitled to be enrolled as citizens, but does not attempt to adjudicate the claims of those who had not complied with the terms of said treaty. The other question settled by that decree had reference solely to the particular individuals who should, or should not, be allowed to participate in the distribution of the funds derived from the sale of the Cherokee Outlet. The provision in the Curtis act that the roll of Cherokee freedmen should be made in conformity with the decree of February 3, 1896, shows that it was not intended to accept the roll made by the Commission, provided for in said decree, or to ratify the same. The Commission to the Five Civilized Tribes was authorized and instructed by the provisions of the Curtis act to make a roll, independent of any other roll, except the one made by the Cherokee Nation, in 1880, limited and guided in that duty by the interpretation placed upon the treaty of 1866 by the Court of Claims; that is: "Enroll all Cherokee freedmen who have been liberated by voluntary act of their former owners, or by law, as well as all other colored persons who were in the Cherokee country at the commencement of the War of the Rebellion, and were residents therein at the date of the treaty, or who returned thereto within six months thereafter, and their descendants, and all those whose names appear on the 1880 roll and their descendants." Defendant's Brief, page 9.

Now, as to the power of the Commission to the Five Civilized Tribes to deal with this subject-matter, we find, on page 721, 143 Fed., on page 545, 74 C. C. A., Wallace v. Adams, supra, the following language: "The Commission [speaking of the Dawes Commission], under the direction of the Secretary, constitutes a special tribunal, vested with the judicial power to hear and determine the claims of all parties to allotments of these lands, and to execute its judgments

by the issue of the allotment certificates, which constitute conveyance of the right to the lands to the parties who it decides are entitled to the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate, when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal empowered to decide the question that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee."

Thus it was seen that in a case like the one under consideration the Commission had ample authority to investigate the facts and to determine the question of citizenship, as well as to order the cancellation of the tentative filing of the plaintiff, and, inasmuch as the filing was canceled and a patent to the land in question was thereafter duly issued to Parsons, it follows that it was not susceptible of collateral attack by plaintiff; but, if it can be shown that the Commission or the Secretary of the Interior had been induced to issue the patent by an erroneous view of the law, or by gross mistake of fact, the matter might be reopened, and if conditions warranted the patent would be canceled. But counsel has failed to point out in his brief, and we have been unable to find by careful research, any authority that would warrant us in saying that the action of the Commission and the Secretary of the Interior was influenced in any way by an erroneous construction of the law applicable to this case, and he does not pretend to say that there was such a gross mistake of fact as would warrant an interference by a court of equity.

[2] We do not desire to be understood as saying that the action of the Commission and the Secretary of the Interior in this case cannot be inquired into by a court of equity. On the contrary, it has been definitely settled in this state, and by this court, that equity will furnish an ample and effective method of correcting any mistakes occasioned by an erroneous construction of law, or a gross mistake of fact. In Garrett et al. v. Walcott et al., 25 Okl. 574, 106 Pac. 848, it was held that: "If the Commission and the Secretary have been induced to cause to be issued a patent to the wrong party by an erroneous view of the law, or by gross or fraudulent mistake of the facts, the rightful claimant may cause such decision to be avoided, and charge the legal title to the lands in the hands of the allottee with his equitable title to it, upon the ground that upon the facts found, conceded, or established, without dispute, at the hearing before this special tribunal its officers fell into error as to the law applicable to the case, which caused them to refuse to have issued the patent to him and give it to another, or through fraud or gross mistake it fell into a misapprehension of the facts proved before

it, which had a like effect." However no such conditions exist in this case; there was no gross mistake of fact, and the law applicable to the case was properly construed and properly applied.

The view taken by the Commission to the Five Civilized Tribes to that portion of the decree of the Court of Claims complained of by the plaintiff is the only reasonable construction, to our mind, that the decree will stand, and, inasmuch as the question of citizenship of plaintiff's father was, on March 11, 1904, decided adversely to him by the Commission to the Five Civilized Tribes, and it appears that by authority of *Wallace v. Adams*, supra, said Commission was clothed by act of Congress with full and complete power to act in the premises, and inasmuch as the tentative filing on and claim of land as an allotment before the issuance of a certificate or patent creates no vested right in the claimant, and the question of citizenship, by act of Congress, had been removed from the consideration of the Cherokee Nation and lodged in the Commission to the Five Civilized Tribes, where it was exercised, and where plaintiff's claims were denied, we are forced to the inevitable conclusion that the petition states no cause of action, and the court did not err in sustaining the demurrer to the same. Having reached this conclusion, it is unnecessary to investigate the other assignments of error.

The judgment of the district court of Washington county should therefore be affirmed.

PER CURIAM. Adopted in whole.

#### KELLMAN v. KENNEDY.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

##### (Syllabus by the Court.)

#### 1. PUBLIC LANDS (§ 39\*)—TOWN SITES—EQUITY JURISDICTION.

The same as syllabus in *Leak et al. v. Johnson*, 20 Okl. 200, 94 Pac. 518.

[Ed. Note.—For other cases, see *Public Lands*, Dec. Dig. § 39.\*]

#### 2. APPEAL AND ERROR (§ 1019\*)—REVIEW—QUESTIONS OF FACT—FINDINGS BY COURT.

In an action instituted in one of the United States courts of the Indian Territory before the admission of the state, the legal presumption, where the evidence is conflicting, is that the findings of fact by the court, sitting as master in chancery, are correct, and such findings will not be set aside, unless it appears with reasonable clearness that he has fallen into a mistake of fact.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4008-4010; Dec. Dig. § 1019.\*]

Error from District Court, Tulsa County; John H. Pitchford, Judge.

Action by C. B. Kellman against James

L. Kennedy. Judgment for defendant, and plaintiff brings error. Affirmed.

Woodson Norvell, for plaintiff in error. Biddison & Campbell, for defendant in error.

HAYES, J. This was originally an action in ejectment, commenced by plaintiff in error in the United States District Court of the Indian Territory, at Sapulpa, before the admission of the state.

Plaintiff in error alleges in his petition in the lower court that he is the absolute owner in fee simple of a strip of land of uniform width of 8½ inches off the south side of lot 9, in block 90, in the town of Tulsa, being a strip of ground having a frontage of 8½ inches, facing on Main street, and a length of 140 feet to the alley, running north and south through the center of said block. He alleges that said strip of land was scheduled and appraised, together with other lands, to William P. Moore, who was at and prior to the time of said schedule and appraisal, and for a long time prior thereto, an occupant of said land; that the price at which said lot had been appraised by the government of the United States had been fully paid to the United States Indian agent at Muskogee, and that he (plaintiff in error) had purchased the land from the heirs of said William P. Moore, who died in the month of February, 1903; and that said heirs had executed to him, on the 25th day of July, 1904, a warranty deed therefor. He alleges that defendant is in the unlawful possession of said strip of land, and has been continuously so since the 6th day of July, 1906, to plaintiff in error's damage in the sum of \$1,000. He thereupon prays for possession and for damages for the unlawful detention of the land.

To plaintiff in error's petition, defendant in error filed a pleading in the nature of an answer and cross-petition, by which he alleges that, prior to the 23d day of June, 1908, the right to possession of said strip of land and the occupancy thereof was held by the said William P. Moore, but that on that date he (defendant in error) purchased from Moore the right of occupancy and possession of a parcel of ground 16 feet wide and 140 feet deep, described as the first 16 feet off the south side of the Moore Hotel plat on the west side of Main street, lying north of the building of J. M. Morrow, containing 16 feet wide, facing Main street from the west, by 140 feet deep back to the alley; that the strip of land, the right of occupancy and possession of which he thus purchased from Moore, was out of a larger parcel of land occupied by the said Moore; that he (defendant in error) immediately built upon said parcel of land a two-story brick building; and that, by agreement between him and the said Moore, the north

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

wall of said building was built upon the boundary line between said tract of land purchased by him from Moore and the remaining lot or parcel of land still retained by Moore after said purchase.

He further alleges that the location of said north wall of his building was made with the full knowledge and consent of said Moore, and with the intention and purpose of putting it on the line separating said two parcels of land; that when he came to have the lot scheduled by the United States town-site commission he made application to have said 16 feet of land purchased by him from Moore, and on which said two-story brick building stands, scheduled and appraised to him, and that he had believed that said lot of ground, including the ground in controversy, had been scheduled and appraised to him, and that he had paid therefor, but that the government surveyors, in platting the town of Tulsa and making the boundary lines to the lots, blocks, streets, and alleys, had varied from the lines upon which said town was originally built, and by mistake, without the knowledge of defendant in error and without the knowledge of said Moore, the strip of land in controversy was placed within a lot scheduled and appraised to said Moore; that Moore did not know the land in controversy had been scheduled and appraised to him, and he died before the mistake was discovered.

He further alleges that the appraised value of the lot in which the strip of land in controversy had been included by mistake was paid in full by the administratrix of Moore to the United States government, and that the patent thereto was issued and delivered before said mistake was discovered; that neither Moore, his heirs, nor their assigns have ever been in possession of the land in controversy since June, 1898. He offered to pay to the said Moore, his heirs, or assigns the pro rata and equitable part of the money paid by them as the appraised value of said lot, whenever the same should be ascertained, and prayed that the cause be transferred to the equity docket; and that it be decreed that plaintiff holds the legal title to said land in trust for defendant, who was the equitable owner thereof; and that plaintiff be required to execute to defendant a good and sufficient deed therefor upon payment of such sum as the court may find to be equitable.

The trial was to the court, without a jury, upon the issues made by the petition and answer and cross-petition. The court made a general finding in favor of defendant, and rendered judgment in conformity with the prayer in his answer and cross-petition.

[1] Plaintiff has made four assignments of error in his brief. The first three present but one proposition, which is: That defendant's answer and cross-petition state no defense or right to equitable relief. And by the

fourth assignment it is complained that the judgment is not supported by the evidence. The city of Tulsa is located in what was formerly the Creek Nation, and the statute regulating the scheduling, appraising, and purchasing from the federal government of town lots in that nation is to be found in sections 11, 13, and 15 of an act of Congress, approved March 1, 1901, generally known as the "Original Creek Agreement." Chapter 676, 31 Stat at L p. 866. By virtue of section 11 of this act, any person in rightful possession of a town lot having improvements thereon, other than temporary buildings, fences, and tillage, had a right to purchase such lot at one-half the appraised value, provided he made application to purchase same and made first payment thereon within 60 days after appraisement was made. Defendant made, within the time prescribed by statute, application to purchase the land upon which his improvements were situated, and in possession of which he had been since 1898, and he thought it had been appraised to and purchased by him. Moore made no claim to a right to purchase any part of the land on which defendant's building stands. He had sold all his possessory right therein to defendant, but by mistake of all the parties and the town-site commission, it was appraised to and purchased by Moore. No question of laches is presented by this record. The objection by plaintiff to the introduction of any evidence under the answer and cross-petition was equivalent to a demurrer thereto, and it presents the same question that was decided by this court in *Leak et al. v. Joslin*, 20 Okl. 200, 94 Pac. 518; and, upon the authority of that case, the overruling of this objection by the trial court should be sustained.

[2] Defendant was in possession of the land in controversy when plaintiff purchased the same from the heirs of Moore, and he had been in possession thereof for some time. It has not been questioned and cannot be that the possession of defendant was equivalent to notice to plaintiff of whatever title, right, or equities defendant has in the premises. *Thalheimer v. Lockert*, 76 Ark. 25, 88 S. W. 591; *Watson v. Murray*, 54 Ark. 499, 16 S. W. 293; *Bird et al. v. Jones et al.*, 37 Ark. 195. Upon all the issues presented by defendant's answer and cross-petition, the establishment of which was necessary in order to entitle defendant to prevail, there is evidence reasonably tending to support the same. Upon some of said issues, it is true, there is considerable conflict in the evidence; but, applying the rule applicable to the trial of cases in the jurisdiction in which this case arose and was instituted, the legal presumption, where the evidence is conflicting, is that the finding of the master in chancery is correct, and his report will not be set aside, unless it appears with reasonable clearness that he has fallen into a mistake of fact.

Blakemore v. Johnson, 24 Okl. 544, 103 Pac. 554. The general finding of the court in this case should not be disturbed.

The judgment of the trial court is affirmed.

TURNER, C. J., and WILLIAMS and KANE, JJ., concur. DUNN, J., not participating.

**STILLWATER ADVANCE PRINTING & PUBLISHING CO. v. BOARD OF COM'RS OF PAYNE COUNTY.**

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)*

**1. TAXATION (§ 630\*)—DELINQUENT TAX LIST—PUBLICATION—STATUTORY PROVISIONS.**

That portion of section 3060 of Wilson's Rev. & Ann. Statutes which provides that an officer whose duty it is to have the publication of a legal notice made shall pay "for publishing lists of land upon which taxes are delinquent each description twenty cents, for publishing each description of town lots on which taxes are delinquent ten cents," was repealed by section 6021 of Wilson's Rev. & Ann. Statutes.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 630.\*]

**2. COUNTIES (§ 114\*)—COUNTY TREASURER—CONTRACT FOR PUBLICATION OF DELINQUENT TAX LISTS.**

Section 6021 of Wilson's Rev. & Ann. Statutes authorizes the county treasurer to contract for the publication of delinquent tax lists and to bind the county to pay therefor not exceeding 25 cents for each tract of land and 10 cents for each town lot advertised for sale.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 114.\*]

**3. NEWSPAPERS (§ 5\*)—DELINQUENT TAX LISTS—PUBLICATION—COMPENSATION.**

Where the county treasurer has procured a publisher to publish the delinquent tax list, without any agreement as to what the publisher shall be paid therefor, or as to when the same shall be paid, the publisher is entitled to receive from the county as his compensation the reasonable value of his services rendered, not exceeding the limit fixed by section 6021 of Wilson's Rev. & Ann. Statutes, and his claim therefor accrues at the time of the last publication of the tax list.

[Ed. Note.—For other cases, see Newspapers, Dec. Dig. § 5.\*]

**4. COUNTIES (§ 200\*)—CLAIMS—TIME FOR PRESENTATION.**

A claim for compensation for publishing a delinquent tax list of real estate, made without any agreement as to the time of payment and not presented to the board of county commissioners for more than four years after the last publication of the list, is barred by section 1253 of Wilson's Rev. & Ann. Statutes.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 200.\*]

Error from District Court, Payne County; L. M. Poe, Judge.

Action by the Stillwater Advance Printing & Publishing Company against the Board of County Commissioners of Payne County. Judgment for defendants, and plaintiff brings error. Affirmed.

On the 21st day of July, 1908, plaintiff in error filed with the county clerk of Payne county its claim against said county for the publication of the delinquent tax list of that county for the year 1903. The claim filed by it consists of a statement in the form of an account and a separate statement, setting up all the facts pertaining to its claim. It alleges that its claim is for compensation for the publication of the delinquent tax list for the year 1903; that the first publication occurred on October 22, 1903, and the last publication occurred on the 5th day of November of the same year; that the list consisted of 470 descriptions of tracts of land, and 1,550 descriptions of town lots; that the legal fees for the publication of the former are 25 cents each, and for the publication of the latter 10 cents each. It alleges that the county has collected said sums on each tract of land and town lot, respectively, and that the last of said collections was made on June 4, 1907; that none of the fees so charged and collected by the county have been paid to plaintiff in error. The board of county commissioners rejected his claim, and an appeal was taken by plaintiff in error to the district court, where a demurrer by defendant in error to plaintiff's petition was sustained, and the cause dismissed at plaintiff's cost. To reverse that judgment this proceeding is prosecuted.

Freeman E. Miller, for plaintiff in error, J. W. Reece, for defendants in error.

HAYES, J. (after stating the facts as above). [1] By act of the territorial Legislature, entitled "An act to regulate printer's fees for public printing," which took effect December 25, 1890 (section 3060, Wilson's Rev. & Ann. Stat.), it was provided that the officer whose duty it is to have the publication of a legal notice made shall pay "for publishing list of land upon which taxes are delinquent, each description twenty cents. For publishing each description of town lots on which taxes are delinquent, ten cents." By act of March 8, 1895, the foregoing act was in part repealed. The later act provides that the treasurer of the county shall give notice of the sale of real property by the publication thereof for three consecutive weeks in some paper in the county, and provides, further, that: "The county treasurer shall charge and collect in addition to the taxes and interest and penalty the sum of twenty-five cents on each tract of real property and ten cents on each town lot, advertised for sale, which sum shall be paid into the county treasury and the county shall pay the cost of the publication; but in no case shall the county be liable for more than the amount charged to the delinquent lands for advertising." Section 6021, Wilson's Rev. & Ann. Stat.

[2] This act empowers the county treasurer to contract with any newspaper of the class mentioned therein to publish the delinquent tax list (Allen and Rixse v. Com'rs Cleveland Co., 12 Okl. 603, 73 Pac. 286), and he may contract the amount the county shall pay therefor; provided said amounts shall not exceed the amount the act requires to be charged against each tract of land and town lot advertised, which is 25 cents and 10 cents respectively. In this respect, this act is in conflict with the act of 1890. Section 3060, *supra*. That statute leaves nothing to the discretion of the officer requiring the publication. It fixes arbitrarily the sum to be paid, to wit, 20 cents for each tract of land, and 10 cents for each town lot. Section 6021 of Wilson's Rev. & Ann. Statutes does not provide that any specific amount shall be paid, or that the taxpayer shall pay the publishers, or that the publishers shall receive the fees taxed against each tract and lot of land. In that event, the county would receive and hold the fees in trust for the publisher. But it does provide that, upon publication of the list, the county becomes liable therefor in the amount agreed upon, not exceeding the amount charged against the land and lots advertised. It will be noticed that the limitation upon the amount for which the county may become liable is the "amount charged" against the lots and lands advertised, and not the amount collected. The amount for which the county may become liable may be less than said fees charged, if so agreed upon between the publisher and the county treasurer, but cannot be more. Said fees are paid into the county treasury, and "the county shall pay the cost of the publication."

[3] The right of the newspaper making the publication to collect compensation for its services is not dependent upon the county collecting the fees from the taxpayer; but it is entitled thereto for the amount agreed upon when it has performed the services or at the time agreed upon for the payment. We cannot, therefore, concur with counsel for plaintiff in his contention that the fees collected by the county were the property of the publisher and held in trust by the county for it, and that the statute began to run as against plaintiff in error on June 4, 1907, the date on which the county collected the last of said fees.

[4] The demurrer to the petition was sustained by the trial court, upon the ground that the petition discloses on its face that the claim of plaintiff is barred by the statute of limitations. There was no express agreement between the county treasurer and plaintiff in error as to what it should receive as its compensation for publishing the list, or when it should be paid. The list, however, was published upon the request of

the county treasurer, the officer of the county authorized to contract and bind the county therefor, and the services were rendered as prescribed by the statute. Under such circumstances, there is an implied promise upon the part of the county to pay the reasonable value of the services rendered, not exceeding, of course, the limitation upon the amount fixed by the statute; but section 1253 of Wilson's Rev. & Ann. Statutes provides: "No account against the county shall be allowed unless presented within two years after the same accrued. Provided, that any person having a claim against the county be (at the time the same accrued) under any legal disability, every such person shall be entitled to present the same within one year after such disability shall be removed." There is no claim in this case that any legal disability has ever existed. "Under an ordinary contract for services for a stated period, whether long or short, no time for payment being agreed upon, the right of action accrues immediately upon the completion of the term of service." Section 120 (3d Ed.) Wood on Limitations.

The same rule applies to an implied agreement for payment. *Blake v. Pratt*, 8 Kan. App. 486, 54 Pac. 806; *Markey v. School District*, 58 Neb. 479, 78 N. W. 932; *Jones v. Lewis*, 11 Tex. 359. There was no agreement in this case as to the time of payment. Plaintiff's right thereto, therefore, accrued at the time of the last publication of the delinquent tax list, which was on November 5, 1903, more than four years prior to the presentation of his claim to the board of county commissioners. It is therefore barred by the statute of limitations (section 1253, *supra*) and the judgment of the trial court should be affirmed.

TURNER, C. J., and WILLIAMS, KANE, and DUNN, JJ., concur.

#### WHITEAKER v. STATE.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

##### (Syllabus by the Court.)

#### 1. BAIL (§ 73\*)—CRIMINAL PROSECUTIONS—CONSTITUTIONAL AND STATUTORY PROVISIONS.

Wilson's Stats. of Okla. 5774, is not repugnant to section 8 of the Bill of Rights.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 254-256; Dec. Dig. § 73.\*]

#### 2. BAIL (§ 73\*)—CRIMINAL PROSECUTIONS—DEPOSIT—RECOVERY BY DEPOSITOR.

Where, pursuant to Wilson's Stats. of Okla. § 5774, permitting a deposit in lieu of bail, one other than defendant deposits the money, held, when construed with Wilson's Stats. Okla. §§ 5403, 5413, which make no provision that the money be returned to one other than defendant, that the same fairly require that said money so deposited should, for the purpose of the de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

posit, be conclusively presumed the money of the defendant and treated accordingly.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 254-256; Dec. Dig. § 73.\*]

**3. BAIL (§ 73\*)—CRIMINAL PROSECUTIONS—DEPOSIT—RECOVERY BY DEPOSITOR.**

Where pursuant to Wilson's Stats. of Okla. § 5774, a deposit of money is made with the clerk of the district court in lieu of bail by one other than defendant, and where, upon failure of defendant to appear at the time and place required by his undertaking, default is had and a forfeiture duly entered upon the journal of the court, on petition of the person making such deposit for an order requiring the clerk to turn the money over to him, *held*, that the court did not err in refusing to grant the prayer of the petition.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 254-256; Dec. Dig. § 73.\*]

**4. BAIL (§ 73\*)—CRIMINAL PROSECUTIONS—RELIEF FROM FORFEITURE.**

Where the court's order for the release of defendant was not signed by the judge when the same was delivered to the sheriff, in conformity to Wilson's Stats. of Okla. § 5773, the failure so to do does not render unlawful the discharge thereon of the prisoner so as to save a forfeiture of the money deposited in lieu of bail pursuant to Wilson's Stats. of Okla. § 5774.

[Ed. Note.—For other cases, see Bail, Dec. Dig. § 73.\*]

**5. BAIL (§ 77\*)—CRIMINAL PROSECUTIONS—FORFEITURE—ENTRY ON MINUTES.**

Where money is deposited in lieu of bail and the defendant fails to appear, it is only necessary, in order to declare a forfeiture, that the court should direct the fact of the deposit, and of the defendant's neglect to appear, to be entered of record. The forfeiture then follows as a matter of course.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 335-339; Dec. Dig. § 77.\*]

Error from District Court, Oklahoma County; Geo. W. Clark, Judge.

Action by J. D. Whiteaker against the State of Oklahoma. Judgment for defendant, and plaintiff brings error. Affirmed.

M. Fulton, for plaintiff in error. Sam Hooker, for defendant in error.

**TURNER, C. J.** On December 16, 1908, the county attorney of Oklahoma county filed in the district court of that county an information charging Grover C. Whiteaker with assault with intent to kill. On the next day but one he was arraigned, and pleaded not guilty, and his bond fixed at \$7,500 the same to be approved by the clerk of said court. On December 23, 1908, there was filed in the office of said clerk an unsigned unofficial order of release indorsed thereon: "This is to verify that I have received this order of release on December 23, 1908, and executed on December 23, by releasing the said Grover C. Whiteaker from custody. [Signed] H. D. Garrison, Sheriff, by M. C. Binion." On January 26, 1909, there was made and entered in said cause the following order: "This cause coming regularly before the court for trial, the defendant comes not, whereupon he is three times loudly called to come into court and

save his recognizance, but comes not, but is in default, whereupon it is ordered that the bond of the defendant be, and the same is, hereby forfeited. And it is ordered that the clerk of this court pay to the county treasurer of Oklahoma county the moneys in his hands as cash bond of the defendant, to which ruling Dr. Whiteaker excepts, and it is further ordered that the clerk issue an alias warrant for the arrest of the said Grover C. Whiteaker." On February 16, 1909, Dr. J. D. Whiteaker, plaintiff in error, petitioned the court for an order directing the clerk to turn said \$7,500 over to him, on the hearing of which it developed that the accused and petitioner were brothers; that for the purpose of furnishing him bail petitioner left his home in Kentucky and came to Oklahoma City, and deposited with the clerk of said court the money in controversy, the property of petitioner, and which is still in his hands; that thereupon the accused was released from jail as shown by said order entered upon the journal of the court, but was not placed in the custody of petitioner, and that petitioner has since been unable to surrender him. Upon this showing the court refused to grant the prayer of said petition and overruled the same, and rendered and entered judgment accordingly. To reverse said judgment this proceeding in error was commenced.

[1] It is urged that Wilson's Stats. of Okla. § 5774, which reads, "A deposit of the sum of money mentioned in the order admitting to bail is equivalent to bail and upon such deposit the defendant must be discharged from custody," was not extended to and put in force throughout the state by section 2 of the Schedule, because repugnant to section 8 of the Bill of Rights, which reads, "All persons shall be bailable by sufficient sureties, except for capital offenses when the proof of guilt is evident, or the presumption thereof is great;" and for that reason the sheriff acted without authority of law in releasing the prisoner on said deposit, which was, in effect, not an enlargement, but an escape, and hence petitioner is entitled to recover back his money. Assuming said repugnancy to exist, and the general doctrine to be as urged, in substance, that an officer authorized to receive bail for the appearance of a person charged with crime cannot receive money in lieu of bail, no such power being conferred by statute, and, if so paid in, neither the state nor county has claim to it (see *Columbus v. Dunnick*, 41 Ohio St. 602; *State v. Lazarre*, 12 La. Ann. 166; *United States v. Faw*, 1 Cranch C. C. 486, Fed. Cas. No. 15,078), petitioner is far from a recovery. This for the reason that by so doing and securing the release of the prisoner the clerk in receiving the money and the sheriff in setting him at liberty were guilty at least, it seems, of "committing an unlawful act tending to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



hinder justice," denounced by Wilson's Stats. of Okla. § 2096, as a felony, and petitioner, if not an accessory under section 1948, was at least in pari delicto, and for that reason not entitled to invoke the power of this court in aid of his recovery.

In *Smart v. Cason*, 50 Ill. 195, David C. Smart was confined in the county jail under indictment for larceny. Plaintiff in error placed in the hands of William L. Simons a sum of money, and procured the enlargement of the prisoner. Defendant in error was the sheriff of the county, and Simons his deputy. The terms upon which the prisoner was released were reduced to writing signed by plaintiff in error prior to such release, the conditions of which were similar to the condition of a recognizance of bail for the appearance of said Smart to answer to the charge at the next term of court, which, when done, the money was to be returned to plaintiff in error, but, failing therein, the same was agreed to be absolutely forfeited to the people and treated as if collected under a judgment upon a forfeited recognizance. On this evidence the trial court found the issues for defendant and rendered judgment accordingly, to reverse which petitioner prosecuted a writ of error. At that time no statute existed authorizing the sheriff to receive money to the amount of bail and enlarge the prisoner. Section 175 of the Criminal Code, however, declared it to be the duty of the circuit court in which an indictment was found to fix bail for bailable offenses and authorized, and required the officers, after arresting the accused, to admit him to bail with good and sufficient security, describing the condition of the recognizance. By which it appeared that said statute did not empower the sheriff or jailer to receive a deposit of money or property for his indemnity in lieu of bail. On this state of the case the court said: "Then, it follows that the act is unauthorized and illegal, and, if so, the sheriff has wrongfully become possessed of this money, and plaintiff in error is entitled to recover it back unless he is in pari delicto. That it is a flagrant violation of the duty of a sheriff or jailer to discharge a prisoner committed to his custody under proper authority, unless it be by legal requirement, there can be no question. And, should a sheriff receive a bribe for the purpose, he would no doubt render himself liable to indictment and punishment under the Criminal Code, or where the sheriff willfully, or from ignorance of his duty, unlawfully discharges a prisoner indicted for crime. Section 101 of the Criminal Code declares that if any sheriff, coroner, jailer, keeper of a prison, constable, or other officer or person whomsoever, having any prisoner in his legal custody, before conviction, shall voluntarily permit or suffer such prisoner to escape or go at large, every such officer or person so offending shall, on conviction, be fined in any sum not exceeding \$1,000, and imprisoned

in the county jail not exceeding six months. It is apparent that the receipt of this money for the purposes shown by the evidence was illegal, and that it did not warrant the discharge of the prisoner; and, if that was not authorized, it was in violation of section 101 of the Criminal Code, and, if so, then plaintiff in error was particeps criminis. There is no rule of law more firmly established than that a party who gives or pays money to induce another to commit a crime or misdemeanor, being a party to it, cannot recover it back. Although this money was not paid as a bribe, it was left as an indemnity to the sheriff to procure the release of the prisoner, and plaintiff in error thereby contributed to the breach of the law, and, from the evidence in the case, to a violation of the Criminal Code. It then follows that as plaintiff in error contributed to the wrongful discharge of the prisoner, and has thus assisted in obstructing justice, he has no right to recover this money back from defendant in error." Thus it inevitably follows that petitioner is not entitled to recover, and that, too, on an assumption of his own choosing, that repugnancy exists as contended. But there is no repugnancy, for the reason that, conceding "all persons shall be bailable by sufficient sureties except," etc., should not be held to authorize the acceptance by the officer of a cash deposit in lieu of bail, it by no means follows that it was thereby intended that this method of enlarging a prisoner should be exclusive, or that the Legislature was thereby prohibited from providing an additional method, which it did in section 5774.

[2] We are therefore of opinion that said section was extended to and put in force throughout the state by virtue of section 2 of the Schedule, and was and is the law of the land. That petitioner is not entitled to the moneys deposited by him pursuant thereto, but that the same must be conclusively presumed to be the property of the prisoner and deposited as his by whomsoever deposited and be so treated, is the uniform construction of similar statutes throughout this Union. And that, too, in the face of the record fact that the money was actually deposited by another and was his own. This is made apparent from the face of section 5774, which, while it seems to leave open to another to make the deposit, yet, when construed with cognate sections, they in no event provide for a return of the money to one other than the defendant, and fairly require that the money so deposited should, for the purpose of the deposit, in fact be considered the money of the defendant. Snyder's Stats. of Okla. § 6742, provides: "If the motion (to set aside the indictment) be granted, the court must order that the defendant, if in custody, be discharged therefrom, or, if admitted to bail, that his bail be exonerated, or, if he have deposited money instead of bail, that the money be refunded to him, unless it direct that the case be resubmitted to the same or

another grand jury." And section 7049: "If the court direct the action to be dismissed, the defendant must, if in custody, be discharged therefrom, or, if admitted to bail, his bail is exonerated, or money deposited instead of bail must be refunded to him." State v. Ross, 100 Tenn. 303, 45 S. W. 673, was an application to withdraw a fund deposited in lieu of bail, pursuant to Shannon's Code, §§ 7131-7135, inclusive, made by the mother of the minor prisoner through her agent. The application was made on the theory that, defendant having appeared and been sentenced by the court, the fund which had been deposited by the mother could no longer be held. After determining that the cost of the case should be paid out of the fund, pursuant to section 7135, the question confronting the court was, To whom shall the balance be paid? The court said in construing said section, which read, "when money has been deposited, if it remains on deposit at the time of a judgment for the payment of a fine and costs, the clerk shall under the direction of the court apply the money in satisfaction thereof, paying the surplus, if any, to the defendant," that New York had a similar statute, and that: "In construing the statute, it was held that, though the money deposited in lieu of bail was so deposited by a third person, it has to be treated as the money of the defendant; that the person advancing the money did so in contemplation of the provisions of the statute; and that such money could be applied to the satisfaction of a fine imposed against the defendant. People v. Laidlaw, 102 N. Y. 588, 7 N. E. 910. Our statute clearly proceeds on the same theory, but the statute of Tennessee goes further than the statute of New York in providing that such deposit shall be applied to costs as well as fine, and directs in express terms that the surplus, if any, shall be paid to the defendant. The statute does not contemplate any inquiry into the source from which the money was received, nor what arrangement the defendant may have made to secure the same, but conclusively presumes that it is the money of the defendant, and may be applied to his fine and costs, and any balance will be paid to him"—and entered judgment accordingly.

State v. Owens, 112 Iowa, 403, 84 N. W. 529, was an application to have money returned to petitioner deposited by him for defendant in lieu of bail, pursuant to a statute which provided that "defendant may at any time \* \* \* instead of giving bail, deposit with the clerk \* \* \* the sum of money mentioned in the order" (admitting him to bail). Another section gave no right to return the money to one other than defendant. There, as here, the record discloses that the money was that of petitioner, and to have been received as such by the officer of the court accepting the same. The court said: "In allowing the money to be retained and held by the clerk in the manner he did,

Perry must be held to have assented to the provisions of the statute, and of the order made by the court. In so assenting the money became the property of the defendant Evans, and Evans became the debtor of Perry to the amount of the deposit. Lyon v. Wilder (Super. N. Y.) 1 N. Y. Supp. 421. The transaction was in effect a loan by Perry to Evans of the amount of the deposit." In People ex rel. Gilbert v. Laidlaw, 102 N. Y. 588, 7 N. E. 910, one Nye, having been arrested in the city of New York charged with assault, was held to bail by a police justice in the sum of \$300 for his appearance at the Court of Special Sessions, whereupon the relator, Gilbert, deposited with the county treasurer said sum, and took from him the following certificate signed by him: "Whereas, heretofore, and on the 30th day of December, 1884, an order was made by Justice Smith, First district police, admitting the above-named defendant to bail on giving an undertaking, in the sum of \$300 on a certain charge of assault. This is to certify that William R. Gilbert, for the defendant above named, has deposited with me the amount of \$300, the sum mentioned in said order as security for his appearance pursuant to such order, instead of the said undertaking of bail, pursuant to section 586 of the Code of Criminal Procedure." Later, Nye appearing, he was convicted and sentenced to pay a fine, which was ordered paid from the moneys thus deposited and the surplus ordered refunded to the defendant. The issues in the case were raised by defendant's return to a writ of alternative mandamus addressed to the county treasurer commanding him to return said sum or show cause. On the trial it was shown, among other things, that the money so deposited was, in fact, Gilbert's money, and was not by him actually loaned to the defendant. There was judgment, in effect, that he was not entitled to the writ, and he was taxed with the cost. The judgment was reversed on appeal to the General Term, and defendant appealed to the Court of Appeals. There, in passing, the court, after quoting section 586 of the Criminal Code of Procedure, which read: "The defendant at any time after an order admitting him to bail, instead of giving bail, may deposit with the county treasurer of the county in which he is held to answer, the sum mentioned in the order; and upon delivering to the officer in whose custody he is a certificate of the deposit, he must be discharged from custody"—and after setting forth substantially sections 587, 588, 590-592, and 598 the latter of which provided "that when money has been deposited, if it remain on deposit and forfeited at the time of a judgment for the payment of a fine, the county treasurer must, under direction of the court, apply the money in satisfaction thereof; and after satisfying the fine, must refund the surplus, if any, to the defendant"—construing them all, said: "All these sec-

tions treat the money deposited as belonging to the defendant, and in all cases where money is deposited in lieu of bail it may be applied in payment of any fine imposed, and the surplus, if any, after the fine has been satisfied, must be returned to the defendant. The relator when he deposited this money must be assumed to have known the provisions of these statutes, and the deposit must have been made in compliance with them. There is no authority for the county treasurer to take a deposit in lieu of bail except by virtue of these statutes, and the deposit must be made in strict compliance with the statutes. The statutes may have been framed as they are for the very purpose of avoiding a dispute like that which has arisen in this case. If the contention of the relator be upheld, the disputes may frequently arise as to whose money was deposited, and the county treasurer can never know with certainty to whom the money is to be returned, and the court cannot know in passing sentence, or in making its order, whether the money is properly applicable upon the fine imposed. It is therefore wiser that the provisions of the statute should have their obvious meaning, to wit, the money is deposited as the money of the defendant, and, if a fine is inflicted upon him, it may be used to pay the fine, and the surplus is to be returned to him. When any party other than the defendant makes the deposit for him, it is a deposit in compliance with the statute, and the money is thus devoted to the purposes of the statute, and to the use of the defendant"—and reversed the order and affirmed the judgment. See, also, *Doty v. Braska et al.*, 138 Iowa, 396. 116 N. W. 141; *State v. Wisniewski*, 134 Wis. 497, 114 N. W. 1113.

[4] It is next contended that inasmuch as the record discloses that the court's order for the release of the prisoner was not signed by the judge when it was delivered to the sheriff pursuant to *Wilson's Stats. of Okla.* § 5773, which reads, "Upon the allowance of bail and the execution of the requisite recognizance, bond or undertaking, to the territory, the magistrate, judge or court, must, if the defendant is in custody, make and sign an order for his discharge, upon the delivery of which to the proper officer the defendant must be discharged," and which, they say, is mandatory, that said order was void, the release unlawful, and the money deposited cannot be held forfeit. Almost an identical contention arose in *State v. Lagoni et al.*, 30 Mont. 472, 76 Pac. 1044, which was a suit against the sureties on a bail bond taken by a justice of the peace for the appearance of defendant on a day certain in the district court. After issue joined there was trial to a jury, during which certain instructions were asked, and their refusal alleged as error on appeal. In passing on one involving the point in question the court said: "Defendants asked the court to instruct the jury that if they found 'that, although all the

other requirements of the law were complied with, still if the magistrate did not make and sign an order for the release of James E. Finch, his release, if he was released, was unlawful, and the defendants cannot be held liable on the bond.' It seems that the magistrate did not make a written order releasing Finch. Section 2354 of the Penal Code provides: 'Upon the allowance of bail and the execution of the undertaking, the magistrate must, if the defendant is in custody, make and sign an order for his discharge, upon the delivery of which to the proper officer, the defendant must be discharged.' This section contemplates that, when the bail is given, the prisoner shall be discharged. The two points aimed at are securing the bond and releasing the prisoner. The intermediate steps are merely directory. An oral order of release given by the magistrate to the officer who has charge of the prisoner is a sufficient compliance with the statute so far as the prisoner and his sureties are concerned, although it shows a neglect of the statutory formalities by the justice which is far from commendable. If anything more is necessary, the prisoner and sureties cannot take advantage of it. The Supreme Court of California held substantially to this effect in construing section 1281 of their Code, which is identical with our section 2354. *San Francisco v. Randall*, 54 Cal. 408. And see *Dilley v. State*, 3 Idaho [Hasb.] 285, 29 Pac. 48. It reasonably appears that the justice gave an oral order to the sheriff to release Finch, and it further appears without any doubt whatever that Finch was released solely because the undertaking in question was given, and the order made." On this point the court in *City of San Francisco v. Randall*, supra, said: "That, after the bonds were given, no order was made or signed by the police judge for the release of the prisoner. Section 1281 of the Penal Code provides that 'upon the allowance of bail and the execution of the undertaking, the magistrate must, if the defendant is in custody, make and sign an order for his discharge,' etc. The object of this provision is that, when bail has been given, the object for which the bail was given shall be accomplished, viz., the release of the prisoner from custody. There are two main points to be looked at, viz., the giving of the bond and the release which follows. The one precedes the other, and that other must follow the first. The machinery, the intermediate steps, are not essential to the validity of the bond. After the bond has been given, but one step further is necessary; and that is, that the prisoner be released. In this case it appears that the police judge made an order, delivered orally from the bench, that the prisoner be released bonds having been given; that order was certified in writing by the clerk of the police court to the keeper of the prison, who thereupon delivered the prisoner and indorsed the discharge on the

order. Thus the giving of the bonds produced the effect for which they were given. The prisoner was released from custody. He became the prisoner of his bail, who could at any time have had him arrested and surrendered, and who had undertaken and were answerable that he appear before the court in response to the charges."

[5] It is next contended that, inasmuch as the court failed to enter upon his minutes that defendant neglected to appear according to his undertaking, whereupon the money deposited was declared forfeited, as required by Wilson's Stats. of Okla. § 5776, which they say is mandatory, that there has been no forfeiture of said money. Not so. It has been expressly otherwise held.

In *Morrow v. State*, 6 Kan. 222, Morrow was charged by information with grand larceny, and, after being arrested, gave his personal recognizance in the sum of \$800 to appear and answer to the charge on the day certain in the district court of Miami county. He also at the same time in lieu of bail, deposited \$800, and took the clerk's receipt therefor, who entered the facts upon the journal, and that he "approved" the same, and made the certified copy required by law on which the sheriff released the defendant. Thereafter said recognizance was forfeited and judgment rendered against defendant and in favor of the state for \$800 which was afterwards reversed on error to the Supreme Court of Kansas, where it was held that said "recognizance" was void, and the clerk had no right to take the same. After the mandate had come down, the county attorney applied to the district court for an order on the clerk to pay to the county treasurer the money thus deposited in lieu of bail, which was sustained, and it was so ordered, to reverse which defendant brought error. In passing upon the same objection there raised, as here, the court said: "It is further claimed upon the argument that there has been no order declaring the money forfeited by reason of the nonappearance of the plaintiff in error to answer the charge pending against him. This may be true as a matter of form, but we think that the record shows that the court below acted in the premises substantially as the law directs. At the time when the plaintiff in error was to appear, he was solemnly called, but came not, as he was bound to do if he would save his money from forfeiture. This appears of record; and thus is met the requirement of the statute that the court must direct the fact of the defendant's neglect to appear to be entered upon the minutes. And, this having been done, the forfeiture of the money deposited in place of bail followed, under the law, as a matter of course ([Gen. St. 1868, c. 82] § 152), and it was not error in such cases for the court to direct the for-

feited money to be turned over to the county treasurer." There is nothing in the remaining assignments of error.

The judgment of the trial court is affirmed. All the Justices concur.

CHICAGO, R. I. & P. RY. CO. v. McINTIRE.  
(Supreme Court of Oklahoma. Nov. 14, 1911.)

(Syllabus by the Court.)

1. COURTS (§ 8\*)—JURISDICTION OF SUBJECT-MATTER—PLACE OF ACCRUAL OF CAUSE OF ACTION.

A cause of action accrued in the state of Kansas under the statute of that state, which provides: "Every railroad company organized or doing business in the state of Kansas shall be liable for damages done to any employé of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employes, to any persons sustaining such damages; provided. \* \* \*" Section 1, c. 281, Laws of Kansas 1907. The law of this state concurs in holding that the act complained of under the Kansas statute gives a right of action. Section 36, art. 9, Constitution. *Held*, that the Kansas statute is not against the public policy or the laws of this state, and, although such right of action exists by statute in the foreign jurisdiction, and not by common law, the same may be enforced in the courts of this state.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 18, 19; Dec. Dig. § 8.\*]

2. PLEADING (§§ 20, 34\*)—NEGLIGENCE (§ 1\*)—ACTIONS—INJURIES TO EMPLOYÉ.

A petition containing general averments of negligence, "as hereinbefore complained of, consisted in this," presents only such issues as are found in the specific allegations, following *Chicago, Rock Island & Pacific Ry. Co. v. Wheeler*, 70 Kan. 755, 79 Pac. 673.

(a) To constitute actionable negligence, where the alleged wrong is not willful and intentional, three essential elements are necessary: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) failure of the defendant to perform that duty; and (3) injury to the plaintiff resulting from such failure.

(b) Where an employé is injured, either by the willful or intentional act of the employer, or the failure to exercise ordinary care on the part of such employer, such employé or his representative may plead both in the alternative in one count.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 43, 68; Dec. Dig. §§ 20, 34.\* *Negligence*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

3. MASTER AND SERVANT (§ 248\*)—INJURIES TO SERVANT—ACTIONS—INSTRUCTIONS.

Certain instructions examined *held* to be erroneous.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 248.\*]

Error from District Court, Garfield County; M. C. Garber, Judge.

Action by Mrs. Frances E. McIntire against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

C. O. Blake, H. B. Low, W. I. Gilbert, and Robertts & Curran, for plaintiff in error. A. A. Graham and Parker & Simons, for defendant in error.

WILLIAMS, J. This proceeding in error is to review the judgment of the lower court in an action wherein the defendant in error, as plaintiff, sued the plaintiff in error, as defendant, for damages alleged to have been sustained on account of the death of her husband, Edwin C. McIntire, at Wichita, Kan., on the 5th day of September, 1907.

The following questions were raised: (1) The lower court was without jurisdiction; (2) a cause of action not stated; and (3) error in giving certain instructions.

[1] 1. Counsel for plaintiff in error in their brief say: "The statutes of Oklahoma and Kansas, providing for recoveries of damages for injuries resulting from the wrongful act or omission of another, are the same, the Oklahoma statute having been adopted from Kansas; and, if this action was for damages resulting from a common-law tort, there can be no question but that this court might properly, in a spirit of comity, entertain jurisdiction. But the plaintiff is not seeking to enforce such a right. The recovery is predicated upon another Kansas statute, also in derogation of the common law, which was in force in Oklahoma at the time the alleged rights were created in Kansas."

In *Herrick v. Minneapolis & St. Louis Ry. Co.*, 31 Minn. 11, 16 N. W. 413, 47 Am. Rep. 771, it is said: "The general rule is that actions for personal torts are transitory in their nature, and may be brought wherever the wrongdoer may be found, and jurisdiction of his person can be obtained. As to torts which give a right of action at common law, this rule has never been questioned, and we do not see why the transitory character of the action, or the jurisdiction of the courts of another state to entertain it, can in any manner be affected by the question whether the right of action is statutory or common law. In actions ex contractu, there is no such distinction, and there is no good reason why any different rule should be applied in actions ex delicto. Whenever, by either common law or statute, a right of action has become fixed and a legal liability incurred, that liability, if the action be transitory, may be enforced, and the right of action pursued, in the courts of any state which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the state where it is sought to be enforced. Of course, statutes that are criminal or penal in their nature will only be enforced in the state which enacted them; but the statute under which this action is brought is neither, being purely one for the reparation of a civil injury. The statute of another state has, of course, no extraterritorial force, but rights acquired under it will always, in comity, be enforced,

if not against the public policy of the laws of the former. In such cases the law of the place where the right was acquired, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought. And we think the principle is the same, whether the right of action be ex contractu or ex delicto." See, also, *Dennick v. Railroad Co.*, 103 U. S. 11, 26 L. Ed. 439; *Leonard v. Steam Nav. Co.*, 84 N. Y. 48, 38 Am. Rep. 491; *Chicago, etc., R. Co. v. Doyle*, 60 Miss. 977, 8 Am. & Eng. Ry. Cas. 171; *Nashville & C. R. Co. v. Sprayberry*, 8 Baxt. (Tenn.) 341, 35 Am. Rep. 705; *Selma, etc., R. Co. v. Lacy*, 43 Ga. 461; *Id.*, 49 Ga. 106.

In *Knight v. West Jersey Railroad Co.*, 108 Pa. 250, 56 Am. Rep. 200, it is said: "At common law purely personal wrongs, as respects civil remedy, died with the person who received them; but, whether just or unjust, that rule has been abrogated to a great extent by the statutes, both in this country and in England. In the earlier period of such legislation, there was a tendency to adopt the principle that, 'where a new right of action is given by the statute for that for which no action would lie at common law, such action can only be brought in the state or county whose statute gives the right, and for the wrongs then suffered.' \* \* \* The general rule is, as to personal torts which give a right of action at common law, that the action may be brought wherever the wrongdoer may be found, and jurisdiction of his person may be obtained. In actions ex contractu, their transitory character, and the jurisdiction of the courts to entertain them, are the same, whether the right be given by statute or the common law. Like rule has recently been applied in Minnesota, in an action ex delicto; the court remarking that where, either by common law or statute, a right of action has become fixed and legal liability incurred, if transitory, it may be enforced in the courts of any state which can obtain jurisdiction of the defendant, provided it is not against the public policy of the laws of the state where it is sought to be enforced. The statute of another state has no extraterritorial force, but rights under it will always, in comity, be enforced, if not against the policy of the laws of the forum. In such cases the law of the place where the right was required, or the liability was incurred, will govern as to the right of action; while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought."

*Herrick v. Railway Co.*, supra, has been approved by the Supreme Court of the United States. *Railroad Co. v. Babcock*, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958. Jurisdiction of this cause seems to have been properly entertained by the courts of this state.

[2] 2. The petition alleges:

"(a) On or about said 5th day of September, 1907, said Edwin C. McIntire, deceased, while in the employ and pay of said defendant, as car inspector and repairer, in the city of Wichita, aforesaid, and while in the proper performance and discharge of his duties as such car inspector and repairer, and without fault on his part, received, through the carelessness and negligence of said defendant, its officers, agents, servants, and employés, other than said Edwin C. McIntire, deceased, certain bodily injuries which, on the same day, resulted in his death. That said carelessness and negligence on the part of said defendant, causing injury to and the death of said deceased, as hereinbefore complained of, consisted in this, to wit:

"(b) In the careless and negligent switching, handling, and moving, by a switch crew of said defendant, in charge of a foreman thereof, in the yards of the defendant in said city of Wichita, of a car upon and along a track in such a manner as to strike against other cars then and there standing upon such track, and upon and between which the said Edwin C. McIntire, deceased, was at the time rightfully and properly working in the capacity of his employment and the line of his duty as car inspector and repairer, as aforesaid, without notice or warning to said deceased, and at a time and place and under circumstances when and where the said deceased did not know, and had no reason to anticipate, that said car would be switched, handled, or moved, but, on the other hand, had good and valid reasons to know and believe that said car would not, at that time, be switched, handled, or moved, and when and where and under the circumstances said switch crew and the foreman in charge thereof knew, or, in the exercise of ordinary care, should have known, that said deceased was at the time working."

Whilst the common-law forms or fictions in pleadings have been abolished by statute (section 5656, Comp. Laws of Oklahoma 1909; section 3994, Stat. Okla. Ter. 1893), yet any particular right of action as it existed at common law remains the same, unless abridged or denied by statute, such actions to be pleaded under one form of action, denominated a "civil action." Section 5625, Comp. Laws of Oklahoma 1909 (section 3963, Statutes of Okla. Ter. 1893); *Casey et al. v. Mason*, 8 Okl. 668, 59 Pac. 252; *Choctaw, Oklahoma & Gulf Railroad Co. v. Zwirtz*, 13 Okl. 421, 73 Pac. 941.

Under the statute (section 5627, Comp. Laws of Okla. 1909; section 3965, Statutes of Okla. Ter. 1893), the facts constituting a cause of action are required to be pleaded in ordinary and concise language, and without repetition. The same facts, however, must be pleaded as would constitute the same cause of action at common law, and every fact necessary to be proven to entitle the plaintiff to recover must be averred in the

petition in ordinary and concise language. *Casey et al. v. Mason*, supra; *Choctaw, Oklahoma & Gulf R. Co.*, supra.

The petition does not allege a duty owing to plaintiff's intestate by the defendant, or any duty of the defendant or its agents to look out for or warn the plaintiff's intestate. To constitute actionable negligence, unless the injury was willful and intentional, three essential elements are necessary: (1) The existence of a duty on the part of the defendant to protect the plaintiff from injury; (2) failure of the defendant to perform that duty; and (3) injury to the plaintiff resulting from such failure. *Muncie Pulp Co. v. Davis*, 162 Ind. 558, 70 N. E. 877; *B., O. & S. W. Ry. v. Cox*, 66 Ohio, 278, 64 N. E. 120; *Atlanta, etc., Ry. v. West*, 121 Ga. 641, 49 S. E. 711, 67 L. R. A. 701, 104 Am. St. Rep. 179; *Wickenburg v. Railway Co.*, 94 Minn. 276, 102 N. W. 713; *Holland House Co. v. Baird*, 169 N. Y. 136, 62 N. E. 149; *Bludeon v. Mo. Pac. Ry. (Mo.)* 24 S. W. 57; *Faris v. Hoberg*, 134 Ind. 289, 33 N. E. 1028, 39 Am. St. Rep. 261; 29 Cyc. 420.

In *Chicago, etc., Ry. Co. v. Wheeler*, 70 Kan. 755, 79 Pac. 673, it is said: "Where a petition contains general averments of negligence, 'as hereinbefore more specifically mentioned and described,' only such issues are thereby pleaded as are found in the specific allegations."

The plaintiff having declared that the carelessness and negligence, "as hereinbefore complained of consisted, in this," setting out the specific allegations, only such issues are thereby pleaded as are found in such specific allegations. The plaintiff thereby stands or falls under the allegations as laid in paragraph "b," supra.

In 1 *White's Personal Injuries on Railroads to Employés*, § 328, p. 434, it is said: "A marked distinction is recognized by the best-considered cases between the obligations of the railroad company toward third parties and that existing toward its own employés, with reference to the necessity of giving warning or notice of the movement of its trains in its own yards, or at places where the business of railroading requires the constant or frequent movement of trains or engines. Where the public are expected to be using the track or right of way, due care requires notice of the movement of trains for strangers may be present who do not know of the perils of the situation; with the company's employés, however, there is held to be no duty to give warning of the movement of trains, as this is the very object of the employment in which the employé is engaged, and a risk is incident to the service, which he is held to assume, under his contract of employment. Employés about railroad yards are not like strangers or third parties; they understand the situation; they know the manner of doing the business, and that cars frequently pass, with-

out notice of their approach; and the danger of being struck by a backing engine or car is a risk incident to the business, as carefully conducted, and a peril of the employment."

In 2 Bailey on Personal Injuries (1897) § 2727, p. 918, it is said: "Employés of a railroad company are presumed to contract with reference to the hazards incident to the service. It is not the duty of such a company to place an employé on the lookout to warn others of approaching danger. It is their duty, without warning, to observe due care, and this is a part of their undertaking, and any omission is at their peril. Hence it was held not negligence per se to back a train without providing a watchman on the rear car to warn a switchman of danger."

In 3 Elliott on Railroads (2d Ed.) § 1283, p. 629, it is said: "The general rule is that, where the danger is an extraordinary one—that is, a danger not ordinarily incident to the service—and the employer has knowledge of the danger, he is guilty of negligence if he fails to warn the employé. Where, however, the danger is obvious to a person of ordinary intelligence, and one that can be known and appreciated by a person who exercises ordinary prudence and care, or where it is not an extraordinary peril, but is one incident to the service, there is no duty to give warning, unless the person employed has not reached the sense of discretion. Where the danger is open to the observation of a person of ordinary intelligence, the general rule is that the employer is not guilty of negligence in failing to give the employé warning of such danger, since the risk is assumed by the employé."

In Crowe v. N. Y. C. & H. R. R. R. Co., 70 Hun, 37, 23 N. Y. Supp. 1100, it is said: "Great care and precaution are required on the part of railroad companies, when they are moving cars in places where the general public have a right to pass, to in some manner announce their approach; but a different rule obtains in the companies' yards, where cars are being distributed and trains made up. The employés about such yard understand the situation; they know the manner of doing the business therein; that cars frequently pass along without notice of their approach; and they assume the risks incident to the business as thus conducted."

In Unfried v. Baltimore & O. R. R. Co., 34 W. Va. 260, 12 S. E. 512, it is said: "\* \* \* And we find in Patterson on Railway Accident Law (page 843, § 316) the author says: 'There is no implied obligation on the part of the master to indemnify the servant against the ordinary risks of the service. \* \* \* And upon this principle train hands take the risk of injury from the negligent movement of other trains, \* \* \* from being struck by engines or cars moving in a railway yard, without no-

tice or unattended.' \* \* \* Also section 317. \* \* \* Car repairers, while working beneath cars in a railway yard, take the risk of injury from the car being struck by another car, when they habitually do such work without asking the car to be protected by a flag."

In Plunkett v. Central of Georgia Railway Company, 105 Ga. 203, 30 S. E. 728, it is said: "\* \* \* The petition alleged that the opening between the cars had been left for the use of the employés of the defendant in going backward and forward within the railroad yard, and that, such being the case, the railroad company was under an obligation to notify its employés when such opening was about to be closed up; and having closed it up without notice to the plaintiff's son, who was lawfully engaged in his work in the defendant's yard, and on account of the failure to so notify him, he being crushed between the cars, the company would be liable. This was the only ground of negligence the court thought sufficient to sustain the petition filed by the plaintiff. Upon the trial of the case, it appeared that the opening had not been left for the use of the employés of the defendant, but was such an opening as was ordinarily left, from time to time, in railroad yards, caused by the shifting, from place to place, of the cars which were usually therein. Such being the case, the defendant was under no duty to notify its employés when this opening would be closed up; and therefore an employé who attempted to use such an opening, in going from place to place in the yard, took the risks incident thereto, and if injured would have no right of action against the company."

In Aerkfetz v. Humphries, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758, Mr. Justice Brewer, in speaking for the court, said: "At the time of the accident, plaintiff was working near the west end of the yard, when a switch engine pushing two cars moved slowly along the track upon which he was at work; the speed of the engine being about that of a man walking. Plaintiff stood with his back to the approaching cars, and so remained at work, without looking backward or watching for the moving engine until he was struck and run over by the first car. Upon these facts we observe that the plaintiff was an employé; and therefore the measure of duty to him was not such as to a passenger or a stranger. As an employé of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved at a slow rate of speed, not greater than that which was customary, and that which was necessary to make up the trains. For a quarter of a mile east of him, there was no obstruction, and by ordinary attention he could have observed the approaching cars. He knew that the switch engine was

just moving cars and making up trains; and that at any minute cars were likely to be moved along the track upon which he was working. With that knowledge, he places himself with his face away from the direction from which cars were to be expected, and continues his work, without ever turning to look. Abundance of time elapsed between the moment the cars entered upon the track upon which he was working and the moment they struck him. There could have been no thought or expectation on the part of the engineer, or of any other employé, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances, what negligence can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. They were not bound to assume that any employé, familiar with the manner of doing business, would be wholly indifferent to the going and coming of the cars. There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employés in the yard, familiar with the continuous recurring movement of the cars, would take reasonable precaution against their approach. The engine was moving slowly, so slowly that any ordinary attention on the part of the plaintiff to that which he knew was a part of the constant business of the yard would have made him aware of the approach of the cars, and enabled him to step to one side as they moved along the track. It cannot be that under these circumstances the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employés, who had all the time knowledge of what was to be expected. We see in the facts as disclosed no negligence on the part of the defendants, and if, by any means, negligence could be imputed to them, surely the plaintiff by his negligent inattention contributed directly to the injury." See, also, *Mo. Pac. Ry. Co. v. Haley*, supra; *Walker et al. v. Scott*, 67 Kan. 814, 64 Pac. 616; *Keefe v. Chicago & N. W. Ry. Co.*, 92 Iowa, 182, 60 N. W. 503, 54 Am. St. Rep. 542; *Wabash Ry. Co. v. Skiles*, 64 Ohio St. 458, 60 N. E. 576.

Under the unbroken line of authority as the law obtained in Kansas at the time of this accident, this petition fails to state a cause of action, unless it charges the switch crew or its foreman with a willful or intentional injury. The petition charges that the switch engine was "switched, handled, or moved" by the switch crew "when, where, and under the circumstances said switch crew and the foreman in charge thereof

knew, or, in the exercise of ordinary care, should have known, that said deceased was at the time working."

Section 5655, Comp. Laws of Oklahoma 1909 (section 3993, Statutes Oklahoma Territory 1893) provides: "In the construction of any pleading, for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties."

The plaintiff here pleads in the alternative, alleging that the crew and the foreman in charge thereof when said switch engine caused the cars to be jammed together knew that said deceased was at said time working between said cars, or, in the exercise of ordinary care, should have known that said deceased was at said time working between said cars. Such allegation is good against a general demurrer; no motion being made to separate same. *Kuchler et al. v. Weaver*, 23 Okl. 420, 100 Pac. 915; *Brockett v. Fair Haven, etc.*, R. R., 73 Conn. 423, 47 Atl. 763; *Turney v. South. Pac. Co.*, 44 Or. 280, 75 Pac. 144, 76 Pac. 1080; *Prehm v. Porter*, 165 Mo. 115, 85 S. W. 284; *Owensboro City R. v. Hill*, 56 S. W. 21, 21 Ky. Law Rep. 1638; 1 Bates, Pleading and Practice (1908) p. 492.

The latter alternative, however, does not charge a willful or intentional injury; the allegation being substantially that, by the exercise of ordinary care, the crew and the foreman in charge thereof should have known that deceased was between said cars working. Nor, under the foregoing authorities, was any duty imposed upon said crew or its foreman to exercise care to look for or warn the intestate. But the other alternative charges that the crew and its foreman knew of the intestate's position. Therefore this alternative, by a liberal construction, with a view to substantial justice between the parties, charges a willful or intentional injury. In that view the petition states a cause of action; otherwise it does not.

In *Labatt on Master and Servant* (1904) at page 4, § 2, it is said: "A proposition which has so frequently been enunciated by the courts as to have become axiomatic is that, prima facie, a servant does not assume any risks which may be obviated by the exercise of reasonable care on the master's part. In other words, the abnormal, unusual, or extraordinary risks which the servant does not assume as being incidental to the work undertaken by him are those which would not have existed if the master had fulfilled his contractual duties."

In *Bailey on Master's Liability for Injuries to Servant* (1894), at page 170, it is said: "Where a fireman was employed in the operation of an engine which was regularly run backward, it was held that, as he was employed to perform a particular thing, as to the dangers of which he must be presumed to have had full knowledge, he



could not complain that the act was dangerous; the rule being that the servant assumes the hazards of dangerous methods, as well as the use of defective tools or machinery, when, after employment, he learns of the defects, but voluntarily continues in the employment without objection (citing *Kuhns v. Railway Company*, 70 Iowa, 561, 31 N. W. 868; *Missouri Furnace Co. v. Abend*, 107 Ill. 44 [47 Am. Rep. 425]).

\* \* \* So, when a foreman or yardmaster, who has charge of switching cars and making up of trains in a yard, is familiar with the tracks, and knows a certain frog is not blocked or filled, and is unsafe or dangerous; the general rule being that an employé who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes open and obvious, the dangerous character of which causes he had an opportunity to ascertain." *Wilson v. Railway Company*, 37 Minn. 326, 33 N. W. 908, 5 Am. St. Rep. 851; *Norfolk & W. Ry. Co. v. Cottrell*, 83 Va. 512, 3 S. E. 123; *Mayes v. Railway Co.*, 63 Iowa, 562, 14 N. W. 340, 19 N. W. 680; *McGlynn v. Brodie*, 31 Cal. 378.

In *Labatt on Master and Servant* (1904) p. 26, § 16, it is also said: "The degree of care, therefore, which the master is bound to exercise is measured by the dangers to be apprehended or avoided, or, as another case puts it, 'must be proportionate to the dangerous nature of the means, instruments, and machinery used;' or, in the words of the Supreme Court of the United States, the 'master is bound to observe all the care which prudence and the exigencies of the situation require in providing the servant with machinery or other instrumentalities adequately safe for use by the latter.'" *Hough v. Texas & P. R. Co.*, 100 U. S. 213, 25 L. Ed. 612; *Texas & P. R. Co. v. Barrett*, 14 C. C. A. 373, 67 Fed. 214, 30 U. S. App. 196; *Sans Bois Coal Co. v. Janeway*, 22 Okl. 425, 99 Pac. 153. "The cases in which this principle suggests itself as the appropriate criterion of the master's fulfillment or nonfulfillment of his legal obligations may be said to fall into three categories: (1) Those in which the business carried on by him is, as regards its ordinary incidents, unusually dangerous, such as that of a railway company, or of mine owners, or of persons operating an elevator, or engaged in the preparation, storage, or handling of explosive and inflammable substances, or using steam boilers, or using electrical appliances. \* \* \*

The plaintiff does not predicate her cause of action upon the failure of the master to discharge any of the duties of the master in the way of providing a safe place to work, or to provide reasonable rules and regulations for protecting him in the place of danger whilst at work. Such being the case, the question of the applicability of section 3,

art. 23, of the Constitution, does not arise. *Independent Cotton Oil Co. v. Beacham*, 120 Pac. 969, decided by this court on September 11, 1911.

[3] The court instructed the jury as follows: (c) "You are instructed that, even though you should find from the evidence that the deceased, Edwin C. McIntire, should, before placing himself between the cars where he received the injuries, if any, complained of, have placed a blue signal, or other signal or warning of any kind, at the end of each car or train where he was working, and failed to do so, yet, if you further find from the evidence that a certain car or cars were, by the switch crew of the defendant then and there working, switched or allowed to run against such cars upon which the deceased was then working, without knowing whether or not such standing cars had a blue signal, or other signal or warning of any kind, at the end thereof, as a warning that such standing cars should not be moved, then such failure, if any, of the deceased to so place such signal becomes immaterial as not affecting the result in this case." This instruction was erroneous, for, under the excerpts heretofore quoted, which correctly state the rule then obtaining in Kansas, the switch crew and its foreman owed the plaintiff's intestate no duty, except not to willfully or intentionally injure him. The law did not impose upon them the duty to look out for him, or to give warnings.

The court further instructed the jury: (d) "You are further instructed that, even though you should find from the evidence that on and prior to the said 5th day of September, 1907, there was a custom in force in the defendant's yards at Wichita, Kan., that a car inspector and repairer, while working upon cars, should place a blue flag at the end thereof for the purpose of warning other employes when working in said yard not to move such cars, and that the deceased failed to do so, yet, if you further find from the evidence that a certain car or cars were, by the switch crew of the defendant then and there working, switched or allowed to run against such cars upon which the deceased was then working, without knowing whether or not such standing cars had a blue signal, or other signal or warning of any kind, at the end thereof, as a warning that such standing cars should not be moved, then such failure, if any, of the deceased to so place such signal becomes immaterial as not affecting the result in this case." This instruction, for the same reason, was also erroneous.

It is not essential to consider the other objections to instructions, as they will not likely arise upon another hearing.

The judgment of the lower court is reversed and remanded, with instructions to grant a new trial. All the Justices concur.

**TOWN OF CHECOTAH et al. v. TOWN OF EUFAULA et al.**

(Supreme Court of Oklahoma. June 27, 1911.  
Rehearing Denied Dec. 19, 1911.)

*(Syllabus by the Court.)*

**1. COUNTIES (§ 35\*)—COUNTY SEATS—LOCATION—SUBMISSION TO POPULAR VOTE.**

Section 12 of article 4, c. 31, of the act entitled "county seat locations," Session Laws of Oklahoma 1907-08, which was passed for the purpose of providing procedure for holding of special elections for the purpose of permanently locating county seats, provides in substance that each elector desiring to vote at the election called shall, after being admitted to the election room and before being given a ballot, permit the clerks to fill out an affidavit to which he shall subscribe and swear before the special election commissioner provided for therein, after which he shall be given a ticket and permitted to prepare and deliver the same to the said official, who shall thereupon, in the presence of said elector, deposit the same in a box provided therefor. At an election called and held under the provisions of this act, the special election commissioner prior to the opening of the polls attached his jurat to a number of blank forms of affidavits and placed them available for the use of the clerks and the electors and continued this practice throughout the day. On an elector entering the room, he was informed by the judges that he would be required to make an affidavit to his qualifications as an elector before he could vote. He then gave the information required to complete the affidavit, which was accordingly done, after which he read the affidavit, or, if unable to read, the same was read and explained to him by the election judge. Thereafter the elector signed his name thereto, or, if unable to write, touched the pen. The affidavit was thereupon delivered to the election commissioner, for the purpose and with the intent on the part of the elector of receiving a ticket and to prepare the same and cast it as his ballot in the election. The special election commissioner and the clerks all understood that this process constituted a swearing on the part of the elector, and the elector intended it as such, and the affidavit was delivered with the intent that it be taken and acted on as true. On a contest the ballots cast under these conditions are objected to, and it is sought to have them held void on the ground that the affidavit was incomplete without a formal taking of the oath, and that, being so incomplete, the elector was not entitled to receive a ballot, and that, having improperly received and cast it, the same should not be counted. *Held*, that such contention cannot be sustained, as under section 2182, Compiled Laws of Oklahoma 1909, it is provided that "the making of a deposition or certificate is deemed to be complete, within the provisions of this article, from the time when it is delivered by the accused to any other person with the intent that it be uttered or published as true."

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 35.\*]

**2. PERJURY (§ 10\*)—ELEMENTS OF OFFENSE—SUFFICIENCY OF OATH—"DEPOSITION."**

The word "deposition," as used in section 2182, Compiled Laws of Oklahoma 1909, includes "affidavit," as under section 2965, Id., the statute provides that every mode of written statement under oath or affirmation is embraced by the term "depose."

[Ed. Note.—For other cases, see Perjury, Cent. Dig. §§ 36, 37; Dec. Dig. § 10.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 2000-2002; vol. 8, p. 7634.]

**3. PERJURY (§ 10\*)—ELEMENTS OF OFFENSE—SUFFICIENCY OF OATH—AFFIDAVIT.**

The test of the sufficiency of an affidavit which is made and delivered within the terms of section 2182, Compiled Laws of Oklahoma 1909, is whether it will sustain and authorize an indictment, not whether a conviction could be had under it.

[Ed. Note.—For other cases, see Perjury, Dec. Dig. § 10.\*]

**4. COUNTIES (§ 35\*)—COUNTY SEAT—LOCATION—SUBMISSION TO POPULAR VOTE.**

Section 12 of article 4, c. 31, of the act entitled "county seat locations," Session Laws of Oklahoma 1907-08, provides for the substantial form of oath which the elector must sign and to which he must swear before being given a ballot. This affidavit, in addition to setting forth the different facts evidencing that the party signing and swearing to the same is a qualified elector, provides that he shall state therein his color and his former place of residence. On the occasion of an election being held under this statute, the election officials of one precinct without fraud, and owing to the great number of electors residing therein, agreed that the time available would not permit completing the affidavits by securing from each elector his color and his former place of residence, and the electors were not by the officials asked these questions nor required to furnish this information, but signed and swore to affidavits, which did not contain this information. On a contest, the ballots cast under these conditions are objected to, and it is sought to have them held void on the ground that the affidavits were incomplete and insufficient in the absence of a statement of the omitted facts to justify the delivery to or reception by the electors of tickets for the purpose of preparing and casting their ballots. The statute in setting forth the form of affidavit provides that it shall be "substantially as follows," etc. It was not shown that the electors participated in making the rule adopted, nor that any refused to give the information, nor that any fraud was perpetrated nor intended, nor that the parties who cast their ballots were not qualified electors, nor that the election or trial was in any particular affected by reason of the absence of the details specified. *Held*, that the ballots were not rendered invalid or void by reason of such defect, and that the affidavit made was a substantial compliance with the statute.

[Ed. Note.—For other cases, see Counties, Dec. Dig. § 35.\*]

*(Additional Syllabus by Editorial Staff.)*

**5. OATH (§ 1\*)—DEFINITION.**

Comp. Laws 1909, § 2177, defines "oath" as including every mode of attesting the truth of that which is stated which is authorized by law.

[Ed. Note.—For other cases, see Oath, Cent. Dig. § 1; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4871-4874; vol. 8, p. 7735.]

**6. WORDS AND PHRASES—"MAKING."**

"Making" is defined as the action of one who makes.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4295.]

**7. WORDS AND PHRASES—"DEEMED."**

The word "deemed" means "adjudged."

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1924-1926.]

**8. WORDS AND PHRASES—"COMPLETE."**

"Complete" means filled up; with no part, item, or element lacking; free from deficiency; entire; perfect; consummate.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1366-1368.]

**9. WORDS AND PHRASES—"SUBSTANTIALLY."**

"Substantially" means in substance; in the main; essentially; by including the material or essential part.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, p. 6741.]

Original action by the Town of Checotah and others against the Town of Eufaula and others for writ of injunction. To the report of a referee appointed to take evidence, with his findings of fact and conclusions of law, the plaintiffs except. Report confirmed and judgment entered accordingly.

Owen & Stone, Ben D. Gross, John F. Vaughan, and Claude A. Niles, for plaintiff. William A. Collier, for defendant.

DUNN, J. November 13, 1908, there was delivered by this court an opinion, entitled Town of Eufaula v. Gibson et al., 22 Okl. 507, 98 Pac. 565, under which a second election was called in McIntosh county for the purpose of permanently locating the county seat in and for said county, in which Eufaula and Checotah alone would be the participants. In accordance therewith, notices were issued, and the same was duly held February 10, 1910. Thereafter the town of Checotah filed in this court an original action contesting the result of the election, and on August 9, 1910, Hon. Robert J. Ray was appointed to take the evidence therein and report the same to this court with findings of fact and conclusions of law. A hearing was duly had, and on February 14, 1911, the referee filed his report in which Eufaula was shown to have received 1,918 votes and Checotah 1,843 votes. To this report counsel for plaintiff filed exceptions under which they have argued and briefed two leading propositions which raise the question of the validity of the ballots cast at Mellette and East Eufaula precincts, a decision on which, from the view which we take of the case, will determine the controversy. In order to squarely present for consideration the questions which are involved by the exceptions filed, it will be necessary to briefly review the requirements of the Constitution and the act under which the election was held.

[1] Article 17 of the Constitution names the different counties of the state and fixes the county seats thereof. Section 6 provides that the towns named shall be and remain the county seats of their respective counties until changed by a vote of the qualified electors of the county. This proviso is thereafter followed by details setting forth the manner in which such election should be called and held. The first Legislature of the state of Oklahoma, 1907-08, passed an act

amplifying and providing full procedure for carrying into effect these provisions of the Constitution. Session Laws Oklahoma 1907-08, act entitled "county seat locations," article 4, c. 31, p. 380. Section 8 of this act provides that, when an election is called for the purpose of selecting a county seat, it shall be the duty of the Governor to appoint one special election commissioner for each voting precinct or voting place in the county. Section 9 provides that no person shall be qualified and eligible to perform the duties of such special election commissioner, who was or had been a resident of such county, or who shall be interested in any manner in the success of any city, town, or place which was a candidate. Section 12 then provides as follows: "Every person desiring to vote at such special election, after having passed the challengers whose duties shall be the same as prescribed by law governing any general election, and being admitted to the room, shall, before being given a ballot, permit the clerks to fill out an affidavit and said intended voter shall subscribe and swear to said affidavit before the said special election commissioner, after which he shall be given a ticket and permitted to prepare same and deliver said ballot to said special election commissioner who shall, in the presence of said voter, deposit said ballot in the proper ballot box, and shall deposit the said affidavit in the box provided for that purpose. The form of the affidavit required of all persons presenting themselves to vote at such special election shall be substantially as follows: State of Oklahoma, county of \_\_\_\_\_, ss. \_\_\_\_\_, of lawful age, first being duly sworn, upon his oath deposes and says: That he is a male citizen of the United States or is of Indian descent, native of the United States, is over the age of 21 years—white—colored,—that he has been for one year last past a bona fide resident of said state, of said county six months and in \_\_\_\_\_ precinct thirty (30) days next preceding this date; that he came to his present residence from \_\_\_\_\_, and is a legally qualified elector in said precinct on this day and has not voted in said election. \_\_\_\_\_, Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_ A. D. 19\_\_\_\_, \_\_\_\_\_, Special Election Commissioner."

It is on the alleged violation of this section that counsel for plaintiff predicate their claim for a reversal of the finding of the referee, and this upon one ground that the affidavit provided for was not sworn to by the electors before the special election commissioner or any other officer prior to being given a ballot and voting in the election, and in view of the holding of this court in the case of Incorporated Town of Stillwell v. Incorporated Town of Westville et al., 24 Okl. 892, 105 Pac. 664, deciding that this statute was mandatory, the ballots of the electors who

voted at Mellette precinct should be rejected. The referee found in reference to this particular precinct that, before the voting began in the morning, the special election commissioner attached his jurat to a number of blank forms of the affidavits and placed them on the judges' desk to be by them filled out as the voters came in to vote, and from time to time during the day, as the affidavits were needed, he would sign them in advance in numbers of 10 or 15 so that they would always be ready and available. On an elector entering the room, he was informed by the judges that he would be required to make an affidavit showing his qualifications as an elector before he could vote. He was then asked and gave the information required to complete the affidavit, and the blanks were filled in by one of the judges in accordance with the voter's statements. The affidavit as thus made out, with the special election commissioner's signature attached, was then presented to the voter by the judge who filled it out. The elector then read it for himself, but, if unable to read, it was read or explained to him by the judge. After this the elector signed his name thereto, or, if unable to write, requested the judge to sign his name for him while he touched the pen. The affidavit was then either by the judge or elector, usually the latter, handed to the special election commissioner, who received the same and placed it in a box for that purpose and then delivered to the elector his ballot. The referee then in his findings of fact specifically found that, with the exception of certain electors not necessary to here notice, every person who voted at that precinct knew and understood the contents of the affidavit, and understood that it was an affidavit as to his qualifications as a voter for the purpose of voting, and in his conclusions of law specifically states that the elector did everything that was required of him under the law, and that he understood the contents, knew he was signing an affidavit, and signed the same in the presence of the special election commissioner and the entire election board, believing that he was signing an oath and believing that he was being sworn and in all respects complying with the law, but that the officer did not ask him to raise his hand or ask him if the statements contained in the affidavit were true, nor 'do anything further than receive from the voter the signed affidavit and put it in the box and deliver to the voter his ballot. That the voter did not in words ask the special election commissioner to swear him, but that, when he presented himself and signed the affidavit duly prepared, he did by fair implication ask to be sworn to the affidavit. Both parties rely upon the holding of this court in the *Westville v. Stillwell Case*, supra, and each have ranged the entire domain of text and case law to support their several contentions. The questions presented herein are of far-reaching and momentous importance, as

there are a number of counties in which the location of the county seat at an election already held depends upon the conclusion to which we come in the determination of this question. In the *Westville v. Stillwell Case*, supra, this court passed merely on the facts which were presented in that case, and then said: "It is not contended that the parties did anything more than subscribe their names to the affidavits; the officers not even attaching their jurats thereto either in the presence or absence of the affiants. It may be that, had the deponent signed the affidavit in the presence of the officer and stood by, and, with knowledge that the officer placed his jurat thereon, acquiesced in such act, that would have been sufficient; but we reserve our decision on that question."

The decision that was there reserved is now essential to be made, for the situation there suggested is now squarely presented. The electors at this precinct attended upon the polling place for the purpose of casting their ballots. The law informed them, and they knew when they entered the election room, that it was necessary, before being given a ballot, that they permit the clerks to fill out this specific affidavit to which it was their duty to subscribe and swear before the special election commissioner prior to being given a ballot and being permitted to prepare the same. It appears from the findings of the referee that the electors at this precinct, in addition to the conclusive presumption of their knowledge of the requirements of the law, received direct information of its demands from the election officials when they were delivered the blank form of affidavit prescribed by law; that they signed their name thereto in the presence of the officials, either reading or having the same explained to them at the time; that for the purpose of procuring a ballot which they were to cast, understanding that they had been sworn to the affidavit and the election officials joining in that understanding, they delivered the affidavit to the special election commissioner with the intent to have him act thereon and deliver to them their blank ballots, which he did, and which they, by reason of these things, were permitted to prepare and cast. With all of these conceded facts before us, we are now asked to say that every ballot which was cast by the electors under this procedure was void, and that the election held thereby must fall, notwithstanding the fact that there is a total and complete absence of any challenge of the qualification of electors who cast the same. It is claimed that because the electors did not hold up their hands and swear to the affidavits, nor ask to be sworn to them, or were not sworn to them in due form, but merely did the things which are above set out, that the affidavit was not complete, that perjury could not be predicated upon it, and that it was in fact a mere nullity. We deem

it unnecessary to consider at length the numerous definitions of "oath," and the different cases holding that the due and formal administrations of the same are necessary in order to complete the requirements of law, for, as we view it, our statute covers completely every element essential for our consideration. The special election statute requires, as we have seen, that the electors shall permit the clerk to fill out an affidavit, and that the intended voter shall subscribe and swear to the same before the special election commissioner. An "affidavit," under our statute (section 5861, Comp. Laws of Oklahoma 1909), is defined to be "a written declaration under oath without notice to the adverse party." So that as the term is used in this act, as there is no adverse party, an affidavit may be defined simply as "a written declaration under oath," or, as the same is sometimes defined by the courts, it means an oath reduced to writing. *State v. Headrick*, 149 Mo. 396, 51 S. W. 99; *Grove & Jenkins v. Campbell et al.*, 9 Yerg. (Tenn.) 7, 10; *Burns v. Doyle*, 28 Wis. 460; *Edwards et al. v. McKay*, Adm'x, 73 Ill. 570.

Section 2176, Compiled Laws of Oklahoma 1909, under article 12, c. 25, being the article on Perjury and Subornation of Perjury, provides that: "Every person who, having taken an oath that he will testify, declare, depose or certify truly before any competent tribunal, officer, or person, in any of the cases in which such an oath may by law be administered, willfully and contrary to such oath, states any material matter which he knows to be false, is guilty of perjury."

[5] The term "oath" is defined (section 2177, Id.) as including every mode of attesting the truth of that which is stated which is authorized by law, and section 2179, Id., provides that it is no defense to a prosecution for perjury that the oath was administered or taken in an irregular manner. Section 2182, Id., is the section which, taken in conjunction with its context, in our judgment renders these affidavits complete, in view of the things which were done by the officials, and the electors, and reads as follows: "The making of a deposition or certificate is deemed to be complete, within the provisions of this article, from the time when it is delivered by the accused to any other person with the intent that it be uttered or published as true."

[2, 3] Section 2965, Id., provides that "every mode of oral statement under oath or affirmation is embraced by the term 'testify,' and every written one in the term 'depose.'" So that, when a party makes a written declaration under oath, he deposes, and very many authorities have held that the word "deposition" includes an affidavit. *State v. Dayton*, 23 N. J. Law, 49, 53 Am. Dec. 270; *People v. Robles*, 117 Cal. 681, 49 Pac. 1042; *People v. Maxwell*, 118 Cal. 50, 50 Pac. 18; *Stimpson v. Brooks*, 3 Blatchf. 456, 23 Fed.

Cas. No. 13,454; *Hershenstein v. Hahn*, 77 N. J. Law, 39, 71 Atl. 105. While the Supreme Court of California, in which state there exists a statute identical with the one before us, held in the case of *People v. Robles*, supra, construing the word "deposition" used in this statute, that "the word 'deposition' as used in this statute includes 'affidavit,'" the affidavits which were made in this case met all of the requirements of the law as to being sufficient upon which to make an assignment of perjury if false. They were entitled, "affidavit." The venue was stated. There was the body containing material and relevant statements relating to the matter then in hand, in accordance with the requirements of the statute. They were signed, which signature was followed by the certificate of the notary: "Subscribed and sworn to before me this 10th day of February, 1910. Eugene Flowers, Special Election Commissioner." Such a paper supplies all the essentials of a completed affidavit. 1 *Encyclopædia of Pleading & Practice*, pp. 310, 311, and authorities cited in notes. Under these circumstances, when the facts in the case are taken into consideration, the foregoing statute (section 2182) rendered these affidavits complete without reference to whether the electors raised their hand or were duly sworn to the same when the facts show that they were delivered by them to the election commissioner with the intent that they should be uttered or published as true for the purpose of procuring the blank ballots which were received, prepared, and cast. A further analysis and consideration of the terms of the act confirms us in this view.

[6] The word "making," according to Webster's New International Dictionary, is the "action of one that makes."

"Affidavit," as we have seen, falls within the term "deposition."

[7] The word "deem," according to Webster, is defined as "to sit in judgment over or upon," and the word "deemed," from such definition, would be construed to mean "adjudged."

[8] "Complete," according to the same authority, means, "filled up; with no part, item, or element lacking; free from deficiency; entire; perfect; consummate."

With this construction then placed upon the dominant elements of the section, there is no room for doubt that it was the intent of the Legislature by this act to provide that where one delivered, as shown, an affidavit or a paper containing the elements which we have referred to above, to another person with the intent that it should be uttered or published as true, that its making should be deemed or adjudged to be free from deficiency, entire, and complete with no part, item, or element lacking. This being true, then perjury was assignable upon these affidavits from the time when they

were delivered by the electors with the intent that they should be acted on as true in securing their ballots, and this, too, without reference to whether the signers were formally sworn or not. The reason for this is that the law has fixed the act of delivery of such a document by the accused to some other person with the intent referred to in the statute, as the act fixing its character. Such an act is just as fully within the control of the accused or the maker of the affidavit as the raising of the hand, and the formal taking of an oath, and the danger of misconstruction is far less likely. And in our judgment the statute was passed to meet just the contingency which has arisen in this and similar cases. The question of whether the signer was actually sworn to an affidavit which he has delivered with the intent that the same be uttered, published, and acted on as true, and under which others have acted, often arises to be established months or even years afterward. The man who will corruptly swear to a false affidavit will usually have few scruples if overtaken in his crime in swearing to that which is necessary to acquit himself, and the fleeting, passing formality of either raising his hand or taking the oath is of such a nature that generally officials will be unable to make positive evidence thereof after a lapse of time, while the accused will be ever ready to avouch the fact that this solemn act was never committed or done. The question, then, in cases of this character, under this statute, is reduced to the proposition of: Was the affidavit executed, as it appears upon its face, delivered by the accused to another with the intent that it be uttered or published as true? If so, and perjury has been committed, the crime is complete when these acts are done. Of course, the defendant may establish any available defense. It may not be sufficient to effect a conviction. He may show, for instance, that he was insane, or that he signed under duress, or that he could not read, and it was misread to him, and doubtless other grounds which do not occur to us; but these facts do not affect the completeness of the affidavits where the terms of the statute are met. Nor is such a rule harsh nor a departure from the great ordinary highway of the law. It is simply the rule of reason that men should be held to the result of their deliberate acts. Since human conduct first began its course, the maxim has been true that actions speak louder than words. It is simply in recognition of this salutary, reasonable doctrine that this statute was enacted, for we all know that by our actions, even in the absence of words, are oftentimes effected the most solemn and consequential relations in life. Nor need such a construction surprise any, nor be deemed inconsistent with the other statutes of our state. Section 6861, Comp. Laws of Oklahoma 1909, under the criminal procedure act,

provides, in reference to prosecutions for perjury, where the perjury is charged to have been committed in court, that "it shall be sufficient to show that the oath was administered by any officer of the court authorized so to do, *or that the defendant testified and gave his testimony as under oath.*" Here again it will be noted the accused is held to the result of his actions. He may never have heard or acceded to the mumble which is often indulged in on the occasion of the administration of the oath, or it may have been omitted entirely, yet when he, in the presence of the court, gave his testimony *as under oath*, this is sufficient upon which to predicate perjury, and, if he were never sworn, the substitute for it was supplied by his acts, just as in the case before us, where, if the form of administering the oath was not acted out, the substitute for it was supplied by the elector when, after having completed the affidavit before us, he delivered it to the election commissioner with the intent of having the same uttered or published as true, and acted on as true, and whereby he received from such official the ballot which he cast.

We have considered the cases of *Case v. People*, 76 N. Y. 242, *O'Reilly v. People*, 86 N. Y. 154, 40 Am. Rep. 523, and *Kane v. City of Brooklyn*, 114 N. Y. 586, 21 N. E. 1063; but in none of these does it appear there was this or a similar statute called to the attention of the court, nor was any such ever passed on or considered, the decisions in those cases being apparently confined to the theory under which the cases were tried. Our statutes, however, are controlling in any event, and the construction which we have placed hereon calls for the confirmation of the referee's report as to Mellette precinct.

[4] It is next contended that the affidavits, as they were prepared, signed, and delivered in East Eufula precinct, were fatally defective because they failed to state the color of the electors or their former place of residence. An inspection of the requirements of the form of the affidavit quoted above discloses that, in addition to all the elements showing that the elector was qualified to vote, he was required to state his color and his former place of residence. The statute provides that the affidavit "shall be *substantially* as follows," etc. This language imports that it is not essential that the affidavit be an exact copy of that set forth in the statute, and means that less than an exact compliance will be sufficient provided that the affidavit substantially, or, generally speaking, in its essential and material parts, meets the requirements. It is conceded that the affidavits in this precinct contain all of the elements set forth in the statute showing that the elector was duly qualified, and as there is no showing that this defect in the affidavits had any effect on the result of the election or the trial,

and as the word "substantially" defeats the claim by counsel that they are void affidavits, the ballots cast thereunder must be deemed valid.

[8] The word "substantially" is defined in volume 7, Century Dictionary & Encyclopedia, p. 6031, as follows: "In substance; in the main; essentially; by including the material or essential part."

To the same effect is the holding of the courts in the following cases: *Edgerton v. State*, 70 S. W. (Tex. Cr. App.) 90; *Western Assurance Co. v. Althelmer*, 58 Ark. 565, 25 S. W. 1067; *Thomas v. State*, 103 Ind. 419, 2 N. E. 808; *Lowrie v. Meldrum Co.* (C. C.) 124 Fed. 761; *Lineberger et al. v. Tidwell et al.*, 104 N. C. 506, 513, 10 S. E. 758; *Russell v. Ralph*, 53 Wis. 328, 10 N. W. 518; *Schwartz et al. v. Allen et al.* (Super. Buff.) 7 N. Y. Supp. 5; *Stanhope et al. v. Dodge et al.*, 52 Md. 483.

The correctness and justice of this conclusion finds complete support in the specific findings of the referee in which it is disclosed that at the time of the opening of the polls it was agreed between the inspector and judges that it would take too much time to fill out the blanks with the color and former place of residence of the electors, in view of the number in that precinct, and hence and for this reason the same were not filled out, that this decision was not in the furtherance of any design on the part of any of the representatives on the part of Eufaula to conceal the identity of any voter, and that no elector refused to state these facts.

Furthermore, it is to be noted that what was done was by the election officials, not the electors, and the statute specifically provides that the elector shall "permit the clerks to fill out an affidavit and said intended voter shall subscribe and swear to said affidavit." This the electors did, and it occurs to us that it would be an act of marked injustice to disfranchise an elector and reject his ballot when he had done all that the statute required and refused to do nothing that the officers requested. He signed and swore to the affidavit which he permitted the clerks to fill out. This met his full duty, especially where the affidavit was in substantial compliance with the statute. Seldom, if ever, are electors penalized by the loss of their votes because officers are derelict, and we can see no reason for it in this case.

It therefore follows that the conclusion reached by the referee on both questions must be affirmed.

This court is duly impressed with the importance of the conclusions to which it has come in this case. Aside from it, there are now pending contests in a number of other counties of the state between competitive communities for the county seats of

their respective counties, and the determination of the issues in this case will necessarily influence to a great extent, if not completely, the decision in a number of the others. The contest in this court has been waged by able and talented counsel on the part of both parties, and nothing has been left undone that zeal and industry on their part could achieve. The case has been fully presented, and ably argued, and the conclusion that Eufaula is the permanent county seat of McIntosh county follows after full consideration of all the issues presented by counsel, and a most careful, painstaking, independent investigation on the part of the court.

The duties of the referee have been performed in an able and impartial manner, and his report is confirmed, and judgment entered accordingly.

TURNER, C. J., and WILLIAMS, J., concur in conclusion. KANE and HAYES, JJ., concur.

#### JOHNSON v. STATE.

(Criminal Court of Appeals of Oklahoma.  
Jan. 6, 1912.)

(*Syllabus by the Court.*)

#### INTOXICATING LIQUORS (§ 236\*)—ILLEGAL SALE—EVIDENCE.

In the absence of a statute making the possession of more than a given quantity of intoxicating liquors presumptive evidence of the intent of the person having possession of the same to illegally dispose of the same, a conviction for having possession of intoxicating liquors for the purpose of violating the prohibition law will not be sustained merely upon the ground of the quantity which a defendant may have in his possession.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Dec. Dig. § 236.\*]

Appeal from Ottawa County Court; W. Y. Quigley, Judge.

Perry Johnson was convicted of violation of the prohibition law, and he appeals. Reversed and remanded.

O. F. Mason, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. In the case at bar it was proved by the state, and not denied by appellant, that appellant had in his possession at his home something like three gallons of whisky. We have no doubt of the right and power of the Legislature to enact a statute making the possession of more than a given amount of intoxicating liquors presumptive evidence of the intent of such person to illegally dispose of the same in violation of the prohibitory liquor law of the state, and thus throw upon the defendant the burden of proving that this possession was not for illegal purposes, yet in the absence of such a statute this court is without power to es-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

tablish such a rule merely upon proof of the amount of intoxicating liquor found in the possession of a defendant. We are of the opinion that the amount of intoxicating liquor found in possession of a defendant is a proper circumstance to be considered by the jury in connection with the other facts and circumstances of a case in determining as to whether or not it was the intent of the person having possession of the liquor to illegally dispose of the same in violation of the prohibitory liquor law of the state, but this circumstance alone cannot support a conviction. If it had been proven that the appellant was in possession of the liquor in this case, and had it in some place to which persons generally resorted, or if it had been proven that the home of appellant had the general reputation of being a place where intoxicating liquors could be illegally obtained, then the case would be entirely different. But this case rests alone upon the fact that the appellant was found in possession of about three gallons of whisky at his home, without any showing of facts which would cause a jury reasonably to believe that it was the purpose of appellant to illegally dispose of the same. The judgment of the lower court is therefore reversed, and the cause is remanded for a new trial.

ARMSTRONG and DOYLE, JJ., concur.

#### MCCARTHY v. STATE.

(Criminal Court of Appeals of Oklahoma.  
Dec. 30, 1911.)

#### (Syllabus by the Court.)

#### 1. INTOXICATING LIQUORS (§ 224\*)—POSSESSION WITH INTENT TO SELL—EVIDENCE.

In a prosecution for having possession of intoxicating liquors, with intent to sell, barter, give away, or otherwise furnish, the evidence, to be sufficient to convict, where there is no proof of the payment by the defendant of the special tax required of liquor dealers by the United States, must show, in addition to possession, such acts or conduct of the defendant as tend to prove unlawful intention. In the absence of such evidence, it is the duty of the trial court to advise the jury to acquit the defendant.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 281; Dec. Dig. § 224.\*]

#### 2. CRIMINAL LAW (§ 823\*)—INSTRUCTIONS—ERRORS—CURE BY OTHER INSTRUCTIONS.

Error in instructing that "it is not necessary or incumbent on the state to show a sale, an attempt to sell, or that the liquors were exposed or offered for sale, or that the liquors were owned by the defendant," where there is no proof of payment by the defendant of the special tax required of liquor dealers by the United States, was not cured by the statement following that: "The unlawful purpose or intention is the essence of the offense, and should be clearly made out to the satisfaction of the jury, beyond a reasonable doubt."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1992-1995; Dec. Dig. § 823.\*]

Appeal from Kay County Court; Claude Duval, Judge.

Jack McCarthy was convicted of violation of the prohibitory law, and he appeals. Reversed.

Herman S. Gurley, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen. (Andrew Wood, of counsel), for the State.

DOYLE, J. The plaintiff in error was convicted in the county court of Kay county on an information which charged: "Did unlawfully have and keep in his possession spirituous liquor, to wit, whisky, with the unlawful intent then and there to sell, furnish, and barter said whisky to various persons." May 21, 1910, he was sentenced to serve a term of 90 days in the county jail and pay a fine of \$250. To reverse this judgment, an appeal was taken.

It is contended that the testimony is wholly insufficient to support a conviction, and that defendant's motion to direct a verdict of not guilty should have been sustained. After a careful examination of the evidence, we must conclude that this assignment is well taken. The only evidence in relation to the offense charged is the testimony of the officer who made the arrest. He testified that the defendant had seven pints of whisky in his possession when arrested. There was no evidence, either positive or presumptive, of the defendant's intent to violate any of the provisions of the prohibition law, except the quantity of liquor in his possession. The mere naked presumption, founded on the fact of possession, standing alone, is insufficient to support a conviction. The rule declared by justice and reason requires that the fact of criminal intent be proved and not presumed. Another rule which is approved by all thinking and just men requires that guilt should flow naturally and easily from the facts proved, and be consistent with all the facts.

[1] The evidence should be of such a character as to overcome prima facie the presumption of innocence. If the evidence raises a mere suspicion, or, admitting all it tends to prove, the defendant's guilt is left doubtful or dependent upon mere supposition, surmise, or conjecture, the court should advise the jury to acquit the defendant.

The court gave to the jury the following instruction: "No. 5. You are instructed that to prove an unlawful keeping of possession of liquors, with the intent to sell or barter the same, it is not necessary or incumbent on the state to show a sale, an attempt to sell, or that the liquors were exposed or offered for sale, or that the liquors were owned by the defendant; but the unlawful purpose or intention is the essence of the offense, and should be clearly made out to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



satisfaction of the jury, beyond a reasonable doubt. (Excepted to by defendant. Exception allowed.) Claude Duval, Judge."

[2] There was no evidence in this case tending to prove the payment of the special tax required of liquor dealers by the United States, the payment of which, under the provisions of the prohibition law (section 4181, Snyder), shall constitute prima facie evidence of the intention to violate the provisions of the act. For this reason, this instruction in effect informed the jury that it would be sufficient to show intent to sell, furnish, or barter by proof on the part of the prosecution showing possession alone, and that the burden was on the defendant to explain his possession of such liquors. Without a doubt, this instruction was prejudicial to the substantial rights of the defendant.

The criminal intent involved in the commission of the offense charged is the intent to sell, furnish, or barter, and in order to convict, where there is no proof of payment by the defendant of the special tax required of liquor dealers of the United States, there must be evidence, either positive or presumptive, amounting to proof of such unlawful intent.

For the reason stated, the judgment is reversed.

FURMAN, P. J., and ARMSTRONG, J., concur.

#### ADAMS v. STATE.

(Criminal Court of Appeals of Oklahoma.  
Dec. 30, 1911.)

Appeal from Kay County Court; Claude Duval, Judge.

W. H. Adams was convicted of having in his possession intoxicating liquors, with intent to sell, and appeals. Reversed.

Herman S. Gurley, for plaintiff in error. Smith C. Matsen, Asst. Atty. Gen., for the State.

DOYLE, J. The plaintiff in error was convicted upon an indictment returned in the district court and duly transferred to the county court of Kay county, which charged that he did have in his possession intoxicating liquor, with the intent to violate the provisions of the prohibition law. May 28, 1910, judgment was entered in accordance with the verdict of the jury, and he was sentenced to serve a term of 30 days in jail and pay a fine of \$50. To reverse this judgment, this appeal was taken.

The state introduced but one witness, the agent of the Wells Fargo Express Company at Blackwell, who produced the copy of a waybill on which was written, "2B. L., W. H. Adams, consignee," delivered by O. H., received by W. H. Adams, and was permitted to testify that B. L. was supposed to stand for boxes of liquor. Three of such waybills were permitted to be introduced in evidence. On cross-examination the

witness admitted that he had no personal knowledge of how much or what the package contained or of the delivery of the shipments.

Among others, the court gave the jury the following instruction: "You are instructed that to prove an unlawful keeping or possession of liquors, with the intent to sell or barter the same, it is not necessary or incumbent on the state to show a sale, an attempt to sell, or that the liquors were exposed or offered for sale, or that the liquors were owned by the defendant; but the unlawful purpose or intention is the essence of the offense, and should be clearly made out to the satisfaction of the jury, beyond a reasonable doubt."

There was no evidence introduced tending to prove the payment of the special tax required of liquor dealers by the United States, the payment of which, under the provisions of the prohibition law (section 4181, Snyder), shall constitute prima facie evidence of the intention to violate the provisions of the act. This instruction in effect informed the jury that possession alone is sufficient to show intent to sell or barter, and places the burden on the defendant to explain his possession of such liquors.

The criminal intent involved in the commission of the offense charged is the intent to sell, barter, give away, or otherwise furnish, and, while quantity is a corroborative circumstance that may be considered by the jury in connection with other proof, possession in itself is insufficient to sustain a conviction. In order to convict, where there is no proof of payment by the defendant of the special tax required of the liquor dealers by the United States, there must be evidence, either positive or presumptive, tending to prove the unlawful intent. *McCarthy v. State*, 7 Okl. Cr. —, 119 Pac. 1020. The testimony is wholly insufficient to support a conviction, and the defendant's motion to direct a verdict of not guilty should have been sustained.

The judgment is therefore reversed.

FURMAN, P. J., and ARMSTRONG, J., concur.

#### PITT v. STATE.

(Criminal Court of Appeals of Oklahoma  
Jan. 3, 1912.)

Appeal from Kay County Court; Claude Duval, Judge.

J. L. Pitt was convicted of violating the prohibitory law, and he appeals. Reversed.

Herman S. Gurley, for plaintiff in error.

PER CURIAM. Plaintiff in error was convicted upon an indictment returned in the district court and duly transferred to the county court of Kay county, which charged that he did have in his possession intoxicating liquor, with intent to violate provisions of the prohibition law. May 28th, in accordance with the verdict of the jury, the defendant was sentenced to serve a term of 30 days in the county jail and to pay a fine of \$50.

The state introduced but one witness, the agent of the St. Louis & San Francisco Railroad at Pechham, who produced several freight delivery receipts, signed by J. L. Pitt. This was all the evidence in the case.

The question presented in this case was the same as in the case of *Adams v. State*, 7 Okl. Cr. —, supra, and presents the same question.

For the reasons given in the opinion in that case, the judgment is reversed.

**HINCHMAN v. STATE.**

(Criminal Court of Appeals of Oklahoma.  
Jan. 2, 1912.)

Appeal from Kay County Court; Claude Duval, Judge.

George Hinchman was convicted of violation of the prohibitory law, and he appeals. Reversed.

Herman S. Gurley, for plaintiff in error.

**PER CURIAM.** The plaintiff in error was convicted on an indictment returned in the district court and duly transferred to the county court of Kay county, which charged that he did have in his possession intoxicating liquor, with intent to violate provisions of the prohibition law. On May 28, 1910, in accordance with the verdict of the jury, he was sentenced to serve a term of 30 days in the county jail and to pay a fine of \$50. To reverse this judgment, this appeal is taken.

The state introduced but one witness, the station agent of the Santa Fé Railway at Kaw City, who produced two freight delivery receipts, dated January 28 and February 5, 1910, each for one cask of bottled liquor, and identified the signatures thereto as those of the defendant, which receipts, over the objection of the defendant, were admitted in evidence. He further testified that the records were not handled by him personally all the time in the office, and he did not know of his own personal knowledge what the shipments contained; that the billing was all he had to go by. This was all the evidence introduced in the case.

The defendant requested a peremptory instruction, as follows: "The court instructs the jury to find the defendant, George Hinchman, not guilty of the offense charged."

The facts and issues in this case and the assignments of error are the same as in the case of *McCarthy v. State*, 7 Okl. Cr. —, 119 Pac. 1020, and present the same questions.

For the reasons given in the opinion in that case, the judgment is reversed.

**BYLAR v. STATE.**

(Criminal Court of Appeals of Oklahoma.  
Dec. 30, 1911.)

Appeal from Kay County Court; Claude Duval, Judge.

J. Bylar was convicted of having liquor in his possession, with intent to sell, and he appeals. Reversed.

Herman S. Gurley, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted upon an indictment returned in the district court and duly transferred to the county court of Kay county, which charged that he did have in his possession intoxicating liquor, with the intent to violate the provisions of the prohibition law. May 28, 1910, in accordance with the verdict of the jury, the defendant was sentenced to serve a term of 30 days in the county jail and to pay a fine of \$50. To reverse this judgment, an appeal was taken.

The state introduced but one witness, the agent of the Wells Fargo Express Company at Blackwell, who produced a copy of a waybill, and stated that the original waybill had been sent to the head office of the Wells Fargo Express Company in New York. Over the defendant's objection, the copy was introduced as evi-

dence, and the witness was permitted to testify to and explain the abbreviations thereon.

The facts and issues in this case and the assignments of error are the same as in the case of *W. H. Adams v. State*, 7 Okl. Cr. —, 119 Pac. 1021, and present the same questions.

For the reasons given in the opinion in that case, the judgment is reversed.

**STUEDLE v. STATE.**

(Criminal Court of Appeals of Oklahoma.  
Jan. 6, 1912.)

(Syllabus by the Court.)

**1. CRIMINAL LAW (§ 1186\*)—NEW TRIAL—GROUNDS.**

When the testimony introduced on behalf of the state is conflicting, and no testimony is introduced on behalf of the accused, and the record discloses errors on the part of the trial court reasonably calculated to mislead the jury, a new trial should be awarded.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 1186.\*]

**2. CRIMINAL LAW (§ 656\*)—TRIAL—CONDUCT IN GENERAL.**

The courts are not partisans of the state nor of the accused. It is their duty to preserve and protect the rights of each in a fair and impartial manner.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.\*]

Appeal from Custer County Court; J. C. McKnight, Judge.

Charles Stuedle was convicted of selling intoxicating liquor, and appeals. Reversed and remanded for new trial.

Phillips & Mills and Chas. D. Peck, for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

**ARMSTRONG, J.** The plaintiff in error was convicted in the county court of Custer county on a charge of selling intoxicating liquor, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a period of 30 days.

The testimony on behalf of the state was from three witnesses, two of whom, in a measure, corroborate each other on some material points. The third witness directly contradicts the principal testimony given by the other witnesses. During the cross-examination of the prosecuting witness, it developed that he was acting in the capacity of a private detective, and that he had secured the services of one or two other persons.

[2] At the close of the state's testimony, counsel for plaintiff in error requested the court to advise the jury to return a verdict for the accused. In response to this motion, the court used the following language: "Which motion the court promptly overrules. You have no right to make such a motion." Counsel excepted to the remark. The trial court is entirely mistaken as to the rights of counsel, and should not have indulged in the remarks. Courts should be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

fair and impartial in all their rulings. The trial court is no more the partisan of the state than he is of the accused. It is his duty to see that all rights are preserved, those of the accused as well as those of the state.

[1] Under the circumstances disclosed by this record, we are not able to say that this plaintiff in error had a fair and impartial trial, especially in view of the fact that the state's own witnesses disagreed. The principal prosecuting witness admitted that he was employed to secure testimony against plaintiff in error, and was to receive \$10 in case of conviction.

The judgment is reversed, and the cause remanded, with directions to grant a new trial in accordance with law.

FURMAN, P. J., and DOYLE, J., concur.

### SCOTT v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 6, 1912.)

(*Syllabus by the Court.*)

INTOXICATING LIQUORS (§ 215\*)—CRIMINAL PROSECUTIONS—INDICTMENT AND INFORMATION.

An information or indictment which charges an accused with the crime of *furnishing* intoxicating liquor should set out the specific acts necessary to constitute an offense; the term "furnishing" being too indefinite.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 258-260; Dec. Dig. § 215.\*]

Appeal from Cherokee County Court; J. T. Parks, Judge.

Scot Scott was convicted of violating the prohibitory law, and appeals. Reversed and remanded.

Bruce L. Keenan, for plaintiff in error. Smith O. Matson and E. G. Spilman, Asst. Atty. Gen., for the State.

ARMSTRONG, J. The prosecution in this case was instituted in the county court of Cherokee county on an information charging plaintiff in error with selling intoxicating liquor. The information was in the usual form for that purpose. During the progress of the trial, the county attorney was permitted to amend the information, so as to charge the defendant with furnishing such liquor. The state elected to stand on the information as amended, leaving it in a very indefinite and unsatisfactory condition.

In the light of the record before us, it appears that the charging part of the information upon which plaintiff in error was finally tried reads as follows: " \* \* \* Did, in Cherokee county, and in the state of Oklahoma, on or about the 29th day of November, 1910, and anterior to the presentment hereof, commit the crime of selling liquor,

in the manner and form as follows, to wit, did unlawfully furnish one pint of spirituous liquor, to wit, one pint of whisky, to C. J. L. Beasley, George Myers, Cleve Presley, and Bill Anderson for one dollar, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state." This is entirely too indefinite. If one is to be charged with *furnishing* liquor, the facts constituting the furnishing should be pleaded. "Furnishing" is a very indefinite term. Every sale is a furnishing, but not every furnishing is a sale. This question has been determined by a number of courts. We think the Supreme Court of Georgia, in *Southern Express Co. v. State*, 107 Ga. 670, 33 S. E. 637, 46 L. R. A. 417, 73 Am. St. Rep. 146, lays down the correct rule. The statute in that state is very similar to ours. The principle is identical. We quote from the opinion the following: "Liquors are always furnished when there is a delivery, but a person may be furnished by other means than a sale, and the General Assembly, by the use of the word, intended to impose further restrictions than those embraced in the prohibition of the sale."

The facts disclosed by this record clearly establish a sale under the holdings of this court since the opinion in the case of *Buchanan v. State*, 4 Okl. Cr. 645, 112 Pac. 32, overruling *Reed v. State*, 3 Okl. Cr. 16, 103 Pac. 107, 24 L. R. A. (N. S.) 268. But the court eliminates this feature by permitting the amendment, striking out that portion of the information charging the sale, and allowing the county attorney to stand on the general term of "furnishing." The writer is of the opinion that the doctrine in the *Reed Case* is the correct rule of law, but the doctrine announced in *Buchanan v. State*, *supra*, has now become the rule of this court.

The judgment is reversed, and the cause remanded, with directions to the trial court to cause the county attorney to file a new information, properly charging the offense of unlawfully furnishing intoxicating liquor, if the accused is to be retried therefor.

FURMAN, P. J., and DOYLE, J., concur.

### STATE v. POTELLO.

(Supreme Court of Utah. Dec. 13, 1911.)

1. LARCENY (§ 55\*)—HORSE THEFT—EVIDENCE—SUFFICIENCY.

Evidence held insufficient to sustain a conviction of horse theft.

[Ed. Note.—For other cases, see *Larceny*, Cent. Dig. §§ 152, 164-169; Dec. Dig. § 53.\*]

2. CONSTITUTIONAL LAW (§ 55\*)—ENCROACHMENT ON JUDICIARY—RULES OF EVIDENCE.

Comp. Laws 1907, § 4355, providing that possession of property recently stolen when the possessor fails to make satisfactory explanation shall be deemed *prima facie* evi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

dence of his guilt, is not invalid as encroaching upon the judiciary on the theory that mere proof of the larceny and of accused's recent possession requires a conviction.<sup>1</sup>

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 59; Dec. Dig. § 55.\*]

**3. LARCENY (§ 64\*)—LARCENY—"PRIMA FACIE EVIDENCE."**

The term "prima facie" evidence, within Comp. Laws 1907, § 4355, which provides that possession of property recently stolen, when the possessor fails to make satisfactory explanation, shall be deemed prima facie evidence of guilt, means "presumptive" evidence, the term not meaning that, unless rebutted by other evidence or discredited by circumstances, the proof becomes conclusive as to guilt.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 170-178; Dec. Dig. § 64.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5549, 5550; vol. 8, p. 7762.]

**4. CONSTITUTIONAL LAW (§ 55\*)—LEGISLATIVE POWER—ENCROACHMENT ON JUDICIARY—RULES OF EVIDENCE.**

The Legislature can declare that certain facts shall be prima facie, presumptive, not conclusive, evidence of another and substantive fact essential to conviction when they have some fair relation to or connection with such other fact.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 59; Dec. Dig. § 55.\*]

**5. CRIMINAL LAW (§ 306\*)—EVIDENCE—PRESUMPTIONS.**

One presumption or inference cannot rest upon another.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 306.\*]

**6. CRIMINAL LAW (§ 562\*)—EVIDENCE—SUFFICIENCY.**

Accused cannot complain of insufficiency of the evidence to sustain a conviction, though the state failed to make a case, if he himself proved one for it.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1263; Dec. Dig. § 562.\*]

**7. LARCENY (§ 64\*)—EVIDENCE—SUFFICIENCY.**

In a larceny trial the state cannot rely upon accused's recent possession of the property as evidence of his guilt, within Comp. Laws 1907, § 4355, if the only evidence of the larceny is afforded by the defendant's evidence, and that shows that the larceny was committed by another.<sup>2</sup>

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 170-178; Dec. Dig. § 64.\*]

Appeal from District Court, Beaver County; Joshua Greenwood, Judge.

P. Potello was convicted of grand larceny, and he appeals. Reversed and remanded.

George B. Greenwood and C C Parsons, for appellant. A. R. Barnes, Atty. Gen., for the State.

**STRAUP, J.** [1] The defendant was convicted of stealing a horse, which, under our statute, is grand larceny. He contends that the evidence is insufficient to sustain the conviction.

The evidence on behalf of the state shows

<sup>1</sup> People v. Swasey, 6 Utah, 93, 21 Pac. 400; People v. Chadwick, 7 Utah, 134, 25 Pac. 737; People v. Hart, 10 Utah, 204, 37 Pac. 330; State v. Webb, 18 Utah, 441, 56 Pac. 159; State v. Overson, 30 Utah, 22, 83 Pac. 557.

<sup>2</sup> State v. Converse, 119 Pac. 1080.

that the horse, with other live stock, got out of the corral of the owner at Frisco and strayed away. No particular search or effort was made to find the horse until about four or five months thereafter, when some one informed the owner that the horse was seen about the defendant's ranch at or near Wah Wah Springs 15 or 20 miles away. The owner, his brother, and Bert James, went to the defendant's place in search of him. The defendant knew them. They greeted each other friendly. After feeding and stabling their horses in the defendant's corral, and pretending that they themselves might desire to use the corral to gather horses from the range, asked permission to look about the defendant's premises. They were readily permitted to do so; the defendant going with them and showing them about. The owner testified that the defendant freely and courteously showed them everything, and made no concealment of anything. They asked him about his corral, which was newly constructed. He told them it was built to corral wild horses down on the range some distance away, and that there were lots of wild horses there not belonging to any one, and that he was going to get some of them. The owner told him he had better not do that. After looking over the defendant's horses about the premises, one of them asked him where his "broncho" was. He told them he was in the field and pointed to the direction and place where the horse was, about a mile away, and said that he had him hobbled because he was wild. One of them, pretending that he might desire to trade, requested to see the horse. The defendant at first volunteered to go and get him, and then suggested that Bert James, who, with the defendant's knowledge, had seen the horse a few days before, should go and get him. He did so. When he returned with the horse, in about 15 or 20 minutes, the owner, after looking at him, said that the horse belonged to him. Defendant said that he did not and that he belonged to him, the defendant. The owner asked the defendant where he got the horse. He replied, "From the Indians." The owner, "What Indians?" The defendant, "I don't know which Indian." The owner, "There is no Indian around here or from town but what knows" the horse. The defendant: "Well, I don't know which Indian. He may be gone this way or that way to Indian Peak to get pine nuts." The horse had been recently branded with the defendant's brand. The owner called the defendant's attention to an old brand, which, as testified to by the owner, though somewhat indistinct, yet was sufficiently visible to be distinguishable, and said that the old brand was his brand. The defendant replied that the mark shown him was not a brand but a bite. The owner said: "That is not a bite; that is my brand;" and told the defendant

that he had better give up the horse. The defendant replied that he would do so if the owner paid him \$20, the amount which the defendant had paid for the horse. This the owner declined, and undertook to lead the horse away; but the defendant forbade him. A wrangle ensued, in which each reasserted his claim of ownership and right of possession to the horse. The owner thereupon said that he would send the sheriff for the horse, and he and his companions departed. He returned to Frisco, and there in a few days obtained a writ of replevin in a civil action and caused a warrant of arrest to issue in a criminal action, in which the defendant was charged with grand larceny. The sheriff testified that in serving the writs and in bringing the defendant to Frisco he told him that he did not steal the horse, and that he bought him from an Indian and gave \$20 for him; and upon further inquiry told the sheriff that he bought him from a man named Walker and a man named Davis, and that Walker was an Indian, or looked like an Indian. The evidence, without dispute, shows that Walker was of very dark complexion, and was a Mexican of the half blood. He further told him that Walker and Davis worked about his place building a corral, and that they had been running horses on the range near by, and that he took the horse in question from them for a board bill amounting to about \$20. When the defendant arrived at Frisco, he and the owner took a drink in a saloon, and in a friendly conversation between them the defendant said: "I know the horse is yours, and that the old brand was your brand; but I thought it was a bite." The owner said: "I know you thought it was a bite, but it was my brand."

What became of the civil suit is not made to appear, nor is it material. The criminal action was either dismissed or abandoned, for subsequently the sheriff filed a complaint before a different magistrate charging the defendant with larceny, upon which complaint the defendant was held to answer. The owner testified that prior to the defendant's arrest he had not sold or otherwise disposed of the horse to any one, and that the defendant's possession was without his authority. It was further made to appear that Walker and Davis had been employed at Frisco. A short time before the defendant obtained possession of the horse, they went to the springs and were there seen about the defendant's premises. A number of range horses belonging to different owners, including the owner of the horse in question, ranged in the vicinity of the defendant's ranch some six or eight miles away. There is no direct evidence on the part of the state that the horse when he left the owner's corral strayed to the range, or that he was thereafter seen on the range. There is direct evidence to show that the horse had been on the range the previous year. The

owner testified that after the horse got out of the corral others told him that they had seen the horse on the range; and that the natural disposition of a horse, under the circumstances, was to stray back to the range. But neither the owner, nor any other witness in behalf of the state, testified that after the horse got out of the corral he was seen, or found on the range, or that some one there took and drove him away. The direct evidence of the state but shows that the horse got out of the corral, strayed away, and was found in the defendant's possession, who claimed he bought him from an Indian, and who refused to give him up. So that upon the evidence of the state the facts that the horse when he left the corral strayed to or was thereafter on the range, or that some one there took and drove him away, rest on mere inferences.

When the owner and his companions were at the defendant's place and demanded possession of the horse, as heretofore stated, Walker and Davis were then about the defendant's place and heard much of the conversation between the defendant and the owner. The owner did not then know that the defendant claimed that he got the horse from them, or that the defendant, by the term "Indian," meant Walker. Another witness for the state, a livery stable keeper, testified that before Walker and Davis went to the springs they were employed by him about his stable at Frisco. There, prior to their leaving, he overheard a part of a conversation between them and the defendant in which the defendant stated that he would make them a better proposition in running wild horses.

The defendant was a witness in his own behalf. He testified that he was a married man and lived with his wife on a ranch at the springs. There he was employed by the South Mountain Mining Company to look after and protect certain water rights belonging to it. He also did work for it at Newhouse, eight miles away, where it was engaged in mining. Walker and Davis came to his place and told him that they had horses on the range, and that they desired to gather them. They asked permission to build a corral on his premises for such purpose. He consented to that upon the understanding that the corral be left when they got through. They built the corral. The defendant assisted them a short time. They were about the defendant's place several weeks and boarded some of the time with him. They owed him about \$20 for board. They brought different horses, as he supposed, and as they told him, from the range, and placed them in the corral. Among them was the horse in question. They tried to sell him to the defendant and offered to sell him to others. They were not able to pay the board bill, and finally tendered the horse in payment of it. The defendant was more or less back and forth from his place

to the mine at Newhouse. On one occasion, when the defendant was absent and at the mine, Walker and Davis branded the horse with the defendant's brand. He had no knowledge of it until he returned. They again tendered the horse in payment of the board bill, when he then accepted. In all this the defendant was corroborated by his wife. Other and disinterested witnesses testified that they saw Walker and Davis leading and driving four or five horses at or near the springs, and place them in the defendant's corral, and that among them was a horse answering the description of the one in question. The defendant and another witness testified that the mark on the horse claimed by the owner as his brand was so indistinct as not to be distinguishable, and that it appeared to be the result of a bite or scratch. The defendant also testified that, when the owner and his companions were at his place, Walker and Davis heard the conversations between the owner and the defendant, and that the owner had talked with them. While James was gone after the horse, Walker and Davis went to the defendant's wife and told her that the defendant must tell the owner that he got the horse from the Indians, and that if he did not do so there would be trouble; that they would burn his house. This was communicated to the defendant before James returned. The defendant further testified that Walker and Davis were armed and carried guns most of the time; that he was afraid of them, and for that reason he told the owner that he got the horse from the Indians, and did not tell him he got the horse from Walker and Davis. The next morning Walker and Davis left, and the defendant has not seen nor heard of them since. It is also made to appear that the defendant, after his arrest, filed a complaint before a magistrate charging Walker and Davis with the theft.

The defendant had been in the employ of the mining company and its predecessor for about four years. One year he lived at Newhouse, and three years at the springs. Prior to that he was a section boss for a railroad company at Los Vegas, Nev. Before that he was in the employ of a smelting company at Bingham. Before coming West he was employed at Columbus, Ohio, and in Boston, where he worked seven years for one company. The superintendent of the mining company and other witnesses testified to the defendant's good character. That testimony was not controverted.

Upon this evidence the defendant was convicted and sentenced to a term of two years in the state prison.

[2] We have a statute (Comp. Laws 1907, § 4355) which, after defining "larceny," provides that "possession of property recently stolen, when the party in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt." By reason of this statute the state contends that

the evidence is sufficient to support the verdict, for it asserts that the evidence shows the commission of a larceny by some one, possession of the property recently stolen in the defendant, and that the question of whether the explanation of his possession was "satisfactory" was one for the jury.

The defendant contends that the statute is invalid because it is an encroachment by the Legislature upon the prerogatives of the judiciary. In support of this the defendant urges that from the mere proof of the larceny and possession of the recently stolen property in the accused the statute requires a conviction, unless the accused shall, to the satisfaction of the jury, be able to account for or explain his possession consistent with innocence. In other words, the defendant in effect contends that should the state merely prove the larceny and recent possession in the defendant and rest, and should the defendant then also rest, the jury, because of the statute, would be required to convict.

The contention involves two things: Firstly, what, in the absence of other evidence, must the state, under the statute, prove to make a "prima facie" case? Secondly, what is meant by the term "prima facie" as used in the statute? If the construction to be given the statute is such as contended for by the defendant, we think it follows that the statute, for the reason urged, is invalid. That is to say, should the Legislature declare that on the mere proof of a larceny and recent possession in the accused, and nothing more, a jury is required or bound to convict, though it may not upon such evidence adduced be convinced beyond a reasonable doubt of the defendant's guilt, such legislation would be an encroachment upon the prerogatives of the judiciary. But we think the statute does not mean that.

Independently of a statute, the authorities are in conflict as to whether mere recent possession of stolen property is even evidence against the accused. In most jurisdictions, and by the great weight of authority, the mere fact of possession of property recently stolen is held to be evidence against the possessor. In others, only his "unexplained possession" is held to be evidence against him. 25 Cyc. 131-134. Whether such evidence alone is sufficient to sustain a conviction is an entirely different thing. It was held by the Utah Territorial Supreme Court (*People v. Swazey*, 6 Utah, 93, 21 Pac. 400; *People v. Chadwick*, 7 Utah, 134, 25 Pac. 737; and *People v. Hart*, 10 Utah, 204, 37 Pac. 330) that "it seems to be the established doctrine, especially in this western country, that in larceny the recent possession of stolen property is not of itself sufficient to warrant a conviction." Cases are there cited supporting such a holding. Others may be found in 25 Cyc. 134. We do not find any different holding by either the territorial or state Supreme

Court, unless it is the case of *State v. Webb*, 18 Utah, 441, 56 Pac. 159. While we think there is some doubt as to the holding in that case on this point, yet we think from the statement of facts as disclosed by the opinion there was there some direct evidence of the taking. There certainly was a showing in that case on the part of the state of an untruthful explanation with respect to the defendant's possession. In the case of *State v. Overson*, 30 Utah, 22, 83 Pac. 557, the question of sufficiency of the evidence to sustain a verdict was neither presented nor considered. That is expressly stated in both the prevailing and dissenting opinions. That case was ruled on entirely different questions.

From a reading of the statute under consideration it will be seen that the mere proof of the larceny and recent possession in the accused does not make a prima facie case of guilt. The statute says that those things, together with the failure "of the party in possession" to make a satisfactory explanation, "shall be deemed prima facie evidence of guilt." To say, under the statute, that the state has made a prima facie case of guilt by the mere proof of the larceny and recent possession in the accused, is to say something not declared by the statute. If the Legislature had intended that, it may be presumed it would have said so in language which readily would convey such a meaning. The language employed does not convey that meaning. It would seem a very strained construction of the statute to say that, when the state had adduced proof tending to show the larceny and recent possession in the accused, it could rest, and then shift or cast the burden on the accused to satisfactorily explain his possession. To say that would mean that the state in the first instance was required to only prove the larceny and recent possession in the defendant, which, under the terms of the statute, is not a prima facie case, and then cast the burden on him to explain his possession, which if done by him satisfactorily and consistent with innocence, then the state had not made a prima facie case. If, however, he had failed or was unable to make such an explanation to the satisfaction of the jury, then the state had made a prima facie case of guilt. That is, the question of whether the state in the first instance and when it rested had made a prima facie case would depend upon the showing made by the defendant with respect to his possession and whether it was accounted for or explained to the satisfaction of the jury. And hence they, and not the court, would determine and be the judges of whether the state had made a prima facie case, a doctrine violative of all principles of criminal jurisprudence. We think the statute does not mean that. To so hold is to hold that juries in larceny cases are the judges of both law and fact.

We think a fair meaning of the statute is that, to make a prima facie case of guilt, the state, in the absence of other evidence, must show the larceny, recent possession in the accused, and that he failed to make a satisfactory explanation. That is, that he, when asked about his possession, or when called upon to explain it, remained silent when he ought to have spoken, or gave an untruthful account, or unreasonable, or improbable, explanation, of it; or gave some explanation not consistent with innocence. When, in the absence of other evidence to prove the offense and that the accused committed it, these things are shown by the state, then a prima facie case, under the statute, is made. We are not holding that a presumption or an inference may not arise against the accused on the mere proof of the larceny and his possession of the recently stolen property. We are holding that under the express wording of the statute the mere proof of such facts alone is not sufficient to make a prima facie case of guilt, and that to make such a case the state, in the absence of other evidence, must also prove that the accused failed to satisfactorily account for or explain his possession. That is what the Legislature declared, and we must presume that is what it meant.

[3] Now, what is meant by the term "prima facie" as here used in the statute? If the meaning to be given it is that, unless rebutted by other evidence, or discredited by circumstances, it becomes conclusive of the fact of guilt and to operate upon the minds of the jury as decisive of that fact, a meaning sometimes given the term (*Kelly v. Jackson*, 31 U. S. 622, 8 L. Ed. 523; *State v. Burlingame*, 146 Mo. 207, 48 S. W. 72), then again are we of the opinion that the Legislature would have encroached upon the judiciary. That is to say, we would be of such opinion, if, upon the proof of the facts which the Legislature has declared shall be deemed a prima facie case of guilt even though un rebutted and unexplained, the jury would be required to find the accused guilty of the alleged offense, though they should not be convinced of his guilt beyond a reasonable doubt. We, however, are of the opinion that the term "prima facie" is not used in the statute in that sense. It frequently is used in statutes similar to the statute here in question in the sense of only presumptive evidence. *State v. Hardelein*, 169 Mo. 579, 70 S. W. 130; *State v. Intoxicating Liquors*, 80 Me. 57, 12 Atl. 794; *State v. Kline*, 50 Or. 426, 93 Pac. 237; *Moore v. Hopkins*, 83 Cal. 270, 23 Pac. 318, 17 Am. St. Rep. 248.

In that sense we think it is used in this statute. That is, it is declared by the statute that from the proven facts of the larceny, recent possession in the defendant, and his failure to satisfactorily explain his possession, an inference or presumption aris-

es, unless rebutted by other evidence or discredited by circumstances, of the further existing fact that it was the defendant who feloniously took the property, the person who committed the proved larceny, and hence a *prima facie* case of guilt is made against him. Not that the jury, on such proven facts, though un rebutted or not discredited by circumstances, are required to convict if upon such proven facts they are not convinced beyond a reasonable doubt of the accused's guilt; but that they, upon such proven facts, if un rebutted or not discredited by circumstances, may presume or infer the further fact of the felonious taking by the accused, and if, upon all the evidence adduced, they are convinced beyond a reasonable doubt of his guilt, may convict. Now, was it within the province of the Legislature to declare that from such proven facts the further fact, the felonious taking by the person in possession, may be presumed or inferred, for, as we have shown, that is in effect all that is meant by the phrase *prima facie* evidence of guilt, *prima facie* or presumptive evidence that the person in possession committed the proved larceny.

[4] It undoubtedly is the established rule by the great weight of authority that the Legislature has the power to declare that certain facts shall be *prima facie*, presumptive not conclusive, evidence of another and substantive fact essential to conviction when they have some fair relation to or connection with such other fact. *State v. Beach*, 147 Ind. 74, 43 N. E. 949, 43 N. E. 145, 36 L. R. A. 179; *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, 36 Am. St. Rep. 668; *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 991, 35 L. R. A. 176, 54 Am. St. Rep. 447; *Robertson v. People*, 20 Colo. 279, 38 Pac. 326; *Banks v. State*, 124 Ga. 15, 52 S. E. 74, 2 L. R. A. (N. S.) 1007; *State v. Thomas*, 144 Ala. 77, 40 So. 271, 2 L. R. A. (N. S.) 1011, 113 Am. St. Rep. 17; *State v. Sheppard*, 64 Kan. 451, 67 Pac. 870; *Parsons v. State*, 61 Neb. 244, 85 N. W. 65.

Says Mr. Justice Monks, in *State v. Beach*, supra: "It is clear that the Legislature has the power to prescribe rules of evidence and methods of proof. \* \* \* It has repeatedly been held that the Legislature has the right to declare what shall be presumptive, or *prima facie*, evidence of any fact. \* \* \* A law which provides that certain facts are conclusive proof of guilt would be unconstitutional, as also would one which makes an act *prima facie* evidence of crime which has no relation to a criminal act, and no tendency whatever to establish the criminal act."

And as correctly stated in Notes to Cases, 2 L. R. A. (N. S.) 1009: "Most of the statutory rules of evidence that have been upheld are in the form of a declaration that certain facts shall be *prima facie* evidence of another fact, and the distinction generally observed

by the courts is that between declaring certain facts conclusive evidence of another fact, and declaring them *prima facie* or presumptive evidence of another fact."

That, we think, was all that was here intended by the Legislature, though, perhaps, not as aptly, expressed as it might be.

In the case of *State v. Anderson*, 5 Wash. 350, 31 Pac. 969, the court, in speaking of a statute which provided that a presumption of a criminal intent should follow the proof of an unlawful entry of a building, said: "It is the constitutional right of the defendant to demand proof of his guilt before he shall be convicted of a crime, but it does not follow from such fact that it is beyond the power of the Legislature to provide that a certain presumption may follow from the establishment of a fact from which such a presumption may follow as a reasonable conclusion."

The same result was reached by that court in the case of *State v. Wilson*, 9 Wash. 218, 37 Pac. 424. A statute similar to that in hand was also by that court held constitutional in the case of *State v. Kyle*, 14 Wash. 550, 45 Pac. 147.

So construing the statute, we think it valid.

Now, referring to the facts: Is the evidence sufficient to make out a *prima facie* case? We look first to the evidence on behalf of the state. There being no direct evidence of the taking by the defendant, to indulge the presumption or draw the inference of a felonious taking of the property by him, the state is required to prove the facts of the larceny, recent possession in the defendant, and that he failed to satisfactorily explain his possession. These facts must not themselves be left to mere inferences or presumptions; they must be proved.

[5] It is a familiar rule that one presumption or inference cannot rest upon another mere inference or presumption. It can only rest on proven facts. In accordance with that rule, the inference or presumption referred to in the statute is also based, not on mere inference, but on declared or proven facts. Let it be assumed that the evidence sufficiently shows that the defendant's explanation of his possession was not satisfactory. Do the proved facts on the part of the state also prove the larceny? We think not. No proof and no claim is made that some one took the horse from the owner's corral. That fact is negatived by the state itself showing that the horse, without a taking by any one, got out of the corral and strayed away—where, the state did not show. All it showed was that the horse got out, strayed away, and four or five months thereafter was found in the possession of the accused, who said he bought him from an Indian, and who refused to give him up. Of course, the state seeks to draw the inference that the horse strayed to the range some six or eight miles from the defendant's place, and



that some one there took and drove him away; and, since the horse was found in the defendant's possession, the further inference is sought that the defendant took and drove, or aided another to take and drive, the horse from the range. But this is merely resting an inference or a presumption upon an inference or a presumption. The only claim made by the state of a taking is a taking from the range. But the state did not show by any one that the horse when he left the corral strayed to the range, or that he subsequently there was seen or found by any one, or that he in fact was on the range, or that some one there, or anywhere else, took and drove him away. It did show that the horse was on the range the previous year, and that the disposition of a horse getting out of the corral, under the circumstances, was to go back to the range. Had the state proved that the horse was in fact on the range—that being the claimed place of the unlawful taking—and by facts or circumstances that some one there took and drove him away, and that shortly thereafter, recently, he was found in the defendant's possession, who failed to satisfactorily explain his possession, then the state, under the statute, would have made a prima facie case. But surely no prima facie case, under the statute, is made by the mere proof that the horse got out of the corral and strayed away, and four or five months thereafter was found in the possession of another, who refused to give him up, even though he may not have given a truthful or a satisfactory explanation of the manner of obtaining possession. To say that is to say that the failure of the party in possession to satisfactorily explain his possession is prima facie evidence of guilt. Guilt of what? A larceny not proved, but which itself rests upon a mere inference or presumption. And, of course, if the state failed to prove the larceny, then it necessarily follows that it also failed to prove that the defendant was in possession "of property recently stolen." The state therefore failed to prove two facts essential to give rise to the presumption that the defendant was the thief.

[8] We now look to the defendant's evidence. Of course, he cannot complain of insufficiency of the evidence to sustain the verdict, though the state failed to make a case, if he himself proved one for it. Does, therefore, the evidence on the part of the state, together with that of the defendant, prove the larceny, and that the defendant committed it? His evidence, not only by his own testimony and that of his wife, but also that of disinterested persons, shows that Walker and Davis were first seen in the possession of the horse leading and driving him at or near the springs and placing him in the defendant's corral. Nothing is made to appear where they got the horse, except the testimony of the defendant and his wife that

they stated to them that they got the horse from the range.

[7] But let it be conceded that this evidence, together with that of the state, proves the larceny—the unlawful taking of the horse from the range. But the evidence which shows the larceny, the felonious taking, also shows who committed it—Walker and Davis, not the defendant. Surely, had the state in the first instance proved the larceny, and by direct evidence that another and not the defendant had committed it, the presumption could not be indulged, nor the inference drawn from such proof, that the defendant committed it, though the horse subsequently and recently was found in his possession, and though he may not have given a truthful or a satisfactory explanation of his possession. And the state is in no better position to seek the indulgence of the presumption when, as here, it is obliged to look to the defendant's evidence to support the proof of the larceny, and when that evidence also shows that another and not the defendant committed the larceny. Upon this point further observations are made by us in the case of *State v. Converse*, 119 Pac. 1030, also just decided, and where the statute here considered was there also involved.

We are of the opinion that the evidence is not sufficient to support the verdict.

The judgment of the court below is therefore reversed, and the case remanded for a new trial.

FRICK, C. J. (concurring). I concur with Mr. Justice STRAUP, in his construction of section 4355, that the state must show as a part of its case that the accused failed either to make any explanation relative to his possession of recently stolen property, or that his explanation is unsatisfactory by showing what explanation he in fact made. The question of whether the explanation is satisfactory—that is, whether, under all the facts and circumstances, it is a reasonable or truthful one, or not—is for the jury, when the facts and circumstances are such as would justify reasonable men to arrive at different conclusions with respect thereto. If all reasonable men should arrive at but one conclusion, which is that the explanation is reasonable and truthful, then there can be but one result, which is that it is also satisfactory, and hence the possession cannot be found to be felonious. In this case there is, in my judgment, no substantial evidence upon which a jury could base a finding that defendant's possession of the horse in question was felonious. Such being the state of the evidence, a legal conviction was impossible, and hence a new trial must follow.

McCARTY, J. (concurring). I concur with my Associates in their construction of section 4355, Comp. Laws 1907. I am of the

opinion, however, that the evidence in this case is sufficient to support a finding by the jury that the horse, when it came into the possession of the defendant, had been recently stolen; but I am also clearly of the opinion that the evidence, when considered in its entirety, is wholly insufficient to sustain a verdict of guilty.

#### STATE v. CONVERSE.

(Supreme Court of Utah. Dec. 13, 1911.)

1. LARCENY (§ 55\*)—EVIDENCE—SUFFICIENCY. Evidence held to sustain a conviction of larceny of plumes.

[Ed. Note.—For other cases, see Larceny, Cent. Dig. §§ 152, 164-169; Dec. Dig. § 55.\*]

2. CONSTITUTIONAL LAW (§ 55\*)—LEGISLATIVE POWER—RULES OF EVIDENCE.

Comp. Laws 1907, § 4355, providing that possession of recently stolen property, where the possessor fails to make satisfactory explanation, shall be deemed prima facie evidence of guilt, is a valid exercise of the Legislature's power.<sup>1</sup>

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 59; Dec. Dig. § 55.\*]

Appeal from District Court, Weber County; J. A. Howell, Judge.

C. H. Converse was convicted of grand larceny, and he appeals. Affirmed.

John E. Bagley, for appellant. A. R. Barnes, Atty. Gen., for the State.

STRAUP, J. The defendant was convicted of grand larceny. He was charged with stealing 41 plumes from the store of Lyman Bros. Company, a corporation, at Ogden, on the 19th day of June, 1909. The manager and employees of the store testified that the 41 plumes, a sample line, were in the store on the evening of the 19th of June, at about 5 o'clock, when the store was closed. The next day, which was Sunday, when they entered the store between 1 and 3 o'clock in the afternoon, and looked the stock of plumes over, they found about 41 of them missing. As testified to by them, the plumes were unlawfully taken by some one between the hours of 5 or 6 in the afternoon of the 19th, and 1 or 3 in the afternoon of the 20th. There is no direct evidence to show that the defendant at any time on the 19th or 20th of June was at or about the store, or was even seen in that vicinity.

Another witness for the state, a milliner at Salt Lake City, testified that the defendant, on the 27th day of June, came to her place of business, and, after soliciting and obtaining an order for an electric flat iron, asked her if she desired to purchase some plumes, saying to her that he had purchased some for his "girl," but "had a row with her and didn't give them to her," and that he

would sell them cheap. Later he brought and sold to her six plumes for \$12. The witness, afterwards learning of the missing plumes of Lyman Bros. Company, wrote to it, giving information of her purchase. The manager called on her and identified the plumes as those stolen. Several days thereafter the defendant again called and asked the witness if she desired to purchase more plumes, then saying to her that he had a friend in the millinery business at Sandy, a place near Salt Lake City, who was going out of business, and that he had some plumes which he could sell for the same price that he had sold the others. She told him to bring them to her and she would look them over. While he was gone to get them, she telephoned the police officers. The defendant, when he arrived with the plumes, 15 or 18 of them, was immediately arrested. To the officers the defendant, as testified to by them, said that he purchased the plumes from a "hobo looking fellow on the railroad track at Murray," a place near Sandy, "Sunday morning, June 20th, at 10 o'clock, who, he first said, had a gunny sack full of plumes, and afterwards said 41, and that he paid \$75 for them and was selling them for \$10 a dozen." The defendant also told them that he had no regular room, and that the night before his arrest he slept at the Belmont hotel at Salt Lake City. On inquiry they did not find his name on the hotel register nor any one about the hotel who could identify him. They later discovered that the defendant had been rooming at a different place in Salt Lake City. To an officer at Ogden the defendant stated, as testified to by that officer, that "he met a man in Murray, either in a saloon or business house, that I am not positive of, and that this man took him around the corner and sold him the plumes on the street," and that he could prove an alibi by Mr. Craig at whose house he was on the night the officer told him the crime was committed.

The foregoing is, in substance, all the evidence on the part of the state of incriminating acts and circumstances to connect the defendant with the commission of the charged offense.

The defendant testified that he had been living in Salt Lake City for about a year, and was engaged in traveling for different wholesale houses, buying his goods direct from them and selling them to consumers. He also employed and established agents at different places for such purpose. He had an agent at Ogden where the defendant in May had solicited and taken orders. He there roomed and boarded at a Mr. Craig's house, where also his agent roomed and boarded at the time of the alleged larceny. The defendant there also had his trunk containing advertising circulars and other belongings. The defendant, who had not had any settlement

<sup>1</sup> State v. Potello, 119 Pac. 1023; State v. Brown, 38 Utah, 46, 102 Pac. 641, 24 L. R. A. (N. S.) 545; State v. Gordon, 28 Utah, 15, 76 Pac. 883.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

with his agent at Ogden for about a month, wrote him that he would be in Ogden to see him on Saturday evening on the 19th of June. He testified that he left Salt Lake City that evening on the Bamberger Road at about 6:35, with a suit case containing his night clothes, brushes, collars, cuffs, and some new samples of electric hair curlers just obtained from the Capital Electric Company, which he desired to show his agent, and arrived at Ogden at "something like 9 to half past 9"; the train being, as testified to by him, an hour or more late. On his arrival at Ogden he went direct to Mr. Craig's house. The Craigs and the agent testified that he arrived at Craig's house that evening between 9:30 and 10. He remained all night at Craig's and occupied the room with his agent. That evening the agent and the Craigs saw the contents of the defendant's suit case, and testified that it did not contain anything except his night clothes, etc., and that it contained no plumes. He settled with his agent and remained at Craig's house all the time he was in Ogden, until between 1 and 2 o'clock of the afternoon of the next day, when he left, to take the train at 2:15 from Ogden to Salt Lake City. The agent accompanied him to the depot. He had with him his suit case and a package of advertising circulars taken from his trunk at Craig's. He arrived at Salt Lake City about 4 o'clock. He testified that on his arrival he went to his room, washed, changed his clothes, and strolled out on the street. He boarded a street car to take a ride, and went to Murray. There, as he got off the car and looked around, he saw a man across the street at a band stand in a little grove of trees in front of a schoolhouse selling plumes. There were other persons about the place attending the sale. Several ladies bought plumes and went away with them. The defendant walked up to the man and inquired about the plumes, and was told that they were a "bankrupt stock." He then had 29 plumes left. The defendant asked him what he would take for all of them, and was told \$75. The defendant finally bought them for \$65. He paid for them and received the plumes. They were in a gunny sack. William H. Newman, a farmer who had lived at Riverton for over 20 years, testified that he was at Murray on the occasion referred to and saw the man with the plumes in a gunny sack, and saw him make sales to several ladies, and saw the defendant buy a number of plumes and pay for them. Frank Clegg, a broker and real estate agent of Salt Lake City, also testified that he was near by and witnessed the sale of plumes to the defendant and to others. The man selling the plumes was described by these witnesses as looking like an Assyrian or a Portuguese. The defendant, after purchasing the plumes, returned to Salt Lake. In canvassing and soliciting orders for other goods, he also sold some of the plumes. He testified he sold

some to Mrs. Pow, the milliner. He admitted he told her that he got the plumes for "his girl and had a row with her," but in effect testified that he made such remarks merely to induce a sale. He also admitted that he did not tell the officers where he roomed at Salt Lake City, and that he did not do so because he was "vexed at his arrest and was hotheaded and angry." He denied that he told the officers that he met the man of whom he bought the plumes in a saloon, and testified that he told them that he bought them from a "Jewish looking fellow" in Murray, who had them in a gunny sack.

The state, in rebuttal, showed by the conductor's train register that the train which left Salt Lake City at 6:35 p. m. on the 19th day of June arrived at Ogden on time, at 8 o'clock p. m.

[1, 2] The principal assignment of error relates to the question of sufficiency of the evidence to support the verdict. The only evidence tending to connect the defendant with the commission of the crime is his possession of the plumes and his statements in respect thereto. This, the state contends, though circumstantial, yet was sufficient to connect the defendant with the commission of the offense, and hence was sufficient to support the verdict. In support of such contention, it relies on the statute (Comp. Laws 1907, § 4355), which, after defining larceny, provides that "possession of property recently stolen, where the party in possession fails to make a satisfactory explanation, shall be deemed prima facie evidence of guilt." In the case of *State v. Potello*, 119 Pac. 1023, just decided, we had occasion to consider this statute at some length. What we there said need not here be repeated. We there held the statute valid and that a prima facie case of guilt under the statute arose upon the proof of the larceny, recent possession in the accused, and his failure to satisfactorily explain or account for his possession. That is, that the Legislature declared that the proof of such facts was presumptive evidence of the further essential fact that the accused feloniously took and carried away the property from the possession of the owner—that it was he who committed the proved larceny. Here the state proved the larceny, not by mere inferences, but by direct evidence. It also proved recent possession of the stolen property in the defendant. It also proved that the defendant, in explanation of his possession, made contradictory statements with respect to it. It proved that when he sold the first plumes to the milliner he said that he had purchased them for "his girl," and had a "row with her." When he offered to sell others to the milliner, he stated that he had obtained, or could obtain, them from a friend in the millinery business at Sandy who was going out of business. To the officers at Salt Lake City he stated that he had purchased them at

"10 o'clock a. m., June 20th," from a "hobo" on the railroad track at Murray, who there had them in a gunny sack and offered them for sale. To the officers at Ogden he stated that he met a man in a store or saloon at Murray who "took him around the corner and sold him the plumes on the street." Such contradictory statements were quite sufficient to show that his explanation of the possession of the property and his manner of obtaining it was not "satisfactory." Undoubtedly, the state, under the statute, proved sufficient facts to give rise to the inference or presumption that the defendant unlawfully and feloniously took and carried away the property from the possession of the owner, that it was he who committed the proved larceny; hence the state made out a prima facie case of guilt. Not, and as we said in the Potello Case, that the jury upon such proven facts were required to convict if they, upon the adduced evidence, were not convinced of his guilt beyond a reasonable doubt; but that a conviction upon such facts, when unrebutted or not discredited by circumstances, would be sufficiently supported by evidence.

There being no direct evidence of the state to show a taking by the defendant—that is, that it was he who was the thief—and that fact resting wholly upon the indirect evidence tending to raise a presumption or an inference, did, now, the defendant, by direct evidence, so clearly rebut or discredit that presumption or inference that the jury were not authorized to longer give it any evidentiary effect or sufficient effect to justify a finding of the felonious taking by him? The rule, independently of statutes, obtains in many jurisdictions, and the doctrine is maintained by Lawson, in his work on the Law of Presumptive Evidence (2d Ed. p. 599), that proof of the larceny and recent possession of the stolen property raises a presumption that the possessor is the thief; whether sufficient, if unrebutted nor discredited, to convict, the authorities divide. But he also maintains the doctrine, and supports it by numerous cases (page 604), that a reasonable explanation by the accused of his possession overthrows the presumption and casts the burden on the prosecution to prove its falsity. This is on the familiar doctrine that a mere presumption cannot prevail against, nor contradict or overcome, direct proof of the fact (Lawson, p. 659), and that a rebuttable presumption of law contested by direct proof of facts showing otherwise loses its value, unless the evidence is equal on both sides, in which case it may have the effect to turn the scale (Lawson, p. 660).

That, too, is the effect of our holding in a well-considered opinion by the present Chief Justice in the case of *State v. Brown*, 36 Utah, 46, 102 Pac. 641, 24 L. R. A. (N. S.) 545. In that case the state contended that the rebuttable presumption of law as to sanity had an evidentiary or probative value

which was not dissipated or overthrown by the defendant's undisputed direct proof of insanity, and that the state was entitled to have it cast in the scale and weighed by the jury against the defendant's direct proof of insanity. But we held against the state on such a contention by holding that the presumption of sanity ceased to have any evidentiary value as against the defendant's direct and undisputed proof of sanity; and, since the fact of insanity was clearly established by direct and undisputed proof, we held that there was no legal evidence in the case to justify a finding of sanity by the jury. Undoubtedly, independently of a statute giving rise to it, the presumption with respect to guilt arising from the proof of the larceny and recent possession in the accused is one of fact and not of law. And it would be error in such case to charge that there was a legal presumption of guilt arising from such facts, or that the law presumed guilt from them. 25 Cyc. 134. Of course, the trier of fact may, on the proven facts, draw an inference of another existing fact essential to guilt, for, logically and argumentatively, the inferred fact of unlawful taking by the possessor bears a natural relation to such proven facts. But the Legislature here by statute has declared that the proven facts of the larceny, recent possession in the accused, and his failure to satisfactorily explain his possession, "shall be deemed prima facie evidence of guilt," presumptive evidence of guilt. That is, from such proven facts, the further fact essential to guilt, the felonious taking by the accused, is presumed. The presumption derives its force, not from logic or argument, but from jurisprudence, and is arbitrary in its application to all cases of such proven facts, and hence is properly called a rebuttable presumption of law. Wharton, *Crim. Ev.* (9th Ed.) § 714; Lawson, 661.

As shown in the Potello Case, the Legislature may declare that from certain facts another substantive fact essential to guilt may be presumed. It, of course, may not declare such facts conclusive of guilt, or of the presumed fact, and require a conviction if, in the judgment of the court or jury, the ultimate fact of guilt is not satisfactorily established. That would be an encroachment upon the prerogatives of the judiciary. The Legislature may prescribe rules of evidence and methods of proof, but it may not direct or control the decisions of the judiciary. There being no direct evidence of the taking by the defendant, and, as already observed, this fact arising only on the rebuttable presumption of law referred to, if, therefore, the presumption itself was controverted by undisputed direct evidence and was overthrown or dissipated, and for that reason no longer had any evidentiary value, then there is no evidence to show a taking by the defendant—to show that he committed the proved larceny. In determining the question of



sumption of a taking of the property by the defendant from the store at Ogden and from the owner's possession. If that testimony were undisputed, if the evidence with respect to that transaction as testified to by these witnesses were not in conflict, we would not permit this verdict to stand. But against that testimony are the statements of the defendant himself made by him to the milliner and to the officers. Of course, the defendant should not be convicted because he may have told an untruth to the officers or to the milliner. He should only be convicted on proof that he committed the larceny. But those statements did not merely serve the purpose of impeachment and to affect credibility, and are not to be considered for that purpose alone; they are also in the nature of admissions by the defendant of facts relating to his possession and the manner of obtaining it.

So, also, is it contended that the presumption was dissipated by the testimony of the defendant that he, on the evening of the 19th, left Salt Lake City at 6:35 o'clock p. m.; that because the train was delayed he did not arrive at Ogden until about 9 or 9:30 o'clock; and that, by his testimony, and that of his agent and of the Craigs, he arrived at Craig's between 9:30 and 10 o'clock and remained there until his departure for Salt Lake City at 2:15 p. m. the next day. But the state proved that the train on which the defendant testified he went to Ogden was not delayed, and that it arrived on time at 8 o'clock. According to that, the defendant was in Ogden an hour and a half or two hours, a period of time unaccounted for, before he went to the Craigs.

In view of these considerations, we cannot say, as matter of law, that the presumption was dissipated, and are therefore of the opinion that the evidence is sufficient to support the verdict.

The judgment of the court below is therefore affirmed.

FRICK, C. J., and McCARTY, J., concur.

#### PARK v. RIVES, City Recorder.

(Supreme Court of Utah. Dec. 8, 1911.)

#### 1. STATUTES (§ 159\*)—REPEAL—IMPLIED REPEAL.

In the absence of an express repeal of a statute, to justify the presumption of an intention to repeal a statute by a later one, the two must be irreconcilable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 229, 231; Dec. Dig. § 159.\*]

#### 2. ELECTIONS (§ 162\*)—BALLOTS—STATUTES—IMPLIED REPEAL.

Laws 1911, c. 126, providing for the nomination at a primary election of candidates for city offices, and providing that the two candidates receiving the highest number of votes at

the primary shall be placed on the general ballot at the general election, does not repeal the provision of the general election laws requiring a blank ticket to be left at the right of the ballot, and the general provisions of the Laws of 1911, that the ballot at the general municipal election shall be the same as provided by the general election laws where not inconsistent therewith render applicable the provisions of the general election laws requiring a blank ticket; and the recorder of a city in making up the official ballot must leave a blank ticket.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 162.\*]

#### 3. CONSTITUTIONAL LAW (§ 45\*)—STATUTES—VALIDITY.

A provision of a statute which has for many years been applied and given effect without challenge will not be held unconstitutional, except on a compelling belief of its invalidity.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 42; Dec. Dig. § 45.\*]

#### 4. ELECTIONS (§ 181\*)—BALLOTS—STATUTES.

The provision in Laws 1911, c. 126, that only the names of the two candidates receiving the highest number of votes at a primary election shall be placed on the ballot for the general municipal election, refers only to what names shall be placed on the ballot by the city recorder in preparing the ballots for the general election, and does not prevent a voter from voting for another person by writing his name on the ballot.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 181.\*]

#### 5. STATUTES (§ 181\*)—CONSTRUCTION—LEGISLATIVE INTENT.

The intention of the Legislature, as expressed by the language of a statute, interpreted according to its fair and obvious meaning and the context, is the controlling feature in the construction of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 259; Dec. Dig. § 181.\*]

#### 6. CONSTITUTIONAL LAW (§ 48\*)—CONSTRUCTION IN FAVOR OF VALIDITY.

Where the language of a statute is equally susceptible to two meanings, one rendering it valid and the other invalid, the court must adopt the one which renders the statute valid.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

Mandamus by Samuel C. Park against B. S. Rives, City Recorder of Salt Lake City, to compel the recorder to issue a certificate of election. Peremptory writ issued.

Van Cott, Allison & Riter, Mathoniah Thomas, C. S. Varian, Rawlins, Ray & Rawlins, Booth, Lee, Badger, Rich & Parke, and Stephens, Smith & Porter, for plaintiff. Soren X. Christensen and H. J. Dininny, for defendant.

STRAUP, J. Prior to the enactment of chapters 125 and 126, Sess. Laws 1911, approved March 20th of that year, incorporated cities of this state were governed and controlled by a mayor and a city council. The elections of such municipal officers were conducted according to the general election laws (Comp. Laws 1907, tit. 21) of the state. Under those laws, political parties are permitted to hold primary elections, or conventions

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of delegates, to nominate candidates for office. Such nominations may also be made by a certificate of nomination of voters signed and filed by them. It is further provided (section 839) that such nominations "shall be placed" on the official ballot under party names and emblems, or some suitable title or designation of group of petitioners, and that "the ballot shall contain no other names except that in case of electors for president and vice president of the United States, the names of the candidates for president and vice president may be added to the party or political designation." The manner of making up the ballot and of voting is done and conducted under a method known as the Australian ballot system. In that respect it is provided that the officer designated to make up the official ballot shall cause to be printed the names of the offices to be filled immediately above the names of the candidates for the same, "and that at the right of the ballot there shall be left a blank ticket long enough to contain as many written names of candidates as there are persons to be elected, in which ticket shall be printed the names of the offices to be filled." By the Session Laws of 1911 referred to, the Legislature abolished the offices of mayor and city councilmen of cities of the first and second class, to take effect the 1st day of January, 1912, created a board of commissioners for the government and control of such cities, prescribed its powers and duties, and vested the municipal government of cities of the first class in a board of five commissioners consisting of a mayor and four commissioners, and in some particulars amended the general election laws theretofore applicable to municipal elections.

It is only necessary to notice the amendments relating to the primary election, the official primary ballot, and the general election ballot. It is provided that candidates for such municipal offices shall be selected or nominated by a primary election, and that "candidates to be voted for at all general municipal elections in cities of the first and second class under the provisions of this act shall be nominated by a primary election and no other name shall be placed upon the general ballot except those selected in the manner hereinafter prescribed." Chapter 126, § 2. Any person desiring to become a candidate is required to file with the recorder a statement of such candidacy and a petition of at least 100 voters requesting such candidacy. At the expiration of the time for filing such statements and petitions, the recorder is required to publish in a newspaper or newspapers the names of the persons who have filed such statements and petitions, and the manner in which they will appear upon the official primary ballot. The recorder shall make up the primary ballots and cause them to be printed; and it is provided that "upon the said ballot the names of the can-

didates for mayor, arranged alphabetically, shall first be placed with a square at the left of each name and immediately below the words 'Vote for One.'" A similar provision is made with respect to candidates for the office of commissioners and auditor, the only other municipal offices to be filled by election. When so made up and printed, the recorder is required to cause such primary ballots to be delivered to the judges at the various polling places for the use of the voters at the primary election. Upon a canvass by the city recorder of the returns of the cast ballots at the primary election, he shall declare and publish the result thereof. It then is provided that "the two candidates receiving the highest number of votes for mayor shall be the candidates and the only candidates whose names shall be placed upon the ballot for mayor at the next succeeding general municipal election." A similar provision also relates to the offices of commissioners and auditor. There is also a general provision which, among other things, provides that "the ballot at said general municipal election, so far as applicable," shall be the same as provided by the general election laws "not inconsistent with the provisions of this act."

The petitioner, Samuel C. Park, was a candidate for mayor of Salt Lake City, a city of the first class, at the primary election held pursuant to the Session Laws of 1911, and was one of the two candidates receiving the highest number of votes cast for that office at that election. A canvass of the returns was made, and the result declared and published. In making up the official ballot for the succeeding general municipal election to be held on the 7th day of November, 1911, the names of the two candidates for mayor so receiving the highest number of votes at the primary election were the only names printed or placed on the official ballot by the recorder for the office of mayor. That, also, was true with respect to the names of candidates for the offices of commissioners and auditor. The recorder, however, at the right of the ballot left a blank ticket long enough to contain as many written names of candidates as there were persons to be elected, and in which were printed the names of the offices to be filled. The official ballots so made up and printed for the general municipal election were delivered to the judges of the several voting districts for the use of the voters. Upon a count of the cast ballots at the general municipal election, and a canvass of the returns, it was found and declared that Park had received the highest number of votes cast for the office of mayor. The city council, whose duty it was to canvass the returns and issue certificates of election, directed the city recorder to issue a certificate to Park, but the recorder refused to do so upon the sole ground of the invalidity of the provisions of the session laws referred to. Hence a writ of mandate

is prayed for by Park to compel the recorder to issue to him the certificate.

No question relating to remedy or parties is made. Both the petitioner and the defendant seek a decision on merits involving questions only with respect to the validity of the laws referred to.

It is not contended that the provisions relating to the primary election, the manner of making nominations, or those relating to the official primary ballot are invalid. The contention made is this: That the provisions of the Session Laws that no other names, except the names of the two candidates receiving the highest number of votes cast at the primary election, "shall be placed upon the general ballot," and, "the only candidates whose names shall be placed upon the ballot for mayor at the next succeeding general municipal election," by necessary implication, repeal the provision of the general election laws, requiring a blank ticket to be left at the right of the ballot long enough to contain as many written names of candidates as there are persons to be elected; and therefore the act of the recorder in providing a blank ticket at the right of the ballot, as was here done by him, was unauthorized; that the provisions that the names of the two candidates receiving the highest number of votes cast at the primary election shall be the only names "placed upon the general ballot" at the general municipal election, either in express terms, or by necessary implication, forbid, not only the recorder placing any other name on the official ballot, but also forbid the voter writing or pasting any other name on the ballot in making up and in casting his vote; and that a provision which so compels the voter to vote only for one of two candidates for a particular office, and which does not permit him to vote for any other person for such office, if he so desires, interferes with the freedom, rights, and privileges of the elective franchise guaranteed by the Constitution. That is, because of such provisions, it is contended that a voter in making up and in casting his ballot is restricted to a choice of only one of the two printed names on the ballot, and is prohibited from writing the name of another thereon, and voting for such other. To do so it is urged would be "placing the name" of another "candidate" on the ballot which is expressly forbidden.

Let it be conceded that, if the act so restricts and prohibits a voter, such legislation would, as is urged, be an improper interference with the elective franchise. 15 Cyc. 289. But we are of the opinion that the proper interpretation of the act does not lead to the conclusion of such a restriction and prohibition.

[1, 2] In the first place, we think the provision of the general election laws requiring a blank ticket to be left at the right of the ballot was not repealed for the reasons that there are no express terms of a repeal of

that provision, and that the presumption is against an intention to repeal where express terms are not used; and, in the absence of such terms, to justify the presumption of an intention to repeal one statute by another, the two statutes must be irreconcilable. We think the statutes here are reconcilable. The provision permitting the names only of the two candidates receiving the highest number of votes at the primary election to be placed on the general or official ballot of the general municipal election is not inconsistent, but is entirely consistent, with the provision of the general election laws requiring a blank ticket to be left at the right of the ballot. The one refers to the names of what candidates may be placed on the general or official ballot by the officer whose duty it is to make up and cause the ballots to be printed; the other, to the leaving of a blank ticket to the right of the ballot. That the one is consistent with the other seems self-evident. A disquisition upon the subject cannot make it any more so.

Having reached this conclusion, it follows that the general provision of the Session Laws providing that "the ballot at said general municipal election shall be the same" as provided by the general election laws not inconsistent with the Session Laws renders applicable the provision in the general laws requiring a blank ticket to be left at the right of the ballot, and hence the recorder in making up the official ballot was authorized to leave, as was done by him, a blank ticket at the right of the ballot. To hold the two provisions here in question inconsistent leads to the conclusion that the provision in the general election laws providing that "the ballot shall contain no other names," except those of the persons nominated by parties, or group of petitioners, is likewise inconsistent with the provision requiring a blank ticket to be left at the right of the ballot.

[3] A provision which for many years has been so repeatedly applied and given effect in the conduct of elections as has this without challenge ought not to be held bad, except upon a compelling belief of its invalidity.

[4] In the next place, the provision in the Session Laws that only the names of the two candidates receiving the highest number of votes at the primary election "shall be placed upon the ballot" for the general municipal election refers to what names, and only what names, shall be placed upon the ballots by the recorder in making up and in causing the ballots for the general municipal election to be printed as he is required to do. That is manifest not only from the language employed, but also by the context. The act, after providing for the primary election, a canvass of the returns, a declaration and a publication of the result, reads: "The two candidates receiving the highest number of votes for mayor shall be the candidates and the only candidates whose



names shall be placed upon the ballot for mayor at the next succeeding general municipal election." To say that the words "the only candidates whose names shall be placed upon the ballot" mean that a voter in making up and in casting his vote is not permitted to vote for another by writing such other's name on the ballot, and that, if he does so, he is "placing the name of a candidate upon the ballot," is to give an unwarranted meaning to such words, and which cannot fairly be implied from the context. Such was the conclusion reached by the court in the case of *Eckerson v. City of Des Moines*, 137 Iowa, 452, 115 N. W. 177, where, on a similar statute, this question was considered.

[5] The intention of the Legislature, of course, is the controlling and determining feature. That intention is expressed by, and is found in, the language actually used, interpreted according to its fair and obvious meaning, and according to the context and the approved usage of the language. So construing these words, it is clear that they do not themselves prohibit a substitution of names by the voter by writing upon the ballot. If that were intended, such an intention could have been expressed in language which readily would convey that meaning. From the language here employed considered in connection with the context, it is very clear that it refers to the making up of the ballot by the recorder, and not to some prohibition or restriction upon the voter. To construe it otherwise, and to hold it a restriction or a prohibition upon the voter, is to hold that the provision in the general statute that "the ballots shall contain no other names," except those of nominations of political parties or groups of petitioners, is likewise a restriction or prohibition upon the voter, and that the requirement that "all nominations" as there provided for "shall be placed" on the ballot under party names and emblems or some suitable title of groups of petitioners also refers to a restriction upon the voter which forbids him writing the name of another upon the ballot and voting for such other, and that, if he does so, he, too, is making a "nomination," and "placing" a name on the ballot forbidden by that statute. That those provisions and that language refer, not to a restriction or a prohibition upon the voter, but to the officer designated to make up and cause to be printed the general ballots to be distributed by him to the judges of the several polling places for the use of the voters, has never been questioned, though our statute has contained them for many years, and though they have so been considered and repeatedly applied in the conduct of elections held thereunder.

[6] We may, however, observe here, as was said by the court in the case of *Eckerson v. City of Des Moines*, supra, that even though

it is possible to infer from the language used that the Legislature in fact intended to prohibit or restrict the voter, as contended, yet there are reasonable grounds for holding that the language was not intended for that purpose, but was intended only to designate what names shall be placed on the official ballot by the recorder, "and on very familiar principles we will not ascribe to the words used by the lawmaking body a meaning which does not in common understanding follow of necessity, for the purpose of holding the act in which they occur obnoxious to the Constitution." And, even though it should be said that the language was equally susceptible to two meanings, one consistent and the other inconsistent with the Constitution, every rule of statutory construction requires us to give it the meaning which renders the statute in harmony with the Constitution.

We are of the opinion that the petitioner is entitled to the writ. The order therefore is that a peremptory writ issue in accordance with the prayer of the petition, costs to the petitioner.

FRICK, C. J., and McCARTY, J., concur.

CARRIGAN v. BOWMAN, City Court Judge.

(Supreme Court of Utah. Dec. 14, 1911.)

1. PROHIBITION (§ 3\*)—ADEQUACY OF OTHER REMEDY.

Under the Constitution and statute authorizing appeals to the district court from final judgments of the city court, and from the district court to the Supreme Court when the validity of an ordinance is involved, and under the statute authorizing prohibition where there is not a plain, speedy, and adequate remedy in the ordinary course of law, prohibition does not lie to restrain a city court from proceeding with the trial of petitioner, charged in the city court with violating a city ordinance, on the ground of the invalidity of the ordinance, in the absence of anything to show wherein the remedy by appeal is not speedy or adequate, or in the absence of any allegation that petitioner is in custody, or that he is unable to give bail, so that he will be held in custody pending an appeal, in case of conviction.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.\*]

2. PROHIBITION (§ 3\*)—ADEQUACY OF OTHER REMEDY.

Where the validity of a statute or ordinance is involved, prohibition will not be granted in advance of the trial in the inferior court, where the question is presented, when a plain remedy by appeal is afforded, though it may be that the higher court will, when the question is presented to it, determine that the statute or ordinance is invalid, and that the inferior court is without jurisdiction, unless it appears that to require petitioner to pursue the remedy by appeal or writ of review will deprive him of some present right, or seriously embarrass him in the exercise thereof.

[Ed. Note.—For other cases, see Prohibition, Cent. Dig. §§ 4-19; Dec. Dig. § 3.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Appeal from District Court, Salt Lake County; T. D. Lewis, Judge.

Prohibition by H. J. Carrigan against J. M. Bowman, Judge of the City Court of Salt Lake City. From a judgment denying the writ and dismissing the proceedings, petitioner appeals. Affirmed.

D. O. Willey and H. J. Robinson, for appellant. H. J. Dininny and P. J. Daly, for respondent.

STRAUP, J. Carrigan, upon a complaint filed in the criminal division of the city court of Salt Lake City, was charged with a violation of a city ordinance. He there demurred, upon the grounds that the complaint did not state facts sufficient to constitute an offense, and that the court was without jurisdiction, for the reason that the ordinance upon which the complaint was founded was unconstitutional. The court overruled the demurrer, took the defendant's plea, and set the case for trial. He then applied to the district court for a writ of prohibition to restrain the city court from further proceeding in the case. These matters were all alleged in the affidavit for the writ. The ordinance and the particulars wherein it is claimed it is invalid were also fully set forth, and the allegations made that the inferior tribunal, for that reason, was without jurisdiction, and, unless restrained, would proceed in the case. It is further averred, in the language of the statute, that the petitioner had no "plain, speedy and adequate remedy in the ordinary course of law." Upon this affidavit, an alternative writ and order to show cause was issued and directed to the judge of the city court. He demurred to the affidavit, raising questions of remedy and sufficiency of facts to entitle the petitioner to the demanded relief. The demurrer was sustained, and a judgment rendered against the petitioner, denying the writ and dismissing the proceedings. Whether the court denied the writ on the ground that the ordinance was valid, or on the ground of remedy, is not made to appear. From that judgment, the petitioner has appealed.

[1] He again at the threshold is here met with the question of remedy. Our statute (Comp. Laws 1907, c. 70) provides that the writ of prohibition arrests the proceedings of a tribunal, etc., when such proceedings are without or in excess of the jurisdiction of such tribunal, etc., and may be issued in all cases where there is "not a plain, speedy and adequate remedy in the ordinary course of law." The petitioner asserts that the ordinance is invalid, and for that reason the city court was without jurisdiction to entertain a complaint founded upon the ordinance, or to further proceed, and that the writ should issue to restrain the further threat-

ened proceedings. If the ordinance is invalid, it of course follows that the city court was without jurisdiction, for the complaint is founded, and the prosecution of the charged offense is dependent, upon the ordinance. But, to entitle the petitioner to the writ, he is not only required to show that the tribunal sought to be restrained is without, or acting in excess of, jurisdiction, but also that he has no plain, speedy, and adequate remedy in the ordinary course of law. Both the Constitution and the statute give the right of appeal to the district court from all final judgments of the city court, and in such case from the district court to the Supreme Court, when the validity of a statute or an ordinance is involved. That remedy is plain. It is guaranteed, both by the Constitution and the statute. An allegation to the contrary cannot prevail. Ordinarily that remedy is also speedy and adequate in the sense in which those terms are generally understood. Nothing is alleged to show wherein that remedy, in the case in hand, is not speedy or adequate. It is not even alleged that the petitioner is in custody, or that he is unable to give bail, or that, because of his inability to give a bond, or otherwise, he will be held in custody pending an appeal, in case of conviction in the city court under the alleged void ordinance.

Upon this point the petitioner has contented himself by merely citing cases where the writ was granted to restrain proceedings under unconstitutional acts or ordinances. The case of *Pennington v. Woolfolk*, 79 Ky. 13, is cited to that effect. But, under the Kentucky statute (*Patton v. Stephens*, 77 Ky. [14 Bush] 324, *Campbellsville Tel. Co. v. Patteson*, Circuit Judge, 114 Ky. 52, 60 S. W. 1070), it is in express terms provided that the validity or constitutionality of a city ordinance, etc., shall be tried by a writ of prohibition. In the cited case of *Hughes v. Recorder's Court*, 75 Mich. 574, 42 N. W. 984, 4 L. R. A. 863, 13 Am. St. Rep. 475, the restraint by prohibition was held proper, because the action of the municipal officers in attempting to enforce the ordinance was in utter disregard of the decisions already made by the Supreme Court, and was vexatious, and led to multifarious "prosecutions which it is evident the city officials have been disposed to set in motion." This was so apparent that the court felt the necessity to state that "it may not be out of place to suggest that a decree of this court is meant to be obeyed." In the cited case of *State ex rel. v. Eby*, 170 Mo. 497, 71 S. W. 52, the court, in holding that the remedy by appeal was there not adequate, observed that if the relators were not granted the relief by prohibition they "would be compelled to go to trial in 1,203 cases; then, if defeated, would have to give bond in each case, take an appeal in each case, pay for a transcript in

each case, pay a docket fee in each case of \$10, amounting in the aggregate to \$12,030, as well as counsel fees in each court; consequently it must be conspicuously obvious that such appeals, although available, would be inadequate to meet the emergencies of the case." In the case of *People v. Dayton*, 120 App. Div. 814, 105 N. Y. Supp. 809, it is not made to appear that the relator had a remedy by appeal. In the case of *Judy v. Lashley*, 50 W. Va. 628, 41 S. E. 197, 57 L. R. A. 413, the question of another or proper remedy was not raised or considered.

[2] Where the validity of a statute or ordinance is involved, we think the general and better rule obtains that a writ of prohibition will not be granted in advance of the trial or determination in the inferior court, where the question is presented, when a plain remedy by appeal is afforded, though it may be that the higher court will, when the question is presented to it, determine that the statute or ordinance is invalid, and the inferior court without jurisdiction, unless it is made to appear that to require the applicant to pursue the remedy by appeal or writ of review will deprive him, or seriously embarrass him in the exercise of, some present right. Notes to cases in the case of *State v. Superior Court*, 111 Am. St. Rep. 964. We may here say, as was well said by the court in the case of *State v. Rost*, 49 La. Ann. 1451, 22 South. 421, that: "Ordinarily we exercise supervisory jurisdiction by writs of certiorari and prohibition only in unappealable cases, leaving errors committed in appealable cases, or questions affecting the validity of the statute upon which the prosecution is based, to be corrected or decided in due course on appeal. \* \* \* Cases may arise where the court, in the exercise of a sound discretion, and in furtherance of the ends of justice, will exert the control and supervision of inferior courts" by prohibition, "even in cases where an ultimate appeal lies. But they must be cases of peculiar circumstances or extreme urgency or necessity, which take them out of the general rule referred to. We do not deem the instant case to be of that character."

The necessary delay and expense of an appeal ordinarily furnish no sufficient reasons for holding that the remedy by appeal is not adequate or speedy. To hold otherwise is to hold that all appeals are not adequate or speedy, for all involve some delay and expense.

We think the writ was properly denied upon the ground of remedy, and hence express no opinion upon the validity of the ordinance. The judgment of the court below is therefore affirmed, with costs.

FRICK, C. J., and McCARTY, J., concur.

# LUNDBERG v. GREEN RIVER IRRIGATION DIST. et al

(Supreme Court of Utah. Dec. 13, 1911.)

## 1. COURTS (§ 95\*) — PRIOR DECISIONS AS PRECEDENTS—COURTS OF OTHER STATES.

That a statute has been upheld by the court of last resort of a sister state, furnishes a strong reason why the statute subsequently adopted in Utah should be upheld if attacked on the same grounds.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 823; Dec. Dig. § 95.\*]

## 2. CONSTITUTIONAL LAW (§ 289\*)—DUE PROCESS OF LAW—STATUTES—VALIDITY.

Laws 1909, c. 74, as amended by Laws 1911, c. 53, authorizing the creation of irrigation districts, and providing for the bonding of the districts and the taxing of the property therein, is not invalid as depriving one of property without due process of law in violation of Const. art. 1, § 7, since any landowner is given an opportunity to be heard on objections to the inclusion of his lands within a proposed district.†

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 870; Dec. Dig. § 289.\*]

## 3. EMINENT DOMAIN (§ 29\*)—TAKING PRIVATE PROPERTY FOR PUBLIC USE—STATUTES.

The purpose for which property may be taken under Laws 1909, c. 74, as amended by Laws 1911, c. 53, providing for the creation of irrigation districts, for the bonding of the districts, and for the levy and assessment of taxes, is for a public, and not a private use.†

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 76; Dec. Dig. § 29.\*]

## 4. WATERS AND WATER COURSES (§ 231\*)—IRRIGATION — ASSESSMENTS — UNIFORMITY ACCORDING TO VALUE — CONSTITUTIONAL PROVISIONS.

Const. art. 13, §§ 2, 3, providing that all property shall be taxed according to value, and at a uniform and equal rate, does not apply to special assessments, and assessments authorized by Laws 1909, c. 74, as amended by Laws 1911, c. 53, authorizing the creation of irrigation districts and the levy and assessment of taxes, are special assessments based on benefits accruing to the land assessed.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. § 231.\*]

## 5. WATERS AND WATER COURSES (§ 230\*)—IRRIGATION DISTRICTS—BONDS.

On application for prohibition to prohibit the directors of an irrigation district from disposing of bonds of the district, the court must assume that all the land within the district is similarly situated, and will be capable of irrigation and improvement by the waterworks system owned by the district, to pay for which the bonds are issued.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 319. Dec. Dig. § 230.\*]

## 6. CONSTITUTIONAL LAW (§ 80\*)—INVASION OF JUDICIAL POWER.

Laws 1909, c. 74, as amended by Laws 1911, c. 53, authorizing the creation of irrigation districts, does not confer judicial power contrary to Const. art. 8, § 1, providing that the judicial power shall be vested in enumerated courts and such other inferior courts as may be established by law.

[Ed. Note.—For other cases, see Constitutional Law, Dec. Dig. § 80.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep't Indexes

† *Argyle v. Johnson*, 118 Pac. 487.

**7 CONSTITUTIONAL LAW (§ 70\*) — WATERS AND WATER COURSES (§ 216\*)—STATUTES—VALIDITY.**

The defects, if any, in Laws 1909, c. 74, as amended by Laws 1911, c. 53, authorizing the creation of irrigation districts, must be remedied by the Legislature, and not by the courts; and such defects afford no ground for holding the statute invalid.<sup>1</sup>

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132; Dec. Dig. § 70; Waters and Water Courses, Dec. Dig. § 216.\*]

**8. WATERS AND WATER COURSES (§ 231\*)—IRRIGATION DISTRICTS—ASSESSMENTS—VALIDITY.**

The owner of land within an irrigation district created under Laws 1909, c. 74, as amended by Laws 1911, c. 53, may seek redress in the courts resulting from any unjust assessment, and raise issues whether his land is being unjustly assessed or burdened to maintain an irrigation system through which his land cannot be irrigated nor benefited.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 320; Dec. Dig. § 231.\*]

Prohibition by John Lundberg against the Green River Irrigation District and others, directors of the district, to prohibit negotiation of bonds of the district. Application dismissed.

W. H. Gregory, for plaintiff. Thurman, Wedgwood & Irvine and J. W. N. Whitecotton, for defendants.

FRICK, C. J. This is an original application to this court for a writ of prohibition to prohibit the individuals named as defendants, while acting as the board of directors of the defendant Green River Irrigation district, from negotiating, selling, or disposing of certain bonds which were duly authorized by the qualified voters of said district under and in virtue of chapter 74, Laws Utah 1909, p. 144, as amended by chapter 53, Laws Utah 1911, p. 70. The defendants waived the issuance and service of an alternative writ, appeared, and filed a general demurrer to the application. The whole controversy between the parties is submitted for determination upon the application and the demurrer thereto.

It is not necessary to set forth the allegations contained in the application. It is sufficient to say that it is made to appear therefrom that all of the provisions of said chapter 74 were complied with in organizing the irrigation district, and in authorizing the issue of the bonds, the disposal of which is sought to be prohibited. It further appears therefrom that the regularity of the organization of the irrigation district has been judicially determined. The plaintiff bases his application for a permanent writ upon the assertion that chapter 74 is violative of certain provisions of our Constitution, and that said chapter is therefore void,

and hence the organization of the district and the issuance of said bonds are without authority of law. It is provided in said chapter 74 that, whenever a majority of the landowners who own the larger portion of the lands within a proposed irrigation district desire to provide for irrigation, they may present a petition to the board of county commissioners of the county in which the larger portion of the lands sought to be incorporated into an irrigation district are situated, asking that such a district be organized. The board of commissioners are required to give notice of the pendency of the petition, and upon a hearing must determine and fix the boundaries of the proposed district. The commissioners are also prohibited from excluding any lands from the proposed district that are "susceptible to irrigation by the same system of waterworks applicable to other lands in said proposed district; nor shall any land which will not in the judgment of the board be benefited by said proposed system be included in such district if the owner thereof shall make application at such hearing to withdraw the same." In some respects chapter 74 follows the provisions of the drainage law which we passed on in *Argyle v Johnson*, 118 Pac. 487, and we refer the reader to that case for a more particular statement of the general provisions of the law. In view that the regularity of the organization of the irrigation district has been judicially settled, we are required to pass only upon the validity of the law.

Chapter 74 is based on what is commonly known as the "Wright Act," passed by the Legislature of California and approved March 7, 1887. See Statutes and Amendments to the Codes of California 1887, p. 29. That act was amended February 16, 1889. Stats., etc., of Cal. 1889, p. 15. And was further amended March 20, 1891. Stats., etc., of Cal. 1891, p. 142. The Wright act is set forth in the margin of the opinion rendered in *Fallbrook Irr. Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369. While there may have been additional amendments to the Wright act, yet, if any were so made, they are not material here. We have carefully compared the provisions of chapter 74 with the provisions of the Wright act; and while the two acts differ in phraseology respecting some of the details, and while certain provisions are incorporated into chapter 74 which are not found in the Wright act, yet in all of the essential or fundamental features there is no substantial difference between the two acts.

[1] If, therefore, the provisions of the Wright act have been passed on and upheld as constitutional by the court of last resort of California, this would no doubt furnish us with a strong reason why similar provisions found in chapter 74 should also be

<sup>1</sup> *Blackrock Copper Min. & Mill. Co. v. Tingey*, 34 Utah, 369, 98 Pac. 180, 28 L. R. A. (N. S.) 255, 131 Am. St. Rep. 850.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



Ditch Co., 22 Colo. 513, 45 Pac. 444, 55 Am. St. Rep. 149. See, also, *Anderson v. Grand Valley Irr. Dist.*, 35 Colo. 525, 85 Pac. 313, in which a law based on the Wright act is upheld as constitutional against objections similar to those which are urged in this case.

[7] The law in question in some respects is crude, and may not be the best that could be devised to attain the purposes sought to be accomplished. Such defects, if there are any, however, must be remedied by the Legislature, and not by the courts. In this regard we can only repeat what we said in respect to similar defects in another law under consideration in the case of *Mining & Milling Co. v. Tingey*, 84 Utah, 369, 98 Pac. 180, 28 L. R. A. (N. S.) 255, 131 Am. St. Rep. 850, namely, that such defects afford no ground for holding a law invalid.

[8] To avoid any misconception, however, we desire to state that by what we have said we intend to and do pass upon the constitutionality of the law in question only. By anything said or omitted it is not intended to foreclose any landowner from seeking redress in the courts for any legal injury he may suffer by reason of the application of the law in question. If it should develop, therefore, in the application of the law that certain lands within a certain irrigation district cannot be irrigated or benefited by the irrigation system which is owned by the district and which is constructed under the law in question, the owner of lands within the district in a proper proceeding timely commenced may no doubt have the question determined as to whether his lands are being unjustly assessed or burdened to maintain an irrigation system through which his lands can neither be irrigated nor benefited in any way. All such questions are left open for consideration and adjustment when they properly arise.

From what has been said it follows that the law in question is not vulnerable to the objections urged against it, that the writ prayed for should be denied, and the application dismissed. It is so ordered.

MCCARTY and STRAUP, JJ., concur.

KIRBY et al. v. UNION PAC. RY. CO.  
(Supreme Court of Colorado. Dec. 4, 1911.)

1. INJUNCTION (§ 118\*)—RESTRAINING TICKET SCALPERS FROM DEALING IN NONTRANSFERABLE RAILROAD TICKETS—ADEQUACY OF OTHER REMEDY.

A complaint by a railroad company against ticket scalpers, which alleges that defendants are engaged in negotiating the sale of nontransferable passenger tickets, or the return portions thereof, and in aiding and procuring other than the original purchasers to secure or attempt to secure passage on the trains of the company on such nontransferable signature tickets, contrary to the terms thereof,

that defendants have organized into associations to carry on such wrongful business, and that as a result the company is suffering great pecuniary loss, and will continue to suffer because defendants will continue to engage in such practices, states a cause of action for an injunction because of irreparable injury, inadequacy of a legal remedy, and of the necessity of avoiding a multiplicity of suits.

[Ed. Note.—For other cases, see *Injunction*, Dec. Dig. § 118.\*]

2. CARRIERS (§ 253\*)—PASSENGER TICKETS—VALIDITY.

A nontransferable passenger ticket evidences a legal contract between the carrier and the purchaser, and limits the benefits of the contract to him.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1011-1013, 1016-1018; Dec. Dig. § 253.\*]

3. CARRIERS (§ 253\*)—NONTRANSFERABLE PASSENGER TICKETS—PROPERTY.

Nontransferable passenger tickets are not property in the hands of the purchasers in the sense that they can be sold and transferred.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1011, 1012; Dec. Dig. § 253.\*]

4. INJUNCTION (§ 55\*)—PROTECTION OF BUSINESS.

The business of a person or corporation is property entitled to protection by injunction from unlawful interference.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 108, 109; Dec. Dig. § 55.\*]

5. INJUNCTION (§ 42\*)—SCALPING OF PASSENGER TICKETS—PECUNIARY LOSS.

The scalping of nontransferable passenger tickets results in such pecuniary loss to the carrier issuing the tickets as to warrant an injunction, because such carrier is cheated out of the regular fare on every mile of its line on which travel is made under color of one of such tickets in the hands of any one other than the original purchaser.

[Ed. Note.—For other cases, see *Injunction*, Dec. Dig. § 42.\*]

6. INJUNCTION (§ 42\*)—SCALPING NONTRANSFERABLE TICKETS—DEFENSES—CONIVANCE.

Where railroad ticket scalpers formed an association to carry on the business, every time a member of the association dealt in an illegal way in nontransferable tickets a new and independent wrong was committed against the carrier issuing the ticket, distinct from all former transactions, and the mere fact that the carrier on former occasions, in connection with other ticket contracts, sold tickets to the scalpers, did not prevent it from complaining of subsequent illegal dealings in nontransferable tickets, since the doctrine of connivance is not a perpetual bar.

[Ed. Note.—For other cases, see *Injunction*, Dec. Dig. § 42.\*]

7. INJUNCTION (§ 42\*)—SCALPING NONTRANSFERABLE TICKETS—CONIVANCE.

Where a carrier sought to enjoin ticket scalpers from further trafficking in nontransferable passenger tickets, it was immaterial that the carrier had connived at or acquiesced in past wrongful acts of the scalpers of the same general character, notwithstanding the maxim that he who comes into equity must do equity, since the inequity which bars one from relief must have been in connection with the particular acts of defendant against which relief is sought.

[Ed. Note.—For other cases, see *Injunction*, Dec. Dig. § 42.\*]

**8. INJUNCTION (§ 42\*)—SCALPERS DEALING IN PASSENGER TICKETS—CONNIVANCE.**

Where, in a suit by a carrier, to restrain ticket scalpers from dealing in nontransferable passenger tickets, the scalpers relied on connivance and showed prior transactions in connection with nontransferable tickets with subordinate employes of the carrier, and that nontransferable tickets had been purchased by the scalpers of the carrier in the usual way, at the regular price, and on compliance with the conditions required of other purchasers of such tickets, the scalpers could not defeat equitable relief on the ground of the carrier's connivance in the unlawful acts; it not appearing that the scalpers were deceived or misled by such transactions.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 42.\*]

**9. INJUNCTION (§ 113\*)—RESTRAINING DEALINGS IN NONTRANSFERABLE PASSENGER TICKETS—CONNIVANCE—LACHES.**

The right of a carrier to an injunction against ticket scalpers dealing in nontransferable tickets is not lost by mere lapse of time, since the foundation of equitable relief lies in the repeated infringement of contracts between the carrier and original purchasers, and in the fact that the scalpers have made a business of aiding in such infringement and purpose to engage in such business in the future; each transaction being a new wrong against the carrier.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 113.\*]

**10. INJUNCTION (§ 42\*)—RESTRAINING TICKET SCALPING—ESTOPPEL.**

Where ticket scalpers, engaged in the sale of nontransferable passenger tickets or the return portions thereof and in aiding other than the original purchasers to secure passage thereon, had acted with full knowledge of the facts and had not been misled by the carrier, and the acts of the scalpers had never been done under any claim of right, but clandestinely and by fraudulent methods, the carrier was not estopped from demanding an injunction against such dealings in the future.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 42.\*]

**11. ESTOPPEL (§ 99\*)—EQUITABLE ESTOPPEL—EXTENT.**

The doctrine of estoppel by conduct is not available except in defense of a legal or equitable right or claim made in good faith, junior in point of time, against which an older right ought not to be heard to assert itself, but the doctrine can never be asserted to defend or uphold crime or fraud.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 291; Dec. Dig. § 99.\*]

**12. INJUNCTION (§ 21\*)—DISCRETION OF COURT.**

Whether connivance, acquiescence, or laches shall affect the issuance of an injunction rests in the sound discretion of the chancellor, determined on a full consideration of every fact adduced bearing on the question.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. § 21.\*]

**13. VENUE (§ 13\*)—ACTIONS AFFECTING PROPERTY.**

A suit by a carrier to enjoin ticket scalpers from dealing in nontransferable passenger tickets is a suit in personam to protect by injunction the property right of the carrier to do a lawful business in a particular way, and the venue is not controlled by Mills' Ann. Code, § 25a, requiring the venue of actions affecting

property to be in the county where the property is situated.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 13.\*]

**14. VENUE (§ 13\*)—NATURE OF CONTROVERSY—"PROPERTY"—"TICKET."**

A passenger ticket is mere evidence of a contract, and is not property within Mills' Ann. Code, § 25a, requiring the venue of actions affecting property to be in the county where the property is situated.

[Ed. Note.—For other cases, see Venue, Dec. Dig. § 13.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770, 6969.]

**15. CARRIERS (§ 253\*)—PASSENGERS—TICKETS.**

A purchaser from a carrier of a nontransferable passenger ticket takes it subject to all its agreements and limitations, and, as the right to transfer it is wanting, the ticket in the hands of a third person lacks an essential element of property, the power of sale and transfer.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1011, 1012; Dec. Dig. § 253.\*]

**16. APPEARANCE (§ 23\*)—CHANGE OF VENUE—WAIVER.**

The right to have the place of trial changed because the action is brought in the wrong county is not jurisdictional, but a mere personal privilege, which may be waived by a general appearance and pleading to the merits.

[Ed. Note.—For other cases, see Appearance, Cent. Dig. §§ 111-117; Dec. Dig. § 23.\*]

**17. VENUE (§ 77\*)—CHANGE OF VENUE—WAIVER.**

The right to a change of venue of an action begun in the wrong county is waived unless the motion therefor is interposed as soon as the moving party acquires knowledge of the facts, and where the knowledge comes to the moving party as soon as the complaint is served, and he fails to move for a change of venue until more than a month later, and after entering a general appearance and filing an answer, the motion comes too late.

[Ed. Note.—For other cases, see Venue, Cent. Dig. §§ 134-138; Dec. Dig. § 77.\*]

**18. CORPORATIONS (§ 661\*)—FOREIGN CORPORATIONS—RIGHT TO DO BUSINESS—ACTION.**

A foreign corporation which has paid the entrance tax, and has received permission to do business in the state on the same basis of restrictions and liabilities as domestic corporations, need not pay the state license tax imposed by the statute of 1902 (Laws 1902, p. 43) as a condition precedent to the maintenance of an action; the statute being void so far as it relates to such corporation.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. § 661.\*]

**19. APPEAL AND ERROR (§ 190\*)—QUESTIONS REVIEWABLE—QUESTIONS NOT RAISED IN TRIAL COURT.**

A defendant in a suit for an injunction who did not urge at the trial that the trial court erred in issuing a temporary order without notice, nor move to dismiss the complaint on the ground that no emergency existed, could not raise the objection for the first time on writ of error to review a judgment making the temporary injunction permanent.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1216-1220; Dec. Dig. § 190.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

**20. INJUNCTION (§ 143\*)—TEMPORARY INJUNCTION—NOTICE OF APPLICATION.**

A railroad company brought suit to enjoin ticket scalpers from dealing in nontransferable passenger tickets, and showed by affidavits that an irreparable mischief would result to the company if notice of a motion for a temporary injunction was given, because delay would be involved, as the scalpers resided in different cities of the state, and that, while the notice was being served, they would continue to commit the acts complained of, and would dispose of tickets acquired by them to third persons, many of them beyond the jurisdiction of the court, and showed that the emergency was not the result of the company's connivance. *Held* to justify the issuance of a temporary order without notice within the Code requiring complainant to file an affidavit showing that an irreparable mischief will result if notice is given of a motion for a temporary injunction.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 315; Dec. Dig. § 143.\*]

En Banc. Error to District Court, Pueblo County; N. Walter Dixon, Judge.

Action by the Union Pacific Railway Company against William F. Kirby and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

O. N. Hilton and Ralph Talbot, for plaintiffs in error. Dorsey & Hodges (John L. Baldwin, of counsel), for defendant in error.

BAILEY, J. This is one of eight cases, by as many railroad companies, operating in the state of Colorado, for injunctive relief, against some sixty-five defendants, railroad ticket brokers or scalpers, located at Denver, Pueblo, Colorado Springs, Trinidad and other Colorado cities, to prevent the alleged fraudulent and wrongful interference by the defendants with the lawful business of the plaintiff, in the issuance and sale of nontransferable signature tickets. The complaint charges in substance that the defendants are engaged in negotiating the sale of nontransferable tickets, or the return portions thereof, and in aiding and procuring other than the original purchasers to secure, or attempt to secure, passage upon the various trains of the plaintiff on such nontransferable signature tickets, contrary to the express terms thereof; that the defendants have organized into associations for the purpose of carrying on such wrongful and fraudulent business, and that as a result the plaintiff is suffering great pecuniary loss, and is about to suffer still greater damage, unless such conduct be prevented; and that plaintiff has no adequate remedy at law, because of the difficulty of detecting such frauds, because of the multiplicity of suits that would be required, because of the insolvency of practically all of the various defendants, and for other reasons specifically set forth in the complaint. It is definitely alleged that the defendants have engaged, are now engaging and will continue to engage in dealing in this character of tickets. These allegations are not only not denied,

but it is expressly averred by the defendants that they are now engaged in such practices and intend to continue the same in the future. At folio 158 of the answer it is expressly averred: "And these defendants admit that they have sold, and are engaged in the business of selling, and purpose to and will continue in the business of selling and regularly dealing in, said nontransferable tickets, issued for transportation over plaintiff's railway." The defendants further, by answer, deny that they are engaged in an unlawful business, and aver that they have been dealing for years in the character and kind of tickets mentioned in the complaint without hindrance on the part of the railroad company, and allege connivance by it in their conduct in this behalf and laches and acquiescence. They deny any fraud, and allege that the railroad company has no legal right to embody stipulations of nontransferability in its tickets, and that such limitations are of no legal force and are not binding.

Not only is the principal fact admitted, but the various fraudulent devices adopted by the defendants, including forgery of tickets, the raising of the limit of tickets, the forging of the name of the original purchaser by the broker, or by some other person through his procurement, the methods adopted for deceiving the conductors on the trains of plaintiff, and the instructions given to the purchasers of such tickets, in order that they may successfully impersonate the original purchasers, are all testified to by witnesses for the plaintiff, and no evidence is offered to refute this showing. The evidence establishes conclusively that these practices have resulted, and will result, in enormous financial losses to the plaintiff, and will render it practically impossible for railroad companies to continue to grant special rates for special occasions, and there is no evidence by defendants to the contrary. The evidence of persistent and continued interference by the brokers, in manner and form as alleged, with the business of plaintiff, in the issuance and sale of nontransferable tickets, causing and threatening to cause great financial loss, is overwhelming and convincing.

A temporary writ of injunction issued, enjoining the defendants from buying, selling, dealing in or soliciting the purchase or sale of tickets, or of the return or unused portions thereof, issued by plaintiff over its lines, which are by their terms nontransferable, and from soliciting, advising, encouraging, procuring, or attempting to procure, any person or persons other than the original purchasers to use such tickets. On final hearing the temporary writ was made permanent. Defendants bring the case here for review on error.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes



The grounds upon which the defendants rely for a reversal of the judgment and decree complained of are:

1. That the complaint states no cause of action cognizable by a court of equity, because, it is claimed, the railroad company could not lawfully impose the limitations contained in nontransferable tickets; that no actual damage has been shown; and that the defendants are guilty of no legal wrong;

2. That the plaintiff companies have, if entitled to any relief, a plain, speedy and adequate remedy at law;

3. That the court had no power or authority, by temporary or permanent injunction, to assume to govern and control the future acts of defendants in the purchase and sale of so-called nontransferable tickets, or unused portions thereof;

4. That plaintiffs are estopped to maintain the action, because of laches, connivance and acquiescence in like conduct by the defendants covering a time prior to the application for the injunction;

5. That the defendant company is precluded from maintaining this action at all, because of its failure to pay the annual state license tax provided by statute;

6. That the court erred in refusing to discharge the temporary restraining order, issued without notice, and dismiss the action, upon the ground that it is not shown that any emergency existed for its issuance; and,

7. That it was error in the court to overrule the separate motions of two of the defendants for a change of venue.

Every fundamental and vital contention of the defendants has been adjudged against them by an overwhelming weight of authority. The following legal propositions are definitely settled and fixed in cases resting upon similar facts to those shown in the present record:

[1] 1. That a clear case of equitable jurisdiction, on the grounds of irreparable injury, inadequacy of a legal remedy, and of the necessity of avoiding a multiplicity of suits, is made out under circumstances and conditions such as are here alleged and proven. *Nashville, C. & St. L. R. Co. v. McConnell* (C. C.) 82 Fed. 65; *Delaware, L. & W. R. Co. v. Frank* (C. C.) 110 Fed. 689; *Kinner v. Lake Shore & M. S. R. Co.*, 69 Ohio St. 339, 69 N. E. 614; *Pennsylvania R. Co. v. Beekman*, 30 Wash. Law Rep. (D. C.) 715; *Illinois C. R. Co. v. Caffrey* (C. C.) 128 Fed. 770; *Schubach v. McDonald*, 179 Mo. 163, 78 S. W. 1020, 65 L. R. A. 136, 101 Am. St. Rep. 452; *Bitterman v. L. & N. R. Co.*, 207 U. S. 205, 28 Sup. Ct. 91, 52 L. Ed. 171.

[2] 2. That the contract evidenced by nontransferable tickets described in the complaint is a legal contract between the railroad company and the purchaser of such tickets, and binds the parties thereto and limits the benefits of the contract to the use of the original purchaser only; that no one

other than such purchaser can become the beneficiary of such contract, and under its terms the railroad company is under no obligation to carry as a passenger any person presenting such ticket, unless such person is in fact the original purchaser. *Mosher v. St. Louis, I. M. & S. R. Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249; *Eastman v. Railroad Co.*, 70 N. H. 240, 46 Atl. 54; *Way v. Chicago, etc., Ry. Co.*, 64 Iowa, 48, 19 N. W. 828, 52 Am. Rep. 431; *Demille v. T. & N. O. Ry. Co.*, 91 Tex. 215, 42 S. W. 540; *Dan-gerfield v. Railway Co.*, 62 Kan. 85, 61 Pac. 405; *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290; *Drummond v. Southern P. R. Co.*, 7 Utah, 118, 25 Pac. 733; *Bitterman v. L. & N. R. Co.*, supra; and 4 *Elliott on Railroads*, § 1599.

[3] 3. That such tickets are not property in the hands of the purchaser, in the sense that they can be transferred or sold, and trafficking in them is not and cannot be made a legitimate business. *State v. Corbett*, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; *Jannin v. State*, 42 Tex. Cr. R. 631, 51 S. W. 1126, 62 S. W. 419, 96 Am. St. Rep. 821; *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329; *Drummond v. Southern P. R. Co.*, supra; *Pennsylvania R. Co. v. Beekman*, supra; *Schubach v. McDonald*, supra; *Nashville, C. & St. L. R. Co. v. McConnell*, supra; and 4 *Elliott on Railroads*, § 1593.

[4] 4. That the business of a person or corporation is property which is entitled under the law to protection from unlawful interference, and such interference may be prevented by injunction. *National Teleg. News Co. v. Western Union Teleg. Co.*, 119 Fed. 294, 56 C. C. A. 198, 60 L. R. A. 805; *Hopkins v. Oxley Stave Co.*, 83 Fed. 912, 28 C. C. A. 99; *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 32 S. W. 1106, 52 Am. St. Rep. 622; *Flaccus v. Smith*, 199 Pa. 128, 48 Atl. 894, 54 L. R. A. 640, 85 Am. St. Rep. 779; *Scott v. Donald*, 165 U. S. 107, 17 Sup. Ct. 262, 41 L. Ed. 648; *Sherry v. Perkins*, 147 Mass. 212, 17 N. E. 307, 9 Am. St. Rep. 689; *Nashville, C. & St. L. R. Co. v. McConnell*, supra; *Railway Co. v. Bitterman*, 144 Fed. 34, 75 C. C. A. 192; *Lake Shore & Michigan So. Ry. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858; and *Smyth v. Aimes*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

[5] 5. That by the scalping of its nontransferable tickets the railroad company sustains a pecuniary loss. There is no process of reasoning, however strained, which can even as a matter of form conceal the ultimate fact, that the company is deliberately cheated out of the regular fare on every mile of its line on which travel is made under color of one of these tickets in the hands of any one other than the original purchaser. *Angle v. Chicago, St. P., M. & O. R. Co.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55; *Flaccus v. Smith*, supra; *Raymond v. Yarrington*, 96

Tex. 443, 72 S. W. 590, 73 S. W. 800, 62 L. R. A. 962, 97 Am. St. Rep. 914; *Illinois Central Ry. Co. v. Caffrey*, supra; *Nashville, C. & St. L. R. Co. v. McConnell*, supra; and *Bitterman v. L. & N. R. Co.*, supra.

The decision in *Bitterman v. Louisville & N. R. Co.*, supra, decided since this case was lodged here, is conclusive against these defendants upon every controlling question. In the opinion in that case, by the present Chief Justice of the United States Supreme Court, it was said, among other things:

"As, for reasons hereafter to be stated, we think the contentions embodied in the first proposition as to want of jurisdiction, etc., are without merit, we come at once to the fundamental question involved in the second proposition; that is, the absence of averment or proof as to the commission of a legal wrong by the defendants.

"That the complainant had the lawful right to sell nontransferable tickets of the character alleged in the bill at reduced rates we think is not open to controversy, and that the condition of nontransferability and forfeiture embodied in such tickets was not only binding upon the original purchaser, but upon any one who acquired such a ticket and attempted to use the same in violation of its terms, is also settled. (Cases cited.) \* \* \*

"Any third person acquiring a nontransferable reduced-rate railroad ticket from the original purchaser, being therefore bound by the clause forbidding transfer, and the ticket in the hands of all such persons being subject to forfeiture on an attempt being made to use the same for passage, it may well be questioned whether the purchaser of such a ticket acquired anything more than a limited and qualified ownership thereof, and whether the carrier did not, for the purpose of enforcing the forfeiture retain a subordinate interest in the ticket, amounting to a right of property therein, which a court of equity would protect. *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236 [25 Sup. Ct. 637, 49 L. Ed. 1081], and authorities there cited. See, also, *Sperry & Hutchinson Co. v. Mechanics' Clothing Co.* [C. C.] 128 Fed. 800. We pass this question, however, because the want of merit in the contention that the case as made did not disclose the commission of a legal wrong conclusively results from a previous decision of this court. The case is *Angle v. Chicago, St. Paul, etc., Ry. Co.*, 151 U. S. 1 [14 Sup. Ct. 240, 38 L. Ed. 55], where it was held that an actionable wrong is committed by one who 'maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other.' That this principle embraces a case like the present, that is, the carrying on of the business of purchasing and selling nontransferable reduced rate railroad tickets for profit, to the injury of the railroad company issuing such ticket is, we think, clear. It

is not necessary that the ingredient of actual malice in the sense of personal ill will should exist to bring this controversy within the doctrine of the *Angle Case*. The wanton disregard of the rights of a carrier causing injury to it, which the business of purchasing and selling nontransferable reduced rate tickets of necessity involved, constitute legal malice within the doctrine of the *Angle Case*. We deem it unnecessary to restate the grounds upon which the ruling in the *Angle Case* was rested, or to trace the evolution of the principle in that case announced, because of the consideration given to the subject in the *Angle Case* and the full reference to the authorities which was made in the opinion in that case.

"Certain it is that the doctrine of the *Angle Case* has been frequently applied in cases which involved the identical question here at issue—that is, whether a legal wrong was committed by the dealing in nontransferable reduced rate railroad excursion tickets. (Cases cited.)

"Indeed, it is shown by decisions of various state courts of last resort that the wrong occasioned by dealing in nontransferable reduced rate railroad tickets has been deemed to be so serious as to call for express legislative prohibition correcting the evil. (Cases cited.) *Samuelson v. State* [116 Tenn. 470] 95 S. W. 1012 [115 Am. St. Rep. 805]. In the case last referred to, where the subject is elaborately reviewed, the Supreme Court of Tennessee, in holding that the prohibitive statute was not unconstitutional as forbidding a lawful business and in affirming a criminal conviction for violating the statute observed:

"That the sale as well as the purchase of nontransferable passage tickets is a fraud upon the carrier and the public, the tendency of which is the demoralization of rates, has been settled by the general consensus of opinion amongst the courts."

"Concluding, as we do, that the commission of a legal wrong by the defendants was disclosed by the case as made, we are brought to consider the several contentions concerning the jurisdiction of the court and its right to afford relief."

Upon the question of the right to relief by injunction in a case like this, further on in that opinion, the writer thereof has this to say:

"The contention that, though it be admitted, for the sake of the argument, that the acts charged against the defendant 'were wrongful, tortious, or even fraudulent,' there was no right to resort to equity because there was a complete and adequate remedy at law to redress the threatened wrongs when committed is, we think, also devoid of merit. From the nature and character of the nontransferable tickets, the number of people to whom they were issued, the dealings of the defendants therein and their avowed purpose to continue such dealings in the fu-

ture, the risk to result from mistakes in enforcing the forfeiture provision and the multiplicity of suits necessarily to be engendered if redress was sought at law, all establish the inadequacy of a legal remedy and the necessity for the intervention of equity. Indeed the want of foundation for the contention to the contrary is shown by the opinions in the cases which we have previously cited in considering whether a legal wrong resulted from acts of the character complained of, since in those cases it was expressly held that the consequences of the legal wrong flowing from the dealing in non-transferable tickets were of such a character as to entitle an injured complainant, to redress in a court of equity."

Upon the proposition that the court erred in issuing the temporary injunction and making it permanent against dealing in non-transferable tickets to be issued in the future, in this same opinion the learned Chief Justice said:

"The Circuit Court of Appeals decided that error had been committed in refusing to grant an injunction against dealing in non-transferable tickets to be used in the future, and directed that the decree below be enlarged in that particular. It is insisted that the Circuit Court of Appeals erred in awarding an injunction as to dealings 'in nontransferable tickets that may be hereafter issued \* \* \* since it thereby undertook to promulgate' a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit 'the petitioners from dealing in tickets not en esse \* \* \* and is, therefore, violative of the most fundamental principles of our government.' But when the broad nature of this proposition is considered it but denies that there is power in a court of equity in any case to afford effective relief by injunction. Certain is it that every injunction in the nature of things contemplates the enforcement as against the party enjoined of a rule of conduct for the future as to the wrong to which the injunction relates. Take the case of trespasses upon land where the elements entitling to equitable relief exist. See *Slater v. Gunn*, 170 Mass. 509 [49 N. E. 1017, 41 L. R. A. 268], and cases cited. It may not be doubted that the authority of a court would extend, not only to restraining a particular imminent trespass, but also to prohibiting like acts for all future time. The power exerted by the court below which is complained of was in no wise different. The bill averred the custom of the complainant at frequently occurring periods to issue reduced rate nontransferable tickets for fairs, conventions, etc., charged a course of illegal dealing in such nontransferable tickets by the defendants, and sought to protect its right to issue such tickets by preventing unlawful dealings in them. The defendants in effect not only admitted the unlawful course of dealing as to particular tickets then outstanding, but ex-

pressly avowed that they possessed the right, and that it was their intention to carry on the business as to all future issues of a similar character of tickets. The action of the Circuit Court of Appeals, therefore, in causing the injunction to apply not only to the illegal dealings as to the then outstanding tickets, but to like dealings as to similar tickets which might be issued in the future, was but the exertion by the court of its power to restrain the continued commission against the rights of the complainant in the future of a definite character of acts adjudged to be wrongful. Indeed, in view of the state of the record, the inadequacy of the relief afforded by the decree as entered in the Circuit Court is, we think, manifest on its face. The necessary predicate of the decree was the illegal nature of the dealings by the defendants in the outstanding tickets, and the fact that such dealings if allowed would seriously impair the right of the complainant in the future to issue the tickets. Doubtless, for this reason the decree was made without prejudice to the rights of the complainant to apply for relief as to future issues of tickets by independent proceedings whenever on other occasions it was determined to issue non-transferable tickets. But this was to deny adequate relief, since it subjected the complainant to the necessity, as a preliminary to the exercise of the right to issue tickets, to begin a new suit with the object of restraining the defendants from the commission in the future of acts identical with those which the court had already adjudged to be wrongful and violative of the rights of the complainant:

"In *Scott v. Donald*, 165 U. S. 107 [17 Sup. Ct. 262, 41 L. Ed. 648], on holding a particular seizure of liquor under the South Carolina dispensary law to be invalid, an injunction was sustained not only addressed to the seizure in controversy but also operated to restrain like seizures of liquor in the future, and the exertion of the same character of power by a court of equity was upheld in the cases of *Donovan v. Pennsylvania Company*, 199 U. S. 279 [26 Sup. Ct. 91, 50 L. Ed. 192], and *Swift v. United States*, 196 U. S. 375 [25 Sup. Ct. 276, 49 L. Ed. 518]."

It is not only plainly established by the evidence that a direct pecuniary loss is inflicted upon the carrier by the wrongful dealings of brokers in these nontransferable tickets, but in addition to this loss it appears that the carrier's business in general is thereby seriously crippled and interfered with; and it is manifest that the railroad company is without an adequate remedy at law for such violation of its ticket contracts and the resultant harmful interference with its business, for to bring a separate suit for damages in case of each ticket sold would involve a multiplicity of suits, excessively burdensome and expensive, and unlikely, in any event, to afford substantial relief to the carrier. It is simply a case of frequently re-

currence wrong calling for equitable relief as the only adequate means of protecting the railroad company in the conduct of its legitimate business. So that, for the damages and injuries sustained, if there is no remedy in equity, there is none at all in any just and proper sense. To so conclude would be a sad reflection upon the power of courts, under the law, to protect against wrong where wrong clearly appears, or to afford relief where it is plainly due.

It is contended, because of alleged former connivance by the railroad companies with the defendants in the matter of trafficking in nontransferable tickets, the brokers have been induced to spend large sums of money in fitting up their offices, in securing thereon leases for the future, in the purchase of great numbers of this class of tickets, at a vast outlay of money, and that the railroad companies ought not to be heard in equity to complain of such transactions now. These matters are pleaded at length in the answer and are put in issue by the replication.

To this point it is said in the brief of the defendants:

"Connivance means tacitly permitting or indirectly aiding a thing; as, when one by collusion withholds condemnation or exposure, or when he actually or impliedly lends encouragement to another in the commission of an act. Connivance is not in law a perpetual estoppel. That the railroads for a considerable length of time prior to the bringing of these suits had ceased to connive with the ticket brokers, were it a fact, would permit them to avoid the legal effect of prior connivance and would enable them to bring an action to enjoin an evil custom to which they had formerly lent their encouragement. The doctrine of connivance is, therefore, no perpetual bar. Proof, however, of connivance continued up to the filing of a complaint, or shortly prior thereto, must defeat the action. It is a question of proof."

Upon the record before us, this admission practically disposes of the contention of counsel on this proposition. The question of estoppel by connivance is one strictly of fact. We search the evidence in vain for a syllable of testimony from any source, which, upon any theory, can fairly be said to even purport to uphold or support the claim that the plaintiff company, so far as the present situation, or any matter involved in this particular controversy, is concerned, by its conduct, in any way, encouraged the defendants, or connived with them, in their lawful business of trafficking in nontransferable tickets, or the unused portions thereof.

There is nothing in the record to show that the defendants, or any or either of them, have spent a single dollar in maintaining or equipping their offices; or that they have any lease or leases upon their respective places of business, good for the present or future; or that they have on hand

railroad tickets of any kind, sort or character at all, nontransferable or otherwise; or that they then had any investment whatever in railroad transportation. Upon all of these matters there is a total lack of evidence. This being so, it would be a waste of time to discuss the question whether the plaintiff company on former occasions, in connection with other ticket contracts, sold tickets to these defendants, for if it did, such conduct could have no application to subsequent and independent transactions, which relate solely to the present and future conduct of the defendants, because, as has been well said by the defendants' counsel, "The doctrine of connivance is not a perpetual bar."

[6, 7] The law is that every time one of these defendants dealt in an illegal way in nontransferable tickets it committed a new and independent wrong against the railroad company, distinct and separate from all former transactions. Every time a defendant interfered with a purchaser of a nontransferable ticket in the performance of his contract with the railroad company, a new wrong and injury was committed against that company, for which it has legal ground of complaint. The question, therefore, is, For what wrong does the plaintiff in this case seek redress? Is it for a past, present or anticipated future wrong? If for a present or contemplated future wrong, it is immaterial whether the plaintiff connived at or acquiesced in past wrongful acts of the defendants, even though they may have been of the same general character as those for which redress is now sought.

In this connection counsel seek to apply the maxim that "He who comes into equity must do equity." To show its inapplicability here, and to show that the inquiry which bars the plaintiff must have been in connection with the particular act or acts of the defendants against which remedy is sought, we quote the following authorities.

In *John Anisfield Co. v. Grossman*, 98 Ill. App. 180, at page 186, the court says:

"The maxim of equity that he who seeks equity must come with clean hands, only applies to the particular transaction under consideration by the court.

"The wrong must have been done to the defendant himself, and must have been in regard to the matter in litigation."

In *Liverpool, etc., Co. v. Clunie* (C. C.) 88 Fed. 160, it was held, at page 170, that:

"The maxim that he who comes into equity must come with clean hands has its limitations. It does not apply to every unconscientious act or inequitable conduct on the part of the complainants. The inequity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrong conduct in the par-

ticular matter or transaction in respect to which judicial protection or redress is sought."

In *Woodward v. Woodward*, 41 N. J. Eq. 224, at page 225, 4 Atl. 424, at page 425, the vice chancellor says:

"The iniquity which deprives a suitor of a right to justice in a court of equity, is not general iniquitous conduct, unconnected with the act of the defendant which the complaining party states as his ground or cause of action, but it must be evil practice or wrongful conduct in the particular matter or transaction in respect to which judicial protection or redress is sought."

In *Shaver v. Heller & Merz Co.*, 108 Fed. 821, at page 834, 48 C. C. A. 48, at page 61 (65 L. R. A. 878), the court said:

"The principle 'that he who comes into equity must do so with clean hands' is familiar and indisputable. But it does not repel all sinners from courts of equity, nor does it disqualify any complainant from obtaining relief there who has not dealt unjustly in the very transaction concerning which he complains."

In *Kinner et al. v. L. S. & M. S. Ry. Co.*, 69 Ohio St. 339, at page 345, 69 N. E. 614, at page 615, the court said:

"The numerous cases cited in the briefs show that in the application of the maxim urged by counsel for the plaintiffs in error, the courts have consistently granted or refused relief by determining whether the reprehensible conduct of the plaintiff is related to the subject of the suit. In the present case the railway company did not count upon the illegal contract, nor did it, in any manner, ask the court to approve the validity of that contract. The tickets against whose fraudulent use the injunction was granted were issued by the company in the usual course of the business for which it was organized; the stipulations against their transfer rested upon the consideration of a reduction of the rates of carriage; they contained no stipulation contrary to any statute either of the United States or of the state of Ohio, or in contravention of public policy, nor was there anything in the conduct of the company by which any right of the original defendants was prejudiced."

[8] The main transactions which the brokers claim to have had with the railroad companies, in connection with nontransferable tickets, were with subordinate employes, not shown to have been specifically authorized to so act, and they occurred for the most part long prior to the commencement of this action. The testimony relating to more recent transactions is to the effect that nontransferable or mileage tickets were purchased by the brokers of certain of the companies in the usual way, at the regular price and upon compliance with the conditions required of other purchasers of such transportation. Those sales appear to have been

made in good faith and to supply bona fide customers of the brokers. It does not appear that the defendants were or could have been deceived or misled by these transactions, or in any wise disadvantaged. The evidence shows that the last of these transactions occurred some months previous to the filing of this suit.

Closely akin to the matter just discussed is that of estoppel by laches and acquiescence, also relied upon in defense.

[9] The theory of counsel on this branch of the case seems to be, that because the railroad companies have not earlier attempted to end the evil complained of they are estopped by laches to do so now; that because they have, with such patience as they could summon, permitted themselves to be thus imposed upon and defrauded in the past, therefore they must continue to do so for all time to come; in other words, because the defendants have heretofore carried on an illegitimate calling by fraudulent means, without prevention by the companies injured and wronged thereby, that they have therefore acquired a vested or prescriptive right to continue to carry on such unlawful calling by similar fraudulent means, and that the railroad companies, by delay in action, have sinned away their right to ever prevent it. No more completely unsupported and startling doctrine could well be submitted for the consideration of a court of equity.

The very foundation of equitable jurisdiction in a case such as the one at bar lies in the repeated infringement on contracts between the railroad companies and the original purchasers of their nontransferable tickets, and in the fact that the defendants have made a business of aiding and abetting in such infringement and purpose to make a business of doing so in the future. *Schubach v. McDonald*, supra; *Syracuse Solar Salt Co. v. Rome W. & O. R. Co.*, 87 Hun, 153, 22 N. Y. Supp. 321; *Corning v. Troy Factory*, 40 N. Y. 205; *Galway v. M. E. R. Co.*, 128 N. Y. 182, 28 N. E. 479, 13 L. R. A. 788; and *Hennessy v. Carmony*, 50 N. J. Eq. 616, 25 Atl. 874.

The repeated trespasses of these defendants upon the property right of the railroad companies, to conduct a lawful business in a lawful way, by entering into nontransferable ticket contracts with passengers, is not dissimilar from repeated or continued trespasses upon real estate. The right of the owner of real estate to injunctive relief against such repeated or continuous trespasses is not defeated by any lapse of time, however great, until title by adverse possession under the statute has passed to the defendant. *Beach on Injunctions*, §§ 1145-1146.

[10] That the plaintiff railroad companies have a strict legal right which they are trying to protect by these proceedings is set-

tied beyond question. That the defendant ticket brokers have wholly failed to prove any facts amounting to an equitable estoppel is equally beyond question. They have neither shown, nor attempted to show, that their course of dealing has been changed by any act of the railroad companies. No facts are established to indicate that they have been misled in the slightest degree; on the contrary, it appears that they have always acted with full knowledge, equal in all respects to that of the companies, and upon full notice. No facts are proven to show that they have been deceived in any way, or induced to alter their position by anything which the railroad companies have done or failed to do. The element of good faith on the part of the brokers is utterly lacking. All of these matters are essential to uphold and support the plea of equitable estoppel. Without them there is no estoppel. The rule is that in order to constitute an estoppel by conduct all the essential elements of such an estoppel must be present. *Bigelow on Estoppel*, pp. 431, 437, 492; 1 *Story's Equity Jurisprudence*, § 191; 2 *Story's Equity Jurisprudence*, § 1543; *People v. Brown et al.*, 67 Ill. 437; *Martin v. Zellerbach*, 38 Cal. 315, 99 Am. Dec. 365; *Patterson v. Hitchcock*, 3 Colo. 533; and *Griffith v. Wright*, 6 Colo. 248.

[11] The doctrine endeavored to be relied upon by the brokers is one which can never be made available, except in defense of a legal or equitable right or claim made in good faith, junior in point of time, against which an older right ought not to be heard to assert itself. The doctrine can never be asserted to defend or uphold crime, fraud or misdoing of any character. One reason for this is that under such circumstances the element of good faith is lacking, that being absolutely essential when one relies on such plea.

That the fraudulent acts of the brokers in the past have never been done under any claim of right is conclusively shown by the fact that they have always been done clandestinely, under attempts at concealment, and by the use of fraudulent methods intended to deceive the railroad companies and their agents. As example of these methods, attention is called to the undisputed evidence regarding the forging of tickets, the use of assumed and fictitious names, the impersonation of the original purchaser of the nontransferable ticket and the imitation of his signature, and other like practices, all of which demonstrate beyond question not only the fraudulent character of the broker's business, but also a knowledge by them that they are without a vestige of right, upon any theory, because of connivance or acquiescence by the companies or otherwise, to thus violate the express terms of a contract between the railroads and their passengers. Whatever place the doctrine of es-

toppel by connivance, laches and acquiescence may have in equity jurisprudence generally, relative to injunctive relief, clearly it is inapplicable to the case at bar, where the defendants are shown to have deliberately and knowingly, for a long period of years, engaged in an unlawful business. When they thus knowingly and voluntarily engaged in these illegal transactions it was for the purpose of defrauding the transportation companies, in the expectation and hope of illegitimate gain, and in so doing they acted at their peril. They took every chance of loss and disaster naturally involved in such conduct, and are not in position to invoke the doctrine of equitable estoppel. *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526; *Galway v. M. E. R. Co.*, supra; *McIntire v. Pryor*, 173 U. S. 38, 19 Sup. Ct. 352, 43 L. Ed. 606; *Saxlehner v. Eisner & M. Co.*, 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60; *Tracey v. Banker*, 170 Mass. 266, 49 N. E. 308, 39 L. R. A. 508; and *Rigney v. Tacoma L. & W. Co.*, 9 Wash. 590, 38 Pac. 147, 26 L. R. A. 425.

In *Tracey v. Banker*, supra, Judge Holmes, now a justice of the United States Supreme Court, said:

"The defendant has the boldness to urge that, because he began his attempt to defraud the union in 1894, before the act of 1895 [St. 1895, c. 462] was passed, after having been permitted on his application to use the label for a time, therefore the plaintiff's union has no rights under the statute. We do not think the suggestion needs more than a statement. The plaintiff has lost no rights through laches."

In *Galway v. M. E. R. Co.*, supra, a leading case upon this subject, the court says:

"Inasmuch as the equitable remedy depends, among other things, upon the existence of a legal cause of action, it follows that those facts which will bar the legal action will also afford an answer to the equitable remedy, and that so long as a legal remedy exists an equity court is open to aid in the enforcement of the legal claim.

"When the trespass is of such a character that it may be discontinued at the option of the wrongdoer, or, if continued, is susceptible of having legal sanction obtained for its continuance, it seems offensive to our sense of right that a wrongdoer should be permitted to allege that his intention to repeat and continue his own unlawful conduct should deprive the owner of any of the remedies which the law has provided for his protection. If it were otherwise the wrongdoer would be permitted to show the aggravated character of his own conduct as a defense to the action of the legal owner and thus violate the rule of law, as well as the plainest principles of equity. \* \* \*

"The lapse, therefore, of six years after a trespass has been committed upon real estate, bars not only the legal but also consti-

tutes a practical defense to an equitable action founded upon the necessity of numerous legal actions to obtain redress, because the right to such redress has as to such wrongs expired. But, if the trespasses are continued after that period, new causes of action arise, unbarred by any rule of law or equity, which are cognizable not only at law but also in equity. \* \* \*

"The doctrine of acquiescence as a defense to an equity action has been generally limited here to those of an equitable nature exclusively, or to cases where the legal right has expired, or the party has lost his right of property by prescription or adverse possession. \* \* \* The principle that so long as the legal right exists the owner is entitled to maintain his action in equity to restrain violations of this right, has been uniformly applied in this court. \* \* \*

"Even in cases where laches have been allowed to operate as a defense the question is to be determined in the discretion of the court upon all of the circumstances of the case. \* \* \*

"What might be considered an unjustifiable delay in one case would be considered reasonable in another, and an equity court which should refuse its aid to a party in protecting a legal right without a valid and sufficient reason, would be subject to the criticism of shutting the doors of the temple of justice in the face of meritorious suitors and condemning them to suffer remediless wrongs."

In *Menendez v. Holt*, supra, the Supreme Court of the United States, speaking through Chief Justice Fuller, says on page 523 of 128 U. S., 9 Sup. Ct. on page 145, 32 L. Ed. 526:

"The intentional use of another's trade-mark is a fraud; and when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent; and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half of the trees upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder, *Attorney General v. Eastlake*, 11 Hare, 205; nor will the issue of an injunction against the infringement of a trade-mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right. *Fullwood v. Fullwood*, 9 Ch. D. 176. Acquiescence to avail must be such as to create a new right in the defendant. *Rodgers v. Nowill*, 3 De G., M. &

G. 614. Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, 'it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license.' *Duer, J., Amoskeag Mfg. Co. v. Spear*, 2 Sandf. (N. Y.) 599; *Julian v. Hoosier Drill Co.*, 78 Ind. 408; *Taylor v. Carpenter*, 3 Story, 453, Fed. Cas. No. 13,784, s. c. 2 Woodb. & M. 1, Fed. Cas. No. 13,785.

"So far as the act complained of is completed, acquiescence may defeat the remedy on the principle applicable when action is taken on the strength of encouragement to do it, but so far as the act is in progress and lies in the future, the right to the intervention of equity is not generally lost by previous delay, in respect to which the elements of an estoppel could rarely arise."

Furthermore, the doctrine of laches only applies to property rights created in the past, and may not be made to apply to other and distinct trespasses in contemplation for the future. As was said by Chief Justice Fuller, in *Menendez v. Holt*, supra:

"Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half of the trees upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder."

The fundamental error in the contention of the defendants upon the question of laches and acquiescence lies in the failure to recognize that each time a broker interfered with one of the nontransferable ticket contracts, he committed a new and distinct wrong against the railroad company, for which a right of action at once accrued. The fact that the railroad company has failed to seek redress for numerous past wrongs clearly may not be urged as a defense against an action seeking relief from an entirely independent and recent wrong, or to an action which seeks protection by injunction against an anticipated future injury.

The cases cited by counsel for the defendants upon the subject of laches go to single distinct acts acquiesced in, where relief against that particular act was denied owing to plaintiff's delay, but such decisions clearly have no application to the present controversy. The doctrine of laches or acquiescence in equity is, in many respects, similar or analogous in its application to the ordinary statute of limitations at law. It will not be seriously contended that because a plaintiff has allowed the statutory limitation period to lapse in a suit upon one cause of action, without pleading and relying upon it, that a defendant could set that fact up as a defense to a suit on another cause of action between the same parties, which had more recently accrued. Such a situation is not unlike the one here present-

ed. That the two causes of action may have grown out of a similar state of facts would in no sense make them identical, or in any way change the rule of law relative to the right of the plaintiff to maintain the action against the plea of estoppel. Each cause is as distinct from the other as it would be if based upon a totally dissimilar state of facts. It seems almost axiomatic to say that the delay which bars the door of equity to a litigant must be delay in respect to the precise right which he is then seeking to enforce or protect.

[12] Moreover, as to whether connivance, acquiescence or laches shall affect the issuance of an injunction rests in the sound discretion of the chancellor to whom the application is made, and it is to be determined upon a full consideration of every fact adduced bearing upon that question. In this case the trial judge, upon the proofs, found that issue against the defendants, and clearly the present record presents no ground upon which this court could possibly feel disposed to interfere with or disturb such finding.

[13] That portion of section 25a, a subdivision of and an amendment to section 25 of the Code of Civil Procedure, upon the provisions of which the defendants relied for a change of venue, reads:

"All actions affecting property, franchises or utilities, whether by foreclosures, appointment of receivers, or otherwise, shall be tried in the county where such property, franchise or utility is situated, or in the county where the greater part thereof is situated."

Section 27 of the Code of Civil Procedure provides in part:

"In all other cases the actions shall be tried in the county in which the defendants, or any of them may reside at the commencement of the action."

Separate like motions to change the venue, each supported by a proper affidavit, were filed by two of the defendants, under subdivision 25a above quoted. The material part of each motion follows:

"That the said action affects property, to-wit, the ownership of certain alleged non-transferable railroad tickets issued and to be issued by the plaintiff herein, and that the greater part of said property or railroad tickets already issued now are and at the time of the bringing of said actions were situated in the said city and county of Denver, and were held in the possession, custody and control of brokers, defendants herein, resident in the city and county of Denver, and not in the said city of Pueblo."

It will be observed that this motion is based solely upon subdivision 25a, and unless it affords grounds for a change of venue of an action like this the cause was properly retained in Pueblo county.

Section 25 and subdivision 25a thereof have reference exclusively to actions in rem,

where specific property is to be directly affected. This action is distinctively an action in personam, and is transitory in its character. In concluding what provision of the Code governs the venue of this action it is necessary first to consider and determine its nature and purpose. What is the character of the suit, and what is its object? It is strictly a suit in equity to protect, by injunction, the property right of the defendant company to do a lawful business in a particular way; such is its only purpose; nothing more, nothing less. It is not sought to affect or obtain relief against specific property. The decree operates against the defendants in personam. It simply restrains them from continuing to do certain unlawful acts, the doing of which wrongfully interferes with and hinders the plaintiff in carrying on, in a perfectly proper and legitimate way, its lawful business of issuing and dealing in nontransferable signature tickets; such is the prayer of the complaint and such is the relief given. It is in no sense an action upon the tickets, either for their recovery or for damage resulting to the company for an unlawful traffic in them. The thing affected is a property or business right of the highest possible value to plaintiff, which is as much entitled to protection as any other species of property, real or personal. This being so, it follows irresistibly that the venue of this suit is in no way controlled by subdivision 25a of the Code of Civil Procedure, but by section 27 thereof.

Railroad Company v. McConnell, *supra*, was in all respects a case like this, based upon similar facts and having the same purpose in view. The decision there is conclusive upon the question as to what is involved in this class of cases. We quote from the opinion on this point as follows:

"The question, as fairly presented in these bills, is that of the protection of the business of the complainants being carried on during this Exposition in aid thereof, and in the form of these Exposition tickets. The wrong of which the complainants are complaining is not limited to the proposition that any particular one or more of these tickets has been violated, giving rise thereby to legal liability. The position here is that the business of the complainants is being seriously damaged, and will continue to be during the period of this Exposition. This loss, it is alleged, is being suffered by these complainants by repeated and continued purchases and use by these defendants of these tickets, and the question involves the entire loss which the complainants may sustain by the fraudulent use of such tickets from the beginning to the end of the Exposition. It is the protection of the whole of this form of business from the entire loss already sustained, and likely to be sustained between now and the end of the Exposition period. I repeat that it is not a question of enforce-



ing a contract, or of recovery of damages for a breach, but it is protection of the business of the complainants from loss suffered and to be suffered by the frauds committed and likely to be committed against these companies by means of, and through the instrumentality of, these void tickets, and it is in these broader limits that the question is here considered. \* \* \*

"The contention is that these bills are substantially suits upon the ticket contracts, to recover damages for a violation thereof, or for specific execution thereof. \* \* \* From what has been said, it will readily be seen that in my opinion these are in no just sense suits upon the contract, nor for specific performance, but are suits to protect the business of the complainants against the irreparable mischief being suffered by reason of the fraudulent use and abuse of these ticket contracts. \* \* \* Plaintiffs' business is the subject-matter in each bill, and the right claimed is exactly the same against all the defendants. The injury complained of is the same, and is being inflicted by defendants in the same method and at the same time. \* \* \*

"The case simply calls for an application of the injunctive process to prevent complainants' business from fraud and obstruction, and a business is just as much the subject of suit, with a right to protection, as ordinary forms of tangible real and personal property. Whatever doubt may have been expressed at any time, the cases are now agreed upon this proposition. It needs no extended statement to make it manifest that the right to carry on a business without interference, without fraud, and without obstruction, is one of the most valuable of all rights. Indeed, in the commercial world the right of greatest value is the right to freely carry on a lawful business without unlawful interruption. It is a substantial right, which may be protected by any remedy known to the court as fully as a constitutional or statutory right, and as fully as a right in the ordinary forms of property. \* \* \*

"It is sufficient to repeat what has already been said, to wit, that these are suits to protect the plaintiffs' business, and in no sense suits upon these ticket contracts, to enforce the same, or to recover damages for breach thereof. These suits are to restrain these defendants from the continued and repeated use of these contracts as instruments and means whereby to commit frauds upon complainants' business. They are not suits between the parties to these contracts, but against third parties, to restrain the fraudulent use of the contracts as means of committing such wrong."

The tickets referred to are not the subject of the suit; they are merely incidental, and are material only as being the means and instruments by which the unlawful and malicious interference of the defendants is made effective. It is too plain to need fur-

ther discussion that the property affected by the present action was and is the property right of the plaintiff company and the other railroad companies to carry on their lawful business by issuing and selling non-transferable tickets at reduced rates, without unlawful and wrongful interference by the defendant brokers.

[14] But if the position assumed as to the object of the suit is incorrect, still railroad tickets do not have the characteristics of property as that term is used in subdivision 25a of the Code. At most a railroad ticket is mere evidence of a contract. By the great weight of authority, where the exact character of a railroad ticket is discriminately considered and exactly defined, it is held that it does not even rise to the dignity of the evidence of a contract, but is a mere token to show that the person properly in possession of it has paid his fare between the stations named in the ticket.

In 4 Elliott on Railroads, § 1593, it is said: "According to the generally accepted doctrine a ticket, in the ordinary form, is a voucher, token or receipt, rather than a contract, adopted for convenience, to show that a passenger has paid his fare from the place or station named therein as the place of departure to the place or station named therein as the place of destination. Fare is 'the price of passage or the sum paid or to be paid for carrying the passenger.' A ticket is evidence of a contract to carry and the right to passage, but the contract itself is implied by law except in so far as it is expressed in the ticket. \* \* \* A railroad ticket is not negotiable as commercial paper, although it may be transferable unless otherwise provided, and a person who purchases a ticket in good faith and for a valuable consideration from one who has stolen or fraudulently obtained it from the company does not thereby acquire a good title."

In Quimby v. Vanderbilt, 17 N. Y. 306, at page 313, 72 Am. Dec. 469, the court, speaking of railroad tickets, said:

"The tickets do not purport to be contracts. They are rather in the nature of receipts for the separate portions of the passage money; and their office is to serve as token to enable the persons having charge of the vessels and carriages of the companies to recognize the bearers as parties who were entitled to be received on board."

In People v. Warden, 157 N. Y. 116, at page 140, 51 N. E. 1006, at page 1016 (43 L. R. A. 264, 68 Am. St. Rep. 763), Judge Martin said:

"A ticket is a mere incident to the business of the companies in transporting passengers. Like a baggage check, it is merely a method adopted by them for the transaction of their own business. The ticket itself possesses none of the ordinary elements of property and cannot, without the consent of the companies, form the basis of a legitimate independent business. At most it is but an

evidence of the arrangement between the companies and their passengers in which others have no lawful interest. No right to transfer is given, and, generally, none is intended."

While this is from a dissenting opinion, there was no division in the court on this particular point.

In *Jannin v. State*, supra, the Texas court said:

"The ticket of a railroad company is not property in the general acceptance of the term, but the purchaser has only a special property in the ticket as evidencing his right to passage on the road."

In *Hibbard v. N. Y. & E. R. R. Co.*, 15 N. Y. 455, at page 466, it is said:

"The ticket is the property of the railroad company, and is a part of the means by which it conducts its business. It is delivered to the passenger to be held by him, temporarily, for a special purpose, and who, to that extent, acquires a special property in it. When the journey is ended, or about to end, it is to be redelivered to the conductor. It serves a threefold purpose: it is evidence in the passenger's hands that he has paid his fare and has a right within the cars; it insures the payment of the passage money by all who take seats, and when it is redelivered to the company it becomes a voucher in its hands, against the officer or agent who issued it, in the adjustment of its accounts."

In *Levinson v. Texas & N. O. Ry. Co.* (Tex. Civ. App.) 43 S. W. 1032, a case in which a nontransferable ticket had, after passing through broker's hands, come into plaintiff's hands, in a suit for conversion, the court said:

"By reason of its very terms, it (the ticket) had, upon being transferred, ceased to be property, was void and subject to be taken up; consequently plaintiffs, as holders of such ticket, had no rights in respect thereto, and cannot be allowed damages from defendant for taking it up and retaining it."

[15] Moreover, it clearly appears that the original purchaser of these tickets took them subject to express agreements and limitations, and that no power to dispose of or transfer them existed. This right being wanting, the tickets, in the hands of third persons, lacked one of the essentials of the right of property, namely, the power of sale and transfer, and therefore, in no event, could they be property in the hands of such holders. *Jannin v. State*, supra; and *Schubach v. McDonald*, supra. In the hands of the defendants these tickets are merely evidence of contracts between the railroad company and third persons, in which the defendants have no possible interest or property right. Not a single ticket in their possession has any legal value; on the contrary, they are void in the hands of any third person. The property right of the defendants in such tick-

ets is precisely of the character of the property right which one acquires in counterfeit money, purchased for a nominal sum with a view of passing it as true and genuine. The tickets have no more the essential elements of property in the hands of a third person than that kind of currency would have.

Furthermore, it appears from the record that the complaint was filed September 7, 1905; that on the 11th of that month the defendants entered a general appearance and filed their answer to the merits upon the order to show cause; and that the same was then fully argued, submitted to the court and taken under advisement. Not until afterward and on the 18th of that month was the motion to change the venue filed. The answers of the 11th day of the month went fully into the merits of the controversy. No intimation was then given that defendants would apply for a change of venue.

[16, 17] The right to have the place of trial changed because the action is brought in an improper county is not jurisdictional, but a mere personal privilege, which may be waived, and is waived, by a general appearance and pleading to the merits. It is also waived unless the motion is interposed at the earliest possible moment. Such a motion must be made as soon as the moving party acquires knowledge of the facts upon which the motion is based. It is manifest that this knowledge came to the moving party in this case as soon as the complaint was served. We are clearly of the opinion that the motion to change the venue came too late. *Denver S. P. & P. R. R. Co. v. Roberts*, 6 Colo. 333; *School District v. Waters*, 20 Colo. App. 106, 77 Pac. 255; *Fletcher v. Stowell*, 17 Colo. 94, 28 Pac. 326; *Commissioners v. Commissioners*, 2 Colo. App. 412, 31 Pac. 183; *Wasson v. Hoffman*, 4 Colo. App. 491, 36 Pac. 445; *D. & R. G. R. R. Co. v. Cahill*, 8 Colo. App. 158, 45 Pac. 285; *Forbes v. Commissioners*, 23 Colo. 344, 47 Pac. 388; *Boyle v. People*, 4 Colo. 176, 84 Am. Rep. 76; *Roberts v. People*, 9 Colo. 458, 13 Pac. 630; *Bean v. Gregg*, 7 Colo. 499, 4 Pac. 903; *Smith v. Morrill*, 12 Colo. App. 233, 55 Pac. 824; and *Burton v. Graham*, 36 Colo. 199, 84 Pac. 978.

In *School District v. Waters*, supra, it was said:

"It may be stated as a general rule that the bringing of an action in an improper county is not a jurisdictional defect, where the court has general jurisdiction of the subject-matter, and that the statutes fixing the venue in certain actions confer a mere personal privilege, which may be waived by a failure to claim it in the proper manner and at the proper time" (citing 22 Enc. P. & P. 815, and cases cited).

[18] Upon the plea that the plaintiff company, because of its failure to pay the state license tax, as provided for by the statute of 1902 (Laws 1902, p. 43), ought not to be permitted to maintain this action, it is suf-

ficient to say that since the decision by the court below in this case the Supreme Court of the United States, in *American S. & R. Co. v. State of Colorado ex rel. Lindsley*, reported in 204 U. S. 108, 27 Sup. Ct. 198, 51 L. Ed. 393, has held that law void, so far as it relates to a foreign corporation which had already paid the entrance tax and received permission to do business in this state, on the same basis of restrictions and liabilities as domestic corporations, and therefore this plea was not and is not available to defendants as against the plaintiff, a corporation organized under the laws of the state of Utah, which had thus complied with all of the requirements of the then existing laws of Colorado, entitling it to those privileges.

In support of the proposition that the court below erred in issuing the temporary restraining order without notice, and in failing to dismiss the complaint upon the ground that no emergency existed, the defense relied upon the code provision of the Session Laws of 1903, p. 252, § 2, as follows:

"That if complainant shall file an affidavit by himself or his representative and by not less than two other persons, showing that irreparable mischief or injury will result to him, if notice be given, and the complainant shall, further, make affidavit (1) that such alleged emergency is not the result of his creation or connivance, and (2) that his application is made at the earliest time that he could have made it, after learning of the facts, the court or judge shall have power to grant a temporary restraining order."

That particular provision for the dismissal of the action, in case the showing called for by the foregoing was insufficient, reads thus:

"That in the event the temporary restraining order shall issue without notice and it shall afterwards appear to the court, upon any hearing or trial of said matter, that the emergency alleged therefor did not exist, or, existing, was brought about by the act or omission of or for the plaintiff, or by his knowledge, the court shall find and enter judgment accordingly, and shall, also, dismiss the complaint without respect to the merits thereof, and shall, also, summarily enter judgment on said emergency bond for the defendant and against the plaintiff and his sureties aforesaid and issue execution therefor."

[19] The record fails to show that the court was requested to rule upon these matters. No motion to dismiss was interposed; neither was judgment moved on the emergency bond. So that, upon these propositions, the court was not requested to act, and

it would be a gross injustice to permit the defendants to now avail themselves of any alleged error in these respects.

[20] Moreover, the questions as to whether such emergency did exist and whether it was brought about by the connivance of the plaintiff, are ones of fact, and must of necessity have been determined, upon the whole record, adversely to the defendants, as the statutory emergency contemplated was fully shown by explicit direct affidavits as required by statute. From these it appears that irreparable mischief or injury would result to the plaintiff if notice were given because great delay would thereby be involved, as the defendants, residing in different cities of the state, could not be readily reached, and while such notice was being served they would continue to commit the acts complained of and would, as had been done under similar circumstances in like cases, assign their business to others, not parties to the suit, and would dispose of the tickets acquired by them to third persons, many of them beyond the jurisdiction of the court. The affidavits further expressly show that the emergency was not the result of plaintiff's connivance. No attempt was made to controvert the showing on these propositions. There was, therefore, no error upon these supposed grounds, and even if there had been, the defendants not having urged these matters in the court below are not in position here and now for the first time to complain of them.

It is to be carefully kept in mind that so far as the defendant brokers carry on a legitimate business, they are not and cannot be affected by this decree at all. It is not intended to affect their lawful dealings. But so far as they have carried on, and seek to carry on, a business in these special contract tickets, it is an illegitimate and improper business and ought to be stopped. It is fraud, not only upon the railroad companies, but upon the traveling public as well. If the railroad companies are permitted to carry on their rightful business in these special contract tickets, without wrongful interference and malicious molestation by the brokers, the result will be to greatly benefit the traveling public; these reduced-rate tickets will then doubtless be issued more frequently than they now are, probably at better rates, and certainly with many less limitations and annoying requirements.

Perceiving no error in the record, the judgment is in all respects affirmed.

Judgment affirmed.

CAMPBELL, C. J., and WHITE, J., not participating.

**KIRBY et al. v. COLORADO & S. RY. CO.**  
(Supreme Court of Colorado. Dec. 4, 1911.)

En Banc. Error to District Court, Pueblo County; N. Walter Dixon, Judge.

Action by the Colorado & Southern Railway Company against William F. Kirby and others. There was a judgment for plaintiff, and defendants bring error. Affirmed.

Whitford & May and O. N. Hilton for plaintiffs in error. Dines, Whitted & Dines and P. H. Holme, for defendant in error.

**BAILEY, J.** The matters in controversy here, with the exception of the payment of the flat license tax provided for by statute, not in dispute in this case, are substantially like those, and were submitted and determined on the same evidence, involved in case No. 5803, William F. Kirby et al. v. Union Pacific Railway Company, 119 Pac. 1042, just decided by this court. Upon the authority of that decision the judgment and decree herein are affirmed. Judgment affirmed.

**CAMPBELL, C. J., and WHITE, J.,** not participating.

**WELDON VALLEY DITCH CO. et al. v. FARMERS' PAWNEE CANAL CO.**

(Supreme Court of Colorado. Dec. 4, 1911.)

**1. WATERS AND WATER COURSES (§ 12\*)—PRIORITIES FOR IRRIGATION.**

A ditch company, to be entitled to a decree settling its priority for irrigation, must show its construction, a diversion of water from the stream, carriage through the ditch, and a beneficial application of the water to the land, and the court, in a suit to settle priorities of ditches in different water districts, will, by a decree, establish the date and volume of the appropriation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 5; Dec. Dig. § 12.\*]

**2. WATERS AND WATER COURSES (§ 12\*)—APPROPRIATION FOR IRRIGATION—PRIORITIES.**

A settler of 160 acres of government land, who constructs a ditch or buys a water right with a view to apply water to his land, may use such an amount of water as is sufficient to irrigate all his land when needed, provided the water is beneficially used with reasonable diligence in the improvement of the land; and the highest aggregate number of acres irrigated by him in any year is not the basis of a first appropriation of water for irrigation.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 5; Dec. Dig. § 12.\*]

**3. WATERS AND WATER COURSES (§ 24\*)—APPROPRIATION FOR IRRIGATION—PRIORITIES.**

The owners of separate tracts of land and water rights, pursuant to a contract with an owner of an irrigation ditch, may only beneficially apply to their lands the necessary amount of water represented by the contracts.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 16; Dec. Dig. § 24.\*]

Error to District Court, Logan County; E. E. Armour, Judge.

Action by the Farmers' Pawnee Canal Company against the Weldon Valley Ditch Company and others. There was a judgment

for plaintiff, and defendants bring error. Reversed.

H. N. Haynes, for plaintiffs in error. Allen & Webster, for defendant in error.

**GARRIGUES, J.** This case involves the same general subject and object of litigation as Johnson v. Sterling Co., 49 Colo. 482, 113 Pac. 496, namely, to settle the relative priorities and amounts of appropriations of ditches in different water districts of the South Platte river. District 1 comprises that portion of the stream from the mouth of the Cache la Poudre river to the west boundary of Washington county; district 64, the remainder of the stream from the west line of Washington county to the east line of the state. The priorities of all the ditches in these two water districts were settled by statutory decrees, and each district had its own independent adjudication decree long before the bringing of this suit. Logan county was settled prior to Morgan, and the ditches in district 64, for convenience called the "Sterling Ditches," generally speaking, are senior in priority to the ditches in district 1, for convenience called the "Ft. Morgan Ditches." Plaintiff's is a Sterling ditch, and defendants' in the main are Ft. Morgan ditches. The ground of complaint is that, ignoring the seniority of plaintiff's canal in district 64, defendants in district 1, in times of scarcity, take all the water, and prevent it flowing to plaintiff's ditch. It is treated as an appropriate proceeding, in the nature of a bill of peace in equity, to quiet plaintiff's title, to adjudicate its priority as against defendants' priorities, and establish and settle the relative priorities between ditches in the different water districts. The right to maintain the action is conceded, and both sides prayed for similar relief. Indeed, defendants say they were about to commence an action, but plaintiff forestalled them by instituting this proceeding. The decree settles the priorities of the ditches, and commands the water commissioners of districts 64 and 1 to distribute the water in accordance with its terms. Defendants complain that excessive amounts were awarded to the Pawnee ditch, and this is the only question we will consider. All that was said in Johnson v. Sterling Co., relative to the parties selecting the action and agreeing on the theory of the case, applies equally well here. It is not an action to change a settled priority on the ground of subsequent abandonment. It is a proceeding to settle the priorities of ditches in different water districts.

[1] A ditch owner, to be entitled to a decree settling its priority for irrigation, must show its construction, a diversion of water from the stream, carriage through the ditch, and a beneficial application of the water to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

the land. The court then settles the water right belonging to the ditch by a decree establishing the date and volume of its appropriation. In this case, it fixed the first appropriation of the Pawnee ditch at 47 cubic feet per second, date of priority, September 17, 1873; and the second appropriation at 150 cubic feet per second; priority dating June 22, 1882.

The canal was originally called the "Buffalo Ditch." The Buffalo Townsite Company constructed it about a mile and a half or two miles from the river to the old grade of the Colorado Central Railway Company. The original plan, which was abandoned, was to build a ditch about 15 miles long, to irrigate some 5,000 acres. Commencing June 22, 1882, the ditch was built or enlarged, and extended about 25 miles, by the Pawnee Ditch & Improvement Company, which constructed it in part along, over, and through the ditch, route, and right of way of the Buffalo ditch, to cover some 30,000 acres of land, and named the "Pawnee Ditch."

In 1873 or 1874, four settlers each made entry to 160 acres of government land at or near the end of the Buffalo ditch, and constructed extensions or laterals from it to irrigate their tracts. The water was beneficially applied on no other lands; these were all the lands they owned under the ditch; and they were all the landowners and users of water from the canal until after the construction of the Pawnee ditch, June 22, 1882. This beneficial use of the water by them upon these four places from 1874 to 1882 is, or should be, the basis of the first appropriation of 47 cubic feet per second; and the construction of the Pawnee ditch in 1882, and the subsequent use of the water down to the time the ditch was turned over to plaintiff, is, or should be, the basis of the second appropriation of 150 second feet.

[2] Up to 1882 these settlers had not cultivated and irrigated the whole of their tracts. Defendants contend the highest aggregate number of acres irrigated by them any year during this time should be the basis of the first appropriation of the ditch. This undoubtedly should be considered, but it does not determine the matter in this case. It is impracticable, if not impossible, for a settler to seed and irrigate 160 acres of sod breaking a year. Settlers on the public domain are usually poor men, and cannot do this all at once, even if it were possible. It is a continuing process, requiring a number of years. A private ditch is constructed or a water right acquired in a ditch by a landowner, with a view to obtaining sufficient water to irrigate his whole farm; but one settling on 160 acres of raw land would not think of buying enough water to irrigate that amount of sod breaking a year.

In this case, each settler could beneficially

use such an amount of water that, when the right ripened, he would have sufficient to irrigate all his land. He could build his ditch or buy his water right in anticipation of this amount, and it would be a beneficial use of the water to apply it on any portion of the land needing it. The test is not necessarily the number of acres irrigated each year. If these tracts were farmed, and all the water necessary to irrigate them was beneficially used with reasonable diligence in the improvement of the land, it is sufficient. What was a sufficient amount of water, and was it applied to a beneficial use, is the test.

The owners of the Pawnee ditch sold 80-acre water rights of 1.44 cubic feet per second, for the irrigation of the land under the ditch, and the water was accordingly divided among the consumers on that basis and applied to the lands. It is the basis of the second appropriation. Its sufficiency is not questioned. If 1.44 cubic feet per second is sufficient to irrigate 80 acres under the Pawnee ditch, it is some evidence of the amount needed for the irrigation of these lands. This is the basis upon which water rights were procured for and applied to the land under the ditches generally in northern Colorado, and subsequent use and experience has demonstrated that that amount is ample.

The court apparently based the first appropriation upon the amount of water carried through the canal, and not the amount necessary for the irrigation of the land, applied to a beneficial use. The complaint, on the same line, ingenuously alleges that the ditch was originally constructed 12 feet wide on the bottom, with a capacity of 100 cubic feet per second, and capable of irrigating 5,000 acres of land. Admitting all this, the ditch might not be entitled to any decree. We have endeavored to show these settlers could not make a beneficial use of more water on the tracts than was necessary for their irrigation. It is immaterial whether the Buffalo ditch was 10, 12 or 15 feet wide on the bottom, or whether it was capable of irrigating 5,000 acres of land, and was filled to its capacity. Any one familiar with irrigation knows that 47 cubic feet of water per second is not necessary for the irrigation of 640 acres of land. That amount, therefore, was not beneficially applied thereto.

There is evidence that the loss in distribution from seepage and evaporation will be of no consequence, while some of the witnesses put it as high as 25 per cent. Allowing the ditch 11.52 cubic feet per second, as the necessary amount, beneficially used, for the irrigation of the land, and adding to this 25 per cent. for the loss in carriage, the first appropriation of the ditch should be 14.40, instead of 47, cubic feet per second.

[3] 2. The second appropriation is based on the use, made by holders of 80-acre water rights, from 1882 until the ditch was tak-

en over by the plaintiff in 1898. During this time the ditch was operated by the owners, who sold and distributed the water in rights of 1.44 cubic feet per second for the irrigation of an 80-acre tract. During the time mentioned, only 70 of these rights were sold and used on the lands. The landowners and water right holders could only beneficially apply to the land the necessary amount of water in this case, represented by these contracts. The use of the aggregate water rights made by them upon the land constitutes the second appropriation of the ditch. Counsel for defendants contends they did not at any time receive and use this amount of water. The evidence upon this point is conflicting. The court, however, awarded 150 feet, which is clearly excessive. Seventy 80-acre water rights of 1.44 cubic feet make 100.8 cubic feet; add to this the 25 per cent. for loss in carriage, and the result—128 cubic feet—is the proper amount.

The case is reversed and remanded, with directions to the district court to amend its former decree or enter a new one, establishing the first and second appropriations of the Pawnee ditch in accordance with this opinion. No other changes will be made, and each party will pay their own costs.

Reversed.

MUSSER and WHITE, JJ., concur.

# JACKSON v. YAK MINING, MILLING & TUNNEL CO.

(Supreme Court of Colorado. Dec. 4, 1911.)

## 1. MASTER AND SERVANT (§ 118\*)—MINES—EMPLOYER'S DUTY—SAFETY OF PLACE OF WORK—"STRUCTURE."

"Structures" used in mining operations as passageways for miners working in a drift come within the rule making a mineowner liable for injuries to his employes, caused by a defect in the material or construction of a structure which could have been avoided by using ordinary care.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 209; Dec. Dig. § 118.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6700-6702; vol. 8, p. 7806.]

## 2. MASTER AND SERVANT (§ 125\*)—VICE PRINCIPAL'S KNOWLEDGE—IMPUTATION TO EMPLOYER.

Knowledge of a mining company's representative of the defective condition of a structure used as a passageway by miners is knowledge of the company.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 251; Dec. Dig. § 125.\*]

## 3. MASTER AND SERVANT (§§ 286, 289\*)—MINES—INJURY TO EMPLOYE—NEGLIGENCE—JURY QUESTION.

In an action against a mining company for injury to an employe, caused by a defect in a structure used as a passageway, whether the company was negligent, and whether plaintiff

was guilty of contributory negligence, *held*, under the evidence, jury questions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1028, 1089-1182; Dec. Dig. §§ 286, 289.\*]

## 4. NEGLIGENCE (§ 136\*)—JURY QUESTIONS—PROVINCE OF JURY.

It is only when the facts are undisputed, and are such that reasonable men can fairly draw but one conclusion, that negligence is a question for the court.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

## 5. MASTER AND SERVANT (§§ 234, 235\*)—SAFETY OF APPLIANCES—EMPLOYER'S DUTY TO INSPECT—CONSTRUCTIVE NOTICE.

One may assume that his employer has used reasonable diligence to provide reasonably safe appliances, if his attention has not been called to a defect or danger, and the same is not obvious; he not being chargeable with notice of a defect discoverable only by careful inspection.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 709-714; Dec. Dig. §§ 234, 235.\*]

## 6. MASTER AND SERVANT (§ 103\*)—SAFETY OF APPLIANCES—EMPLOYER'S DUTY NONDELEGABLE.

An employer's duty to use reasonable care to furnish reasonably safe appliances cannot be delegated, so as to absolve him from liability for negligent performance.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.\*]

## 7. MASTER AND SERVANT (§ 288\*)—MINES—INJURY TO EMPLOYE—ASSUMPTION OF RISK—JURY QUESTION.

Whether a timberman working in a mine drift assumed the risk of being injured through defective condition of a structure upon which he was working *held*, under the evidence, a jury question.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1070; Dec. Dig. § 288.\*]

## 8. MASTER AND SERVANT (§ 107\*)—SAFETY OF PLACE OF WORK.

The exception to the safe place rule, that it does not apply where the work being done by the employe is the making or repairing of the place, does not apply to an action for injury to a timberman, caused by defects in a structure which he was using as a passageway.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 200; Dec. Dig. § 107.\*]

Error to District Court, Lake County; Charles Cavender, Judge.

Action by Andrew J. Jackson against the Yak Mining, Milling & Tunnel Company. Judgment of nonsuit, and plaintiff brings error. Reversed and remanded.

J. J. McFeely (Dixon & Dixon, of counsel), for plaintiff in error. William E. Hutton and John A. Ewing (B. B. McCay, of counsel), for defendant in error.

HILL, J. Action for damages upon account of personal injuries. At the close of plaintiff's case, the defendant upon motion was granted a nonsuit. The plaintiff brings the case here for review upon error.

The rule of law relied upon to reverse the judgment is the rule which requires the master to furnish for his servant a reasonably safe place in which to work. The

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

main contention is in the application of the rule to the facts, rather than over the rule itself.

For about two years prior to the accident, the plaintiff had been in the employ of the defendant company as a laborer, engaged in mucking, shoveling, and helping on machines. About two weeks prior to the accident, he was changed to what is known as a timberman, and as such was engaged in the defendant's mine, in what is called "Stope No. 11, Drift K." This drift was timbered with what are known in mining parlance as "square sets." These are frames so constructed and so arranged with reference to each other that the tops can be and are covered with what are known as "cribsticks" or "lagging." The square sets follow each other, so the cribsticks thereon form a continuous floor or gangway, to be used by the employes in going to and from their work. These cribsticks appear to have been about 5 feet in length, about 2 inches in thickness, of various widths, mostly unedged. They rested upon timbers, called "caps," which were about 7 feet in length, about 12 inches in depth, and 10 inches in width. The plan of this structure was for the cribsticks at the ends to be butted up against each other, not lapped. This gave each cribstick or board a bearing at the ends of 5 inches with which to lay upon the tops of the caps, which were 10 inches in width. The cribstick boards were not nailed down; it was necessary at times to remove them, in order to allow the ore, dirt, rock, and rubbish to drop through, and then replace them. They were intended to be secured by wedges, driven between the edges of the outside cribsticks and the posts at the corners of the square set. These wedges could not be driven tightly, because, the cribsticks being unedged, such driving would cause them to "buckle up," as it is termed. The height of each square set appears to have been about 7 feet. In the operation of this mine, it appears that when a drift was stoped out, so as to render it necessary, a second set of square sets was constructed upon the first, and a third on the second, etc. In the drift involved, 3 sets or tiers of square sets had been erected all along prior to the accident, so that the top floor or gangway was 21 feet from the ground. The evidence does not disclose how long this timbering had been done by the defendant company before plaintiff was employed as timberman and set to work in this drift, but it does disclose that it had been there for some time prior to his employment as timberman, and that the plaintiff had nothing to do with its construction. It was likewise erected as and for a permanent structure; that is, so far as such structures are permanent consistent with the operation of a mine. It was constructed as a permanent structure for the purposes intended, so long as such a structure was needed there for that purpose, evi-

dently depending upon the length of time the mine would be operated, at least in that drift.

The plaintiff testified that at about 7 o'clock in the morning on the day of the accident he was working in stope 11; that, in order to get to it, he had to go through a drift and walk on the flooring made of cribsticks on top of the square sets (crossing over four or five of such sets), then turned and went to the stope where the men were working, which was 4 or 5 feet from the timbers where the accident occurred; that when he turned to go back he looked at the floor, and it looked all right; that he had a candle in his right hand and an ax in the left; that when he stepped upon some of the cribsticks in a certain section the cribbing slipped beneath him and went down; that he endeavored to save himself by seizing other cribsticks, but they fell with him, and he was precipitated a distance of 21 feet, sustaining injuries of a very serious and permanent character. The plaintiff testified that after the accident he learned for the first time (and other evidence also discloses) that one of the caps on the square set through which he had fallen was defective. From its description, the inference is that it was sawed from a log insufficient in size to furnish a cap with the same dimensions throughout, but for a distance of 2 feet or more from one end it was smaller in size, and was not of the height of 12 inches or the width of 10, but smaller than this dimension, and was rounding, instead of square, on the side in and towards the square set in which the plaintiff fell, and in which place it appears that the cribsticks on which he had attempted to walk slipped therefrom. The plaintiff testified that when he came to the cribsticks on the square set through which he fell he examined the floor carefully, as he did all others; that the set was entirely covered with cribsticks, and that they were in proper position, the ends coming to the center of the caps; that he could tell this by their position relative to the posts; that his principal duty was that of doing timber work where the men were working in the stope, although he also testified that if he found a cribstick board broken it would probably have been his duty to have replaced it.

The shift boss testified that neither the timberman nor the miners had anything to do with laying the flooring upon the caps, except upon his order. Mr. Hoagland, a witness for the plaintiff, testified that he was employed by the defendant as an all-around man; that three days before the accident the shift boss ordered him to go to the particular square set in question to clean the dirt off of the floor; that on taking up the cribsticks he discovered the defective cap as above described; that after cleaning off the dirt he replaced the cribsticks as he found them, except that at one point they would not lie level, because a knot had not

been trimmed close enough; that he procured an ax and trimmed the knot off; that he replaced the cribsticks carefully, as he found them, side by side, and wedged them in the usual manner; that when the cribsticks were down one could not see the condition of the cap underneath; that, owing to the condition of the cap, they should have been fastened. Under this state of facts, the plaintiff's contention is that the accident was caused on account of the cribsticks slipping from the end of the cap, which was round on that side, and which was an unsuitable, unsafe, and unfit timber for that purpose, viz., for the purposes intended, in the manner intended; that the defendant was negligent in the use of this timber in the building of the square set.

The defendant presents four theories upon which it contends that the findings of the trial court can be sustained: First, that the evidence fails to show that the defendant was guilty of negligence as charged. Second, that the evidence fails to show that the act of the defendant in the original use of the cap of which plaintiff complains was the proximate cause of the injury. Third, if otherwise, that plaintiff, having engaged himself to the defendant as a timberman, was charged with the responsibility for the condition of the timbers and cribsticks, the proper placement and wedging of the sticks, the duty of inspecting it all and ascertaining whether it was or was not in a safe condition; that if there was negligence in failing to discover a dangerous condition of the place where he was injured that negligence must be attributed to him. Fourth, that the plaintiff assumed the risk.

[1] We cannot agree with either of these positions. Such structures, used in mining operation, come within the safe place rule, and, unless for some other reason which makes an exception, the rule is that a mine-owner is liable in damages for injuries to his employes occasioned by any defect in the material or insufficiency in the construction of such a structure which could have been avoided by the exercise of ordinary care. *Grant v. Varney*, 21 Colo. 329, 40 Pac. 771; *Cripple Creek Mining Co. v. Brabant*, 37 Colo. 423, 87 Pac. 794; *Garity v. Mining Co.*, 27 Utah, 534, 76 Pac. 556; *Western C. & M. Co. v. Ingraham*, 70 Fed. 219, 17 C. C. A. 71; *Westland v. Gold Coin Mines Co.*, 101 Fed. 59, 41 C. C. A. 193; *Kelley v. Fourth of July Mining Co.*, 16 Mont. 484, 41 Pac. 273; *Hanley v. California, etc., Co.*, 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597.

In *Grant v. Varney*, supra, this court held that it was the duty of the master to furnish and maintain a reasonably safe place for the servant to work in; that if he delegates the performance of this duty to an agent, who is negligent in furnishing or maintaining such a safe place, and if in working therein, and without fault on his part, an in-

jury occurs to another employe, such negligence is the negligence of the master.

In *D. & R. G. R. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1098, we held that it was the duty of the employer to make reasonable efforts to keep machinery and appliances used by its employes in suitable condition for use; that this duty cannot be delegated, so as to exonerate the employer from liability to an employe injured by the negligence of a co-employe charged with the performance of such duty in failing to do so, but that the employe charged with such duty is a representative of the employer in the performance thereof and not a fellow servant; that his negligence therein is the negligence of the employer, and if the negligence of the master in this respect is the proximate cause of an injury he is not relieved from responsibility, because the negligence of a coemploye contributes to the injury.

In volume 26, p. 1144, Cyc. it is said: "Where the defect in an appliance is shown to be structural, and is of such a character as renders it unsafe, it may be inferred that the employer was aware of the defect, and an employe who has been injured by such an appliance need not show that the master knew that it was defective. \* \* \*". Cases from Arkansas, Illinois, Indiana, Kansas, Massachusetts, Michigan, Pennsylvania, the federal courts, and England are cited in support of this statement.

[2-4] Applying these principles to the case at bar in the original construction of this framework, the knowledge of the then agent of the master that this cap was not suitable was the knowledge of the master, and if there was negligence in the original construction, and upon account of this negligence the injury occurred, the master cannot escape liability by claiming that at the time of the injury he had no knowledge of the condition of this structure; the fault, if any in this case, as shown by the evidence, was in the use of the material supplied in the first instance. The question of whether the master was negligent in this respect was for the jury to determine. It is only when the facts are undisputed, and are such that reasonable men can fairly draw but one conclusion, that the question of negligence is ever considered one of law for the court. *Hines Lumber Co. v. Ligas*, 172 Ill. 315, 50 N. E. 225, 64 Am. St. Rep. 38. We do not think this case, as it comes to us, is one where all reasonable men must draw the inference that the plaintiff was guilty of, or the defendant free from, negligence. These were questions of fact on which there was evidence which should have gone to the jury.

The contention of counsel that the cribsticks that fell with the plaintiff evidently had been displaced since the preceding day, for the reason that they did not fall with him on the day before, and appeared then to be all right, and for the further reason that they had been firmly tapped down and



wedged by Hoagland three or four days before the accident, and for these reasons the defective timber could not have been the proximate cause of the injury, are but arguments only to sustain their theory of the evidence. On the other hand, there is no evidence showing that the plaintiff stepped upon the same cribsticks upon the preceding day, or that the wedges would have held them at any time when the weight was placed directly upon those at the place where the timber was round and not flat, as the evidence shows it should have been in the manner used. The evidence, as it stands, tends to show that it was not upon account of the fact that there had been recent displacement of the cribsticks and loosening or displacement of the wedges that caused this injury, but that it was upon account of the condition of the cap itself. According to the testimony of the plaintiff's witnesses, the cap was unsuitable for the purposes intended, and this is not in any way mitigated against because there is evidence to the effect that the cribsticks on the adjoining set nearer the breast where the shooting was done were pushed over farther than they should have been.

The testimony of the plaintiff is to the effect that he examined the cribsticks upon this square before stepping upon it, and that they all appeared to be in their proper position. It was not his duty, and he never was instructed to investigate the timbers underneath, or any of them, for the purposes of ascertaining if there had been any unsuitable or defective timbers used in the original construction. He had a right to assume that in the original construction of this framework the master had caused it to be supplied with proper timbers placed there in a proper manner; and his duties, at most, were to examine the surface to ascertain if the cribsticks were in proper place, and, if not to so place them, for the purpose of making the surface reasonably safe for him and the other employes to walk over, and likewise to use reasonable diligence in going over it.

In the case of *Westland v. Gold Coin Mines Company*, 101 Fed. 59, 41 C. C. A. 193, it was held that a mining company is bound to exercise reasonable care in the erection of such structures to see that the timbers are of adequate strength and number and securely fastened, to render it a safe place in which to work. To the same effect is the case of *Western C. & M. Co. v. Ingraham*, 70 Fed. 219, 17 C. C. A. 71, and many other cases there cited in support of this position.

In the case of *Hanley v. California, etc., Co.*, 127 Cal. 232, 59 Pac. 577, 47 L. R. A. 597, it was held that, where a permanent tunnel is driven into a mountain to open up veins of mineral, as fast as it is completed the finished tunnel becomes an appliance or means furnished by the master through which the remaining work is to be prosecuted; that the laborer employed upon

the unfinished portion of such a tunnel does not take a fellow servant's risk in passing through the finished portion to get to his place of employment; that this rule would not be different where he himself helped to complete the finished portion. The same principle is involved in *Union Pacific Ry. Co. v. Jarvi*, 53 Fed. 65, 3 C. C. A. 433, and *Kelley v. Fourth of July Mining Co.*, 16 Mont. 484, 41 Pac. 273, and we think it is applicable here.

[8] It is true the plaintiff might, by a minute inspection of the entire structure, have ascertained that the dimension timber upon which the boards rested was round at the one end, and for that reason unsafe for the purposes intended, in the manner planned, viz., to place the plank thereon butted up against the ends of each other and not lapped; but there is no evidence which goes to show that, under the circumstances, it was his duty to do so, or that a failure so to do was neglect to exercise ordinary care. An employé has a right to act upon the theory that his employer has used reasonable diligence to provide reasonably safe appliances and himself exercising ordinary care; if his attention has not been called to a defect or danger, and the same is not obvious, he is not chargeable with notice of a defect which could only be discovered by a careful inspection. *Wood on Master and Servant*, §§ 332-385; *Rice & Bullen Malting Co. v. Paulsen*, 51 Ill. App. 123.

[8] The obligation to use reasonable care in furnishing appliances for the use of employes is one that cannot be delegated, so as to absolve the master from responsibility for negligence in this regard, and if such care is not used, and the servant is injured because of insufficient, unreasonable, and insecure appliances, he, having no notice of the defective condition, may recover. *D. & R. G. R. Co. v. Sipes*, 26 Colo. 17, 55 Pac. 1093; *Pullman's Palace Car Co. v. Laack*, 41 Ill. App. 34; *Tudor Iron Works v. Weber*, 31 Ill. App. 306.

[7] Further, upon the question of the assumption of the risk, because the plaintiff was a timberman, and thereby, as counsel contend, assumes the risk ordinarily incident to and naturally arising out of the employment, the authorities are to the effect that he does not assume unusual and extraordinary risk, caused by the master's negligence, unless such risks are open visibly, or the servant has knowledge of them. *Garity v. Mining Co.*, 27 Utah, 534, 76 Pac. 556.

In the case of *Pantzar v. Tilly Foster Iron Mining Co.*, 99 N. Y. 368, 2 N. E. 24, it is said: "The rule that the servant takes the risk of the service presupposes that the master has performed the duties of caution, care, and vigilance which the law casts upon him. \* \* \* It is those risks alone which cannot be obviated by the adoption of reasonable measures of precaution by the

master that the servant assumes." In the same case it was further said: "That no duty belonging to the master to perform for the safety and protection of his servants can be delegated to any servant of any grade, so as to exonerate the master from responsibility to a servant who has been injured by its nonperformance."

In the case at bar, the original construction is chargeable to the master; he is held to the duty of having exercised ordinary care for the safety of his employes, both in construction and in the material selected therefor and in its being suitable for the purpose intended. There is evidence that he did not do so. This was a question for the jury to determine.

When constructing it, the then employes of the company had every opportunity to inspect and observe the defective condition of the caps. They had the handling and examination of this timber when it was being placed where it was used, and therefore had every opportunity to discover its defective condition for the purposes intended, if such existed, and there is not a scintilla of evidence that even suggests that the defective condition of this timber was known to the plaintiff. It was not open or visible, and we cannot say, as a matter of law, by the exercise of ordinary care, that he would have known of it. It was the cause of the injury, as testified to by the plaintiff and his witnesses.

[§] The exceptions to the safe place rule, that it does not apply where the work being done by the employe is the making or repairing of the place, as in substance held by this court in the cases of *City of Greeley v. Foster*, 82 Colo. 292, 75 Pac. 351, *Poorman Silver Mines v. Devling*, 34 Colo. 37, 81 Pac. 252, *Maloney v. F. & C. C. R. R. Co.*, 39 Colo. 384, 89 Pac. 649, 19 L. R. A. (N. S.) 348, 121 Am. St. Rep. 180, has no application to this case.

The plaintiff had nothing to do with the construction of this timbering; his duties, as shown by the evidence, were in doing timbering where the miners were at work, and, in case he found a board or cribstick misplaced elsewhere or broken upon top of the timbering in that drift theretofore constructed by others, it was his duty, presumably, to fix it; but all the testimony introduced, including that of the shift boss, goes to establish that it was never intended that the plaintiff make an inspection of this framework under the cribsticks. All appear to have assumed, as they had a right to, that that was constructed suitably and sufficiently safe for the purposes intended, and that the timbers used therein were of sufficient size, strength, and shape to make them reasonably safe for the purposes and in the manner in which they were used. The plaintiff had a right to presume that the com-

pany, through its former agents and employes, performed all these duties. At the time of the accident, he was not engaged in inspecting or repairing these timbers, but did examine the cribsticks before he stepped on them, and, according to his testimony, they were all in proper condition, and would have been perfectly safe, had it not been for the defective cap underneath.

The judgment is reversed, and the cause remanded for a new trial in harmony with the views herein expressed.

Reversed.

MUSSER and WHITE, JJ., concur.

### EPLEY v. PEOPLE.

(Supreme Court of Colorado. Dec. 4, 1911.)

#### 1. CRIMINAL LAW (§ 292\*)—FORMER JEOPARDY—REQUISITES OF PLEA.

A plea of former jeopardy must state that the offense for which accused is prosecuted is the same offense for which he has been tried and convicted under a former information, or that, by reason thereof, he has been in jeopardy of the same offense for which he is prosecuted.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 668-671; Dec. Dig. § 292.\*]

#### 2. CRIMINAL LAW (§ 292\*)—FORMER JEOPARDY—REQUISITES OF PLEA.

A plea of former jeopardy to an information alleging that accused sold liquor in anti-saloon territory, on or about August 31st, which alleges that accused had been charged with selling liquor to the same person, in the same territory, on or about August 24th, that he had been convicted, that at the trial evidence was given of all sales, and that the trial court charged the jury that the exact date of the sale was immaterial, and which states that, by reason of the former information, trial, evidence, and conviction, accused has been in jeopardy of the same offense for which he is prosecuted, is sufficient to call for a reply and trial by jury of the issues raised.

[Ed. Note.—For other cases, see *Criminal Law*, Dec. Dig. § 292.\*]

Error to Larimer County Court; Fred. W. Stover, Judge.

C. L. Epley was convicted of selling intoxicating liquor in anti-saloon territory, and he brings error. Reversed and remanded.

L. J. Stark and Bert Martin, for plaintiff in error. Benjamin Griffith, Atty. Gen., and George D. Talbot, Sp. Counsel, for defendant in error.

MUSSER, J. [1] C. L. Epley was convicted of selling intoxicating liquor in anti-saloon territory. The information, upon which he was convicted, was filed on October 9, 1909, in the county court, and charged him with selling liquor to Willis Hill on or about August 31st. To this information the defendant filed a plea of former jeopardy, alleging, in substance, that, on September 2d, an information, which was set out, was filed in the same court, charging him with sell-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ing liquor to the same person, in the same territory, on or about August 24th; that on September 21st he had been tried, convicted, and sentenced under the first information (setting out the sentence); that at the trial evidence was given, not only of a sale, as alleged in the first information, but also of all other sales; that the judge charged the jury at the trial of the first information that the exact date of the sale was immaterial and need not be proved as alleged. It was necessary for the plea to state that the offense for which he was prosecuted under the second information was the same offense for which he had been tried and convicted under the first, or that, by reason of the trial and conviction under the first, he had been in jeopardy of the same offense for which he was prosecuted under the second.

[2] In its concluding averments, the plea, in substance, stated that, by reason of the former information, trial, evidence and conviction, the defendant had been in jeopardy of the same offense for which he was prosecuted under the second information. To this plea a demurrer was filed, stating, as a ground of demurrer, that the plea was void for uncertainty. This demurrer was sustained, and nothing more came of the plea. While not deciding that such a demurrer would lie, it is enough to say that the plea does not appear uncertain. It could have been couched in language that would have made it plainer, but the substantial allegations of such a plea are stated. 1 Bish. New Crim. Procedure, § 810. This being so, the plea called for a reply from the district attorney and trial by jury of the issues of fact raised. *Dockstader v. People*, 43 Colo. 437, 97 Pac. 254.

The judgment is therefore reversed and the cause remanded, with instructions to the lower court to overrule the demurrer, and that the matter then proceed according to law.

Reversed and remanded.

HILL and GARRIGUES, JJ., concur.

#### HARDING et al. v. BURRIS et al.

(Supreme Court of Colorado. Nov. 6, 1911.  
Rehearing Denied Jan. 6, 1912.)

#### 1. TRUSTS (§ 356\*)—PURCHASER FROM TRUSTEE—CONTRAVENTION OF TRUST—CONSTRUCTIVE TRUST.

A purchaser from a trustee in contravention of the trust does not become an express trustee, but rather a trustee in invitum, or a constructive trustee by operation of law.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 529; Dec. Dig. § 356.\*]

#### 2. LIMITATION OF ACTIONS (§ 86\*)—EQUITABLE RELIEF—CONSTRUCTIVE TRUSTS.

Defendant B. pending litigation over mining claims in order to raise money with which to prosecute the litigation assigned one-third

of the fruits of the same to complainant, H., for an advancement of \$350. The money was advanced and B. was successful in an appeal but before further proceedings were taken after remand, B. transferred all of the fruits of the litigation to his wife and she was substituted in the proceedings. A decree was rendered in her favor and she assigned the property to others without recognizing the interest of H. Held that H., though not a party to such litigation was nevertheless charged with constructive notice thereof and not having instituted suit to compel an accounting by H., his wife and her assigns, until five years had elapsed from that date, his subsequent action therefor was barred by laches under Rev. St. 1908, § 4073, providing that bills for relief in case of the existence of a trust not cognizable by the courts of common law and in all other cases not specially provided for, shall be filed within five years after the cause of action shall accrue and not after.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. § 172; Dec. Dig. § 36.\*]

Error to District Court, El Paso County; W. S. Morris, Judge.

Action by T. A. Harding and another against Allen Burris and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

L. Ward Bannister and Guy Leroy Stevick, for plaintiffs in error. J. C. Helm, Chinn & Strickler, and John R. Dixon, for defendants in error.

HILL, J. The amended complaint in this action is voluminous. It contains about 14,000 words. A demurrer was sustained to this amended complaint. The action was dismissed at the cost of the plaintiffs, who have brought the cause here for review upon error. The contract out of which this contention arose reads as follows:

"This memorandum of agreement, made this tenth day of September, A. D. 1898, by and between William M. Burris, of the county of El Paso, state of Colorado, party of the first part, and T. A. Harding, of the city of Des Moines, and state of Iowa, party of the second part: Witnesseth, that, for and in consideration of the sum of three hundred and fifty dollars (\$350.00), the receipt of which is hereby acknowledged, paid by the party of the second part to T. M. S. Rhett, attorney, to be expended by said Rhett, in the costs and expenses of prosecuting to final determination in the Supreme Court, in the state of Colorado, that certain suit, now pending therein, and entitled 'James Doyle et al. v. Minnie E. Anderson et al.,' and numbered No. 4563 on the records of the district court of the county of El Paso, state of Colorado. In consideration therefor the said William M. Burris, from each, every and all fruits of said suit, either by compromise or otherwise, whether the same be money, property or stock, agrees that the said T. A. Harding shall receive one-third thereof. And the said William M. Burris transfers, sells and assigns to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

said T. A. Harding, one full and undivided third part, parcel and interest in that certain lease and bond on the North Cascade lode mining claim, granted by J. Arthur Connell, and now standing in the name of S. S. Sindlinger, for the use and benefit of the said William M. Burris. Also one full and undivided third part, parcel and interest in that certain contract by and between the said William M. Burris and Benj. Franklin, about and concerning that certain judgment heretofore obtained by one Franklin against the Little May Gold Mining Company in the county court of the county of El Paso. Also one full and undivided third part, parcel and interest in, to and of that certain suit and the proceeds thereof, entitled 'William M. Burris v. The Little May Gold Mining Company,' now pending in the county court of El Paso county, and state of Colorado. And it is further stipulated and agreed that the said T. A. Harding shall not be called upon to pay or contribute any sum of money other than the above-mentioned three hundred and fifty dollars, towards the prosecution of said suit in said Supreme Court of Colorado. And it is further stipulated and agreed that when and as soon as the parties hereto obtain control, at the stockholders' meeting, of the Little May Gold Mining Company, to be held hereafter, that said sum of three hundred and fifty dollars advanced as aforesaid, shall, by due and proper resolution of the said the board of directors of said company, be secured, by lien, upon the assets of said company in favor of the said T. A. Harding. And each and both of the parties hereto contract with the other, that no compromise, settlement or agreement will be made about or concerning said above-mentioned suit No. 4,563; nor about said lease and bond; nor about said Franklin judgment, without the advice and consent of both the parties hereto. Executed in duplicate the day and year first above written. Witness: Wm. M. Burris. T. A. Harding."

It appears from the complaint that some time after the execution of this contract and the payment of the \$350 called for that the original judgment in the suit referred to in the contract was reversed by this court, in which it sustained the validity of the bonds and leases held by William M. Burris and Henry Brandenburg upon certain mining claims, holding that the said Burris and Brandenburg were entitled to specific performance of such leases, as prayed for in their supplemental cross-complaint in the original action. Burris et al. v. Anderson et al., 27 Colo. 506, 62 Pac. 362.

The plaintiffs here seek to recover a portion of the proceeds derived from the sale of some of these claims. According to the complaint, the judgment of reversal by this court appears to have been made during the month of September, 1900. Thereafter, in

pursuance of the mandate of this court, and on or about the 18th of February, 1901, said cause came on again for hearing in the district court of El Paso county, at which time there was a judgment and decree entered, which, among other things, recites: "Third. That since the rendition of said order and judgment of reversal one Mattie B. Burris has succeeded to all the rights and interest of said William M. Burris and Henry Brandenburg in and to the matters and things in controversy in this suit, and in, under, and by virtue of said order, judgment, and reversal, and ought to be substituted as cross-complainant herein in place of the said cross-complainants aforesaid. \* \* \* It is therefore considered, ordered, adjudged and decreed by the court: First. That the said Mattie B. Burris be, and she hereby is, substituted as defendant and cross-complainant in this action in the place and stead of said William M. Burris and Henry Brandenburg."

This decree further provided that within five days from that date certain companies and persons make conveyances to Mattie B. Burris of all their right in and to the property, the fruits of which are here in controversy, and in and to other properties not involved herein; that within five days from that date Mattie B. Burris pay and deposit in a bank \$60,000, to be distributed to certain persons; that upon such payment or deposit the deeds be delivered to her; that said \$60,000 be accepted in full as the purchase price of said properties; that in case she failed or refused to pay said money within the five days as directed, upon satisfactory showing, she would forfeit her claim to said properties, and any interest therein, but that, upon the making of said payment and the delivery of said deeds in full satisfaction of such order, said judgment and decree should be entered of record and become final. This decree was entered on February 18, 1901, from which no appeal was taken. This action was begun on March 16, 1906. The complaint alleges, to the further effect, that thereafter Mattie B. Burris entered into a written contract with the El Paso Gold Mining & Milling Company, whereby she agreed to convey certain of said properties named in said decree, to wit, the Little May and Australia lode mining claims to said company; that the company agreed to pay therefor 400,000 shares of its capital stock; that the said Mattie Burris or William Burris had no money to pay the purchase price called for by the agreements. It is then alleged that, through certain written conveyances, she conveyed the said properties to the El Paso Gold Mining & Milling Company, which agreed to pay therefor 400,000 shares of its capital stock; that this company also found a person who would purchase 250,000 of said 400,000 shares for \$100,000, which was done, and out of which

the \$60,000, as directed by the decree of the district court, was paid; that a large part of the remaining \$40,000 was devoted to the clearing up of certain debts and defects in connection with the title of said property, including payment of mechanics' liens, etc.; that the balance of said \$40,000, being the major part thereof, was turned over to William Burris or Mattie B. Burris; that the remaining 150,000 shares of said stock, in pursuance of said contract, was not delivered to said Mattie B. Burris, but was delivered to the defendant S. S. Bernard, and held in trust to protect and secure said company against certain defects, mechanics' liens, and judgments against the title of said property, and that the defendant Bernard still holds said 150,000 shares or the major part thereof so in trust; that William M. Burris died prior to the commencement of this action; that Mattie B. Burris and Allen Burris, who are entitled to the stock held by said Bernard, are his sole heirs, etc.

The plaintiff Nesting is alleged to be a part owner by purchase in the interest of the plaintiff Harding to the contract aforesaid. The prayer is for judgment against the defendants for 133,000 shares of said stock, for an accounting, etc., and that Bernard be adjudged to hold the stock in trust for the plaintiffs, etc. The special demurrer raises the question of the statute of limitations; also that the complaint does not state facts sufficient to constitute a cause of action.

It is claimed by the defendants: First, that the contract under which recovery is sought is *malum in se*, and no recovery can be had thereon. Second, that as the complaint pleads the judgment in full in the Anderson suit in favor of Mattie B. Burris, and since it was therein affirmatively adjudicated that she had succeeded to all the rights and interests of the original parties plaintiff, and the decree was never appealed from, that the alleged rights of the plaintiffs in the present action, if any they had, were thereby concluded. Third, that the alleged cause of action attempted to be pleaded was barred by the statute of limitations when the action was brought.

If the third position contended for is correct, neither of the others need be considered; nor the further questions raised by the defendants that a proper construction of the contract as a whole, when that clause which provides for the securing of this advancement by the Little May Company is considered, which means that it was intended to have this money paid back, and thereby made of it simply a loan.

Section 4073, Rev. Stats. of 1908, reads as follows: "Bills of relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within five years after the cause thereof shall accrue, and not after."

It is contended by the plaintiffs that this is the statute of limitation which should apply. The contention of the defendants is that, while the action is barred under this statute, according to the allegations of the complaint it is also barred under general section 4072, Rev. Stats. of 1908, which reads: "Bills for relief, on the ground of fraud, shall be filed within three years after the discovery by the aggrieved party, of the facts constituting such fraud, and not afterwards."

We find it unnecessary to pass upon the three-year statute. According to the allegations of the complaint, the transfer or assignment of the interest of Burris and Brandenburg to Mrs. Burris, and the decree declaring the assignment valid, and her being the owner, being the frauds complained of, transpired over five years prior to the bringing of this action.

Assuming, without deciding, that the facts in the case of *Farris v. Wirt*, 16 Colo. App. 1, 63 Pac. 948, are applicable, and that this is not a proceeding for relief on the ground of fraud, but is a proceeding to enforce a trust, in which the plaintiffs seek to compel specific performance of the contract between Harding and William Burris (who thereby became the trustee of an express trust), the allegations of the complaint are such that the present defendant Mattie B. Burris became the trustee only of a constructive trust.

[1] A purchaser from a trustee in contravention of the trust in no sense becomes thereby an express trustee; he becomes a trustee in invitum by construction of law. He is a constructive trustee. He holds actually in his own right and in hostility to the world; but a court of equity, as Judge Story says, will force a trust upon his conscience and compel him to perform it, or answer for its fruits. 2 Story's Eq. Jur. (12th Ed.) § 1257; 1 Perry on Trusts (5th Ed.) § 172; 2 Pom. Eq. Jur. (2d Ed.) § 1048; *Robinson et al. v. Pierce et al.*, 118 Ala. 273, 24 South. 984, 45 L. R. A. 66, 72 Am. St. Rep. 160; *Smyth v. Oliver*, 31 Ala. 39. Such a trust is raised and enforced by a court of equity as a principle of justice. It has attached to it none of the attributes of an express trust. The purchaser is charged for breaking up the trust, and not because he has agreed to execute it; but, in either event, the remedy of the complainants was all in equity upon bill filed in due season, regardless of which section of the statute of limitations was applicable.

In the case of *M. S. & R. Cole v. Noble*, 63 Tex. at page 434, it is said: "In case of a constructive trust, which is born of fraud, and which presupposes from its beginning an adverse claim of right on the part of the trustee by implication, the statute will commence to run from the period at which the cestui que trust could have indicated his right by action or otherwise." Cited in sup-

port of this statement are other cases of *Hunter v. Hubbard*, 26 Tex. 537; *Anderson v. Stewart*, 15 Tex. 285; *Carlisle v. Hart*, 27 Tex. 350.

[2] But it is contended, as the complaint alleges, that the plaintiff Harding had no actual knowledge of the assignment to Mrs. Burris or of the decree entered in her favor; that the five-year statute did not begin to run until such knowledge was brought home to his attention. This doctrine does not always apply to constructive trusts. But, again assuming that this principle is applicable here, and that, on account of the allegations in the complaint concerning the manner in which Mrs. Burris secured this title, that the statute did not commence to run until the plaintiff Harding had actual or constructive knowledge of such repudiation, we think it can avail him nothing.

The complaint sets forth in full the decree entered by the district court in the *Anderson Case*, pursuant to directions from this court. It recognizes the validity of that decree; in fact, it is necessary, if the plaintiffs recover at all, to base their right upon the validity of the title secured to the property by virtue of this decree. According to this decree, Mattie B. Burris had become the exclusive owner thereof. According to the complaint, she made this claim herself at that time, and caused it to receive the sanctity of a decree of the district court, and we do not think that the complainants can now be allowed to say that this decree is valid in the part under which they seek to recover and meaningless upon the question of her claim of ownership, wherein this portion is detrimental to their contention. In other words, they allege, in substance, that by virtue of this decree, which became final, title was secured in her, yet, notwithstanding this, her adverse claim and holding thereunder were not in good faith, but for the use and benefit of her husband and thereby meaningless, so far as being an adverse claim was concerned. When the contract is given the construction he contends for, Mr. Harding, to a certain extent, is a privy to the *Anderson* suit; he was seeking to obtain a one-third interest in its result in case of a reversal by virtue of a contract, which, practically, according to his interpretation, gave him this one-third interest.

In volume 1, *Herman on Estoppel and Res Judicata*, in section 156, it is stated: "It is not always essential to the creation of an estoppel that the person should be a party to the record. One who instigates and promotes litigation for his own benefit by employing counsel or binding himself for the costs and damages will be bound by the litigation or procedure as much as the party to the record."

While, ordinarily, it is true that the decree of a court binds only parties and their privies in representation or estate, yet the gen-

eral rule appears to be that he who purchases during the pendency of a suit is held bound by the decree that may be made against the person from whom he derives title. 1 *Story's Eq. Jur.* (12th Ed.) § 406; 25 *Cyc.* 1484, 1485; 21 *Am. & Eng. Enc. of Law*, 596; *Bennett on Lis Pendens*, § 320. This being the case, the same rule certainly ought to apply when it comes to the question of being charged with constructive notice of the result of the action.

Counsel for plaintiffs urge that Harding did not purchase the legal title of anything involved in the *Anderson* litigation, but that he thus became interested in the essential use only of the subject of the controversy, which beneficial use they, however, claim was the essential thing. In placing a construction upon a pleading, the substance of its allegations, and not the form, is to be looked at. We think it makes no difference whether the party intruding into the litigation does so by purchase of the thing that is in controversy, or whether his purchase is that of the interest, the fruits, or the result of the controversy. In this case he was to have one-third of anything secured therefrom, and in order to make his interest in it more certain he provided that there should be no settlement made pertaining to it without his consent. Such being the case, as we view it, under these circumstances, it was his duty to have ascertained and had actual notice of the result of this litigation. A party may not be allowed to turn his back to a condition of affairs which he could have observed, when it was his duty to have done so, and then say: "I did not see these matters take place, and for that reason did not have actual knowledge of their existence." The rule has always been that a party, put by the circumstances on inquiry as to a fact, is affected with constructive notice thereof. *Oliver v. Platt*, 3 *How.* 333, 11 *L. Ed.* 622. After the reversal of the *Anderson* suit, it was the duty of the plaintiff Harding to have known the result of this litigation; he should be held to have had constructive notice of the rendition of this decree in the district court of El Paso county, which disclosed, announced, and published the fact to him that, if any such trust relation did exist between him and William Burris or Brandenburg or Mrs. Burris, it was then and there repudiated, and that the title was then being claimed by Mrs. Burris, adverse to him, and in open hostility to any claim he might make. This was more than five years prior to the bringing of this action. We do not think the reasons given by Mr. Harding, viz., that he was in Iowa and relied upon Mr. Burris to keep him posted, are sufficient to relieve him from the responsibility of being held to have had constructive notice of the result of this decree, and the adverse claim then being made by Mrs. Burris, as against him and all the world, as to her ownership of these properties.

We find nothing in the complaint that would appeal to the conscience of the chancellor to relieve him of his laches and failure to bring his action within the statutory period in a case of this kind, where the other party, claiming open and notorious ownership, went through all the trials concerning it, was compelled to raise large amounts of money for its relief, and especially so after the lips of the party who had made the contract with him had been sealed by death, thus preventing him from bringing forward his construction of it or his reasons for non-compliance with it. The complainants had the right to file their bill at any time after the commission of the alleged breach of trust; if they were entitled to what they contend for, after the decision of this court, it was their duty to have followed it up and ascertained as to its disposition at least within the period of the statute of limitation. To disallow its defense would be to overrule that great and invaluable principle of equity which has stood for centuries, requiring the student to be diligent; further, it would be to abrogate the statute itself.

The judgment is affirmed.

Affirmed.

MUSSER and GABBERT, JJ., concur.

# BAILEY et al. v. COLLEGE OF SACRED HEART.

(Supreme Court of Colorado. July 8, 1911. Rehearing Denied Jan. 6, 1912.)

## 1. APPEAL AND ERROR (§ 1078\*)—ASSIGNMENTS OF ERROR—WAIVER.

Defendant, by not arguing a ground of demurrer to the complaint for misjoinder of plaintiffs, waived the assignment.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4256-4261; Dec. Dig. § 1078.\*]

## 2. PARENT AND CHILD (§ 7\*)—INJURIES TO CHILD—ACTIONS—JOINDER OF PLAINTIFFS—PARENTS.

Both parents may join in a suit for the death of a child resulting from a breach of contract to properly care for him.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. § 91; Dec. Dig. § 7.\*]

## 3. ACTION (§ 27\*)—CONTRACT OR TORT.

The complaint alleged that defendant is a corporation, existing under Colorado Laws for the purpose of encouraging learning and of giving usefulness to the institution known as the College of the Sacred Heart, and for such purpose carried on a boarding school; that plaintiffs contracted with defendant for tuition and board for their minor child, the contract providing that, should he become sick, defendant would immediately inform plaintiffs thereof and send for a skilled physician to treat him at plaintiffs' expense; that their son was physically well and sound when sent to the school, but, while there, became sick with diphtheria, a contagious disease, the nature of which illness defendant knew or should have known in the exercise of reasonable care; that a city ordinance required all schools to re-

port contagious diseases to the health commissioner; that defendant did not have any physician attend plaintiffs' son and failed to keep its contract; that plaintiffs first learned of his illness from the boy when they were permitted to remove him from the school, defendant not informing them that he had had diphtheria or had been dangerously sick, and that, though plaintiffs had him skillfully treated, by reason of the neglect and breach of contract by defendant, the disease left the boy with paralysis of the throat and heart, so that in consequence thereof, he died of paralysis of the heart. *Held*, that the cause of action alleged was for breach of contract and not in tort.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 160-195; Dec. Dig. § 27.\*]

## 4. PARENT AND CHILD (§ 7\*)—ACTIONS BY PARENT—ALLEGATIONS OF COMPLAINT.

The complaint sufficiently alleged a cause of action as against general demurrer; not showing that defendant was a purely eleemosynary corporation not organized for profit, even if that fact would relieve it of liability.

[Ed. Note.—For other cases, see Parent and Child, Dec. Dig. § 7.\*]

## 5. APPEAL AND ERROR (§ 19\*)—MOOT QUESTIONS.

The Supreme Court will not, as a rule, decide moot questions.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 63-80; Dec. Dig. § 19.\*]

Error to District Court, City and County of Denver; Carlton M. Bliss, Judge.

Action by Charles M. Bailey and another against the College of the Sacred Heart, Denver, Colo. Judgment of dismissal on demurrer, and plaintiffs bring error. Reversed and remanded.

Talbot, Denison & Wadley, for plaintiffs in error. T. J. O'Donnell, John W. Graham, and R. T. McNeal, for defendant in error.

CAMPBELL, C. J. The action is for damages which plaintiffs claim they suffered from wrongful acts of defendant. A demurrer to the complaint on the grounds that there was a misjoinder of parties plaintiff, and that it did not state facts sufficient to constitute a cause of action, was sustained, and, the plaintiffs electing to stand thereby, the action was dismissed. The complaint charges that defendant is "a corporation organized and existing under and by virtue of the laws of the state of Colorado, for the purpose of encouraging learning and of extending the means of education, and of giving permanency and usefulness to the institution known as the College of the Sacred Heart; and that to such ends it conducted and carried on a boarding school and college in the city of Denver, state of Colorado." It further alleges: That plaintiffs entered into a contract with defendant whereby the latter agreed for a stated pecuniary consideration, to be paid monthly, to provide tuition and board for plaintiffs' minor child, and in the event that he should be taken sick while at defendant's college it would cause plaintiffs to be immediately

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

notified thereof, and would send for a skilled attending physician and have him administer to, and prescribe for, their son during any such illness, the fees of such physician to be an extra charge to plaintiffs. That in pursuance of the contract plaintiffs entered their son as a student and boarder in defendant's school, and he was then physically and mentally sound, well, and strong. That he remained in such school from November 13 until December 11, 1906. That in the latter part of November he became sick with diphtheria, a contagious disease, and continued so to be sick at the school until December 11th. That defendant knew, or ought to have known, in the exercise of reasonable diligence, the nature of the sickness. That an ordinance of the city of Denver required all such schools to report to the health commissioner every case of contagious disease occurring in the school. That plaintiffs' son was a minor, and that defendant did not have its own, or any other, attending physician connected with its college, and neglected and failed to send for any to attend plaintiffs' son in his illness. That, if defendant had performed its duties growing out of the contract referred to, plaintiffs' son would have recovered his health; but defendant failed to observe and keep its agreements, and that plaintiffs first learned from their son himself that he was ill, whereupon they were suffered and permitted by defendant to remove him from the school, defendant not informing them that the child had diphtheria or was even dangerously sick. Immediately, and until his death, plaintiffs provided him with treatment and care of skillful physicians, but by reason of the neglect and breach of the contract by defendant, the disease had left the child with paresis of the throat and heart, so that in consequence thereafter, and within less than a month, he died of paralysis of the heart. Damages were asked against defendant in the sum of \$5,000.

There is nothing in the record to indicate upon what ground the demurrer was sustained.

[1] Defendant, upon this review, has not argued the first ground—that there was a misjoinder of parties plaintiff—and, under our practice, has waived the assignment.

[2] Both of the parents, however, may join in a suit of this kind. *Pierce v. Connors*, 20 Colo. 178-183, 37 Pac. 721, 46 Am. St. Rep. 279.

[3] The question, then, is whether the complaint sets up a cause of action. It is apparent that the action sounds in contract, not tort. There are certain expressions in the complaint which, segregated from the context, might indicate a reliance on negligence independent of contract, but, considering the complaint in its entirety, it is clear that plaintiffs' cause of action, as conceived and relied upon by them, was for a breach of the contract set out in the complaint.

The theory of plaintiffs is that the complaint states a contract between them and an ordinary "business private corporation whereby, for a valuable consideration, defendant corporation agreed to do certain things which it failed to do, by reason whereof the death of their child ensued, for which they are entitled to receive compensatory damages.

[4] Defendant's theory is that there is sufficient in the complaint to show that it is a purely eleemosynary institution, organized under the laws of this state as a corporation not for profit; that it is supported by trust funds which must be held sacred and cannot be used, either as the result of contract, or through negligence by its managing officers, for any other purpose than that of carrying out the object for which it was created, and therefore this contract was not one which defendant by its officers could make; and that, if the cause of action is for a tort committed, defendant is not liable for the negligence of its agents.

Evidently the trial court adopted the views of defendant and entered judgment accordingly. We think the demurrer should have been overruled. If defendant's theory as above outlined is true and can be established by the evidence, such ultimate facts do not appear in the complaint, and they are not to be deduced from its existing allegations. A court is not called upon to lay down abstract principles of law, which may have no application to the real dispute between the parties. It is true that plaintiffs' counsel argues that, even upon a state of facts which defendant says the complaint, by construction, sets forth, defendant is liable for its breach of the contract pleaded. We withhold expression of opinion thereon, for defendant may file an answer, which the facts produced at the trial may establish, making an entirely different case.

[5] This court is not organized to decide moot cases. It will be time to apply the law when the pleadings, or facts, or both, present a real controversy. The only allegation in the complaint as to the character of defendant corporation is the one which has been quoted in the foregoing statement. It may be subject to a special demurrer for uncertainty as to defendant's corporate character, yet it is good against a general demurrer, as stating a cause of action for breach of a contract which, so far as the complaint shows, was within the power of defendant to make. Defendant argues that the breach of the contract was not the proximate cause of the child's death. We cannot, as matter of law, say that it was not. The complaint says it was. The answer may deny it, and the proofs may, or not, be with defendant. Until the facts are made known, decision of the point should be withheld.

The judgment is reversed and the cause remanded, with instructions to vacate the judgment of dismissal and the order sustaining



the demurrer, to enter an order overruling the demurrer, with leave to defendant to answer as it may be advised. Further proceedings, if any, to be in harmony with this opinion.

Reversed and remanded.

GABBERT and HILL, JJ., concur.

# CITY OF GOLDFIELD v. MacDONALD et al.

(Supreme Court of Colorado. Dec. 4, 1911.  
Rehearing Denied Jan. 6, 1912.)

## 1. PLEADING (§ 220\*)—DEMURRER—RULING—EFFECT.

Where the complaint was demurred to on several grounds, a general order sustaining the demurrer determined every legal issue tendered thereby in favor of defendant.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 220.\*]

## 2. MUNICIPAL CORPORATIONS (§ 1016\*)—MUNICIPAL OBLIGATIONS—CANCELLATION—ACTIONS—PARTIES.

A city had the legal capacity to sue to cancel municipal water right obligations issued through the fraudulent conspiracy of its officers with others for private gain.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 2189; Dec. Dig. § 1016.\*]

## 3. PLEADING (§ 208\*)—DEMURRER—SPECIAL DEMURRER—SUFFICIENCY.

In a suit by a city to cancel water right obligations issued in its name by the fraudulent conspiracy of members of the city council and others in order to sell land to the city for private profit, a special demurrer to the complaint recited that it was ambiguous, unintelligible, and uncertain in that it did not connect the matters alleged therein with defendants or either of them and did not state the place, day, or date of any of the supposed facts, nor which of defendants performed the alleged acts, and that the allegations were not specific as to any one defendant. *Held*, that the demurrer was too indefinite to be considered, not sufficiently pointing out the defects complained of.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 513-519; Dec. Dig. § 208.\*]

## 4. PLEADING (§ 192\*)—OBJECTIONS—INDEFINITENESS—REMEDY.

If a complaint states a cause of action, objections thereto for indefiniteness or informality in the allegations should be taken by motion and not by demurrer.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 408-427; Dec. Dig. § 192.\*]

## 5. MUNICIPAL CORPORATIONS (§ 1034\*)—WATER RIGHT OBLIGATIONS—ACTION TO CANCEL—SUFFICIENCY OF COMPLAINT.

A complaint by a city alleged that the four female defendants owned a half interest in a 10-acre tract near complainant city, and, together with another defendant, owned a pretended water right connected therewith, all of which property, to the knowledge of all of defendants, was not worth more than \$2,000 and was of no use whatever to the city; that four of the other defendants were members of the city council which consisted of six members, and that three other defendants were attorneys at law, representing the property owners and advisers of the councilmen, and that the several defendants, for the purpose of defrauding the

city, conspired together to sell the interest mentioned in the land and water right to the city for \$30,000, using the official position of the councilmen to effectuate the sale, and have issued water right obligations of the city for the agreed price, which was divided between all of defendants. The complaint also set out the form of the water right obligations and prayed that they be canceled. *Held*, that the complaint stated a cause of action on demurrer.

[Ed. Note.—For other cases, see Municipal Corporations, Dec. Dig. § 1034.\*]

## 6. PLEADING (§ 214\*)—DEMURRER—ADMISSIONS.

A demurrer admits of all the material facts alleged in the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 525-534; Dec. Dig. § 214.\*]

Error to District Court, City and County of Denver; Samuel L. Carpenter, Judge.

Suit by the City of Goldfield against John MacDonald and others. Judgment dismissing the complaint, and complainant brings error. Reversed with instructions.

J. McD. Livesay and Thomas, Bryant & Malburn, for plaintiff in error. Van Cise & Grant, for defendants in error, MacDonalds, Eliasons, and Struby-Estabrook Co.

BAILEY, J. The action is for the cancellation of certain outstanding municipal obligations of the city of Goldfield, referred to as "water right obligations," the precise form of which is set out at length in the complaint. The allegations of the complaint disclose, in substance, this state of facts:

That prior to the 12th day of November, 1900, the defendants, Minnie, Christina, Tenna and Kittle MacDonald, now Kittle Eliason, were the owners of an undivided half of 10 acres of land described in the complaint; that these defendants, with one John MacDonald, who was then acting as attorney in fact for the other MacDonalds as well as for himself, claimed to own an undivided one-half of a pretended water right, said to be connected with the land; that the defendants, Smith, Collins, La Kamp and Allen, were members of the city council of the city of Goldfield, which consisted of a mayor and six aldermen; that the defendants, Hoyt, Parks and Little, were attorneys at law and acted in an advisory capacity to Smith, Collins, La Kamp and Allen, as members of the city council, and also represented and acted for the MacDonalds in the transactions involved in this suit.

That prior to November 12, 1900, the defendants, the MacDonalds, for the purpose of defrauding the city of Goldfield, entered into an agreement with the defendants Smith, Collins, La Kamp and Allen, and Hoyt, Parks and Little, whereby it was agreed that the MacDonalds should offer to sell, and did sell to that city, the land and water right described for \$30,000 in water right obligations of the city of Goldfield; that when the proposition should be submitted to the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

city council, Smith, Collins, La Kamp and Allen, in their official capacity as members of the council, should vote to accept the proposition on behalf of the city, and should order the issuance of the water right obligations in payment therefor.

That on or about October 12th a proposition in writing was submitted in behalf of the MacDonalds to said four members of the council, proposing to sell said property to the city, and to carry out this deal 30 or more obligations for \$1,000 each were prepared and lithographed in words and figures as pleaded. It was also arranged that La Kamp, president of the council, should sign and execute the obligations, and all necessary details were arranged for the immediate delivery thereof to John MacDonald. A deed conveying the land and water rights to the city was prepared, executed and signed on November 12th, ready for delivery prior to the acceptance of the proposition.

On November 12th a regular meeting of the city council was held, at which meeting the proposition of sale was first presented; also a resolution, which purported to accept the proposition for the city and to authorize the issuance of the water obligations.

Immediately on the passage of the resolution, on November 12th, La Kamp signed the obligations. The next morning he caused the city clerk to attest his signature and the seal of the city to be impressed thereon. They were delivered to the MacDonalds and other unknown parties, and were secretly taken away to hinder the taxpayers of the city from bringing suit to prevent their delivery and disposal. These obligations were never presented to the mayor for signing and were never signed by him. No ordinance providing for the purchase and issuance of these obligations was ever passed by the city; nor was the proposition to purchase the property in question submitted to the taxpaying voters.

The defendants Smith, Collins, La Kamp and Allen were to and did receive a part of the water right obligations, or the proceeds thereof, for voting for and carrying out the fraudulent purchase scheme. The land and alleged water rights were not worth to exceed \$2,000, and were and are of no use whatever to the plaintiff, which the defendants well knew, and in selling same to the city they intended to defraud the city of \$30,000; that the obligations are fraudulent and void, as the city never received any valuable or adequate consideration therefor.

On April 15, 1901, a new city council was inducted into office, whereupon, and at the earliest possible moment, it passed a resolution declaring all of the acts done by defendants Smith, Collins, La Kamp and Allen, in carrying out said scheme, to be wholly fraudulent and void. On April 22, 1901, the city by resolution authorized and instructed the mayor to reconvey said land and water rights to the MacDonalds; that deeds at-

tested by the city clerk have been made out, executed and sent to John MacDonald, reconveying same accordingly.

Prior to April 15, 1901, defendants Smith, Collins, La Kamp and Allen were members of the council and parties to the fraud, and it was impossible to induce them to take any action to cancel the obligations. Defendants MacDonalds, Eliason, Hoyt, Parks and Little have in their possession a number of these obligations and are using every endeavor to dispose of them, and the defendant, the Struby-Estabrook Company, has two of them, which are held as security for the personal debts of John MacDonald, all of which will be disposed of if not enjoined. That plaintiff has no speedy or adequate remedy at law. Then follows an allegation of urgency, with prayer for temporary and final relief.

A demurrer was interposed to the complaint on three separate grounds:

1. That it does not state facts sufficient to state a cause of action against all, or any one, or either, of the defendants;

2. That the plaintiff has no legal capacity to sue; that is to say, that this action is misconceived and cannot be maintained by plaintiff, as it is without power or authority to do so; and,

3. That the complaint is ambiguous, unintelligible and uncertain, in that it does not connect the matters and things alleged with the defendants or either of them, and does not state the place, day or date of any of the supposed facts, nor which, if any, of the defendants performed the alleged acts; that the allegations thereof, so far as the defendants are concerned, are general and not specific as to any one defendant.

The court below sustained the demurrer, and, the plaintiff failing to amend, rendered a judgment of dismissal. The case is brought here on error to review the ruling of the court upon the demurrer and its action in dismissing the complaint.

[1] The order sustaining the demurrer is general, and means that the court held the complaint bad for all the legal reasons assigned; that is, the court resolved every legal issue tendered by the demurrer in favor of the defendants. In legal effect this ruling was to hold: 1. That the complaint states no cause of action; 2. That the plaintiff, the city of Goldfield, is without legal capacity to sue; and, 3. That the complaint is ambiguous, uncertain and unintelligible.

If the court meant to hold the complaint bad simply because of uncertainty, ambiguity or unintelligibility, it was its duty to so advise, and then doubtless an attempt would have been made to amend it in conformity with such ruling. But when it was held that plaintiff had no legal capacity to sue, and that no cause of action was stated, amendment was impossible, and plaintiff could do nothing except stand by its cause as made.

[2] The ruling on the demurrer was wrong

and the judgment of dismissal based thereon cannot stand. There is neither suggestion nor pretense anywhere in argument that the plaintiff is without legal capacity to sue, and we can conceive of no reason upon which such holding can be supported. We are also of the opinion that a cause of action is stated in the complaint, and that it was error to hold otherwise.

For the sake of argument, let it be admitted that the plaintiff should have stated more definitely and specifically the dates, places and other details connected with the fraudulent acts and conduct charged; yet, with all those matters, to which the special demurrer may fairly be said to refer, absent from the complaint, sufficient is alleged to constitute a cause of action and put the defendants to answer. [3] Furthermore, the special demurrer is too indefinite to deserve serious attention. It does not, with sufficient certainty, point out the specific and precise defects complained of, and is itself, therefore, without merit. [4] The rule is, that when a complaint states a cause of action, a demurrer because of incomplete, imperfect and informal allegations will not lie; if the defendant desires to have the facts alleged with greater particularity, that result must be sought by motion.

Pomeroy's Code Remedies (4th Ed.) §§ 442, 443, speaking to this point, says:

"The Codes clearly intend to draw a broad line of distinction between an entire failure to state any cause of action or defense, on the one side, which is to be taken advantage of either by the general demurrer for want of sufficient facts, or by the exclusion of all evidence at the trial, and the statement of a cause of action or a defense in an insufficient, imperfect, incomplete, or informal manner, which is to be corrected by a motion to render the pleading more definite and certain by amendment. The courts have, in the main, endeavored to preserve this distinction, but not always with success; since averments have sometimes been treated as merely incomplete, and the pleadings containing them have been sustained on demurrer, which appeared to state no cause of action or defense whatever; while, in other instances, pleadings have been pronounced wholly defective and therefore bad on demurrer, or incapable of admitting any evidence, the allegations of which appear to have been simply imperfect or incomplete. It is undoubtedly difficult to discriminate between these two conditions of partial and of total failure; and it is utterly impossible to frame any accurate general formula which shall define or describe the insufficiency, incompleteness or imperfectness of averment intended by the Codes, and shall embrace all the possible instances within its terms. By a comparison of the decided cases, some notion, however, may be obtained of the distinction, recognized if not definitely established by the courts, between the absolute deficiency which ren-

ders a pleading bad on demurrer or at the trial, and the incompleteness or imperfection of allegation which exposes it to amendment by motion; and in this manner alone can any light be thrown upon the nature of the insufficiency which is the subject of the present inquiry.

"The true doctrine to be gathered from all the cases is, that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete, and defective, such insufficiency pertaining, however, to the form rather than to the substance, the proper mode of correction is not by demurrer, nor by excluding evidence at the trial, but by motion before the trial to make the averments more definite and certain by amendment. From the citations in the footnote, it is clear that the courts have, with a considerable degree of unanimity, agreed upon this rule, and have in most instances applied it to the defects and mistakes having the same general features, and have sometimes severely strained the doctrine of liberal construction in order to enforce it.  
\* \* \*

[5] Succinctly stated, the complaint charges these ultimate facts: That the four defendants, the MacDonald women, in November, 1900, owned an undivided one-half interest in 10 acres of land near the city of Goldfield; that they, together with John MacDonald, another defendant, owned a pretended water right connected with that land; that to the knowledge of all of the defendants this property was of no greater value than \$2,000, and was of no use at all to the city of Goldfield; that the defendants Smith, Collins, La Kamp and Allen were then members of the town council of the city of Goldfield, which consisted of six members; that the defendants Parks, Little and Hoyt were attorneys at law representing the MacDonalds, and at the same time advising these four councilmen; that these several defendants, for the purpose of defrauding the city of Goldfield, conspired and confederated together to sell the interest in the land and the water right in question to that city for \$30,000, using the good offices of these councilmen, in their official capacity, to put through the deal, issue water right obligations of the city for the agreed purchase price and divide the proceeds; and that the deal was consummated, the obligations issued, and a division of the spoils made, the four councilmen having sold their official acts to accomplish this result. There is no ambiguity, no uncertainty and no unintelligibility about this statement of facts. The defects in the complaint, if any, are not of substance, but consist rather in informal, imperfect, and incomplete statements of facts, and are to be remedied, if at all, as we have already seen, by motion

pointing out specifically and particularly the precise matters of which complaint in this respect is made. Manifestly there is an infinitude of detail, connected with a transaction such as is here under consideration, which could be stated, and some of which details possibly, on motion, the plaintiffs might properly be required to set forth. But that the facts as alleged state a cause of action, requiring answer from the defendants, cannot be successfully challenged.

[6] It is a plain, clear and explicit charge of official wrongdoing by the four councilmen for a money consideration, which, if true, and for the purposes of the demurrer these material facts which we hold have been well pleaded are admitted to be true, renders the supposed obligations utterly void.

If the charges made are true, then the conduct of these officials is condemned on every principle of law, justice, morality and public policy, and the plaintiff city has an undoubted right to have these unholy obligations canceled and held for naught. The cause ought to be tried upon its merits, and the defendants, above all others, if innocent of wrongdoing, should be here insisting upon such action, rather than contending and defending on mere technicalities.

We leave the questions argued in the briefs, as to whether the loan should have been authorized by ordinance, whether the seal of the city should have been attached to the obligations, whether they should have been signed by the mayor, whether the length of time for which they were to run is in conflict with the statute, whether they were issued for a purpose for which the city was authorized to issue negotiable paper, and other kindred questions, undetermined; so also any and all proper questions which may be

hereafter urged by alleged innocent holders for value of any of these obligations.

Citations of authorities to support the views here expressed, relative to the legality of these obligations, if issued in manner and form and upon the considerations alleged, seems unnecessary. However, we have examined with care the following and find in them ample and satisfactory support for our conclusion on this point, should the alleged facts of corruption, upon a trial of the merits, prove well founded: 1 Bigelow on Fraud, pp. 319, 320; Cook on Corporations, § 648; Mechem on Agency, §§ 464-467 and 461-463; Perry on Trusts, § 207; Morgan v. King, 27 Colo. 539, 63 Pac. 416; Wardell v. Railroad Co., 103 U. S. 651, 26 L. Ed. 509; Wight v. Rindskopf, 43 Wis. 344; 3 Clark & Marshall on Private Corporations, p. 2289, § 757; Smith on Municipal Corporations, § 739; Snipes v. City of Winston, 128 N. C. 374, 35 S. E. 610, 78 Am. St. Rep. 686; Santa Ana Water Co. v. Town of San Buenaventura (C. C.) 65 Fed. 323; Oscanayan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Meguire v. Corwine, 101 U. S. 108, 25 L. Ed. 899; Lee v. Johnson, 116 U. S. 48, 6 Sup. Ct. 249, 29 L. Ed. 570; Lucas v. Allen, 80 Ky. 681; City of Concordia v. Haggman, 1 Kan. App. 35, 41 Pac. 133; and Carter-Crume Co. v. Perrung, 86 Fed. 439, 30 C. C. A. 174.

The judgment is reversed and the cause remanded with instructions to the lower court to allow defendants to file a motion to make the complaint more specific, or grant leave to plaintiff, if it shall so apply, to amend its complaint, amending generally, as it may be advised.

Reversed and remanded with instructions.

MUSSER and WHITE, JJ., concur.

## SAN PEDRO, L. A. &amp; S. L. R. CO. v. HAMILTON et al.

HAMILTON et al. v. SAN PEDRO, L. A. &amp; S. L. R. CO.

(L. A. 2,539, 2,540.)

(Supreme Court of California. Dec. 19, 1911.

Rehearing Denied Jan. 18, 1912.)

## 1. NAVIGABLE WATERS (§ 37\*)—"TIDELANDS."

Const. art. 15, § 3, provides that all tidelands within two miles of any incorporated city or town in the state fronting on the waters of any harbor, estuary, bay, or inlet used for navigation shall be withheld from grant or sale to private persons, partnerships, or corporations. *Held*, that the word "tidelands," as so used, was not limited to lands covered and uncovered by daily efflux and reflux of the tide, but embraced lands properly described as submerged lands.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-227; Dec. Dig. § 37.\*

For other definitions, see Words and Phrases, vol. 8, p. 6970.]

## 2. STATUTES (§ 104\*)—CURATIVE OR VALIDATING ACT—SPECIAL LEGISLATION.

St. 1907, p. 987, confirming and validating leases of any tide or submerged lands belonging to the state within the municipal boundary of any county or municipality, or over which the county or municipality at the time of executing the lease was acting in de facto authority, for a period of not more than 50 years, etc., was not unconstitutional as special legislation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 116; Dec. Dig. § 104.\*]

## 3. NAVIGABLE WATERS (§ 37\*)—"TIDELANDS"—"GRANT OR SALE"—LEASE.

Const. art. 15, § 3, provides that all tidelands within two miles of any incorporated city or town, and fronting on the waters of any harbor, estuary, bay, or inlet used for navigation, shall be withheld from "grant or sale" to private corporations, partnerships, or corporations. *Held* that, while the word "grant" has sometimes been used to include a lease for a term of years, the constitutional provision should be construed in its ordinary sense to refer to a conveyance of the title to property; and hence such provision did not prevent a lease of tidelands belonging to the state to private persons or corporations for a term of years.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 201-227; Dec. Dig. § 37.\*

For other definitions, see Words and Phrases, vol. 4, pp. 8151-8156; vol. 8, p. 7674.]

In Bank. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Actions by the San Pedro, Los Angeles & Salt Lake Railroad Company against Louise M. Hamilton and husband and by Louise M. Hamilton and husband against the same railroad company. Judgment for the railroad company in each case, and the Hamiltons appeal. Affirmed.

Grant Jackson, Keefer & Bowers, John W. Shenk, City Atty., and Leslie R. Hewitt, Sp. Counsel, for appellants. Anderson & Anderson, amici curiæ. A. S. Halsted, Miner P. Goodrich, and W. C. Petchner, for respondent. Benjamin E. Page, amicus curiæ.

HENSHAW, J. The above-entitled cases involve a consideration of the same legal questions. The former case is an action to quiet title, the latter an action in ejectment, both between the same parties.

The facts found by the court, over which there is no controversy, may be briefly stated. In 1903 the government of the United States was engaged in the improvement of the harbor of San Pedro. The work contemplated a deepening of the "inner harbor" (an estuary or arm of the sea), the rectification of the inner harbor lines, the construction of jetties delimiting those lines, and to the seaward the construction of an enormous breakwater which, in a great sweep or curve, extends across the entrance to the inner harbor, and, while protecting it, affords safe anchorage to vessels on its landward side. Much dredging was necessary to deepen the inner harbor. The disposition of the material dredged was important. If cast into the ocean, the reflux tides would carry it back to the inner harbor. This being the condition, in April, 1903, the United States government entered into a contract with the San Pedro Railroad Company, by which it was agreed that the corporation would build in the Pacific Ocean, east of the inner harbor and of the government jetty bounding that harbor upon the east, a sea wall and retaining wall which would protect and confine not less than 2,500,000 cubic yards of the material dredged by the government from the inner harbor, and permit the government to pump its dredged material onto the corporation's land. The object to be attained was one of mutual benefit to the contracting parties. The government, upon the one hand, would thus safely and economically dispose of the dredged material, and the corporation, upon the other hand, would receive the benefit of this dredged material in the contemplated reclamation of tide and submerged lands fronting on the Pacific Ocean. Thereafter the railroad company obtained a lease from the city of Long Beach, a municipality of the sixth class, whose jurisdiction then extended over the territory in question, to a tract of land including the lands in controversy. It then proceeded, at an expense of \$30,000, to build the retaining wall. The government deposited the materials dredged from the inner harbor within the confines of the wall, and thus were reclaimed from the Pacific Ocean the lands here in controversy. Thereafter, on March 23, 1907, the Legislature of the state of California passed a validating act, ratifying leases of a certain class, within which class this lease admittedly comes. Of the greater part of the lands in controversy, the railroad company has been in possession under its lease. To a minor portion of the lands, in the possession of Louise M.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Hamilton and her husband, the railroad company has claimed the right of possession.

The foregoing outlines the railroad company's claim of title. Louise M. Hamilton, defendant in the one action, plaintiff in the other, claimed a right of possession to a portion of the lands by virtue of her attempt to comply with the provisions of the possessory act of 1852. Stats. 1852, p. 158. Without regard to the question whether this act has been repealed, it is sufficient to say that the act contemplates the occupation of public lands "for the purpose of cultivating or grazing the same." The court found that none of the lands was suitable for purposes of cultivation or grazing—a finding which, under the circumstances, will excite no surprise. In truth, no serious attempt is made to support the asserted claim of title of the Hamiltons; their possession of a small portion of the land, however, affording sufficient standing ground from which to attack the title of the railroad company.

It was made to appear that the city of San Pedro had made leases similar to the one here in question, and that the city of San Pedro had subsequently become annexed to or amalgamated with the city of Los Angeles. The city of Los Angeles had also from the state acquired certain rights to the lands contiguous to the harbor of San Pedro, which rights, it is asserted, include the lands here in question. The city of Los Angeles, however, did not connect itself with this litigation, but was permitted through its representatives to file a brief. Other briefs were filed in answer thereto by others interested in the principal question here to be considered.

That question may be thus broadly stated: When the Constitution (article 15, § 3) declares: "All tidelands within two miles of any incorporated city or town in this state, and fronting on the waters of any harbor, estuary, bay, or inlet used for the purposes of navigation, shall be withheld from grant or sale to private persons, partnerships or corporations"—does this language forbid the leasing for a term of any part of such lands?

[1] For the consideration of the question thus broadly stated, "tidelands," as thus used in the Constitution, will be construed more broadly than in the ordinary signification of lands covered and uncovered by the daily efflux and reflux of the tide. It will be construed to embrace lands properly described as submerged lands (Ward v. Willis, 51 N. C. 183, 72 Am. Dec. 570), such as, in major parts, the lands here in controversy unquestionably were. The phrase will be so construed to carry out the manifest intent of the framers of the Constitution to protect the harbors of cities and towns from falling into private monopolistic ownership. *People v. Kerber*, 152 Cal. 731, 93 Pac. 878, 125 Am. St. Rep. 93. Such being the undoubted purpose, it would result in the absolute de-

struction of that purpose to hold that a city might not convey its tidelands proper, but might convey into private ownership all of the submerged lands beyond the tidelands proper. For there thus might be erected an impassable barrier between the city and its own harbor waters, with the resulting monopolistic control of the harbor itself. It will further be assumed that the lands here in controversy front on a "bay." They certainly do not front upon the harbor of San Pedro, for the maps in evidence in the case establish that between these lands and the harbor of San Pedro is a wide jetty, wholly under the ownership and control of the government of the United States. To seaward these lands front upon the Pacific Ocean. They do not even front upon the outer harbor, but upon the open sea. The slight indentation in the shore line upon which they do front is San Pedro Bay, and, as has been said, it will be assumed that this bay is used for purposes of navigation, so as to bring the lands within the purview of the language of the Constitution.

[2] The Legislature, by its general validating act, as has been said, admittedly confirmed the lease made by the city of Long Beach. Stats. 1907, p. 987. If this confirmatory act is valid, it, of course, cures any defects in the lease from the town of San Pedro which may be thought to exist by reason of the lack of power in that municipality. Against the validity of the act, it is contended that it is special legislation. But this contention is completely answered by *Upham v. Hosking*, 62 Cal. 250, *Baird v. Monroe*, 150 Cal. 560, 89 Pac. 352, and *Redlands v. Brook*, 151 Cal. 474, 91 Pac. 150. The principle of decision is that such curative acts do not come within the constitutional inhibition against special legislation. Elsewhere the same principle of decision is uniformly applied. *Read v. Plattsmouth*, 107 U. S. 568, 2 Sup. Ct. 208, 27 L. Ed. 414; *State v. Brown*, 97 Minn. 402, 106 N. W. 477, 5 L. R. A. (N. S.) 327; *State v. Squires*, 26 Iowa, 340.

[3] This conclusion, then, is a declaration that the Legislature did not violate this particular constitutional inhibition against special legislation in the passage of the curative act, and thus clears the way for the consideration of the ultimate question first above stated. In passing, it may be said that it is, of course, recognized that the legislative department of the state, like the Congress of our national government, has plenary power over the management and disposition of state lands, subject, of course, in the case of lands under navigable waters, to the paramount right of the national government to exercise a control in the interest of commerce and navigation, and subject, also, to the trust for the whole public upon which these lands are held by the state—a trust which would forbid the alienation into

private ownership of any such considerable part of them as would interfere with the proper exercise of the public trust upon which they are all held. But with none of these questions does this case concern itself. The question before us is a much narrower one. It is the question of the extent of the limitation of this general power imposed upon the Legislature by the constitutional mandate. The Constitution has clearly forbidden the Legislature from granting or selling lands of the character of those here in controversy. The question is: Did the Constitution by this language mean to forbid the Legislature from leasing, as contradistinguished from disposing of the fee, any such lands?

Over the meaning of these words "grant or sale," as thus employed in the Constitution, many niceties of reasoning are indulged in, and many authorities upon either side are cited. Thus it is pointed out that section 1053, Civil Code, provides that a transfer in writing is called a "grant," or "conveyance," or "bill of sale," and that the term "grant" in that section and in the succeeding articles includes all these instruments. Again, it is pointed out that section 1091, relating to the transfer of real property, provides that an estate in real property, other than an estate at will or for a term not exceeding one year, can be transferred only by operation of law, or by an instrument in writing; that section 1092 provides that a "grant of an estate in real property may be made in substance as follows"; and that this contemplates a leasehold interest exceeding one year. Again, section 1105 provides that a fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended, and that by this section the lesser estate referred to must be a life estate or a leasehold estate for years. Again, section 1108 deals with "a grant made by the owner of an estate for life or years." Still further it is pointed out that in *S. F. & O. R. R. Co. v. City of Oakland*, 48 Cal. 502, it is declared that at the present day the word "grant" is effectual to convey an estate in a corporeal hereditament; that the word has now become a generic term, applicable to the transfer of all classes of real property; and that in *Commercial Bank v. Pritchard*, 126 Cal. 600, 59 Pac. 180, a lease of land for a term of five years is construed to be a conveyance of real property, within the meaning of section 1215, Civil Code. Upon the other hand, respondent points out that these interpretations have to do generally with recordation acts, and that, while section 1053, as above set forth, declares that "a transfer in writing is called a grant or conveyance or bill of sale," a transfer, itself defined by section 1039 of the same Code, is "an act of the parties or of the law by which the title to prop-

erty is conveyed from one living person to another," and that in the case of leases the title is not transferred. Attention is directed to such cases as *Simonson v. Burr*, 121 Cal. 582, 54 Pac. 87, where it was contended that the lease of the homestead was an abandonment of the homestead right, under section 1243 of the Civil Code, which declares that a homestead is abandoned "by a grant thereof," and this court held that a lease was not embraced within the meaning of "grant," as there employed; and *Mott v. Ruckman*, 3 Blatchf. 71, Fed. Cas. No. 9,881, where the statute provided that no conveyance of a vessel should be valid, unless recorded, and the vessel had been leased, the United States Circuit Court held that a lease was not included in the word "conveyance"; and *Des Moines Co., etc., v. Tubbsing*, 87 Iowa, 188, 54 N. W. 68, where the court declared: "We are unable to find a single instance where the word 'grant' is construed as a 'lease,' without other words to control its meaning." And, finally, the *American & English Encyclopedia of the Law* (2d Ed.) vol. 7, p. 487, is cited to the following effect: "Blackstone enumerates leases as among the primary 'conveyances' at common law, and in several cases the term 'conveyance' has been held to include a 'lease'; but the weight of authority is to the effect that in its ordinary significance the term does not embrace a chattel interest in realty."

Enough has been said to show that the meaning of the word "grant" has by judicial interpretation been narrowed or enlarged to meet the exigencies of specific cases and the spirit of the law in which the word is employed. We are still left to determine the specific meaning as employed in the Constitution. And here resort first must be had to the rule of construction that, in interpreting the Constitution, as in construing a legislative statute, unless a special definition has been given to a word, the word shall be taken in its ordinary and generally accepted sense. *Harris v. Reynolds*, 13 Cal. 514, 73 Am. Dec. 600; *Houghton's Appeal*, 42 Cal. 35. These cases have to do with the construction of statutes. The applicability of the same rule in constitutional interpretation is declared in *Oakland, etc., Co. v. Hilton*, 69 Cal. 491, 11 Pac. 3. Indeed, even if the word have a technical, as well as popular, meaning, the latter will be given it, unless the context forces the conclusion that it was otherwise used. *Well v. Kenfield*, 54 Cal. 111. It cannot be gainsaid but that in the ordinary and general acceptance of the word "grant" and of the word "sale," and particularly where the two are used in conjunction, as here, they convey the idea of parting with the fee for a monetary or other consideration, and do not embrace the concept of a lease. It would require no explanation if a man declared that he had granted his farm. But it would require ex-

plantation if he desired to be understood thereby that he had merely leased it. It would require no explanation if a man should desire to convey the idea that he had sold his horse or his house, but it would require much explanation if he said that by the use of the word "sold" he meant to convey the idea that he had leased his house or let his horse. Only by a resort to meanings given to the words in extreme cases, and not to their generally accepted meaning, can they be stretched to cover and include the idea of leasing.

A resort to the constitutional debates to which we are invited throws no light upon the question. An amendment to the provision as it now stands was offered, authorizing boards of supervisors to lease for a limited period of years, excepting from this provision the board of supervisors and the water front of the city and county of San Francisco. In the debate which followed, little light is thrown upon the question, because the attack was directed principally to the whole section, with or without its amendment. It cannot be determined from the debates, under any consensus of opinion expressed by the debaters, why the amendment was stricken out, and, for aught that appears to the contrary, it might have been under the view that the section as it now appears authorized leases without the amendment. It might have been because the term of leasing in the proposed amendment was deemed too great or too small; or it might have been because the city and county of San Francisco was excluded from the operation of the provision. It might have been for any of these or for a multitude of other reasons.

Much more light, however, is thrown upon the question by the interpretation put upon it by the body which first declared it, and which, saving for the constitutional restrictions, has supreme charge and control over the public lands, namely, the Legislature. The constitutional provision itself was originally a legislative enactment. It will be found in the early statutes (see Pol. Code, § 3488), which, making provision for the sale of swamp, marsh, and tide lands, excluded from the operation of the law all such lands within five miles of the corporate limits of either San Francisco or the city of Oakland, or within two miles of any other incorporated city or town. The advocates of the constitutional amendment declared in debate that by subdivision 3 they were merely putting into the Constitution what for years had been upon the statute books of the state. As this provision originated with the Legislature, its interpretation of its own enactment is peculiarly persuasive. Throughout it will be found that the Legislature has never regarded its provision or the constitutional declaration as forbidding the leasing of such lands. The act of the Legisla-

ture ratifying this lease does not stand alone. An act of the Legislature in 1889 (Stats. 1889, p. 305) creates a board of state harbor commissioners for the bay of San Diego. By this act certain sections were added to the Political Code, and one of them (section 2605) declares: "The commission shall have the right to lease said lands under such established rules and regulations as it may adopt." In 1901 (Stats. 1901, p. 601) the lease of China Basin in the bay of San Francisco was ratified and confirmed by the state. By act of March 26, 1895 (Stats. 1895, p. 194), the state board of harbor commissioners of San Francisco was authorized "to lease such portion or portions of the sea wall as they may deem expedient for such purposes solely, as will be most advantageous to the commerce of the port." The Legislature of 1909 ratified and approved amendments to the charter of the city of Los Angeles. Stats. 1909, p. 1289. And herein was the provision that the city may "lease by ordinance from the water front in excess of said 10,000 feet so owned by the city \* \* \* alternate frontages," etc. While in an act granting to the city of Los Angeles the tidelands and submerged lands of the state within the boundaries of the city (Stats. 1911, p. 1256), it is declared "that said city or its successors may grant franchises thereon for limited periods for wharves and other public uses and purposes, and may lease said lands or any part thereof for limited periods for purposes consistent with the trusts upon which said lands are held by the state of California." And prior to the adoption of the Constitution of 1879 authority to make leases of the tidelands had been frequently granted by the Legislature to the harbor commissioners of San Francisco. Stats. 1863, p. 406; Stats. 1865-66, p. 853; Stats. 1867-68, p. 408; Stats. 1869-70, pp. 799-800. Finally, it may be said that by this court there has been a judicial acceptance of the soundness of this interpretation expressed in *Pac. Coast Steamship Co. v. Kimball*, 114 Cal. 414, 46 Pac. 275, where the city of Monterey had leased land to a steamship company, which had erected thereon its private wharf; the land being within the corporate limits of the city. In discussing the power of the municipality to make such a lease, the court, speaking through Justice Temple, said: "Wharves are often appropriated to the use of an individual or a company, and it cannot be doubted that Monterey could lease small portions of its water front for bathing grounds, or for any lawful purpose, not injurious to the harbor or an inconvenience to commerce. This being so, I see no reason why it might not lease a small portion to a steamship company for its special use."

But if, after all this, doubt can be entertained, that doubt must be resolved in favor of the power of the state so to lease, from the manifest benefits which will follow such



construction, as contrasted with the most obvious detriments to commercial development which would attend the other. The purpose of the constitutional provision was not to blight commercial development, but to foster it. It designed to foster it by preventing the alienation into private ownership of the fee of such lands, whereby all might be acquired and held in private ownership to the destruction of the public use. But it did not mean to abort commerce in embryo or to strangle it in its infancy by putting a ban upon the activities of private commercial enterprises. Saving in San Francisco, most of the improvements of our harbors have been made by private capital. The case last referred to in 114 Cal. 414, 46 Pac. 275, is typical of it, where the sole wharf of the town of Monterey, at which five steamers a week landed, was due wholly to private enterprise and private capital. To hold that the state, or that municipalities acting as its mandatories, may not lease, with proper restrictions of time and proper regard to public and quasi public use, lands such as these, so that private enterprise and capital may build up the commerce of our seaport cities, is to declare that all such commerce must await the slow and frequently incompetent initiative of the municipalities themselves—municipalities which frequently are unwilling to incur the expense and risk which would be accepted under reasonable terms by private enterprise. If municipalities may not so lease these lands, they may not even grant franchises in connection with them; for, notwithstanding the well-recognized legal distinctions existing between a lease of land and a franchise involving the use of land for specific purposes, in practical effect the franchise is nothing other than a lease, with a right of possession and use for the indicated purposes. Pol. Code, § 2911. Nor need the slightest apprehension be felt that the power so to lease may result in a monopoly comparable to that which might follow the power to sell. In the case of sale, the title and control over the land are gone. In the case of leases, all proper restrictions may be cast about the use. An entry by the lessor may be had for breach of covenant; possession of the land, with its improvements, after the term of years, returns to the municipality and state, and in the meantime the interests of navigation and commerce are not impaired, but are in the highest degree stimulated and fostered. The lease in this instance is typical. Vast expenditures were made which the lessor would never have made, and to a portion of land—a mere fragment of all of the like water front lands—access is given to a transcontinental railroad for all purposes of inland and marine commerce, while at the expiration of the term of the lease the possession of the lands returns to the state. What pol-

icy more beneficial to the state itself than this, it would not be easy to point out. No other matters call for special mention.

For the foregoing reasons, the judgments and orders appealed from are affirmed.

We concur: SHAW, J.; SLOSS, J.; ANGELLOTTI, J.; MELVIN, J.; LORIGAN, J.

#### SAN PEDRO, L. A. & S. L. R. CO. v. NELSON et al. (L. A. 2,759.)

(Supreme Court of California. Dec. 19, 1911. Rehearing Denied Jan. 18, 1912.)

Department 1. Appeal from Superior Court, Los Angeles County; N. P. Conrey, Judge.

Action by San Pedro, Los Angeles & Salt Lake Railroad Company against Gussie Nelson and others. From a judgment for plaintiff and from an order denying defendants a new trial, they appeal. Affirmed.

Dian R. Gardner, for appellants. A. S. Halsted, Miner P. Goodrich, and S. M. Johnstone, for respondent.

PER CURIAM. This is an appeal from the judgment and from an order denying the defendants' motion for a new trial. The case is in all essential particulars identical with the cases entitled San Pedro, Los Angeles & Salt Lake Railroad Company v. Hamilton et al. (L. A. No. 2,539), and Hamilton et al. v. San Pedro, Los Angeles & Salt Lake Railroad Company (L. A. No. 2,540), 119 Pac. 1073, which have been this day decided in bank upon an opinion filed.

Upon the authority of those cases, and for the reasons given in the opinion aforesaid, the judgment and order herein appealed from are affirmed.

#### McPHEE v. RECLAMATION DIST. NO. 765 et al. (Sac. 1,930.)

(Supreme Court of California. Dec. 14, 1911. Rehearing Denied Jan. 13, 1912.)

#### 1. JUDGMENT (§ 432\*) — ENFORCEMENT — INJUNCTION.

Where a defense existed in favor of a party, but could not be interposed in the action in which a judgment complained of was rendered, equity would restrain the enforcement of the judgment until such proceeding could be taken to render the defense available.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 816-819; Dec. Dig. § 432.\*]

#### 2. DRAINS (§ 91\*) — JUDGMENT — ENFORCEMENT.

In an action to enforce an assessment levied by a reclamation district, a landowner denied that the district was legally created; but on appeal it was held that the validity of the organization of the district could not be questioned in an action on the assessment, if, when the assessment was levied, the district had a de facto existence. The court then decided that the validity of the organization of the district could be tested only on quo warranto, and that at the time the assessment was levied it had a de facto existence. The landowner immediately instituted quo warranto proceedings to test the validity of the organization of the district, and while these proceedings were pending other proceedings were instituted to sell her land for nonpayment of the assessments. Held, that

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

such owner was not entitled to an injunction restraining the prosecution of such proceedings until the quo warranto case was determined, since, even if a judgment of ouster against the district was rendered, it would not annul or affect the acts performed by the district prior to the judgment; such judgment of ouster not being retroactive so as to affect or destroy acts or contracts made prior to its rendition.

[Ed. Note.—For other cases, see *Drains*, Dec. Dig. § 91.\*]

### 3. JUDGMENT (§ 713\*) — RES JUDICATA — DEFENSES—ESTOPPEL.

A suit having been instituted by a reclamation district to sell a landowner's property for nonpayment of an assessment, she defended on the ground that the district was without legal organization. On appeal, it was held that the district was a de facto corporation, and the assessment therefore enforceable. The owner thereafter brought quo warranto to test the validity of the district. *Held*, that the landowner in such prior action either litigated the question of the district's de facto existence and was defeated thereon, or had an opportunity to show want of de facto existence and failed to do so; in either of which events, the prior judgment, finding that the district had a de facto existence, was res judicata.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. §§ 1234-1241; Dec. Dig. § 713.\*]

In Bank. Appeal from Superior Court, Yolo County: N. A. Hawkins, Judge.

Action by Anna McPhee against Reclamation District No. 765 and others. Judgment for defendants, and plaintiff appeals. Affirmed.

See, also, 13 Cal. App. 382, 109 Pac. 1106.

Hudson Grant and U. S. Webb, Atty. Gen. (E. A. Bridgford, of counsel), for appellant. A. L. Shinn and Shinn & Shinn, for respondents.

SLOSS, J. Plaintiff is the owner of certain lands in Yolo county. She is seeking to free these lands from the lien of assessments levied by the defendant Reclamation District No. 765. Her contention is that the proceedings leading up to the attempted formation of said district were void for want of jurisdictional prerequisites. A proceeding in quo warranto has been instituted in the name of the people of the state against said district to test its right to corporate existence. The present action is one in equity, and is brought to enjoin the enforcement of the assessment liens until the conclusion of the quo warranto proceedings shall have determined whether or not there is a reclamation district authorized to levy assessments. The court below sustained a demurrer to the amended complaint, and, the plaintiff declining to amend further, judgment was entered in favor of defendants. From this judgment the plaintiff appeals.

The amended complaint begins by setting forth the steps taken in the attempt to form Reclamation District No. 765. We need not undertake to state these matters in detail. It is enough to say that there was a failure to publish the petition for the organization

of the district for the period required by the statute (Pol. Code, § 3447), and that this failure, as is conceded by the respondents, went to the jurisdiction of the board of supervisors to form the district, and is fatal to the de jure existence of such district.

The pleading then goes on to describe the various steps leading up to the levy of an assessment on the lands within the district (including the lands of plaintiff) to pay the cost of reclamation work. All of this was done without the knowledge of the plaintiff. Upon her refusal to pay, an action was begun against her in the name of said Reclamation District No. 765, to enforce said assessment. In that action said defendant (plaintiff herein) attempted to defend by denying the allegation, contained in the complaint therein, that said pretended district was duly organized and existing as a reclamation district and constituted a public corporation and agency, and relied, in support of such denial, upon the facts above stated, showing that there never had been a valid organization of the district. But the superior court refused to entertain the defense, and gave judgment for the plaintiff in said action. On appeal, the judgment was affirmed by the District Court of Appeal for the Third Appellate District, on the ground that in that action the corporate existence of the plaintiff therein could not be questioned, but such existence could only be questioned in proceedings in quo warranto, at the suit of the state. A petition to have the cause heard in the Supreme Court was denied and the judgment in favor of the district became final. Thereafter the defendant in that action, and plaintiff herein, Anna McPhee, applied to the Attorney General for leave to institute proceedings in quo warranto against the said district. Such leave was granted, and an action, entitled "People of the State of California, on the relation of Anna McPhee v. Reclamation District No. 765 et al.," was instituted and is now pending. In that action the right of the defendant to exist as a corporation or public agency is involved. After the commencement of such proceedings in the name of the people, and notwithstanding the pendency thereof, the defendants caused execution to be issued upon the judgment theretofore obtained against the plaintiff, and pursuant thereto the sheriff of Yolo county gave notice that plaintiff's lands would be sold on such execution on the 14th day of January, 1911. This action was commenced on the 13th day of January, 1911, for the purpose of obtaining an injunction restraining the district and the sheriff from selling plaintiff's lands under said execution until the proceeding in quo warranto could be heard and final judgment therein be rendered. The court below denied a temporary restraining order, and on

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the day set for the sale the sheriff offered plaintiff's lands for sale under the execution, and said property was struck off to Lizzie H. Glide, one of the defendants herein, for the amount of the judgment, interest, and costs. A certificate of sale was executed and delivered by the sheriff to said purchaser. After such sale, the plaintiff, with leave of court, filed her amended complaint, in which she set forth, in addition to the foregoing facts, the commencement of a second action against her by the defendants to enforce a second assessment against her lands. The prayer of the amended complaint is for an injunction restraining the execution of a sheriff's deed under the sale made, and the prosecution of the action on the second amendment, until the determination of the proceeding in quo warranto.

The position of the appellant is that inasmuch as she was, in the litigation instituted by the district to foreclose the alleged lien, precluded from showing in defense that the district was never legally organized, but was remitted to the remedy of quo warranto, she should in equity and justice be entitled to protect her land from forced sale under such assessment until the question of the legality of the existence of the district can be determined in the only proceeding by which she may have it tested. The effect of the decision in the action brought by the district against the plaintiff was, it is argued, to hold that any set of persons acting without authority of the statute may assume to be a reclamation district, may levy assessments upon land, and then enforce such assessments by actions in which their want of power to proceed cannot be questioned. Unless the property owner can, by some other form of proceeding, litigate the question of the right of such persons to so proceed, he is, says the appellant, deprived of his property without due process of law. If the only opportunity of the landowner to raise this question is in quo warranto, and he diligently proceeds to seek this remedy, he must be protected in the possession of his land until the quo warranto proceedings can be brought to a determination.

The opinion of the District Court of Appeal affirming the judgment against plaintiff is reported in 13 Cal. App. at page 382, 109 Pac. 1106, under the title of "Reclamation District No. 765 v. Anna McPhee." If it were true that, in that case, the Court of Appeal had held that, in an action brought in the name of a pretended reclamation district, the landowner could not defend upon the ground that there was no such district, and that the only way in which the existence of the district could be questioned was by quo warranto, the position of the appellant would be unanswerable, for certainly, as was said in *Piper v. Rhodes*, 30 Ind. 309, "there must be a corporation to authorize the collection of assessments," and the law must,

in some form of proceeding, give to such appellant an opportunity to deny the existence of a district authorized to levy assessments before her land is finally taken from her. If her only remedy against an attempt to burden her land with assessments levied by unauthorized persons assuming without right to act as a reclamation district is by quo warranto, and she is proceeding as diligently as may be to assert this remedy, she is entitled in the interim to the protection of a court of equity.

[1] The fact that the judgment foreclosing the lien has gone against her would not affect her right, if the facts entitling her to attack the assessment were of such a nature that she was, by reason of some rule of law, precluded from asserting them in defense to the foreclosure suit. Where a defense existed in favor of a party defendant, but could not be interposed in the action in which the judgment complained of was rendered, equity will restrain the enforcement of that judgment. *N. Y. & H. R. Co. v. Haws*, 56 N. Y. 175; *Scott v. Shreeve*, 12 Wheat. 607, 6 L. Ed. 744; *Hibbard v. Eastman*, 47 N. H. 507, 93 Am. Dec. 467; *Ferrell v. Allen*, 5 W. Va. 43.

[2] But an examination of the opinion in *Reclamation District v. McPhee* shows that the court did not lay down the rule as broadly as the appellant claims. What was held was that the validity of the organization of the district could not be questioned by the defendant in an action on the assessment, *if at the time of levying the assessment the district had a de facto existence*. As appears by that opinion, the court decided that the reclamation district, plaintiff herein, although not validly organized, was a de facto corporation, and it was for this reason that it was held that its de jure existence could not be collaterally questioned in a proceeding brought by it to enforce its assessments. It was not held that in an action on an assessment, brought by a pretended reclamation district, the landowner could not show in defense that the body or persons assuming to assess his land and to bring an action to enforce the assessment had no existence, either de jure or de facto, as a corporation. On the contrary, it was stated that, if the pretended corporation had had no de facto existence, its right to exist might have been attacked collaterally in an action on the assessment. But, concluding that the district was shown to have had a de facto existence, the court held that the legality of the steps taken for its formation could not be attacked in the action to enforce the assessment. This was based upon the rule that the validity of an assessment levied by a de facto corporation of this character does not depend upon the fact of the de jure character of the corporation. Anything contrary to this rule that may have been said in *Reclamation District v. Burger*, 122 Cal. 442, 55 Pac. 156,

must be disregarded as conflicting with a long line of earlier and later decisions, many of which are cited by the District Court of Appeal in its opinion (13 Cal. App. at page 388, 109 Pac. 1106).

Under these circumstances it is difficult to see how an injunction restraining the execution of a sheriff's deed until the determination of the quo warranto proceedings would be of any benefit to plaintiff. If the reclamation district was a de facto corporation, a judgment in quo warranto, even though it should determine that the district had not been legally organized, would not annul or affect the acts performed by it before the judgment in quo warranto. *People v. Flint*, 64 Cal. 49, 28 Pac. 495; 23 Am. & Eng. Ency. of Law, 628, 629; *Gaff v. Flesher*, 33 Ohio St. 115; *Schaefer v. People*, 20 Ill. App. 605. "A judgment of ouster is not retroactive so as to affect or destroy acts done or contracts made prior to its rendition." 23 Am. & Eng. Ency. of Law, 629. If the assessments when levied were valid because of the de facto character of the corporation, their validity could not be destroyed by a subsequent adjudication, in an action at the suit of the state, that the alleged district had no legal right to corporate existence.

[3] But, argues the appellant, the facts alleged by her in the present complaint show that the reclamation district never had even a de facto existence. We need not enter into any discussion of this point. The supposed de facto existence of the district was the only ground upon which this plaintiff as defendant in the action to enforce the assessment was precluded from showing the want of legal authority of the assumed district. Under the law laid down by the Court of Appeal, it was certainly open to her to show in defense that there was neither a de jure nor a de facto corporation. One of two things must then be true: Either she litigated in that action the question of the de facto existence of the district, and, having been defeated on this issue, is estopped by the final judgment from again raising the same question in this action; or else, having had the opportunity to show the want of de facto (in addition to de jure) existence in defense to the former action, she failed to show it. If the court in the suit on the assessment did actually determine that the plaintiff therein was a de facto corporation, and the question was in issue, the plaintiff cannot now urge that the determination on this point was erroneous. When a judgment has once become final, its conclusive effect upon the parties with respect to the matters adjudicated does not depend in any degree upon the correctness of the adjudication. On the other hand, if the plaintiff failed, in the former action, to plead and show that there

was no de facto corporation, she is equally precluded from raising the point now. Equity will not relieve against a final judgment upon any ground which might have been asserted as a defense in the action in which the judgment complained of was rendered. 25 Cyc. 1006; *Agard v. Valencia*, 39 Cal. 292; *Ede v. Hazen*, 61 Cal. 360.

In what we have said, we have confined ourselves to a discussion of the plaintiff's prayer for an injunction restraining the enforcement of the judgment obtained on the first assessment. If the grounds for sustaining the denial of this relief be sound, the plaintiff is in no better position to restrain the prosecution of the action to enforce the second assessment. The want of de facto existence is available to the appellant in defense of that action, unless she is estopped by the judgment in the first action. We express no opinion as to which of these alternatives be correct; but, in either view, there is no ground for the interposition of equity. Furthermore, the granting of an injunction to stay proceedings in the pending action on the second assessment would be directly contrary to the provisions of subdivision 1 of section 3423 of the Civil Code. *Spreckels v. Hawaiian C. & S. Co.*, 117 Cal. 377, 49 Pac. 353; *Wright v. Superior Court*, 139 Cal. 469, 73 Pac. 145.

It would seem, therefore, that the court below rightly sustained the demurrer.

The judgment is affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; LORIGAN, J.; HENSHAW, J.; MELVIN, J.

#### WELCH v. WARE, County Auditor. (S. F. 5,629.)

(Supreme Court of California. Dec. 21, 1911.)

#### 1. WOODS AND FORESTS (§ 7\*)—COUNTY FIRE WARDENS—POWER OF COUNTY SUPERVISORS.

Under St. 1905, p. 235, authorizing the state forester to appoint county fire wardens, who may receive payment from the county or from private sources, an order of the board of supervisors removing as "fire, fish and game warden" one who held both offices of fire warden and fish and game warden, while invalid so far as it attempts to remove him as fire warden, does operate to deprive him of right to any compensation from the county.

[Ed. Note.—For other cases, see *Woods and Forests*, Dec. Dig. § 7.\*]

#### 2 FISH (§ 11\*)—GAME (§ 6\*)—FISH AND GAME WARDENS—REMOVAL—POWER OF SUPERVISORS.

Under Pol. Code, § 4149b, authorizing the removal of a county fish and game warden for cause, an order attempting to remove one as such officer without charges, notice thereof, and opportunity to be heard is void, entitling him to the compensation fixed for the office.

[Ed. Note.—For other cases, see *Fish*, Dec. Dig. § 11.\*; *Game*, Dec. Dig. § 6.\*]

In Bank. Appeal from Superior Court, Santa Cruz County; Lucas F. Smith, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

Petition by Walter R. Welch for writ of mandate against Willett Ware, Auditor of the County of Santa Cruz. Judgment granting a peremptory writ, and respondent appeals. Modified and affirmed.

Benj. K. Knight, Dist. Atty., for appellant. Charles B. Younger, for respondent.

LORIGAN, J. This is an appeal from a judgment granting petitioner a peremptory writ of mandate.

[1] On April 30, 1907, petitioner was appointed by the state forester of the state of California a voluntary fire warden for Santa Cruz county. He qualified as such, and has since continued to perform the duties of such fire warden. On January 4, 1909, he was by a single order of the board of supervisors of Santa Cruz county appointed the fish and game warden of said county and also fire warden thereof for the ensuing two years with a general salary fixed at \$100 a month, and he duly qualified as such fish and game warden under said appointment. On May 18, 1909, the members of said board of supervisors called a special meeting of said board for that same date, setting forth in the call, among other business to be transacted at such special meeting, "to take action in reference to the appointment of W. R. Welch [petitioner] as the fire, fish, and game warden of the county of Santa Cruz," and at said called meeting an order of the board was made and entered reciting that "it appearing to the board that W. R. Welch, the fire, fish, and game warden of Santa Cruz county has not been acting for the best interests of this county for the protection of fish and game, and good and sufficient cause appearing therefor, \* \* \* it is by unanimous vote ordered that the office of fire, fish, and game warden of the county of Santa Cruz be declared vacant on and after June 1, 1909," and about June 7, 1909, appointed one Al Malott as fire, fish, and game warden of the county. No notice was given petitioner by the board that it contemplated his removal from the said office or offices; and no charges were ever preferred against said petitioner by or before the board for violation or alleged violation of the duties of said offices or any of them, and after said attempted removal petitioner continued to perform and discharge the duties of fire, fish, and game warden for said county. On July 3, 1909, petitioner demanded of the appellant, auditor of the county, that he draw a warrant upon the treasurer thereof for the sum of \$100 or any other sum in payment of the salary of petitioner as fire, fish, and game warden of the county for the month of June, 1909, but appellant declined to draw said warrant for said sum or any other sum, and on his refusal petitioner brought this proceeding in mandamus in the superior court of Santa Cruz county to compel the auditor to draw said warrant, alleging the above facts as a basis therefor. After answer by

appellant, which substantially admitted all the allegations of the petition, and a hearing thereon, the superior court awarded the petitioner a peremptory writ against appellant as prayed for, directing him to issue a warrant in favor of respondent for \$100 as salary for the said month of June as fire, fish, and game warden.

The main question involved on this appeal is the validity of the order of the board of supervisors of May 18, 1909, removing the respondent from office. In considering this question it will have to be borne in mind that the respondent while appointed by the board of supervisors on January 4, 1909, generally as fire, fish, and game warden of the county for the ensuing two years, was in effect appointed to two different offices, one as fire warden of the county, the other as fish and game warden thereof, if it really can be said that the order of the board of supervisors appointing him fire warden had even that effect. There is nothing in the statutes authorizing the appointment by a board of supervisors of a fire warden. Under the act "providing for the regulation of fires" (Stats. 1905, p. 235), it is provided that "the state forester shall appoint in such number and localities as he deems wise, public spirited citizens to act as public fire wardens, who may receive payment for their services from the county or from private sources." Under this provision of the act, it is conceded by appellant that the board of supervisors of Santa Cruz county had authority to provide for the payment of compensation for respondent as the appointee of the state forester as fire warden of Santa Cruz county, but this is the only authority given the board; hence, as far as the order of the board appointing respondent fire warden is concerned, it can only be taken as evidencing an election on the part of the board under the forestry act to pay him as the appointee of the state forester for his services in the discharge of his duties under such appointment. There is no provision of the law, however, which requires the board to make compensation to him in any given amount or if compensation is allowed him by the board, that it shall continue for any given time or term.

[2] The situation, however, is different as to the appointment of a fish and game warden. Section 4149b of the Political Code provides that "the board of supervisors of each county may in the discretion of the board \* \* \* appoint a suitable person to serve for the period of two years from the date of his appointment as fish and game warden of the county. Such fish and game warden may be removed by the board of supervisors for intemperance, neglect of duty or other good and sufficient reasons." And section 4149d provides that the salary of the fish and game warden shall be in counties of the thirteenth class (to which Santa Cruz county belongs) the sum of \$50 per month. In addition, he

month for expenses incurred by him in the performance of his duties. "Said salary and expenses must be paid monthly from the county treasury." Having directed attention to these provisions of the law respecting the dual offices held by respondent, we proceed to a consideration of the merits of the appeal.

The claim of the appellant is that, as far as the appointment of respondent as fire warden is concerned (treating the order of January 4, 1909, as an appointment), the board had authority to remove him at any time, as no term for his appointment is provided by law, and the provisions of section 4149d of the Political Code have no application, and that this latter provision of the Code relating to the removal of the fish and game warden for certain causes or any good or sufficient reason left it entirely to the board of supervisors to remove him summarily for any reason satisfactory to itself without any charges made or hearing thereon, and that the contrary view taken by the trial court was erroneous. In support of this latter position appellant relies on the Matter of Carter, 141 Cal. 316, 74 Pac. 997.

As far as the attempted removal of respondent from the office to which he was appointed as fish and game warden is concerned, we are satisfied that the conclusion of the trial court was correct. This point is thoroughly settled by the recent decision of this court in *Bannerman v. Boyle*, 116 Pac. 732. In that case the charter of the city and county of San Francisco provided that the board of education shall be composed of four school directors appointed by the mayor whose term of office shall be four years, so classified that the term of one of them should expire each year. *Bannerman* was appointed in 1909 to hold for the remainder of an unexpired term ending January 8, 1911. On February 15, 1910, the mayor without any notice or hearing removed or attempted to remove him from office and attempted to appoint another to fill the assumed vacancy. *Bannerman* refused to vacate the office, denied the validity of the action of the mayor in attempting to remove him, and in due time brought an original proceeding in mandamus in this court to compel the auditor to pay his monthly salary which had accrued subsequent to the attempted removal. The charter of the city of San Francisco (section 18) provides that "any elected officer except supervisors may be suspended by the mayor and removed by the supervisors for cause; and any appointed officer may be removed by the mayor for cause. The mayor shall appoint some person to discharge the duties of the office during the period of such suspension." It was sought to sustain the action of the mayor under this provision of the charter; that it conferred upon him authority to summarily remove any appointive officer without the formula-

thereon. On the other hand, it was contended that the mayor had no power to proceed against such appointive officer without charges preferred against him constituting "cause" and giving the officer notice and an opportunity to be heard in defense before conviction and removal. In disposing of this question this court said: "Upon this question, the great weight of authority is to the effect that where an officer is appointed for a fixed term, and it is provided that he may be removed during the term 'for cause,' without other qualifying words, such removal cannot be made except after notice and a hearing. Mr. Throop states it thus: 'The doctrine that an officer can be removed only upon notice, and after a hearing, where the tenure of his office is during good behavior, or until removal for cause or for a definite term, subject to be removed for cause, \* \* \* may be regarded as settled law in this country.' Throop on Public Officers, § 384. Mr. Mechem says: 'Where the appointment or election is made for a definite term or during good behavior, and the removal is to be for cause, it is now clearly established by the great weight of authority that the power of removal cannot, except by clear statutory authority, be exercised without notice and hearing, but that the existence of the cause, for which the power is to be exercised, must first be determined after notice has been given to the officer of the charges made against him and he has been given an opportunity to be heard in his defense.' Mechem on Officers, § 454. The same is said to be the rule by Mr. Dillon. *Dillon, Mun. Corp.* § 250. A large number of decisions are cited in support of this doctrine. The following apply the doctrine to cases like the present one, where the tenure is for a fixed term." Here a number of cases are cited by the court sustaining the doctrine. "Many of these are cases where the power to remove was qualified, as here, simply by the words, 'for cause'; in others particular causes are specified, such as 'official misconduct,' 'inability or misbehavior,' and the like. The distinction is not material. The words 'for cause,' without more, imply good cause; the existence of some facts which would constitute a reasonable cause for the removal." There is no difference between the terms of the charter provision construed in the foregoing decision and the terms of the provision of section 4149b allowing the removal of a fish and game warden appointed for a fixed term under the law only for cause. Under such provision of the Code, the respondent could only be legally removed after an opportunity to be heard on charges preferred against him. Nor is it necessary to discuss the *Carter* Case because it is fully considered in the *Bannerman* Case and the doctrine announced there is shown to have no application to a provision of law with reference to the re-

moval of officers for cause such as is involved here.

It therefore follows under the foregoing decision that the action of the board of supervisors in as far as it attempted to remove plaintiff from the office of fish and game warden, without charges made and notice thereof and an opportunity to be heard, was void, and petitioner still held the office of fish and game warden during the month of June, was entitled to whatever amount his salary as such was, and to a writ compelling the auditor to draw a warrant on the treasurer therefor. But, while the attempt of the board to remove him as fish and game warden was void, we are satisfied that the order of the board, in as far as it was directed against him as fire warden, was valid. Of course, the board of supervisors could not revoke his appointment as fire warden because that came officially from the state forester. The board had, however, on January 4, 1909, when it made the order appointing him fish and game warden also formally appointed him fire warden for two years at an aggregate salary in his dual capacities of \$100 a month. The only purpose of designating him an appointee of the board as fire warden for the county of Santa Cruz was to authorize payment for his services as such from the county, which was all the board was authorized to do. It was a matter of volition with the board, however, whether in the first instance it would compensate a fire warden at all and in what amount and for how long. It might provide for it at pleasure and revoke it at any time it saw fit, and all that the order of the board of May 18, 1909, amounted to, as far as it affected petitioner's office as fire warden, was to withdraw any further compensation to him as such warden after June 1, 1909, and this the board had undoubtedly the right to do. Even treating respondent as an appointee of the board to the office of fire warden, as the law does not fix any term for which such appointment is to be made, he could hold it only during the pleasure of the board, as he would come within the general rule that, where no definite time of appointment is fixed by law for which an appointee shall hold, the board or officer who makes it may revoke the appointment at pleasure without notice or charge; that the pleasure of the appointing officer or board is the measure of the appointee's term. Throop on Pub. Officers, § 354; Mechem on Officers, § 445.

Now as to the validity of the judgment requiring the auditor to draw a warrant in the amount of \$100 in favor of petitioner for the month of June, 1909.

It is quite obvious from the conclusion that we have reached that the court should not have ordered the warrant drawn for that amount. The office of the fish and game

warden is a county office (Pol. Code, § 4013), having a fixed term and a definite salary of \$50 a month, with the additional proviso that the board may further allow the expenses of the said fish and game warden in an amount not exceeding \$25 monthly. As a county officer petitioner was entitled to have a warrant drawn for his salary for each month, as a warrant for the salary of other county officers is drawn. Any amount claimed by him as expenses must be presented to the board of supervisors for allowance, which it is conceded in the case at bar was not done by the petitioner. In fixing the compensation of petitioner at \$100 a month, the board of supervisors, as the salary of fish and game warden could only be \$50 a month, must have allowed the additional sum of \$50 for his compensation as fire warden. But as the order revoking his allowance as such fire warden, which was the practical effect of the order of May 18, 1909, was valid, and the order revoking his appointment as fish and game warden void, he was only entitled to have drawn in his favor a warrant for \$50 for the month of June, 1909, for the salary fixed by law as fish and game warden, and a warrant for that sum is all that the court should in its judgment have directed the auditor to draw.

The judgment is therefore reversed, with instructions to the superior court to modify its judgment by directing the auditor to draw a warrant on the treasurer in favor of petitioner for \$50 only for his salary as fish and game warden for the month of June, 1909, and as so modified the judgment is affirmed. The appellant to recover his costs.

We concur: SHAW, J.; ANGELLOTTI, J.; SLOSS, J.; MELVIN, J.; HENSHAW, J.

#### PEOPLE v. SZAFCSUR. (Cr. 1,645.)

(Supreme Court of California. Dec. 21, 1911.

Rehearing Denied Jan. 18, 1912.)

#### 1. CRIMINAL LAW (§ 404\*)—EVIDENCE—INSTRUMENT USED—IDENTIFICATION.

Evidence in a homicide case held sufficient prima facie evidence of the identity of a revolver as that with which the killing was done to authorize its admission in evidence.

[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. § 404.\*]

#### 2. CRIMINAL LAW (§ 656\*)—TRIAL—REMARKS OF COURT.

After the court had suggested to defendant's counsel the proper method of impeaching witness, by her statements at the preliminary examination, and, on his claiming the right to pursue the method he was following, because of the incompetency of the interpreter, had stated that another interpreter would be provided, said counsel expressed a desire to make a statement to the court, whereon it said: "Never mind what your statement is. This is a small matter. I want to straighten it out. I don't want any dilly-dallying about small

matters." *Held*, this remark of the court was not a comment on the weight of any evidence of the witness, but referred to useless discussion of the incompetency of the interpreter.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1524-1533; Dec. Dig. § 656.\*]

### 3. WITNESSES (§ 246\*)—INTERROGATING BY COURT.

The interrogating by the court of witnesses on behalf of the people, being for the purpose of bringing out more clearly some facts which their testimony on the subject had left rather indefinite, cannot be complained of as showing an active sympathy with the prosecution.

[Ed. Note.—For other cases, see Witnesses, Dec. Dig. § 246.\*]

### 4. CRIMINAL LAW (§ 1166½\*)—TRIAL—ABRUPTNESS OF COURT TO DEFENDANT'S COUNSEL.

It being impossible to say that it tended to prejudice defendant, the fact of the court being abrupt in its proper rulings on procedure and emphatic in its remarks to defendant's counsel in respect thereto is not subject to review.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3125; Dec. Dig. § 1166½.\*]

In Bank. Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Alex Szafcsur was convicted of murder, and, denied a new trial, appeals. Affirmed.

Henry F. Marshall, for appellant. U. S. Webb, Atty. Gen., George Beebe, Deputy Atty. Gen., C. M. Fickert, Dist. Atty., James F. Brennan, Asst. Dist. Atty., and E. A. Lane, Asst. Dist. Atty., for the People.

LORIGAN, J. Appellant was convicted of the murder of his wife and sentenced to death, and from the judgment and an order denying his motion for a new trial he appeals.

Trouble had occurred between appellant and his wife, and she had instituted divorce proceedings. The evidence shows that prior to the killing appellant had contemplated the death of his wife and his own suicide. The parties lived on Frederick street in the city of San Francisco near Golden Gate Park. On the morning of April 4, 1910, appellant purchased a pistol and ammunition, and about 7:30 in the evening went home and deliberately fired three shots therefrom into the body of his wife causing her instant death. He immediately ran from the house to Golden Gate Park and there shot himself in the head, inflicting, however, a scalp wound from which he readily recovered. A police officer, immediately notified of appellant's attempted suicide, found him lying in the park, wounded as stated, but conscious, and with a five-chamber revolver in his hand, three chambers being empty and the other two containing shells—one exploded, the other intact. On the trial the appellant did not take the stand. The killing of his wife by him was not denied; the sole defense inter-

posed in his behalf being that he was insane at the time he killed her.

On this appeal the following points are made for a reversal: That the court erred in admitting in evidence the revolver found in the possession of the defendant in the park and which was taken from him by the police officer, because it was not sufficiently identified as the weapon with which he killed his wife; that for the same reason it erroneously allowed testimony by the same officer of statements by defendant concerning the purchase of a revolver and ammunition on the morning of the killing; that the court erred in commenting before the jury on the weight of certain evidence; and that both the court and the district attorney were guilty of misconduct prejudicial to the cause of the defendant. None of these points have any merit and in ordinary cases might be disposed of with short notice. As, however, this is a capital case, we will consider them separately.

[1] That the deceased was killed by shots fired from a revolver by appellant there can be no question. There is no room for dispute in the case on that subject, and this being true, under ordinary circumstances, whether the court erred in admitting on insufficient proof of identity a particular revolver with which it was claimed a killing took place could work no prejudice. Appellant's claim of prejudicial error, is based, however, on the nature of his defense—insanity. He insists that admitting the revolver in evidence which was found in possession of appellant in the park, together with the showing of its condition as to the absence and presence of shells, afforded a basis for an argument by the district attorney to the jury, and which was in fact made, that appellant on his way to the park after the firing of the three shots at his wife had extracted that number of empty shells from the revolver, and that this action hardly comported with the act of an insane man. We simply state the reasoning of counsel for appellant to show that if the court erred there might be some plausibility in his claim that the error was prejudicial. But we think there was sufficient proof tending to show that the revolver which was found in the hand of appellant by the officer was the same weapon with which the killing had been done, and its admission in evidence was proper for the very reason which appellant now assigns against its admissibility. That appellant killed his wife with a revolver was, as we have said, at no time in the case open to question. Immediately after shooting her, he ran to the park, and within a short interval of time after the killing of his wife attempted suicide, and is found in the possession of a revolver with three chambers emptied which would rep-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



resent the chambers discharged at his wife, if it was the same weapon he had used on her, with an exploded shell used in his attempted suicide and an unexploded shell. The police officer took him to the county jail and seated together there on a bench the officer interrogated him about the revolver and the killing of his wife. The officer was not inquiring about an indefinite revolver, but about the very one he had taken from him and in connection with the killing of his wife. He admitted killing her. About the revolver he was asked, "Did you purchase it (the revolver) previous to that time of the shooting (referring to the shooting of his wife)?" and defendant answered that he had purchased the revolver the same day; that he had gone downtown and purchased it and the ammunition at a pawnshop. This evidence on the part of the police officer, while it does not point with clearness or certainty to the identity of the revolver as the one with which the killing was done, was sufficient prima facie evidence to warrant its admission in evidence as the revolver with which it was accomplished. Nowhere in the case was there any effort to overcome this showing.

[2] Now, as to the other points: There is no merit in the claim of appellant that the court commented on the weight of the evidence. During the cross-examination, through an interpreter, by counsel for defendant of a witness produced on behalf of the prosecution, the court said: "Never mind what your statement is. This is a small matter. I want to straighten it out. I don't want any dilly-dallying about small matters." Counsel for defendant was endeavoring to impeach the witness by calling her attention to what purported to be testimony given by her on the preliminary examination of the defendant as appeared in the printed record thereof which counsel had. Counsel and the court had some discussion as to the proper method of proceeding to do so. The court suggested that the proper method for counsel to pursue was to read the question and answer to the witness, as counsel claimed it had been given at the preliminary examination and then ask the witness if the question so purporting to have been asked and answered by her was so asked and answered by her. Counsel for defendant claimed that he was entitled to pursue the method he was following on account of the incompetency of the interpreter not permitting the proper method. The court then remarked that another interpreter would be provided, and, counsel for defendant expressing a desire to make a statement to the court, the judge used the language complained of. This remark by the court was not a comment on the weight of any evidence given by the witness then being examined. The "dilly-dallying" had reference to further discussion by counsel of his in-

ability to proceed in the method suggested by the court, which was undoubtedly the correct one, on account of the incompetency of the interpreter, after the court had announced that another interpreter would be called so that the difficulty could be obviated. It had reference to frittering away time in useless discussion about the incompetency of the present interpreter, when another one was to be procured, and had no relation to the testimony of the witness.

Assignments are made of misconduct on the part of the court and district attorney to the prejudice of the rights of the defendant. Only one assignment is made of misconduct on the part of the district attorney in asking a question to which an objection of counsel for defendant was sustained. This assignment is entirely without merit.

[3, 4] It is claimed that the court interrogated witnesses on the part of the people, thereby showing an active sympathy with the prosecution, that it entered into unnecessary controversy with counsel for defendant, was abrupt in its rulings against him, and in several instances unreasonably reproved counsel and showed hostility to the position of counsel for the defendant in the method of presenting his client's case, all of which tended to embarrass and humiliate counsel and prejudice the cause of his client before the jury. But none of these points is well taken. The interrogation of witnesses by the court was for the purpose of bringing out more clearly some facts which the testimony of the witnesses upon the subject had left rather indefinite. As to the other matters complained of, when the record is examined, it is found that they do not amount in any degree to misconduct on the part of the court or show any hostility to either counsel, his client, or his cause. While in some instances the rulings of the court were abrupt and its remarks to counsel emphatic, they were directed to matters respecting testimony and procedure, and directed solely to points and propositions of law involved, and the discussion between court and counsel had reference to the orderly method of procedure in which the court was right. It is true the court might in some respects have been more urbane and proceeded with a nicer regard to the sensibilities of counsel, who was respectful and courteous to the court throughout the trial, and was defending the accused under appointment by the court. This, however, is a temperamental and ethical matter addressed to the court's own sense of propriety, and its conduct in that respect is not subject to review by the appellate court save to consider whether it has tended to prejudice the defendant. *People v. Oliveria*, 127 Cal. 383, 59 Pac. 772; *People v. Molina*, 146 Cal. 142, 79 Pac. 842. The court was insisting, when the rulings and remarks complained of were made, on having certain proceedings conducted in what it deemed a prop-

er and orderly way, and, while somewhat brusque and emphatic in insisting that counsel should proceed as directed by the court, these rulings were proper, and made without any intention of injuring counsel or the cause of his client, and cannot be said to have had any such effect.

The judgment and order appealed from are affirmed.

We concur: SHAW, J.; ANGELLOTTI, J.; MELVIN, J.; HENSHAW, J.; SLOSS, J.

### DULEY v. PEACOCK. (Civ. 859.)

(District Court of Appeal, Third District, California. Nov. 8, 1911.)

#### 1. COSTS (§ 12\*)—NATURE AND GROUND OF RIGHT—DEPENDENT ON STATUTE—DISCRETION OF COURT.

The right to recover costs is purely statutory, and whether a court can exercise any discretion in the awarding of costs depends on whether the Legislature has committed such discretion to the court.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 20; Dec. Dig. § 12.\*]

#### 2. ELECTIONS (§ 307\*)—CONTEST—CONSOLIDATION—COSTS.

Code Civ. Proc. § 1125, provides that if the proceedings in election contests are dismissed for insufficiency or want of prosecution, or the election is confirmed, a judgment for costs must be rendered against contestant, and, if the election is annulled or set aside, judgment for costs must be rendered in favor of contestant, and that, where two or more contested elections are joined for the purpose of recounting votes, "the costs shall be apportioned among the parties in the discretion of the court." Actions to contest elections for supervisor of a district of a county and for county clerk were consolidated under authority of the statute. In an order granting a nonsuit in the contest of the election for supervisor, the court decreed that each party to the action pay his own costs. *Held*, in a contest to but one office, the statute clearly makes it the duty to award costs to the victorious party, and, as the reason for the legislative authorization of consolidation was merely to decrease the expense to the parties and the trouble to the court by the clause vesting the court with discretion to apportion the costs, the Legislature evidently intended to fix no new rule, but merely contemplated that costs in such cases would be different in each case consolidated, and intended to provide the court with power to adjust the costs equitably among the unsuccessful parties, and, as any other construction would permit the court to determine whether it would tax an unsuccessful party, the division of the costs between the parties to the contest was erroneous.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 333; Dec. Dig. § 307.\*]

Appeal from Superior Court, Del Norte County; J. L. Childs, Judge.

Election contest by West Duley against Thomas E. Peacock. From a decree entered upon a nonsuit requiring each party to pay his own costs, defendant appeals. Reversed, with directions to modify.

James F. Quinn and James McNulty, for appellant. Geo. W. Howe, for respondent.

HART, J. The contestant and contestee were rival candidates for the office of supervisor for the Fourth supervisor district of Del Norte county at the general election held on November 8, 1910. The official canvass of the ballots cast in the several precincts of said supervisor district disclosed the election of the contestee to said office, and his election thereto was thereupon officially declared by the board of supervisors of said county, sitting as a board of canvassers. On December 17, 1910, the contestant filed his complaint, contesting the election of the contestee. At the same election one Ashley Cooper and one W. L. Nichols were opposing candidates for the office of county clerk of Del Norte county, and the latter, upon the official canvassing of the ballots by the board of supervisors of said county, was officially declared to have been elected to said office. Later and in due time Cooper filed a contest against Nichols for the said office of clerk.

The court, having been duly notified by the clerk of the filing of the contests in the two cases mentioned, ordered a special session of the court to be held on the 27th day of December, 1910, for the opening and recounting of the ballots cast for the respective offices so contested. On the day on which the contests came up for hearing, the court, on motion of the attorney for respondent, ordered a consolidation of the two contests for the purpose of counting the ballots. Section 1125, Code Civ. Proc. A motion for a nonsuit was granted by the court in the case at bar and the contest dismissed. In its judgment entered upon the order granting the nonsuit the court decreed that "each party to this action pay his own costs and disbursements incurred." The appeal here is by the contestee from that portion of the judgment binding each party to the contest to pay his own costs, etc.

The single question submitted for determination by this appeal is therefore whether the court erred in adjudging that each party should pay his own costs, etc., the contestee claiming that, having won the contest, he was entitled to judgment for his costs.

[1] The right to recover costs is purely statutory, and, in the absence of a statute, no costs could be recovered by either party. *Fox v. Hale & Norcross S. M. Co.*, 122 Cal. 223, 54 Pac. 731. And it is equally true that, assuming that the Legislature would have the constitutional right to enact such legislation, whether the matter of awarding costs in a given case rests in the discretion of the court must depend upon whether the Legislature has committed such discretion to the court.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

[2] In the case at bar, whether the court was authorized, by its judgment, to compel each party to the contest to bear his own costs, is a question which in its solution must of necessity rest upon the proposition whether there is, in the class of cases to which this case belongs, any statutory warrant for such a judgment, again assuming that such a statute would not infringe upon the provisions of the Constitution inhibitory of class and special legislation. The court below, of course, planted its judgment as to the costs on its construction of the language of section 1125 of the Code of Civil Procedure, which reads: "If the proceedings are dismissed for insufficiency, or for want of prosecution, or the election is by the court confirmed, judgment must be rendered against the party contesting such election, for costs, in favor of the party whose election was contested; but if the election is annulled or set aside, judgment for costs must be rendered against the party whose election was contested, in favor of the party contesting the same; *provided, that where two or more contested elections are joined for the purpose of recounting votes as in this title provided, the costs shall be apportioned among the parties in the discretion of the court.* Primarily each party is liable for the costs created by himself, to the officers and witnesses entitled thereto, which may be collected in the same manner as similar costs are collected in other cases." The language of the foregoing section italicized by us was added to said section by the Legislature of 1907 (Stats. 1907, p. 643), there having been previously to said amendment no specific provision as to costs in cases where two or more contested elections were joined. And it was undoubtedly upon that particular language that the court founded its conclusion that it is in its discretion to apportion the costs where two or more election contests are consolidated among the parties, contestants and contestees.

We think the court's construction of the language of the amendment of that section is erroneous. It is not disputed, nor could it be, that in a single contest or a contest wherein the right to but one office was contested it would be the duty of the court, under the plain mandates of the section, to award costs to the victorious party. *Campbell v. Free*, 7 Cal. App. 151, 93 Pac. 1060. In the case at bar, in other words, if the contest had not been joined with another election contest, it would have been the duty of the court to have "rendered judgment against the party contesting such election, for costs, in favor of the party whose election was contested." The principle of which this provision of the section is predicated is equitable and just. When the board of canvassers, after an official canvass of the ballots cast at an election officially declares a certain person to have received the highest number of votes cast for the office for

which he has been a candidate and has therefore been elected to such office, the person so declared to have been elected is at once vested with a prima facie title to the office. On the other hand, any elector, to conserve the rights of the public or the people, who are entitled to be protected against usurpation of public offices by those not legally entitled to exercise the duties thereof, may, and it is his duty, if there exist probable grounds therefor to challenge, through an appropriate proceeding, the right of a person to hold and discharge the duties of a public office. The Legislature, therefore, deemed it only just to authorize the court to which the adjudication of such differences is confided to impose upon the losing party in such a contest the burden of reimbursing the victorious party for the costs which the latter has necessarily incurred by reason of such contest. Now, then, this being clearly and unquestionably the law as to costs as the Legislature has laid it down in those cases where there is but a single office concerned in the proceeding before the court, such law obviously involving the only just rule as to the awarding of costs in such cases, the first question that suggests itself to the mind, when examining the amendment of section 1125 of the Code of Civil Procedure, is: Upon what just principle can there be founded any different rule as to costs where the proceeding involves the contest of more than one office from that prescribed in those cases where the proceeding involves but a single office? Or, to put the question in another form, why should not the victorious party in a contest of this character be equally as entitled, from a just view of the proposition, to his costs in a proceeding wherein and whereby the right to other offices has been contested as he confessedly would be had his contest been fought out in a proceeding in which the right to hold the office involved was the sole and single issue? These questions follow from the ambiguity of the language added to section 1125 by the Legislature of 1907, upon which the court below obviously based its judgment in the matter of the costs, and the meaning of which must be ascertained by construction.

There is but one answer to the questions propounded. There is no just reason why the victorious parties in a single proceeding involving the right to several offices should not be awarded their costs as they would be if their respective contests were each tried alone or not joined with other similar contests in the same proceeding. The manifest purpose of authorizing two or more contests for offices growing out of the same election to be joined in one proceeding and thus to be heard at one and the same time by the court was to minimize the expense to the parties and the trouble to the court. These contests are usually based upon propositions calling for a review or recount of the

ballots cast at the election for the contested office, and where, in the same county, it is claimed that the election officers have improperly counted the ballots or so conducted their duties as that the returns made by them do not involve a true expression of the wishes of the electors with regard to several county or township offices, the investigation of a charge of that sort may just as easily be made in a single proceeding as to all the offices so contested as it may be as to one office. The bulk of the expense incurred in such contests flows from the necessity of employing special clerks to examine, count, and tally the ballots under the supervision of the court, and, as before suggested, the object the Legislature had in view in authorizing the joinder of such contests, where there were more than one arising from the same election, was to make the expense in prosecuting the same less onerous on each of the losing parties than it would be if each contest were prosecuted singly, and, furthermore, to save time and trouble to the court, which would otherwise be compelled to hear several different contests in as many different proceedings where all may just as conveniently be heard in one. This, we say, was the primary and paramount object of the amendment, and, while the language as to the apportionment of the costs "among the parties in the discretion of the court" is, upon its face, somewhat ambiguous, yet we think that, upon a fair consideration of it and the unjust result which would inevitably follow the construction given it by counsel for the respondent and the court below, it is clear that the legislature merely intended to say that, where there were several election contests joined and heard in the same proceeding, "the costs shall be apportioned among the losing parties, according as the court, in the exercise of a sound discretion, founded upon all the circumstances as disclosed, may deem fair and just as between such parties." In other words, the discretion vested in the court by the amendment was not intended to commit to the court the power or right to require the victorious parties to bear the necessary costs or expense to which they have been put by the contest, but to merely make an equitable and just apportionment of all the costs accruing by reason of the proceeding among those who have failed, whether the contestants or the contestees, or the contestant in the one case or the contestee in another, to sustain the grounds of contest or to refute them, it being plainly apparent that, although two contests may be joined in one proceeding, the expense attendant upon the investigation of the contest with respect to one office may be largely in excess of the expense incurred in the investigation of that of the other—as, for example, where, as here, one of the contested offices is a township and the other a county office, therefore requiring perhaps the

examination and counting of more ballots to determine the contest of the right to the latter office than the contest as to the former.

The conclusion at which we have arrived is in accord with the views of the Supreme Court as expressed through Mr. Justice Shaw prior to the adoption of the amendment in question in the case of *Coghlan v. Alpers*, 140 Cal. 650, 74 Pac. 146, as follows: "Costs would be allowed and judgment given therefor in the same manner as if the cases had not been consolidated, except that if any item should be incurred by two or more parties jointly the court should either apportion the amount equitably among them, or provide in the judgment that there should be but one payment by the party held liable in case separate judgments were given, for the same sum in favor of different parties. In either event, the consolidation would not be prejudicial to the appellant." Any other construction of the amendment than that with which we are in accord would place it in the power of the court in cases where there were several different contests originating out of the same election to deny to the victorious parties, who would be as of right entitled to their costs if their respective contests were heard independently of and separately from the others, reimbursement at the hands of the vanquished parties for the costs which have accrued against them by reason of the contests. In other words, the effect of respondent's contention, if sustained, would be to leave it entirely in the discretion of the court to say whether the parties winning their contests should or should not have their costs, since the right to consolidate the contests rests wholly in the court's discretion, upon the manner of the exercise of which would necessarily hinge the determination of the question whether the prevailing parties would or would not be entitled to reimbursement for their costs.

There is much force in the contention of the appellant (though the point need not be decided here) that, if the construction of the statute in question by respondent be tenable and should be sustained, the result would be that the enactment would be in violation of several provisions of the Constitution. Section 11, art. 1; subdivision 33, § 25, art. 4; *Bloss v. Lewis*, 109 Cal. 496, 41 Pac. 1081; *Darcy v. Mayor, etc.*, 104 Cal. 645, 38 Pac. 500.

It follows from the foregoing views that the judgment, in so far as it undertakes to adjudicate the matter of costs by apportioning them among all the parties to the contest, is erroneous. The part of the judgment appealed from is therefore reversed, with directions to the court below to so modify it as to allow to the contestee the costs legitimately accruing against him by reason of the contest.

We concur: CHIPMAN, P. J.; BURNETT, J.

**PEOPLE ex rel. SPIERS v. LAWLEY et al.**  
(Civ. 866.)

(District Court of Appeal, Third District, California. Oct. 30, 1911. On Petition for Rehearing, Nov. 29, 1911. Rehearing Denied by Supreme Court Dec. 29, 1911.)

**1. TURNPIKES AND TOLL ROADS (§ 30\*)—DURATION OF FRANCHISE—CONSTRUCTION.**

While a franchise for a toll road is to be strictly construed, where there are no express words of limitation or law fixing the duration of franchises, a court will not, except in a very clear case, declare as the result of a mere construction that such a franchise had terminated.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. § 19; Dec. Dig. § 30.\*]

**2. TURNPIKES AND TOLL ROADS (§ 23\*)—FRANCHISES AS "PROPERTY."**

A franchise to one and to such persons as he might associate with him to construct and maintain a turnpike road and to collect tolls thereon, subject to supervision by county officers, granting a right of way, and fixing a time for the completion of the road, is "property" within Civ. Code, § 1044, providing that "property of any kind may be transferred except as otherwise provided by this article," and as such is transferable by assignment or in any other authorized mode of transferring real property.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 67-70; Dec. Dig. § 23.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5693-5728; vol. 8, pp. 7768-7770.]

**3. TURNPIKES AND TOLL ROADS (§ 23\*)—FRANCHISE—RIGHT OF ASSIGNMENT—"ASSOCIATE WITH."**

Under a franchise to one "and such persons as he may associate with him" to construct and maintain a turnpike and toll road with a grant of a right of way, and the requirement that the road should be constructed within two years, the grantee named had an implied right to transfer or assign certain interests in the franchise, since he could not otherwise associate persons with him; the term "and such persons as he may associate with him" not meaning persons employed to assist in the construction and maintenance of the road, but persons in whom he might vest an interest and franchise.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 67-70; Dec. Dig. § 23.\*]

For other definitions, see Words and Phrases, vol. 1, p. 584.]

**4. EXECUTION (§ 27\*)—PROPERTY SUBJECT—TOLL ROAD—FRANCHISE.**

In the absence of any provision therefor, a toll road franchise may be levied upon and sold under execution for the satisfaction of any judgment against its owners, and Civ. Code, § 388, expressly so provides.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 64; Dec. Dig. § 27.\*]

**5. TURNPIKES AND TOLL ROADS (§ 23\*)—INTEREST OF GRANTEE—PROPERTY IN FREE-STATUTES.**

In view of Civ. Code, § 1072, providing that words of inheritance or succession are not requisite to transfer the fee in real property, and section 1105, providing that a fee-simple title is presumed to be intended to pass by a grant of real property, unless it appears from the grant that a lesser estate was intended, the grant of a toll road franchise not expressly limited by the grant itself vests in the grantee

named and his associates an estate in fee in the real property so granted.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 67-70; Dec. Dig. § 23.\*]

**6. TURNPIKES AND TOLL ROADS (§ 23\*)—FRANCHISE—TRANSFERS—CONSENT OF STATE.**

Where a grant of a franchise to construct and maintain a toll road contained in itself no provision requiring that the consent of the state should first be obtained before the right to sell or transfer the franchise could be exercised, or any statute to that effect, it might be transferred without the consent of the state.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 67-70; Dec. Dig. § 23.\*]

**7. TURNPIKES AND TOLL ROADS (§ 33\*)—POWER TO CONTROL AND REGULATE.**

The state always retains or reserves the power to regulate and control toll road franchises wherever they may be or to whomsoever's hands or ownership they may be transmitted, and to see that they shall not only be used for the purposes which they were created to subserve, but so used as not to injure the public.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Dec. Dig. § 33.\*]

**8. TURNPIKES AND TOLL ROADS (§ 31\*)—FORFEITURE OF FRANCHISE.**

The state may forfeit a toll road franchise and all the rights acquired thereby, where it is not used or where it is misused.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 79-89; Dec. Dig. § 31.\*]

**9. TRIAL (§ 404\*)—FINDING—CONSTRUCTION.**

A finding that defendants' predecessor "never associated with him in the construction and maintenance of said toll road any person or persons whatsoever," as he was authorized by his grant to do, involves a conclusion of law as well as a finding of fact; since it is necessarily founded on a construction of the legal effect of the language of the grant.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 957-962; Dec. Dig. § 404.\*]

**10. TURNPIKES AND TOLL ROADS (§ 9\*)—TRANSFER—"SUCH PERSONS AS HE MAY ASSOCIATE WITH HIM."**

Defendants' predecessor and "such persons as he may associate with him" were authorized by grant to construct and maintain a turnpike road, and to collect tolls thereon with the requirement that the road be constructed within two years, but he never associated any one with him in the construction of the road. Defendants' rights therein rested upon a promise of the original grantee to devise to a part of them an interest in the franchise if they would help maintain the road, and upon a decree of distribution in the estate of the widow of the original grantee. *Held*, that defendants were, within the terms of the grant, "such persons as he may associate with him," since it was requisite that such persons be associated with the grantee both in the construction and in the maintenance of the road.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 12-18; Dec. Dig. § 9.\*]

**11. TURNPIKES AND TOLL ROADS (§ 34\*)—STATUTORY PROVISIONS.**

Civ. Code, § 518, enacted in 1872, which required the owner of a toll road to post up at or over each gate or in some conspicuous place a printed list of the rates of toll levied and demanded, was amended by Acts 1901, p. 6, to require that the printed list show the date when

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

the franchise or privilege under which the right to collect tolls was claimed as granted, and the term of duration of such franchise, and the date upon which the rates of toll were last fixed by the board of supervisors. *Held*, that the requirements of the amendment were not intended to apply to perpetual franchises, or those as to which no limit as to duration have been prescribed.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 97-100; Dec. Dig. § 34.\*]

#### On Petition for Rehearing.

#### 12. TURNPIKES AND TOLL ROADS (§ 23\*)—FRANCHISE—TRANSFER—CONSENT OF STATE.

The state has the right to require as a condition to the transfer of a toll road franchise that its consent be procured.

[Ed. Note.—For other cases, see Turnpikes and Toll Roads, Cent. Dig. §§ 67-70; Dec. Dig. § 23.\*]

Appeal from Superior Court, Lake County; Thos. J. Lennon, Judge.

Action by the People by U. S. Webb, Attorney General, on the relation of William Spliers against Charles A. Lawley and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Charles A. Shurtleff, John T. York, and Theo. A. Bell, for appellants. U. S. Webb, Atty. Gen., F. E. Johnston, and E. J. Talbott, for respondent.

HART, J. This is a proceeding in quo warranto.

The complaint charges that the defendants have "usurped, intruded into and unlawfully held and exercised," and so continue wrongfully and without right to exercise, a certain franchise for the construction and maintenance of a toll road starting from a certain point in Napa county, and extending into and terminating at a certain point in Lake county, and for the collection of tolls thereon, and asks the judgment of the court that said franchise be declared to have ceased and terminated on the death of the original grantee, "that the defendants herein be adjudged as usurping and intruding into and unlawfully holding said franchise," and that they be excluded therefrom, etc. Judgment passed for the plaintiff, and this appeal is prosecuted by the defendants from said judgment and from the order denying them a new trial.

The franchise involved here was granted to one "John Lawley and his associates" by an act of the Legislature of 1865-66. Said act reads as follows:

"Section 1. John Lawley, and such persons as he may associate with him, are hereby authorized to construct and maintain a turnpike road from Edward Ebey's residence, in the county of Napa, through St. Helena Cañon, and over the St. Helena range of mountains, to Sigler Valley, by Sigler Cañon, in Lake county, a distance of about twenty miles.

"Sec. 2. That said grantees, upon the con-

struction and completion of said road, are hereby authorized to charge and collect such rates of toll for travel and passage upon the same, in the county of Lake, as the board of supervisors of said county may fix and establish, and in the county of Napa, as the board of supervisors of Napa county may fix and establish; and the said boards of supervisors shall have authority to regulate and charge such rates of toll annually.

"Sec. 3. The right of way for said road is hereby granted to John Lawley and his associates; provided, that in case the lands of private persons are taken for said road, the right of way may be obtained in the same manner and by the same mode of proceeding as is provided by law for railroad companies.

"Sec. 4. After the expiration of five years from the time of the completion of said road, the said counties of Napa and Lake shall have the right to take, possess, and own said road, by payment to said grantees such sum as three appraisers, one to be selected by the board of supervisors of Napa county, one by the board of supervisors of Lake county, and one by said grantees aforesaid, may determine the value thereof to be; and in case one of said parties should fail to select such appraiser after reasonable notice so to do by the other parties, then such valuation as may be made by the two appraisers chosen as aforesaid.

"Sec. 5. The rights herein granted are conferred upon the express condition that said road shall be completed, with requisite and proper bridges, culverts and embankments, in good order, within two years from the passage of this act." Stats. of Cal. 1865-66, p. 277.

The Legislature of 1867-68 amended section 1 of said act so as to read as follows: "Section 1. John Lawley and his associates are hereby authorized to construct and maintain a turnpike road from Edward Ebey's residence, in the county of Napa, through St. Helena Cañon and over the St. Helena range of mountains, to a point in Loconoma Valley, where the road leading from Calistoga to Lower Lake intersects the road from Calistoga to Lakeport via Cobb Valley." St. 1867-68, p. 138.

Lawley, the grantee, alone completed the construction of the road during the year 1868, and operated it alone, according to the findings, until March, 1871, when John Lawley, in consideration of the indebtedness owing by him to one William Patterson, executed and conveyed to the latter an undivided one-quarter interest in said toll road "and all the franchises and rights granted to him by the aforesaid acts of the Legislature." On the 6th day of January, 1877, John Lawley executed a conveyance purporting to transfer all his right, title, and interest in and to the said toll road and the right to collect tolls thereon to one W. C. Watson, then cash-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r indexes

ler of the bank of Napa. The purpose of this conveyance was to secure said bank in a large indebtedness due from said John Lawley to said bank. Watson subsequently conveyed to the bank. In the year 1880, so the court finds, "the defendants, Harry B. Lawley and Charles A. Lawley, who were then of the ages of 21 and 23 years, respectively, declared to their father, the said John Lawley, that they intended to leave home and work for themselves, and thereupon the said John Lawley, who was then insolvent, stated to said defendants that if they would continue to assist him in the conduct and operation of said toll road, and other properties then owned by said John Lawley, and assist him in paying off certain indebtedness existing against said toll road and the other properties, he would give to each of them an undivided one-fourth of his interest in said toll road and franchises, whereupon the said defendants accepted said proposal, and from 1880 to the time of the death of the said John Lawley they each contributed their labor and certain moneys toward the maintenance and operation of said toll road, and the other said properties, and assisted in paying off all indebtedness against the same." In the year 1884 "William Patterson by deed of conveyance transferred all his interest in and to said toll road and the right to collect tolls thereon, to Cynthia A. Lawley, wife of said John Lawley," and thereafter said Cynthia A. Lawley died, administration was duly had upon her estate, and, under the decree of distribution therein entered, all her interest in and to said toll road and the right to collect tolls thereon was distributed to Charles A. Lawley, Harry B. Lawley, Ada W. Neal, and Mary F. Patton, children of said John Lawley and Cynthia A. Lawley. On the 17th day of August, 1889, John Lawley executed a conveyance purporting to transfer all his right, title and interest in and to the said toll road, and right to collect tolls thereon, to his four children above named. There were some subsequent conveyances involving said franchise—one by the bank of Napa and one by a referee appointed by the superior court of Napa county in a certain action in that court between the children of John Lawley—but these are of no material importance in their bearing upon the questions presented here for decision. John Lawley, the father of defendants, died some time prior to January, 1906.

The main contention of the respondent is that the life of said franchise was coextensive only with the lives of John Lawley and his associates, if any he had within the contemplation of the terms of the grant from the state, and that, John Lawley having never had any associate or associates, said franchise ceased to exist immediately upon his death. It is further contended that the franchise was forfeited by reason of the transfer of the same by John Lawley without the consent of the state, and also by rea-

son of noncompliance with the requirements of section 516 of the Civil Code. The court found as a matter of fact, as well as a conclusion of law, that "John Lawley never at any time associated with himself in the construction and maintenance of said toll road any person or persons whatsoever." The court further found that while the defendants Harry B. and Charles A. Lawley "did affix, and at all times kept up, at or near the said toll gate on said toll road, a list showing the rates of toll last theretofore duly fixed and determined by the said board of supervisors of the county of Napa," they failed to comply with the provisions of said section 516 of the Civil Code, "other than as specified in this paragraph." The judgment, however, is founded entirely on the fact of the death of John Lawley and the asserted termination of the franchise by reason thereof.

The appellants contend that the franchise in question is property in the sense that it may be transferred the same as any other kind of property; that, there being no limitation provided in the franchise as to the time during which it should run, the state granted to John Lawley and his associates, if any he had, an estate in fee in said franchise and toll road; that, consequently, the franchise did not cease to exist or terminate with the death of John Lawley.

It is further contended that the grant, properly construed, contemplates that the "associates" of John Lawley are such persons as he might associate with him either in the construction or the maintenance of the toll road or both.

As to the claim that the franchise was forfeited by the failure of the appellants to comply with certain of the provisions of section 516 of the Civil Code, the position of appellants is that those particular requirements of said section with which the court found that they had omitted to comply, having been added to the section subsequently to the granting of the franchise, are, as applied to the toll road in question, in the nature of legislation impairing the obligations of a contract, and are therefore void. The theory upon which the issues were decided by the court below is predicated of the assumption that the franchise granted by the acts of the Legislature referred to is a mere license or personal privilege to collect tolls; but it is very clear to my mind that such a construction of such franchises as the one here involved would result in working the rankest sort of injustice in many cases. It would certainly open up opportunity for the destruction of valuable rights acquired thereby and thereunder, and this no rational or well-poised system of laws ought to tolerate in any case or under any circumstances. If, for example, the life of the franchise here were intended to be determinable upon the death of John Lawley, assuming that he had no

ever soon after the completion of the toll road—whether a year, a month, or a day would be immaterial—that he might die. Thus it may readily be seen, that, after he had expended thousands of dollars in the construction of the road and perhaps created an indebtedness against it in necessarily borrowing large sums of money to build it, the franchise would cease to exist immediately upon his death, the rights acquired thereby would become vested in the counties through which the road traversed, and Lawley's creditors whose money had been employed in the construction of the road perhaps left without resources from which they might recoup themselves.

It is a proposition within the compass of the common history of California that in the infancy of the state the only means of transportation either of freight or passengers or as a means of traveling from point to point were over the wagon roads constructed and maintained either by the taxpayers or private individuals or corporations organized for the purpose of building and maintaining such thoroughfares. Railroad transportation, as a financially feasible scheme, had, at the time of the granting of the franchise in question, scarcely more than entered the minds of the people of California as a serious proposition, and even now, in many of the mountainous regions of the state, it appears to be regarded as financially impracticable to build and maintain railroads. It goes without saying that the general prosperity of a state, if such prosperity would be developed and maintained up to the full measure of its capacity in resources, must depend very largely on whether all the sections of the commonwealth are brought in to reasonably close touch with commercial, industrial, and financial centers. Without wagon roads in the earlier periods of the state's history commercial intercourse to any important extent between the people of the various sections of the state would have been impossible. In fact, public roads, even with all the facilities for railroad transportation which later years have brought to California, are an absolute necessity to the general welfare and prosperity. The building and maintenance of public highways is, under the most favorable conditions, a very heavy burden on the taxpayers, and it is safe to say that few, if any, of the roads originally established and maintained under a toll road franchise, would ever have been constructed if the taxpayers had been required to bear the cost of their construction. In other words, to encourage and promote the building of highways, particularly in the earlier history of the state, it was necessary to grant toll road franchises vesting the grantees with the right to build and maintain public highways, and to enjoy the right to claim and appropriate to themselves the

it is the essential part of government to perform, but which it is often financially impracticable for the latter to execute. It was therefore in the pioneer days of the state, as, indeed, it is now as to counties to which that power has been committed, where the necessity therefor is found to exist, only in line with an enlightened and necessary policy of the state to grant these franchises and thus minimize the difficulties of general commercial and business intercourse between the inhabitants thereof.

[1] The state should not, therefore, be deemed to have intended to so restrict or hamper the rights of its grantees under such franchises as to permit the destruction of those rights except upon very substantial reasons or for very material causes. In other words, while the general rule is that such grants are to be strictly construed, it should be a very clear case—one admitting of little, if any, doubt of the correctness of such a construction—of an intention on the part of the granting power to limit the life of such a franchise upon an event which may happen at any moment, where, as here, there are no express words of limitation and no law, as now, expressly fixing the period of time during which it shall run, before a court should feel justified in declaring, as the result of a mere process of construction, that such a franchise has ceased to exist.

There is, as will be observed, no limit fixed by the grant upon the time during which the franchise involved here shall run, and the conclusion reached by the learned court below that it ceased to exist synchronously with the death of John Lawley proceeds from the theory that the franchise is a personal trust, and therefore could not survive after the death of the person to whom the same had been specially granted.

[2] In my opinion the question whether franchises of the character of the one involved here are assignable must depend upon the proposition whether they are property within the meaning of that term as used in section 1044 of the Civil Code, which provides that "property of any kind, may be transferred, except as otherwise provided by this article." If the word "property" as so used was not intended to be broad enough to include franchises of the sort involved here, then manifestly the franchise under attack in this case would have to be construed and held to be a mere personal privilege or trust, and, assuming that John Lawley left no associate or associates within the meaning of the term, "associate," as employed in the grant, the same expired and passed out of existence coincidentally with his death. If, on the other hand, the franchise is property within the purview of section 1044 of the Civil Code, then obviously it is, like any other species of property, subject to transfer, and may be, even in the absence of an ex-



press provision of law to that effect, sold on execution in satisfaction of any judgment which might be obtained against the owner thereof.

That the franchise in question is property within the meaning of section 1044 of the Civil Code, is a proposition concerning which I entertain no kind or degree of doubt. While there are some early cases which seem to hold that ferry franchises are nothing more than a personal trust, and not the subject of levy, sale or delivery under execution (*Munroe v. Thomas*, 5 Cal. 470; *Thomas v. Armstrong*, 7 Cal. 286; *Wood v. Truckee Turnpike Co.*, 24 Cal. 474; *People v. Duncan*, 41 Cal. 507; and *Gregory v. Blanchard*, 98 Cal. 313, 33 Pac. 199), still, I think, there are other California authorities which support the view that they are real property, to be governed by the same rules by which other real property is regulated. Indeed, I know of no principle or reason why they should be regarded in any other light. There are many reasons why they should be so classified and treated. While the government ought always to subject the exercise of such rights—rights flowing from the bestowal of certain functions of government upon corporations or natural persons—to such restrictions and regulations as will prevent their abuse or their use against the interests of the public, which they are created to serve, it will not render them practically worthless or undesirable by placing such unreasonable restrictions upon their exercise as to make it possible that rights acquired thereby and thereunder may be unjustly destroyed. To do so would inevitably result in greatly handicapping the government in the execution of its paramount end, viz.: The promotion of the safety, comfort, convenience, the prosperity, and happiness of the inhabitants of the state; for who would ask for a franchise, the execution of the purpose of which would necessitate the outlay of a vast sum of money, if the privilege or right so granted could, upon the merest pretext, deduced entirely through construction, be divested, and the property acquired thereby and thereunder practically confiscated?

[3] It seems to me that the power or right in John Lawley to transfer or assign certain interests in the franchise here is clearly implied from the language of the grant itself. The person or persons whom John Lawley is thus authorized to associate with himself in the construction and maintenance of the road are not specifically named in the grant. Who they are or may be is a matter left solely to the determination or election of John Lawley. It is obviously true that John Lawley could not associate with himself another person or other persons in the construction and maintenance of the road without assigning to such person or persons some interest in the franchise. This would, of course, be just as true before the construction of the road as after its completion, and, if thus it is neces-

sarily to be implied that he may assign certain interests in the franchise before the road is constructed, what language is there in the grant that may reasonably be so construed as to justify the conclusion that he was without right to assign such interests after the completion of the road? Of course, it will not be contended that the language, "and such persons as he may associate with him," means anything less than persons in whom he might vest an interest in the franchise. In other words, no one will say that the mere employment of persons to assist in the construction and maintenance of the road would amount to an association of such persons with Lawley within the contemplation of the grant. But there are cases which sustain my position, and I will now refer to a few thereof.

Although, as I have shown, some of the California cases have declared that franchises of the character of the one concerned here involve mere personal trusts and others that they are real property, yet the question as it is presented in its present form has never before been urged before and decided by the higher courts of this state. The precise question submitted here is, therefore, new in California. But, as I have already indicated, I am in accord with those cases which hold that such franchises constitute property. In the case of *Powell v. Maguire*, 43 Cal. 11, speaking of a ferry franchise, Justice Rhodes, in a concurring opinion, said: "I am of the opinion that the franchise in question is real estate; that in its transfer it is to be governed by the rules applicable to the transfer of title to other real estate." It is held in the case of *Stockton Gas, etc., Co. v. San Joaquin County*, 148 Cal. 319, 83 Pac. 56, 5 L. R. A. (N. S.) 174, that franchises authorized by section 19 of article 11 of the Constitution to lay pipes and conduits, or erect poles and supply the inhabitants of a city with artificial light, are incorporeal hereditaments appurtenant to the land. The court says: "The principle that franchises of the character here involved are treated as incorporeal hereditaments finds ready support from the authorities." And in support of this announcement it quotes approvingly from *Bowman v. Wathen*, 2 McLean, 376, 3 Fed. Cas. No. 1,740, in which it is decided that a ferry franchise is real property and passes by deed; that it "is assets in the hands of heirs, and in all respects is subject to the laws which regulate real estate"; that "there would seem to be no doubt that the ferry franchise, with all that belongs to it, may be taken by descent or by conveyance the same as other interests which pertain to realty. \* \* \* In this respect no difference is perceived between a ferry franchise, the franchise of a toll bridge, a turnpike or railroad, or any other franchise of the same nature." In many of the other jurisdictions of this country the same rule is firmly established. In *Wilmington & R. A.*

*Co. v. Downward* (Del.) 14 Atl. 721, it is said that "a franchise is property, and it cannot wantonly or of whim be taken away by legislative act and transferred to another." "A franchise," says the Supreme Court of Connecticut, *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19, "is property which may be transferred by sale or devise, and it will descend to heirs like other property." "The grant was of a franchise, which had the legal character of an estate or property. 'An estate' said Chancellor Kent (3 Kent's Com. 458), 'in such a franchise and an estate in land rest upon the same principle, being equally grants of a right or privilege for an adequate consideration.'" *Oakland R. Co. v. Oakland B. & F. V. R. Co.*, 45 Cal. 365, 373, 13 Am. Rep. 181. "A franchise," said Justice Daniel, in *West River Bridge v. Dix*, 6 How. 507, 534, 12 L. Ed. 535, "is property and nothing more. It is incorporeal property, and is so defined by Justice Blackstone when treating in his second volume (chapter 3, p. 20) of the rights of things. It is its character of property which imparts to it value, and alone authorizes in individuals a right of action for invasion or disturbance of its enjoyment. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect toll upon them, granted by the authority of the state, we regard as occupying the same position, with respect to the paramount power and duty of the state, to promote and protect, as does the right of the citizen to the possession and enjoyment of his land, under his patent or contract with the state, and it can no more interpose any obstruction in the way of their just exertion." In the same case Justice McLean said: "It is objected that this bridge, being owned by a corporation, and used by the public, does not come within the designation of private property. All property, whether owned by an individual or individuals, a corporation aggregate or sole, is within the term. In short, all property not public is private." See *Welch v. County of Plumas*, 80 Cal. 338, 22 Pac. 254; *Lippencott v. Allander*, 27 Iowa, 460, 1 Am. Rep. 299; *Dufour v. Stacey*, 90 Ky. 238, 14 S. W. 48, 29 Am. St. Rep. 374; *Johnson's Appeal*, 95 Pa. 79; *Evans v. Hughes County*, 3 S. D. 580, 54 N. W. 603; *Greer v. Haugabook*, 47 Ga. 282.

I could well rest the conclusion at which I have arrived that a franchise of the kind involved in the case at bar is property—real property—within the full meaning of section 1044 of the Civil Code, upon the foregoing authorities, by which the proposition seems to be conclusively established. Still the case of *Lippencott v. Allander*, supra, as to the facts, so closely resembles the present case that I feel justified in quoting from the opinion therein in extenso. The Iowa Supreme Court in that case, among other things, says: But one question is presented by the record for our determination. It is this: Is a ferry license vacated or the franchise lost by the

death of the party to whom it was granted? "The right acquired under a ferry license is called a franchise, and is conferred by grant from the government, and with an implied covenant, on the part of the government, not to invade the right vested, and, on the part of the grantee, to perform the duties and conditions prescribed by the grant. \* \* \* The fact that it is conferred by grant from the government, and may be forfeited for misuser or nonuser does not argue that it is not property, or that it may be lost in a way or manner which will not deprive the owner of other property or his rights therein. \* \* \* Hence it is thought that the death of the grantee terminates the franchise. The answer to this is: That, if the person exercising the franchise fails to perform the duties appertaining thereto, the license, by proper proceedings, may be revoked. Rev. § 1212. And that this position of appellee is not in accordance with the policy of our statutes is made very plain by the provisions permitting and regulating the sales of the franchise upon execution. In such case the purchaser, by substitution, assumes the duties of the original grantee, and acquires all his rights. No reason can be given why the law will permit this, and yet prohibit the exercise of the franchise, in case of the death of the grantee, by his representatives. The doctrine contended for leads to another inconsistency, namely, the franchise may be subjected to the payment of the debts of the grantee in his lifetime, but is not assets for the payment of the same debts after his death. The grant of a ferry franchise is made for a specified time, not less than three nor more than ten years, with no reservation that it shall terminate upon the death of the grantee. Being, as we have seen, property, it would not, upon every analogy of the law, be lost by the death of the grantee. At common law it was granted as other real property, in estates for years, for life, or in perpetuity, and was so held. Under our statute, it is granted in an estate for years only; and the death of the grantee can no more terminate it than the death of a tenant can terminate a like estate in lands. The above hardship, and injustice of the rule contended for, support a powerful argument against it. These franchises often require great outlays for boats, improvement of roads, etc., in order to render them remunerative to the owners, and useful to the public. The property thus acquired is valuable only in connection with the franchises; and, if they are forfeited by the death of the grantees, great loss and gross injustice would thus be wrought their estates. The doctrine contended for by defendant's counsel is not supported by the authorities they cite, viz., *Munroe v. Thomas*, 5 Cal. 470, and *Thomas v. Armstrong*, 7 Cal. 286. These cases hold that ferry franchises are not the subjects of levy and sale under execution. The decisions appear to be based upon the grounds that a

ferry franchise involves a personal trust, granted by the sovereign, upon conditions imposed upon the grantee, alone; and his liability cannot be removed by substitutions. Such sales, as we have seen, are recognized by our statutes, and the ground of these decisions seems to be unsupported by reason and principles of law."

[4] It thus being clearly established that the franchise involved here is property in the sense of that term as it is used in section 1044 of the Civil Code, it follows, of course, that, under the provision of said section, it is subject to all the rights and burdens of property of any other kind, and that it may be transferred by assignment or by any other authorized mode of transferring real property; or, under section 388 of the same Code, or, as stated even in the absence of any such a provision, it may be levied upon and sold under execution, for the satisfaction of any judgment against the owner or owners thereof, "in the same manner, and with the same effect, as any other property."

[5] The conclusion to which the foregoing views irresistibly lead is that, the time to which the franchise here shall run not being expressly limited by the grant itself, the effect of said franchise was to vest in John Lawley and his associates an estate in fee in the franchise and the toll road; in other words, an estate in fee in the real property so granted to them by the state. Sections 1072, 1105, Civ. Code.

[6] This being true, and since there is no provision in the grant itself or of any statute to which my attention has been directed expressly requiring that the consent of the state shall first be obtained before the right to sell or transfer the franchise may be exercised, manifestly said franchise may be transferred without the consent of the granting power. I do not, however, intend to be understood as holding that the state could not have made the procurement of its consent a prerequisite or a condition precedent to the exercise of the right by the grantee to transfer the franchise; but the state has not done so in this case by express language or by language reasonably capable of the construction that such was its intention.

[7] The state always retains or reserves the power to regulate and control such franchises wherever they may go or to whomsoever's hands or ownership they may be transmitted, and its chief, and, indeed, only, concern with regard to such grants is that they shall not only be used for the purpose which they are created to subserve, but so used as not to injure the public or trespass upon its rights.

[8] Having this power of supervision or control over such grants, the state may forfeit them and all rights acquired thereby where they are not used or where they are misused. There is, therefore, no necessity for imposing restraints upon or in any way

fettering the power of alienation as to estates thus created and thus rendering their value as property exceedingly precarious.

[9] While the result at which I have arrived is manifestly decisive of this case, still I can conceive no impropriety in saying that in my opinion the court erred in finding that John Lawley "never associated with himself in the construction and maintenance of said toll road any person or persons whatsoever." This finding obviously involves a conclusion of law as well as a finding of fact, since necessarily it is founded on a construction of the legal effect of the language of the grant.

[10] The act, as we have seen, provides that "John Lawley, and such persons as he may associate with him, are hereby authorized to construct and maintain a turnpike road," etc.

The respondent contends, as we have seen, that the term "associate," as it appears in the act, contemplates only such persons as John Lawley might have associated with himself in the construction as well as the maintenance of the road. In other words, it is insisted that unless John Lawley associated with himself some person or persons in the construction of the turnpike, but constructed it himself without associates in that work, then he could not associate others with himself, within the meaning of the grant, in the maintenance of the road or after the completion of its construction.

Of course, the Legislature had some material or important purpose in view when authorizing John Lawley, if he chose to do so, to associate others with himself in the execution of the terms of the grant, and I can conceive of no other object intended thus to be effected than that of clothing Lawley with the right to invoke assistance in the building and operation of the road in the event that he found himself unable financially to carry out the purposes of the franchise himself. The purposes of the franchise were twofold, viz.: (1) To construct the road; (2) To operate it. The contingency to meet which the provision was inserted in the grant authorizing Lawley to associate with himself other persons in the prosecution of the enterprise was just as likely to happen in the matter of the maintenance of the road as it was in the matter of its construction, and, the state being equally as interested in its maintenance as in its construction, it would hardly be reasonable to hold that the Legislature intended to say that Lawley could not take associates, within the contemplation of the grant, in the maintenance of the turnpike after its completion by him alone. A contrary view of this proposition would, it seems to me, necessarily involve an imputation to the Legislature of a design to lay a trap by which the forfeiture of the franchise for nonuser might happen long before the grantee named in the fran-

chise had been given an opportunity to reimburse himself for the financial outlay requisite to build the road.

Apart, therefore, from the consideration that the franchise and its essential concomitants are transferable the same as any other character of property and that Lawley, the named grantee, could consequently have taken in associates either in the construction or maintenance of the road or in both or have sold and transferred it altogether, even in the absence of a provision in the grant authorizing him to do so, it is clear to my mind that the Legislature intended to clothe Lawley with the right to take in associates in the prosecution of the enterprise at any time—after as well as before the completion of the turnpike. It follows, of course, that the appellants, although associated with John Lawley in the maintenance of the road after its construction, are, nevertheless, within the purview of the act granting the franchise in question, "such persons as he may associate with him," etc.

I am not prepared to say that the amendment by the Legislature of 1901 (Stats. 1901, p. 5) of section 516 of the Civil Code would involve, if applicable to the franchise in question, legislation whose effect as so applied would impair the obligations of a contract. The Legislature has the undoubted right to subject the exercise of rights under all such franchises to reasonable regulation in order that the interests of the public may be fully safeguarded and protected, and such franchises are granted subject not alone to existing regulations, but to such additional regulations as the granting power may deem proper and reasonable to impose subsequently to the granting of such privileges. I see nothing in the additional requirements prescribed by the amendment of section 516 of the Civil Code which is unreasonable or which could not be complied with without impairing in the slightest measure any rights which might have been acquired under the franchise involved here.

[11] But I am of the opinion that the requirements of the amendment were not intended to apply to perpetual franchises or those as to which no limitation is prescribed as to their term of duration. By said amendment, the owner of a toll road is required, in addition to affixing and keeping up, "at or over each gate, or in some conspicuous place, so as to be conveniently read, a printed list of the rates of toll levied and demanded," as said section formerly read, to show in and by such printed list, "the date when the franchise or privilege under which the right to collect tolls is claimed was granted and the term of duration of said franchise," and "the date upon which rates of toll were last fixed by the board of supervisors." Said section further provides that "failure to comply with the provisions of this act shall work an immediate forfeiture

of the franchise." The court found, as we have seen, that the defendants "did affix and at all times kept up at or near the said toll gate on said toll road a list showing the rates of toll last theretofore duly fixed and determined by the said board of supervisors," etc., but that they failed to show in said printed list the date when the franchise was granted or the term of duration of said franchise, and concluded, as a matter of law, that the defendants did not comply with the provisions of the section named.

The obvious object of the requirements of section 516 of the Civil Code is to prevent the public from being fraudulently imposed upon or deceived by persons claiming the right without authority to collect tolls, or, having such authority, claiming the right to collect tolls in excess of the rates established by the board of supervisors. The importance in all cases of the provision as to the posting of the rates of toll fixed by the authorities is plainly apparent, but with respect to the posting of a notice showing the date when the franchise was granted and the term of its duration is important only in those cases where the term of duration of the franchise is limited to a specified number of years. In a case like the present, where the franchise is granted to exist perpetually, the public could not be imposed upon or deceived by the mere failure to publish, as required by the statute, the date the franchise was granted or the time during which it is to run. I am therefore of the opinion that the Legislature did not intend that those provisions which have been added since the granting of the franchise in question should apply to such franchises as were granted by the state itself to exist for an indefinite period prior to the enactment of the amendment, but were inspired solely by the policy, since adopted, of limiting the life of all franchises to a definite number of years. In any event, the vital requirements of the section, so far as this franchise is concerned, having been observed by the defendants, it would certainly be a gross injustice to declare the franchise forfeited for the reason suggested, and particularly would this be true in view of the fact that no possible injury can result to the public from the omission to comply with the requirements referred to.

The summary of my conclusion is: That the franchise in question is property in the sense of that term as it is used in section 1044 of the Civil Code, and is therefore subject to all the rights and burdens of any other species of property; that the appellants are not only the surviving associates of John Lawley within the meaning of the grant, but acquired title to the property—the franchise and the right to collect toll thereunder—through various mesne conveyances, assignments, and other instruments in writing; that the franchise was not forfeited by reason of the noncompliance with the require-

ments of the amendment of section 516 of the Civil Code.

The judgment and order are therefore reversed.

We concur: CHIPMAN, P. J.; BURNETT, J.

On Petition for a Rehearing.

HART, J. The respondents have petitioned this court for the reopening of this cause and a reconsideration of the points originally urged by them in favor of the judgment. After an extended consultation, the justices of this court have reached the conclusion that, upon a rehearing, there would be no likelihood of a recession from the result arrived at in the original opinion filed herein. We may remark, however, that we keenly appreciate the gravity and importance of the ultimate question submitted for decision in this cause, both in its legal aspect and in its effect upon the parties to the action, whatever may be the final decision; but we may further observe it is a source of much comfort to us to know that, if we have conceived erroneous views upon the legal questions, upon the solution of which the ultimate result must depend, there is another court that can correct the errors of our judgment.

It is said in the petition that "for over 40 years these defendants have exacted tolls on this road," that "at the present time appellants are bleeding the public and the public has no redress," and that, "if the time has not come, it will soon come when the profits from this toll road will amount to more in one year than the whole cost of construction and repair." It must readily be admitted that these are considerations which should make it most desirable that the public should own the road, or that it should not remain in private hands, a consummation not at all adverse to our sentiments, if the conditions be as they are depicted in the petition, but learned counsel will not, of course, undertake to maintain that such considerations constitute a legal argument in favor or in support of the confiscation of private property or the destruction of vested rights, or that will justify the establishment of a principle or precedent that must of necessity operate most disastrously to the owners generally of such franchises. If the appellants are "bleeding the public"—a phrase that can imply nothing short of an accusation that they are exacting unauthorized and illegal tolls—the plain, ready, and effectual remedy lies in a proceeding looking to a forfeiture of the franchise for a misuser of the right granted to them by the state. The boards of supervisors of the two counties into which the road extends have the power, and it is their bounden duty not only to regulate the

rates of toll, but to establish such rates only as are reasonable and just both to the owners of the franchise and the public. The owner of the franchise is entitled to only a reasonable return on his investment, and, if the appellants in this case are now charging such rates as will make the profits of the venture in one year equal to the sum total of the original cost of the construction of the road and the cost of maintaining it, the fault lies with the rate-fixing body in such cases and with no one else.

But counsel declare that our construction of section 1044 of the Civil Code is entirely too broad, "because it does not include or provide for the transfer of a franchise such as this"; that "the term 'property' as used in this section refers to private property, and not to grants of public functions." We are unable to follow the argument that franchises such as the one involved in this controversy do not constitute private property. What are they if not private property? They are as much private property as franchises authorizing the construction and maintenance of railroads. There can be no distinction in principle between the two classes of franchises. It is true that they are charged with a public use and subject to the control, for the purposes of necessary and proper regulation, of the granting power and may be forfeited for misuser or nonuser, but, subject to these necessary restraints, they are as much private property in the hands of the grantees as is any other species of property.

[12] As stated in our former opinion, the state undoubtedly has the right to annex as a condition to the transfer of such franchises the procurement of its consent, but it did not do so in the case of the present franchise, and, in the absence of a provision expressly requiring that its consent shall first be obtained before said franchise may be transferred, there was, in our opinion, no necessity for such course to be pursued.

But, having fully presented in the original opinion filed herein our views on the questions discussed in the petition, there is no necessity for further consideration of them now.

As stated, feeling that further consideration of the cause or the points passed upon by us would not have the effect of changing or modifying our views, it will certainly save time to the parties and hasten a final decision, if the judgment of this court does not stand, by denying the petition and thus affording the earliest opportunity of getting the cause before the Supreme Court, if counsel choose to adopt that course.

The petition is denied.

We concur: CHIPMAN, P. J.; BURNETT, J.

**IDAHO NORTHERN R. CO. v. POST FALLS  
LUMBER & MFG. CO.**

(Supreme Court of Idaho. Dec. 4, 1911.)

(Syllabus by the Court.)

**1. NAVIGABLE WATERS (§ 1\*)—WHAT CONSTITUTES—CAPACITY FOR FLOATING TIMBER—QUESTION FOR JURY—"NAVIGABLE STREAM."**

Any stream in this state is navigable on which logs or timber can be floated to market or the place of use, and to that extent and for that purpose is a public highway; and it is not necessary that such stream be navigable the whole year for such or any purpose. It is sufficient if during the high-water season such stream can be used for the floating of logs and timber, and the question of navigability for such or any useful purpose is a question of fact, to be determined in the same manner as any other question of fact is determined.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 5-16; Dec. Dig. § 1.\*]

For other definitions, see *Words and Phrases*, vol. 5, pp. 4675-4684; vol. 8, p. 7728.]

**2. NAVIGABLE WATERS (§ 1\*)—WHAT CONSTITUTES—CAPACITY FOR FLOATING TIMBER.**

If a stream is in fact navigable or floatable, the question as to whether or not logs, lumber, or other floatable materials may be profitably transported by means of such water course is a question that should be left in a large measure to the person who undertakes the enterprise, and the chief question to be determined by a court in such a case is the question of navigability in fact, while the question as to whether it can be done profitably is one that will depend largely upon the condition and circumstances of the person who undertakes the enterprise, and to him it may be both practicable and profitable, while to another differently situated it might be unprofitable.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 1.\*]

**3. NAVIGABLE WATERS (§ 1\*)—WHAT CONSTITUTES—CAPACITY FOR FLOATING TIMBER—WEIGHT OF EVIDENCE.**

In the new and undeveloped condition of this state, and in view of the circumstance that large areas of the state's forest and mineral wealth have not been opened or developed, proof that a stream flowing through such territory has never before been utilized for the floating of logs or other materials should have but little or no weight in determining the fact of the navigability or floatability of such stream.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 5-16; Dec. Dig. § 1.\*]

**4. NAVIGABLE WATERS (§ 39\*)—RIGHT TO USE—CARE REQUIRED.**

One who undertakes to utilize a stream for the floating of logs, lumber, or other material must do so having due and proper regard for the interests and property rights of others along such stream, and must exercise care proportionate to the natural conditions of the stream, the dangers and difficulties of the undertaking, and the liability of inflicting injury upon others.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 39.\*]

**5. NAVIGABLE WATERS (§§ 19, 39\*)—OBSTRUCTION—RAILROAD BRIDGE.**

Where a railroad company builds its grade and track along the course of a stream, crossing it from time to time and utilizing a bank of the stream for its grade, it is chargeable with notice of the navigability of such stream for the floating of logs and other articles of

commerce and of the natural conditions of the country and the fact that the stream is subject to periods of high water, freshets, and floods, and must so build its grade and road as not to unreasonably impede or obstruct the navigation of such stream, and in so doing it must take notice of the fact that floatable commodities are liable at times to strike the banks of the stream, and cause abrasions of the bank, and must accordingly guard and protect its road-bed built along such banks.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. §§ 19, 39.\*]

Appeal from District Court, Shoshone County; W. W. Woods, Judge.

Action by the Idaho Northern Railroad Company against the Post Falls Lumber & Manufacturing Company for damages and perpetual injunction. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

McBee & La Veine and Phil Averitt, for appellant. Franklin Pirman and W. A. Cleland, for respondent.

**AILSHIE, J.** This is an appeal from the judgment and order denying a motion for a new trial. The respondent, the Idaho Northern Railroad Company, is an Idaho corporation, and has constructed and is operating a line of road from a point near the junction of the north and south forks of the Cœur d'Alene river in Shoshone county up the north fork of the Cœur d'Alene river to its confluence with Prichard creek, and thence up Prichard creek to the mouth of Paragon gulch. Prichard creek is a tributary of the north fork of the Cœur d'Alene river, and flows through a mineral and timber section of Shoshone county. It appears that a great deal of placer mining has been done for many years along the course of Prichard creek and Eagle creek, which is a tributary to Prichard creek, and flows into Prichard creek at a point near the respondent's line of track. The railroad track is built along the canyon through which Prichard creek flows, and follows the stream, at some points, being constructed in what was formerly the bed of the stream and at other places crossing the stream, and at still other points following along one of the banks of the stream. By reason of having built the road along the stream and at some places in the bed of the stream, it was necessary for the railroad company to cut new channels and straighten the course of the channel so as to give the water free passage and protect the railroad property. Between the mouth of Eagle creek and the mouth of Prichard creek, the railroad company constructed two bridges. These bridges are constructed (according to the court's finding No. 14) "of piling arranged in rows or bents parallel to the banks of the stream at said points, the piling being about one foot in diameter and the bents 15 feet from center to center.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

There are 11 bents to each bridge, providing 140 feet of clear space at each bridge for the passage of water." It seems that as a result of many years placer mining along Prichard creek the ancient channel of this stream has been in a great measure filled up with gravel and debris, and that at places there is no very well-defined bed or channel to the stream, the sand and gravel and debris having so filled up the depressions that, when the high-water season comes, the water spreads out over a considerable space, and at such time has no well-defined main channel or stream. During the greater portion of the year there is not much of a flow of water in this stream, but in the springtime during the melting of the snow and spring rains there is a large body of water flowing in this stream, and along from March to May and June it is subject to freshets and floods. The railroad was built up this canyon in the year 1908. Along the latter part of 1909 or the early part of 1910, the appellant, the Post Falls Lumber & Manufacturing Company, which is also an Idaho corporation, purchased from the government a large quantity of saw timber aggregating about 2,500,000 feet, which was then standing on the forest reserve about a mile and a half above the confluence of Eagle creek with Prichard creek. The lumber company thereafter employed men, and set them to cutting timber, and banking it along Eagle creek, and, when the high-water season came in March following, had about 500,000 feet banked along Eagle creek. Shortly preceding the rise in the stream, appellant caused some of its employees to go along Eagle creek and down into Prichard creek and cut away fallen timber and brush, and blast out stumps, and such things as constituted an obstruction in the stream, but did not remove them from the stream. The men began putting the logs into the stream along the latter part of February or the 1st of March for the purpose of floating them down Eagle creek into Prichard creek, and thence on down into the Cœur d'Alene river for the purpose of transporting them to its mill at Post Falls on the Spokane river. It seems that none of the logs arrived in Prichard creek until about the 15th of March. This is accounted for perhaps by the fact that the high-water season did not come on until the middle or latter part of March.

It seems, both from the findings made by the trial judge and the evidence as contained in the record, that the appellant did not place men along the stream when the high water came for the purpose of keeping the logs moving or preventing jams. About the 17th of March the logs began to jam in Prichard creek a short distance below the mouth of Eagle creek and also at a point further down Prichard creek near the entrance to a slough, which is designated as "McGuire's Millrace." As the logs came down they were hurled to one side and caused the sand

and gravel to collect and form a jam or obstruction in the stream, and changed the current of the stream so that it was directed against the respondent's railroad track and grade, and it resulted in washing out the track and grade for a considerable distance. A similar jam was also formed at the first bridge by such logs as were not caught in the other two obstructions, and appears to have closed up a number of the open spaces between the piling which supported the bridge. The respondent notified appellant, and asked the appellant to furnish men and take steps to release these logs, and to protect the respondent's track, grade, and bridge. It appears, however, that appellant did not take any steps to relieve the situation until after this suit was instituted. Respondent commenced this action against the appellant for damages caused to its property by reason of the negligent and wrongful acts of the appellant and for an injunction restraining the appellant from further discharging logs in these streams. The case was tried to the court without a jury, and the court found in favor of the respondent and assessed its damages in the sum of \$2,697.57, and issued a permanent injunction against the appellant restraining and enjoining it from placing any logs or timber in either Eagle creek or Prichard creek so as to in any manner change the natural channel thereof to the injury of the plaintiff, or to in any manner dam up or obstruct the streams, etc.

The appellant has assigned a large number of errors, but, as we view the case, it will only be necessary for us to consider two questions. The first question to be considered is the navigability of Prichard creek; and the second question is the respective duties of these parties with reference to each other in attempting to do business along this stream. The respondent's position is stated as follows in its brief: It contends, first, "that Prichard creek was not a navigable stream for the floating of logs;" second, "that had it been, in fact, a navigable stream for the floating of logs, appellant's manner of conducting its logging operations was so negligent and careless that it caused the damage complained of by respondent;" third, "that in either case the operations of appellant should be restrained." The respondent further insists that a finding in its favor on either of the foregoing issues was sufficient to justify and sustain the decree in this case. The court, however, found with the respondent on both these issues; that is, the court found, first, that the stream was not navigable for the floatage of logs and lumber, and, second, that the appellant was guilty of negligence in the manner in which it used this stream and attempted to float logs, and wrongfully and unlawfully caused the damage which respondent sustained.

Now there is no more conflict in the evidence in this case with reference to the navi-

gability or floatability of this stream than would ordinarily rise from the observations of different persons as they occur in the ordinary course of events and affairs of everyday life. We can safely consider this question on the theory that there is no substantial conflict in the evidence thereon. There is no contention that logs can be floated on the stream to any advantage or with any success at any time of the year except during the high-water season. The evidence is not entirely clear as to just what months are covered by the high-water season in that section of the state, but there appears to be no question but that it includes at least the months of March, April, and May. We think it is perhaps safe to say that that period ordinarily extends into the month of June, if not later. It is entirely clear that during March and April there is a large volume of water flowing down Prichard creek, as, indeed, it appears here that it was so great that it tore out sections of respondent's railroad track and grade, and did a great amount of damage in a very short period of time. There is no question or doubt about there being sufficient volume of water in the stream to float logs and lumber. The only question over which there is any controversy is as to whether logs and lumber can be profitably floated down this stream. It appears quite clearly that, in order to prevent jams and the logs piling up and changing the course of the current so as to render it dangerous and destructive to property along the stream, it is necessary to have a force of men along the creek sufficient to keep the logs in the main current, and prevent them piling and jamming and collecting the gravel and sand and debris that always attends a high-water period in this stream.

[2] The question, however, as to the profits with which logs, lumber, and other floatable material may be transported down a stream which carries sufficient volume of water to actually float such materials is not one that should receive great or controlling consideration by the courts. The question as to the practicability of navigating the stream for such purposes with profit to the one who undertakes the enterprise is a question that ought to be left, in a large measure, to the judgment of the man who undertakes the enterprise where it is once admitted that the stream will float the material. One man or a number of men may have abundance of time at their disposal and but little money. They may be able to and feel justified in contributing a great deal of labor in getting their lumber to market by way of the floatable stream, whereas they could not for the want of capital reach the market in any other way. Another man in the same locality who has sufficient capital might more easily and more profitably reach the market by way of a railroad or other means of transportation. This might have been true in this

case. Here the respondent company was operating a railroad which tapped a large timber belt. It could undoubtedly carry logs and timber to the mills and market more profitably over its railroad than it could by way of the water course. The appellant, on the other hand, owned a large body of timber and a sawmill, but did not own a railroad, and it evidently thought it could carry its timber to its mill more profitably by way of the water course than it could over the respondent's railroad. It must in all cases be first ascertained and determined that the floatage or navigation proposed is a valuable or a beneficial use, but as to whether it can be profitably exercised in any instance will depend largely on the circumstances and situation of the persons seeking to avail themselves of such use.

[3] The trial court evidently considered the fact that the stream had never heretofore been used for floating of logs a strong reason for holding that the stream was nonnavigable as he made a finding to that effect. This fact has been considered by some courts and rejected by others. See *Moore v. Sanborne*, 2 Mich. 520, 59 Am. Dec. 209; *Brown v. Chadbourne*, 31 Me. 9, 50 Am. Dec. 641. The fact that a stream has never been used for the purpose of navigation would seem to us to be an important question for consideration in an old state, where it has been long settled and its various resources have been developed and exploited, but such rule is scarcely applicable in a new state like this, where there are large sections of the state that have never yet been settled, occupied, or in any manner developed. There are streams flowing through large areas in this state that are heavily timbered and where there are also large mineral deposits, and yet no one has so far had any occasion to attempt the use of these streams for any commercial purpose such as the floating of logs and lumber or any other product. The fact, therefore, that such streams have never heretofore been employed for the purposes of carrying to the markets the products of the country through which they flow, is no evidence that they may not be so used in the future, or that they are not susceptible of such use. It is the policy of this state to encourage the employment of the water courses for any useful and beneficial purpose, and to that end the power of eminent domain has been granted by the state for the purposes of improving streams, so that the people interested in the country through which they flow may utilize them for beneficial purposes. *Potlatch Lumber Co. v. Peterson*, 12 Idaho, 769, 88 Pac. 426, 118 Am. St. Rep. 233; *Mashburn v. St. Joe Improvement Co.*, 19 Idaho, 30, 113 Pac. 92.

[1] We think the definition of a navigable stream given by the Supreme Court of Oregon in *Felger v. Robinson*, 3 Or. 455, and approved and reaffirmed in *Hallock v. Sultor*, 37 Or. 9, 60 Pac. 384, is the correct definition,



and is in harmony with the general trend of the decisions in this state dealing with navigable and floatable streams. The court there said: "We hold the law to be that any stream in this state is navigable on whose waters logs or timbers can be floated to market, and that they are public highways for that purpose, and that it is not necessary that they be navigable the whole year for that purpose to constitute them such. If at high water they can be used for floating timber, then they are navigable; and the question of their navigability is a question of fact, to be determined, as any other question of fact, by a jury. Any stream in which logs will go by the force of the water is navigable."

To the same general effect, see *Powell v. Springston Lumber Co.*, 12 Idaho, 723, 88 Pac. 97; *Potlatch Lumber Co. v. Peterson*, 12 Idaho, 769, 88 Pac. 426, 118 Am. St. Rep. 233; *La Veine v. Stack-Gibbs Lumber Co.*, 17 Idaho, 51, 104 Pac. 666, 134 Am. St. Rep. 253; *Mashburn v. St. Joe Improvement Co.*, 19 Idaho, 30, 113 Pac. 92. See, also, *Moore v. Sanborne and Brown v. Chadbourne*, supra, and *Com'rs of Burke County v. Catawba Lumber Co.*, 116 N. C. 731, 21 S. E. 941, 47 Am. St. Rep. 829.

[4] It having been determined, however, that Prichard creek is a navigable stream for the floating of logs and lumber, does not dispose of the case. The person who undertakes to float logs and lumber down a stream must exercise reasonable care in order to avoid injury to the property of others. The fact that a stream is navigable does not give any one a right to dump logs and timber into the stream and allow the same to go unattended and without being cared for, and as a consequence to form dams, and divert the current of water, to the injury and damages of others. No doubt the damages which a riparian proprietor may sustain as a natural and unavoidable consequence of the navigation of a stream either with boats and other craft or rafts and logs, where the same is conducted with due care and in a reasonably prudent manner, must be borne by such riparian proprietor as a natural and consequent injury under the rule of *damnum absque injuria*. *Mashburn v. St. Joe Improvement Co.*, 19 Idaho, 30, 113 Pac. 92, and note on page 840 of 47 Am. St. Rep. On the other hand, the party who is attempting to navigate such a stream must exercise care proportionate to the dangers and difficulties of the undertaking and the liability of inflicting injury upon others. *Com'rs of Burke County v. Catawba Lbr. Co.*, 116 N. C. 731, 21 S. E. 941, 47 Am. St. Rep. 829. If the exercise of such care will entail such an expense as to make the enterprise unprofitable, the result will necessarily be that he will not navigate the stream. This, however, is a problem with which he is confronted, and which he must solve at his own risk and responsibility. The appel-

lant when it placed its logs in Eagle creek did so with notice of the conditions of the stream and the situation of respondent's railroad grade and track. Appellant owed respondent the duty of exercising reasonable care and diligence in looking after its logs and keeping them moving and preventing them piling up and jamming so as to inflict unnecessary damages on respondent.

[5] Respondent, on the other hand, was charged with a corresponding duty when it undertook to build its railroad up Prichard creek. It was chargeable with notice that Prichard creek was a stream capable of floating logs and lumber, and that it might be used for such purpose. It was also chargeable with notice of the natural conditions of the country, and the frequency of floods and freshets. It was likewise chargeable with notice that, if any one attempted to float logs or lumber down the stream, they would necessarily, in the course of such navigation, be likely to at some places and at some times strike the banks of the stream, and that in doing so there would necessarily be some abrasions of the banks. If the company sought to convert one bank of the stream into a railroad grade and track, it was under the necessity of exercising such reasonable precaution in building the grade and protecting the same as the nature of the stream, and the natural conditions of the country and use of the stream for the floating of logs and lumber would demand of a reasonably prudent person. It was also chargeable with due care and caution in the building and construction of bridges across the stream. *Com'rs of Burke County v. Lumber Co.*, 116 N. C. 731, 21 S. E. 941, 47 Am. St. Rep. 829. The railroad company is granted the right (under subdivision 5, § 2796, Rev. Codes) to build along and across navigable streams, but, when it does so, it must restore the stream or water course as nearly as possible to its original state or in as good condition as it found it; and under section 2798 such railroad company is authorized to bridge navigable streams, but in so doing it must not "impede or obstruct the navigation of such stream." In bridging a stream like Prichard creek, doing so may and probably will in some degree impair or render more difficult the navigation of the stream. Whether it has unreasonably and unnecessarily impaired or obstructed navigation is a question of fact, to be determined from the evidence in the case. *Small v. Harrington*, 10 Idaho, 499, 79 Pac. 461. The trial court found that the railroad company had properly constructed its grade, and built a sufficient and adequate bridge across the stream, and used due care and diligence in these respects. These findings, however, were made on the theory that Prichard creek is a nonnavigable stream. The court had previously made his finding that Prichard creek is nonnavigable for the floating of logs. After it is de-

terminated that this stream is navigable for the floatage of logs, the trial court might find differently as to the care and precaution with which the railroad company has constructed its roadbed and bridges. *Com'rs of Burke Co. v. Lumber Co.*, supra. The court may now conclude that the grade is either too low or improperly constructed and protected, or that the bridges are not properly constructed. He may conclude that the openings under the bridge ought to be larger or the spans longer. The court, looking at the situation from the viewpoint that this is a navigable stream, may find differently as to the diligence and care exercised by either or both the appellant and respondent in this case.

For the foregoing reasons, the judgment is reversed and a new trial granted. In the event it is satisfactory to both parties, the trial court may make new findings upon the evidence already submitted, and enter judgment in accordance therewith. If, however, it is desired by either party to introduce further proofs, a new trial will be granted for that purpose.

Judgment reversed and cause remanded. Costs awarded in favor of appellant.

STEWART, C. J., and SULLIVAN, J., concur.

#### SWILLING et al. v. COTTONWOOD LAND CO.

(Supreme Court of Montana. Dec. 23, 1911.)

##### 1. APPEAL AND ERROR (§ 1024\*)—FINDINGS—CONCLUSIVENESS—MOTION TO OPEN DEFAULT.

A general order denying a motion to set aside a default judgment has the effect of a finding in favor of plaintiff on every disputed question of fact which is conclusive on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1024.\*]

##### 2. JUDGMENT (§ 159\*)—VACATION—AFFIDAVITS—HEARSAY EVIDENCE.

An affidavit by an attorney for defendant in support of a motion to set aside a default judgment that the attorney's wife had, in his absence, removed his calendar page for the date on which the answer must be served, and on which he had made a note to that effect, may be treated as hearsay, in the absence of affidavit by the wife, and defendant may not complain because of the denial of the motion.

[Ed. Note.—For other cases, see Judgment, Dec. Dig. § 159.\*]

##### 3. JUDGMENT (§ 153\*)—DEFAULT JUDGMENT—VACATION—INEXCUSABLE NEGLIGENCE.

One who appeals to the discretion of the trial court to relieve him from a default judgment must show diligence on the discovery of the default, and, where a defendant who had from September 28th to December 9th, in which to answer took no steps toward preparing an answer until December 8th, and did not offer any excuse for the delay, and did not move to set aside the default for almost a month after his counsel had knowledge of it,

refusal to set aside the default would not be disturbed on appeal.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 300-304; Dec. Dig. § 153.\*]

##### 4. JUDGMENT (§ 139\*)—APPEAL AND ERROR (§§ 935, 957\*)—DEFAULT JUDGMENT—VACATION—DISCRETION OF COURT.

Whether a default judgment should be set aside rests in the sound legal discretion of the trial court, and, in the absence of a manifest abuse of discretion, its ruling will not be disturbed on appeal, and the court on appeal will not substitute its discretion for that of the trial court, but every presumption in favor of the trial court's ruling will be indulged in.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 235-238; Dec. Dig. § 139.\* Appeal and Error, Cent. Dig. §§ 8785, 8823; Dec. Dig. §§ 935, 957.\*]

Appeal from District Court, Cascade County; J. B. Leslie, Judge.

Action by S. R. Swilling and another against the Cottonwood Land Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

Freeman & Thelen, for appellant. J. W. Speer, for respondents.

HOLLOWAY, J. The defendant appealed from a judgment and from an order of the district court refusing to set aside a default.

The action was commenced on September 28, 1910. On October 13th the defendant filed a demurrer to the complaint and a motion for change of venue. The motion was denied and the demurrer noticed for hearing, but on November 19th counsel for the respective parties stipulated that the demurrer should be withdrawn, and defendant given to and including December 9th within which to answer. An answer was not filed, and on December 12th a judgment by default in favor of plaintiff was rendered and entered. On January 12, 1911, defendant filed its motion to set aside the default, supported by the affidavit of J. N. Thelen, one of the attorneys for the defendant, and accompanied by a proposed answer. In this affidavit the affiant states that at the time the stipulation was made he entered upon his office calendar for December 8th, a notation that the answer in this case would be due on the following day (December 9th); that on December 7th his residence was burglarized; that on December 8th the wife of affiant went to his office, and in his absence used his calendar sheet for December 8th, and removed it, thereby removing the notation which he had made as to the due date of the answer in this case; that affiant was much excited over the burglary, and by reason thereof, and by reason of the fact that the notation was removed from his office calendar, he neglected to prepare and file an answer within time. J. W. Speer, attorney for the plaintiff, filed a counter affidavit, and this was followed by another affidavit by Mr. Thelen, and this by another by Mr. Speer. A great amount of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

matter entirely foreign to the question which the trial court had to determine was unnecessarily dragged into the record. There are charges of unprofessional conduct and very sharp conflicts as to what actually occurred after December 16th, when defendant became aware of the default. After considering these affidavits and the proposed answer of the defendant, the trial court denied defendant's motion to set aside the default, and we are now asked to say that in so doing the court so far abused that judicial discretion lodged in it as to warrant this court in reversing the order.

[1] In the first instance it was peculiarly the province of the trial court to pass upon the affidavits presented and upon the credibility of the affiants. The general order denying the motion has the effect of findings in favor of the plaintiff upon every disputed question of fact, and such findings are conclusive upon this court.

[2] In the second place, in the absence of an affidavit by the person who removed the calendar page from the office of defendant's attorneys, the trial court may have treated the statements in the first affidavit of Mr. Thelen as hearsay.

[3] Again, having determined the conflicting statements in the affidavits in favor of the plaintiff, the trial court may have reached the conclusion that defendant's failure to move to set aside the default for almost a month after its counsel had knowledge of it was inexcusable. It is a rule that one in default who appeals to the discretion of the trial court to relieve him must show that he proceeded with diligence upon discovering his default. *Bowen v. Webb*, 34 Mont. 61, 85 Pac. 739. Furthermore, the trial court may have applied the rule with more rigor because of the fact that defendant had from September 28th to December 9th within which to file this answer, and up to December 8th had not taken any steps toward preparing it, nor offered any excuse for delaying until the very last day. It is clearly inferable from the affidavit of Mr. Thelen that the answer could have been prepared in a very short time and that consultation with the client was not necessary. In fact, the answer tendered is verified by one of the attorneys.

[4] That the default of the defendant here was properly entered is not questioned. In *Donlan v. Thompson Falls C. & M. Co.*, 42 Mont. 257, 112 Pac. 445, this court said of a default: "Whether it should have been set aside was a matter within the sound legal discretion of the court below, and with its discretion we may not interfere unless there was a manifest abuse of such discretion." Every application of this character must be determined by its own facts; but in the following cases, wherein orders refusing to set aside defaults have been affirmed, the facts were somewhat analogous to those presented

by this record, so far as the facts of this case are not disputed: *Herbst Importing Co. v. Hogan*, 16 Mont. 384, 41 Pac. 135; *Butte Butchering Co. v. Clarke*, 19 Mont. 306, 48 Pac. 303; *Haggin v. Lorentz*, 13 Mont. 406, 34 Pac. 607; *Bowen v. Webb*, supra; *City of Helena v. Brule*, 15 Mont. 429, 39 Pac. 458. See, also, *Thomas v. Chambers*, 14 Mont. 423, 36 Pac. 814; *Chambers v. City of Butte*, 16 Mont. 90, 40 Pac. 71; *Scilley v. Babcock*, 39 Mont. 536, 104 Pac. 677.

It is beside the question that any member of this court, if sitting in the trial court, would probably have exercised the discretion in favor of the appellant. It is not the province of this court to substitute its discretion for that of the district court. In matters of this character we sit as a court of review only, and our work is confined to the correction of errors which must be made to appear. Every presumption is in favor of the trial court's ruling, and we cannot say, in view of the more advantageous position occupied by the trial court in considering the question, that there was an abuse of discretion in denying the motion. The complaint states a cause of action and supports the judgment. The judgment and order are affirmed.

Affirmed.

BRANTLY, C. J., and SMITH, J., concur.

#### STATE ex rel. ROWE v. DISTRICT COURT, SILVER BOW COUNTY, et al.

(Supreme Court of Montana. Dec. 18, 1911.)

#### 1. JUDGES (§ 22\*) — COMPENSATION — POLICE JUDGES.

Rev. Codes, § 3241, provides that the salary and compensation of police judges must be fixed by ordinance, and shall not exceed the amount stated in cities of the classes named, and that, in addition, a police judge is entitled to receive in all civil cases the fees allowed justices of the peace, and in all criminal actions or proceedings, when acting as a police justice of the peace or committing magistrate, "he must receive no compensation whatever." Section 3297 gives the police court concurrent jurisdiction with the justice of the peace of the offenses named, including petit larceny, assault and battery, breach of the peace, etc.; and section 3300 provides that proceedings in preliminary examinations in the police court must be had in conformity with the provisions of the Penal Code, §§ 9077, 9101. *Held*, that a police judge was not entitled to receive compensation, other than that provided in section 3241, for services rendered as justice of the peace in proceedings arising under the criminal laws.

[Ed. Note.—For other cases, see *Judges*, Cent. Dig. §§ 75-88; Dec. Dig. § 22.\*]

#### 2. OFFICERS (§ 94\*) — COMPENSATION — EXTRA DUTIES — VALIDITY OF STATUTES.

The Legislature may exact extra duties of a public officer without providing compensation therefor.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. § 132; Dec. Dig. § 94.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

### 3. JUDGES (§ 11\*)—REMOVAL—POLICE JUDGES—RECEIVING ILLEGAL COMPENSATION—BAD FAITH.

Rev. Codes, § 9006, provides that when an accusation is presented to a district court, alleging that any officer has been guilty of collecting illegal fees, or has refused or neglected to perform his duties, the court must cite such officer to appear, and if it appears that the charge is sustained the court must deprive him of his office. Const. art. 5, § 18, provides that all officers not liable to impeachment are subject to removal in the manner provided by law; and Rev. Codes, § 8992, provides for the removal of officers upon accusation presented by a grand jury, charging willful or wrongful misconduct or malfeasance in office. *Held*, that a police judge could be removed from office, under section 9006, for charging and receiving illegal compensation, though he did so in good faith and upon the advice of the Attorney General; willful or intentional wrongdoing in receiving the compensation not being essential to authorize removal under that section, as it is under section 8992.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 43-45; Dec. Dig. § 11.\*]

### 4. CRIMINAL LAW (§ 32\*)—DEFENSES—IGNORANCE OF LAW.

Ignorance of law is not an excuse for its violation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 37; Dec. Dig. § 32.\*]

### 5. CRIMINAL LAW (§ 21\*)—OFFENSES—STATUTORY OFFENSES—INTENT.

Where an act is made indictable in general terms, a criminal intent is not essential, unless a purpose to require such intent is shown in the statute.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 22; Dec. Dig. § 21.\*]

### 6. JUDGES (§ 11\*)—REMOVAL—ACCUSATION—SURPLUSAGE.

Since it is not essential that an official acted willfully and intentionally in receiving illegal compensation to authorize his removal under Rev. Codes, § 9006, an accusation that a police judge acted "willfully, intentionally, and corruptly" in receiving illegal compensation was surplusage, and did not place the burden of proving intent, as alleged, upon the person making the charge.

[Ed. Note.—For other cases, see Judges, Cent. Dig. §§ 43-45; Dec. Dig. § 11.\*]

### 7. OFFICERS (§ 74\*)—MANDAMUS (§ 51\*)—REMOVAL—NATURE OF PROCEEDING—COMPELLING ENTRY OF JUDGMENT.

Rev. Codes, § 9006, provides that when an accusation in writing is presented in a district court, alleging that any officer within its jurisdiction has been guilty of collecting illegal fees, the court must cite the officer to appear within a certain time, and proceed to hear in a summary manner the accusation and evidence offered in support of the charge and by the accused, and if, on such hearing, the charge is sustained, the court must enter a judgment that the party accused be deprived of his office, and for such costs as are allowed in civil cases. *Held* that, as a proceeding to remove an officer for receiving illegal fees under the statute is a criminal proceeding, and though one charged is not entitled to a jury trial, mandamus will not lie to compel the court to enter a judgment of removal, though a violation of the statute is shown by uncontroverted evidence; the judge hearing the removal proceedings having the exclusive power to determine accused's guilt.

[Ed. Note.—For other cases, see Officers, Cent. Dig. § 101; Dec. Dig. § 74; Mandamus, Cent. Dig. §§ 98-100; Dec. Dig. § 51.\*]

### 8. MANDAMUS (§ 28\*)—PURPOSE OF WRIT—DISCRETIONARY POWERS.

Mandamus will not lie to direct an officer or tribunal to decide in a particular way, though the act to be done is ministerial, if it involves discretion.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. § 64; Dec. Dig. § 28.\*]

### 9. CRIMINAL LAW (§§ 753, 907\*)—TRIAL—DIRECTION OF VERDICT—UNCONTROVERTED EVIDENCE.

An accused who pleads not guilty is entitled to have the jury's verdict upon the question of guilt, however clear and uncontroverted the evidence may be; and the court cannot set aside a verdict of acquittal and grant a new trial, even if the jury disregarded the evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1713, 1728, 2130; Dec. Dig. §§ 753, 907.\*]

Application for mandamus by the State, on the relation of James H. Rowe, against the District Court of Silver Bow County and others. Alternative writ set aside, and proceeding dismissed.

Jesse B. Roote and T. F. Nolan, for relator. I. G. Denny, P. E. Geagan, and M. F. Canning, for respondents.

BRANTLY, C. J. Application for writ of mandamus. On November 11, 1911, the relator herein, a resident and taxpayer of the city of Butte, presented to the district court of Silver Bow county a written accusation against Thomas J. Booher, police judge of said city, asking for his removal from office. The accusation, after alleging the corporate capacity of the city and the official character of said Booher, charges:

"Fourth. That on or about the 21st day of June, 1911, the said Thomas J. Booher did willfully, intentionally, and corruptly charge to the county of Silver Bow certain illegal fees for services rendered by the said Thomas J. Booher, in certain criminal actions and proceedings arising under the criminal laws of the state of Montana, police judge of the said city of Butte, when acting as a justice of the peace, a full and itemized statement of which said charges more fully appears from the account of the said Thomas J. Booher, filed in the office of the county clerk and recorder of Silver Bow county, Montana, a true copy of which is hereto attached and marked 'Exhibit No. 1,' and made a part hereof. That the said Thomas J. Booher did, on or about the 22d day of June, 1911, willfully and intentionally and corruptly collect from the said county of Silver Bow illegal fees, amounting to the sum of \$41.65, for the said services in this paragraph set out.

"Fifth. That each and all of the fees charged and collected, as above set out, were and are illegal, and that the said Thomas J. Booher well knew the same to be illegal, and did willfully and intentionally and corruptly charge and collect the same."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

On November 20th, in obedience to a citation issued to him, the said Booher appeared before Honorable Michael Donlan, the judge presiding in Department 3 of said court, to which the proceeding was assigned under the rules distributing the business pending therein. Judge Donlan being disqualified, the hearing was postponed until the following day. On the following day, Judge Donlan entered an order postponing the hearing until November 25th, and called in Honorable J. Miller Smith, one of the judges of the district court of Lewis and Clark county, to preside in his stead. On November 25th and 27th the hearing was had before Judge Smith; the accused having entered his plea of not guilty, both orally and in writing. It was admitted by the accused that he had demanded and received from the county of Silver Bow, for services rendered during the month of May, 1911, the sum of \$41.65, as charged, upon claims presented by him, in his official capacity as police judge of the city of Butte, to the board of commissioners of the county, as compensation which he deemed to be due him for his services as justice of the peace in proceedings arising under the criminal laws of the state. It was admitted by counsel for the relator that the claims were presented to the commissioners by the accused in good faith, in the belief that under the provisions of law applicable the board of county commissioners was authorized to allow them, and that he was entitled to collect them from the county for the services so rendered; that theretofore the predecessor of the present board of commissioners, having been advised by Hon. James Donovan, at that time Attorney General of the state, that a police judge, when acting in the capacity of justice of the peace or committing magistrate, was entitled to compensation from the county for his services in that behalf, had made an order allowing the police judge of the city of Butte the sum of \$500 per year for such services; that such order, if it had any validity, was in full force and effect at the time the accused was allowed and collected the said claims; and that at said time he had knowledge of the advice so given to the board by the Attorney General. Upon these admissions, counsel for the relator demanded of the court judgment removing the accused from his office, and for costs, for that, he having admitted that he had demanded and received from the county compensation to which he was not entitled, the court was without authority to adjudge otherwise, notwithstanding the accused had acted in good faith and in an honest belief that he was entitled to such compensation. The court, however, refused to so adjudge, and ordered the proceeding dismissed. Thereupon this application was made to compel the court, through Judge Smith, to set aside the order of dismissal and order judgment as demanded.

At the hearing in this court, counsel for defendants interposed a motion to quash the alternative writ and dismiss the proceeding, on the ground that upon the admitted facts the relator is not entitled to any relief.

[1] The sections of the statute invoked by the proceedings in the district court, are the following:

"Sec. 8241. The annual salary and compensation of police judges must be fixed by ordinance, and in a city of the first class must not exceed, for all services rendered, two thousand dollars; in a city of the second class, must not exceed one thousand dollars, and in a city of the third class must not exceed four hundred dollars, and, in addition, a police judge is entitled to receive in all civil cases the fees which are now, or may hereafter be, allowed justices of the peace. In all criminal actions or proceedings arising under the criminal laws of the state when acting as a police justice of the peace or committing magistrate, he must receive no compensation whatever."

"Sec. 9006. When an accusation in writing, verified by the oath of any person, is presented in a district court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered, or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the accusation was presented; and on that day, or some other subsequent day not more than twenty days from that on which the accusation was presented, must proceed to hear, in a summary manner, the accusation and evidence offered in support of the same, and the answer and evidence offered by the party accused; and if, on such hearing, it appears that the charge is sustained, the court must enter a judgment that the party accused be deprived of his office, and for such costs as are allowed in civil cases."

Some contention was made at the hearing in this court that, in view of the provisions of section 8178, Revised Codes, which fixes a schedule of fees which justices of the peace may charge in criminal cases and proceedings, a police judge, who is, with some exceptions, clothed with concurrent criminal jurisdiction (Rev. Codes, §§ 3297, 3300), may demand and receive the compensation to which justices of the peace are entitled. At least, it is said, the various provisions involve an ambiguity which requires a construction of them, in order to determine what compensation a police judge is entitled to under them; and that, since this is so, and since the accused claimed in good faith and was allowed the compensation received by him under the advice of the Attorney General, he is not subject to the

penalty prescribed by the statute. There is no ambiguity in these provisions. Sections 3297 and 3300 merely confer jurisdiction upon the police court or judge in the cases and proceedings enumerated. Notwithstanding the language, "when acting as justice of the peace or committing magistrate," loosely used in section 3241, when this section is read in connection with sections 3297 and 3300, supra, it is entirely clear that in exercising the jurisdiction conferred by the latter the police judge does not abdicate his office as such, and act in a different official capacity. He performs all acts which he may perform in this behalf by virtue of his office as police judge, and not otherwise. The compensation to which he is entitled is provided for in section 3241. No reference to the subject is found elsewhere in the Codes. This provision is therefore exclusive—made so by the language found in the last clause, which seems to have been inserted purposely to prevent any misunderstanding as to what, and only what, compensation he may claim, not only from the municipality, but also from any other source.

[2] It is competent for the Legislature to exact extra duties of a public officer without providing compensation for them; but it is none the less incumbent upon the officer to perform the duties so prescribed. *State ex rel. Kranich v. Supple*, 22 Mont. 184, 56 Pac. 20; *Mechem on Public Officers*, 855 et seq.; 29 Cyc. 1422-1433. Therefore the accused had no right to demand, nor had the board of commissioners the power to allow, compensation for the services in question.

[3] The question then arises: Do the facts admitted bring the accused within the penalty prescribed by section 9006, supra; it appearing that both he and the board acted in good faith under the advice of the Attorney General? This query must be answered in the affirmative. Under the Constitution, the Governor and other state and judicial officers, except justices of the peace, are removable from office by impeachment. Constitution, art. 5, § 17. "All officers not liable to impeachment shall be subject to removal for misconduct or malfeasance in office, in such manner as may be provided by law." *Id.* § 18. In pursuance of this provision, the Legislature enacted section 8992 and section 9006, supra. The former provides for the removal, upon accusation presented by a grand jury, charging willful or corrupt misconduct or malfeasance in office. Under the latter the proceeding may be initiated by any person, upon a charge that an officer has been guilty of collecting illegal fees for services rendered or to be rendered, or has refused or neglected to perform the duties pertaining to his office. A comparison of these two provisions leads to the conclusion that the Legislature intended the first to apply to those cases only in which the accused has been guilty of willful or corrupt misconduct or malfeasance; while

the latter was intended to apply to those derelictions which are the result of incompetency or inattention to official duties. It is apparent that under the latter section the officer is subject to removal for delinquency, either in demanding excessive fees, or in the performance of the duties enjoined by law, without reference to whether he acts willfully and corruptly or not. It proceeds upon the assumption that the officer must know and perform the duties enjoined upon him by law, and demand only such compensation for his services as the law has prescribed. The motives governing his conduct are not material, because they are not declared so by statute. He must act at his peril; otherwise this section is without effective purpose. It is clear and unambiguous in its terms, and is not open to any other construction. It is evident that the Legislature intended to make this proceeding a quasi criminal prosecution, both because the section is found in the Penal Code, and because it imposes as a punishment removal from office. *Kilburn v. Law*, 111 Cal. 237, 43 Pac. 615; *In re Curtis*, 108 Cal. 661, 41 Pac. 793. But it does not therefore follow that a sinister purpose is a necessary ingredient of the offense thus created.

[4] Ignorance of the law cannot be urged as an excuse for a violation of it. Nor is good faith, under such circumstances, any justification or excuse. *Leggatt v. Prideaux*, 16 Mont. 205, 40 Pac. 377, 50 Am. St. Rep. 498; *State v. Examination and Trial Board*, 43 Mont. 389, 117 Pac. 77. "The rule rests on public necessity; the welfare of society and the safety of the state depend upon its enforcement. If a person accused of crime could shield himself behind the defense that he was ignorant of the law which he violated, immunity from punishment would in most cases result. No system of criminal justice could be sustained with such an element in it to obstruct the course of its administration. The plea would be universally made, and would lead to interminable questions incapable of solution. Was the defendant in fact ignorant of the law? Was his ignorance of the law excusable? The denser the ignorance, the greater would be the exemption from liability." *People v. O'Brien*, 96 Cal. 171, 31 Pac. 45.

[5] When an act is in general terms made indictable, a criminal intent need not be shown, unless from the language of the law applicable a purpose to require the existence of such an intent can be discovered. *Halsted v. State*, 41 N. J. Law, 522, 32 Am. Rep. 247. In *State v. McBrayer*, 98 N. C. 619, 2 S. E. 755, in considering a statute prohibiting the sale of intoxicating liquor, the court said: "It is a mistaken notion that positive, willful intent, as distinguished from a mere intent, to violate the criminal law is an essential ingredient in every criminal offense, and that where there is the absence

of such intent there is no offense; this is especially so as to statutory offenses. When the statute plainly forbids an act to be done, and it is done by some person, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. When the language is plain and positive, and the offense is not made to depend upon the positive, willful intent and purpose, nothing is left to interpretation. It would be a very dangerous exercise of the power of courts to interpret positive statutes so as, in effect, to interpolate into them exceptive provisions. If the court could do so, there would be scarcely a limit beyond which it might not go, and thus make, instead of interpret, the law."

In *Coates v. Wallace*, 17 Serg. & R. (Pa.) 75, the court, through Chief Justice Gibson, stated the rule thus: "Ignorance of the law will not excuse in any case; and this principle is applicable, and with irresistible force, to the case of an officer selected for his capacity, and in whom ignorance is unpardonable. The very acceptance of the office carries with it an assertion of a sufficient share of intelligence to enable the party to follow a guide provided for him with an unusual attention to clearness and precision. On any other principle, a conviction would seldom take place, even in cases of the most flagrant abuse; for pretexts would never be wanting. Sound policy, therefore, requires that the officer should be held to act at his peril, and we are of opinion that the absence of a corrupt motive, or the existence of an agreement by the party injured, furnishes no justification for doing what the law forbids." This case and *Leggatt v. Pridaux*, supra, were both civil actions to recover penalties from public officers for the collection of illegal fees, but the principle involved in each of them is none the less applicable here. To the same effect are the following cases: *Beckham v. Nacke*, 56 Mo. 546; *Roherge v. Bernham*, 124 Mass. 277; *Commonwealth v. Weiss*, 139 Pa. 251, 21 Atl. 10, 11 L. R. A. 530, 23 Am. St. Rep. 182; *State v. Gould*, 40 Iowa, 374; *Gardner v. People*, 62 N. Y. 299. Though in every public offense there must exist a union of act and intent (Rev. Codes, § 8112), in statutory offenses, such as this, the intent is conclusively presumed, when it is shown that the statute has been violated.

[8] The ignorance of the accused being, therefore, no excuse or justification, the fact that he was acting upon the advice given to the board by the Attorney General does not put him in any more favorable position. If, as we have said, he must act at his peril, that he proceeded upon the advice of others did not relieve him from responsibility; and, though the charge alleges that he acted willfully, intentionally, and corruptly, this characterization of his conduct was wholly unnecessary, and should have been treated as

surplusage, not casting upon the relator the burden of showing any other fact than that the accused had transgressed the statute. The court should have granted a judgment removing him from office.

[7, 8] This brings us to the question whether mandamus will issue to compel the entry of a judgment of removal. In civil cases circumstances often arise calling for the issuance of mandamus to a judicial officer or tribunal to put into motion the power of such officer or tribunal, or to compel the performance of an act which, being ministerial in character, does not involve the exercise of judicial discretion. But the writ will not in any case direct how an officer or tribunal shall act, or to what effect they shall exercise their power. Even when the proper performance of an act, ministerial in character, involves discretion, the writ will not direct a decision in a particular way. Spelling on *Injunction and Extraordinary Remedies*, §§ 1394, 1395. In the notes this author cites many illustrative cases. The following, decided by this court, are pertinent: *State ex rel. Independent Pub. Co. v. Smith*, 23 Mont. 329, 58 Pac. 867; *Raleigh v. District Court*, 24 Mont. 306, 61 Pac. 991, 81 Am. St. Rep. 431; *State ex rel. Northern Pac. Ry. Co. v. Loud*, 24 Mont. 428, 62 Pac. 497; *State ex rel. Dempsey v. District Court*, 24 Mont. 566, 63 Pac. 389; *Montana Ore. Pur. Co. v. Lindsay*, 25 Mont. 24, 63 Pac. 715; *State ex rel. King v. District Court*, 25 Mont. 202, 64 Pac. 352; *State ex rel. Finlen v. District Court*, 26 Mont. 372, 68 Pac. 465; *State ex rel. Davis v. District Court*, 30 Mont. 8, 75 Pac. 516; *State ex rel. Montana Central Ry. Co. v. District Court*, 32 Mont. 37, 79 Pac. 546; *State ex rel. Stiefel v. District Court*, 37 Mont. 298, 96 Pac. 337; *State ex rel. Happel v. District Court*, 38 Mont. 166, 99 Pac. 291, 129 Am. St. Rep. 636. In none of these cases has the court, by virtue of the writ, undertaken to control judicial action; on the contrary, an examination of them will show that it has consistently refused to do so.

[9] But though, as has been said, the violation of the statute by the accused was established by uncontroverted evidence, nevertheless, if it be conceded that the writ would go in a civil proceeding presenting identical conditions, it ought not to go in this case. This is a quasi criminal proceeding. The rules applicable to civil cases do not apply. Upon a plea of not guilty, the defendant in a criminal case is entitled to have the verdict of a jury upon the question of his guilt or innocence, however clear and unimpeached or free from suspicion the evidence may be. *State v. Koch*, 33 Mont. 490, 85 Pac. 272. There is always a presumption of his innocence, and, though the court may direct a verdict in his favor, it cannot direct a verdict of guilty, nor go further than to tell the jury that if they believe the evidence they may find him guilty; and, if the jury acquits him through a clear disregard of the evidence,

the court may not set aside the verdict and grant a new trial. *Id.* In our opinion, the same rule applies in this proceeding, though it is statutory and summary, and the defendant is not entitled to a trial by jury, as is one accused under section 8902, *supra*. The statute lodges the power to determine the question of his guilt or innocence exclusively in the judge. It does not provide for an appeal by the state, or any other mode of review, for error or mistake in his conclusion. Therefore, by analogy and upon principle, his judgment may not be controlled or coerced by this court.

The relator relies with confidence upon *State ex rel. Davis v. District Court*, *supra*, and *Hensley v. Superior Court*, 111 Cal. 541, 44 Pac. 232. These were both civil cases. Besides, the facts out of which each of them arose present a case in which the defendant court, in refusing to make the particular order demanded, refused to perform a plain legal duty which involved no discretion whatever.

The alternative writ is set aside, and the proceeding is dismissed.

SMITH and HOLLOWAY, JJ., concur.

SWEENEY v. LEWIS CONST. CO. et al.  
(Supreme Court of Washington. Jan. 4, 1912.)

1. CONTRACTS (§ 350\*)—EXCAVATION CONTRACTS—IDENTITY OF PARTIES—EVIDENCE—WEIGHT.

In an action for breach of contract to excavate lots to grade, evidence held to show that plaintiff contracted with defendant corporation, and not with defendant stockholders as individuals.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1819-1823; Dec. Dig. § 350.\*]

2. CONTRACTS (§ 175\*)—WAIVER OF DAMAGE—EVIDENCE—WEIGHT.

Provision, in a contract for excavation of lots to grade, that the owner would waive claim for damage to the property, held under the evidence to have contemplated future damages only.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 766; Dec. Dig. § 175.\*]

3. DAMAGES (§ 121\*)—BREACH OF CONTRACT—MEASURE.

In an action for breach of contract to fully excavate lots to grade, defendants being entitled to have the damages measured by the method which would minimize its liability and at the same time give plaintiff just and complete compensation, it was error to exclude a showing by defendants as to the difference in the value of the lots before work was commenced and after it was suspended, and the amount of damages to buildings and rentals, and to permit plaintiff to show the injury to his buildings, loss of rentals, and the cost of completing the excavation, irrespective of the value of the lots before or after the excavation actually made or contemplated.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 306-308; Dec. Dig. § 121.\*]

Department 2. Appeal from Superior Court, King County; John B. Yakey, Judge.

Action by Bo Sweeney against the Lewis Construction Company and others. Judgment for plaintiff, and defendants appeal. Reversed and remanded.

Harold Preston, Leander T. Turner, and Sandford C. Rose, for appellants. Dorr & Hadley, for respondent.

CROW, J. [1] Action by Bo Sweeney against Lewis Construction Company, a corporation, W. H. Lewis, and Charles S. Wiley, to recover damages for breach of an alleged contract. The trial court made findings and entered judgment in plaintiff's favor for \$30,500. The defendants have appealed.

After trial and prior to entry of judgment, the death of Charles S. Wiley was suggested. Thereupon Clifford Wiley, his administrator, was substituted as party defendant and now joins in the prosecution of this appeal. The respondent, Bo Sweeney, is the owner of four lots in block 62 of Kidd's addition to the city of Seattle. These lots, located on what is known as North Beacon Hill, were at so great an elevation that it was considered that they and all other property in that immediate neighborhood would be improved and advanced in value by regrading to a lower level. The appellant W. H. Lewis and Charles S. Wiley, now deceased, purchased a number of lots in the same locality, and about the year 1903 had a contract with the Seattle & Montana Railway Company to fill tidelands, which contract they were performing by sluicing earth from their Beacon Hill lots and other property. In May, 1904, Lewis, Wiley, and L. T. Turner, their attorney, organized the appellant corporation, Lewis Construction Company, with a capital stock of \$2,000, divided into 100 shares of the par value of \$20 each. Lewis and Wiley subscribed for 49 shares each, and Turner subscribed and paid for 2 shares. Lewis and Wiley paid their stock subscription by transferring to the corporation their sluicing plant, which was of a greater value than \$2,000. Thereafter the sluicing and regrading was done by the Lewis Construction Company, under a subcontract from Lewis and Wiley, who collected 15 cents per cubic yard from the railroad company, and paid the construction company from 5 to 10 cents per cubic yard for doing the work. About the same time, Lewis and Wiley organized another corporation known as the Beacon Place Company, with a capital stock of \$12,000, and in payment of their stock subscriptions transferred to it their North Beacon Hill real estate of that value. The regrading operations on North Beacon Hill extended over platted streets and private property of other parties in the neighborhood. For this purpose it became necessary to obtain permits from the city and owners of abutting property. At first permits and licenses, together with

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes



the right to use city water, were obtained in the name of Lewis, but later in the name of the Lewis Construction Company which in its operations, without the formality of any written transfer, used those obtained by Lewis. That portion of North Beacon Hill involved in this action had platted streets running east and west, named from north to south as follows: Lane street, Dearborn street, Charles street, and Norman street. A portion of Dearborn street was condemned about the time the improvements here involved were under consideration. There were also cross-avenues running north and south, named from west to east as follows: Tenth Avenue South; Eleventh Avenue South, and Twelfth Avenue South. Respondent's lots fronted on the south side of Charles street and the west side of Eleventh Avenue South, near the center of the district. On February 15, 1906, ordinance No. 13,320 of the city of Seattle was approved. This ordinance provided for widening, extending and establishing Dearborn street, for changing and lowering its grade, the grade of Tenth Avenue South, and the grades of other streets, and for condemning and damaging property necessary for these purposes. While this ordinance affected other streets and avenues, it did not establish any grade for Charles street, Eleventh Avenue South, or Twelfth Avenue South. The grades thus established for Dearborn street and Tenth Avenue South within the district mentioned called for cuts of at least 100 feet; at some points more, at others less. We need not give exact figures. The cuts were to be very deep. About the time these street grades were adopted, there was a general discussion and consideration by city officials and property owners, including parties to this action, of the advisability of a general regrade of the North Beacon Hill district. Appellants were desirous of lowering the level of property owned by the Beacon Place Company, and also of obtaining earth to be used by the Lewis Construction Company in filling the tidelands. Respondent also seems to have been desirous of having the grade of his lots and the adjoining streets lowered to correspond with the adopted grades of Dearborn street and Tenth Avenue South, if done without expense to him, and within a definite time. Considerable negotiation occurred between respondent and Lewis and Wiley, officers of the appellant Lewis Construction Company. The construction company submitted and suggested to respondent written offers running to it from him. None of them were satisfactory to respondent. On April 16, 1906, respondent prepared and delivered to appellant Lewis Construction Company the following proposal, which he now claims is the contract on the breach of which this action is predicated: "April 16, 1906. Lewis Construction Co., Seattle, Washington—Gentlemen: Replying to your communication of the 12th inst, I wish to say that I am desirous that Charles

street between Tenth and Twelfth avenues be reduced to the same grade as Dearborn street, as provided for in ordinance No. 13,320 and also of Eleventh avenue to the same grade as Tenth avenue, as provided in said ordinance No. 13,320. I therefore wish to advise you that if the same shall be reduced to grade as above indicated, and that my lots numbered one, four, five, and the north one-half of lot two, and the south one-half of lot three, in block sixty-two, Kidd's addition to the city of Seattle, are at the same time reduced to the same grade, as the streets above named, I shall and will waive all claims for damages to said property; provided, however, that said grading is done and completed on or before January the first, 1907. Yours truly, Bo Sweeney." This offer was not acceptable to the appellant construction company to which respondent was to make no payments for lowering the grade, but a few days later Mr. Lewis telephoned respondent that he thought it would be satisfactory. Immediately thereafter the appellant construction company entered upon respondent's lots and the adjoining streets, and by sluicing lowered their grade to a considerable extent, but far short of the grades of Dearborn street and Tenth Avenue South. Respondent had some small tenement houses upon his lots, which he claims were so completely damaged by the regrading as to render them worthless and unfit for occupancy. Shortly before January 1, 1907, the appellant construction company ceased the work of regrading and thereafter refused to continue. Respondent prosecuted this action for the breach of the contract, not only against the appellant construction company, but also against Lewis and Wiley individually; his contention being that he never knew of the existence of the construction company, that he understood he was dealing with Lewis and Wiley, and that he looked to them only. Appellants claim he dealt with the corporation. The trial judge substantially found the corporation was a pretense and subterfuge, that appellants Lewis and Wiley were the contracting parties, and entered judgment against them as well as against the corporation.

The record is voluminous, and we cannot within the limits of an opinion of reasonable length state the evidence in detail. We conclude, however, that respondent was dealing with the corporation only. His letter was addressed to it. The proposals previously drafted by it and submitted to him for his signature were also addressed to the corporation. Attached to one of them was a blank form of acceptance, reading as follows: "The foregoing is acceptable to us, and we agree to the conditions therein contained. Lewis Construction Company, By \_\_\_\_\_, President." It clearly appears from the evidence that the Lewis Construction Company was regularly incorporated under the laws of this state; that its stock was fully subscribed, paid, and issued; that

its articles of incorporation were of record in the office of the auditor of King county; that a list of its officers was also certified to and filed with the county auditor; that permits were granted it by the city of Seattle; and that it did the regrading on North Beacon Hill at all times after its incorporation. While it is true that respondent talked with the individuals Lewis and Wiley, they were officers of the corporation which could act only through them. The respondent could not talk to the entity known as a corporation. Lewis and Wiley claim they represented the corporation as its officers. Every writing that passed between the parties prior to the commencement of the work mentioned the corporation as the contemplated contracting party. The respondent himself prepared and addressed the identical letter on which he predicates this action. The evidence shows him to be an attorney of active practice. The name used by him in addressing his letter should have challenged his attention. There is no evidence of any investigation on his part as to who constituted the Lewis Construction Company, or whether it was a corporation or partnership. Respondent's testimony was that he gave the matter no thought. It was his place to give it thought, and to know the party with whom he was dealing. There is no suggestion in the evidence that Lewis and Wiley or either of them attempted to deceive him or in any way perpetrate a fraud upon him by inducing him to contract with the corporation, under the impression that he was contracting with them as individuals. It might be that the corporation would make a contract which the individuals would not make. It is suggested that the appellants Lewis and Wiley are also lawyers, but that fact cannot change respondent's situation. He is predicating his action on an alleged written contract drawn by himself, addressed to the corporation, and accepted by it. The evidence is insufficient to hold Lewis and Wiley to individual liability. As to them the action should have been dismissed.

[2] It is apparent the partial work of regrading respondent's lots was done in pursuance of permission granted by his letter of April 16, 1906. Whether the proposal therein contained was followed by such a complete acceptance by the appellant corporation as to impose upon it an unconditional obligation to grade the lots to the depth mentioned by January 1, 1907, is sharply contested. We think sufficient acceptance was shown on appellant's part to complete a contract, but that the vital questions on this appeal are: (1) How should that contract be construed; and (2) what should be the measure of any damages respondent may have sustained?

There is some dispute as to what damages were to be waived, whether past, future, or both. Respondent contends appellants had theretofore damaged him by work done with-

out his license or permission, and that the contract was for a waiver of his claim for those as well as future damages. Appellants insist no substantial damages had theretofore been sustained by respondent, that he had made no claim for past damages, and that they were neither discussed nor mentioned during the preliminary negotiations. From the evidence we conclude that future damages only were contemplated in the waiver.

The appellants introduced evidence sufficient to show that it was impossible for the construction company to complete the grade to the contemplated level within the time named, for the reason that no improvement of Dearborn street or Tenth Avenue South was ordered prior to January 1, 1907; that no plans for a general regrading of North Beacon Hill were perfected; that a city water main was laid in Twelfth Avenue South; that if respondent's lots, Charles street, and Eleventh Avenue South, had been lowered to the contemplated depth, the entire eastern portion of North Beacon Hill, including Twelfth Avenue South, would have been deprived of support, and by an avalanche would have been precipitated on respondent's property, destroying the water mains and damaging not only respondent's lots but all of that locality. Respondent contends appellants knew when making the contract that its full performance might become impossible, but that they failed to communicate that knowledge to him. We fail to understand why he did not possess the same knowledge. The entire scope of the evidence shows the parties were all acting in contemplation of the probable adoption of a general regrading scheme the perfection of which would be necessary to a complete performance of the contemplated work of regrading respondent's lots in accordance with his wishes. They all must have known respondent's lots could not be graded to the contemplated depth, if perchance that general scheme should be abandoned or fail to materialize. It did so fail, rendering it impossible for the construction company to complete the regrading. Under these circumstances, how should the contract, not clear in its terms but somewhat ambiguous, be construed? Our construction is that respondent contracted, not to settle past claims for damages which were nominal if they existed at all, but to waive all future damages which might result to his property, especially his buildings, should the grade be fully completed within the stipulated time, but that, if for any reason the grade could not or should not be thus fully completed, he would not waive his claim for damages, but would be entitled to prosecute the same. We cannot conclude the appellant construction company, knowing the uncertainties of the situation, unconditionally agreed to reduce the lots to the stipulated grade within the time named, but do conclude that it did

agree that, in the event of its failure to complete the work, respondent should be entitled to prosecute his claim for such damages only as might result to his lots and buildings by reason of any partial regrade that might be made. The appellant construction company could not and did not reduce respondent's lots to the desired grade, and his claim for such damages remained unimpaired and available to him.

[3] Appellants, as affecting the measure of damages, offered evidence to show that respondent's lots had been improved by the partial regrading, rather than injured. This evidence was rejected by the trial judge. Appellants' theory was that respondent's injuries, if any, should be measured by the difference in the value of his lots before the construction company commenced work and their value when it suspended, together with damages to his buildings and his loss of rentals. This theory was also rejected by the trial judge. Respondent contended, and the trial court held, he was entitled to recover for injuries to his buildings, for loss of rentals, and also for the actual cost of completing the grade to the contemplated depth. Applying this rule, the trial court admitted evidence offered by respondent, and found the number of cubic yards of dirt yet to be removed, the cost per yard, and, as this exceeded the total damages demanded by the complaint, awarded judgment for the full amount asked. There is no evidence of the value of respondent's lots before the regrading was commenced, after it was abandoned, or at any other time. It might be that their value never equaled the damages awarded, and that they would not appreciate to that value if actually regraded as contemplated and desired by respondent. For all that appears from the evidence, it is possible that respondent's judgment for \$30,500 may exceed the value of his lots in their former condition, their present condition, or the condition in which they would have been had the regrading been completed to levels corresponding to the established grades of Dearborn street and Tenth Avenue South. Yet on an affirmance of the judgment herein respondent would not only recover the damages awarded, but he would at the same time retain his lots, the value of which might not have been depreciated to any considerable extent by appellants' alleged breach of contract. We do not know that such a condition would result from an enforcement of the judgment entered, nor do we know the contrary. The action should have been, but was not, so tried as to avoid the possibility of such a result. Evidence offered by appellants in support of what they contended to be the proper measure of damages should have been admitted, and, after hearing all the evidence, the trial judge should have awarded such damages only as would be necessary to compensate respondent. He is

not entitled to avail himself of appellants' alleged breach of contract for speculative purposes, and thereby recover damages largely in excess of any loss he may have actually sustained. This he may not have done. Yet appellants were deprived of their right to introduce evidence applicable to their theory of the case. Punitive damages are not recoverable in this state. Compensatory damages only may be awarded. In any given case that measure of damages should be applied to the facts and circumstances shown which will result in full compensation to the injured party without punishing his adversary.

In *Bigham v. Wabash, etc., Ry. Co.*, 223 Pa. 103, 72 Atl. 318, the defendant failed to fill plaintiff's lots to the extent contemplated by the alleged contract. The trial court held the measure of damages to be the cost of completing the fill, and directed a verdict accordingly. The defendant contended the proper measure of damages was the difference in the value of the lands with the fill completed and their value at the time of the breach of the contract when they were partially filled. In reversing the judgment the appellate court said: "It has been well said that it is difficult to point out in advance what the true measure of damages should be under a given state of facts. If there be different modes of measuring damages, depending on the circumstances, the court should first hear the evidence and instruct the jury afterward as to the proper measure to be applied. The underlying principle in such cases is that the damages must be such as might naturally be expected to follow a breach of the contract, keeping in mind the benefit which the contracting parties had in contemplation when the agreement was entered into. \* \* \* In this respect what was said in *Seely v. Alden*, 61 Pa. 302, 100 Am. Dec. 642, applies: 'It may turn out that the cost of removing the deposit in a certain case would be less than the difference in the value of the land, and then the cost of removal would be the proper measure of damages; or it may be that the cost of removal would be much greater than the injury by the deposit when the true measure would be the difference in value merely.' The question of the proper measure of damages must always be taken into consideration by the court in the proper disposition of any case wherein damages are claimed. *Wilkinson v. North East Borough*, 215 Pa. 486, 64 Atl. 734."

From the contract itself and the attending circumstances we cannot conclude the appellant corporation, or the respondent, or either of them, when the work on respondent's lots was commenced, contemplated the actual cost of the completion of any possible unfinished regrade as an element of damages, or as a test to be applied in measuring any damages respondent might sustain, and

within the time mentioned and as desired by him. The appellant corporation was entitled to have the damages measured by that method which would minimize its liability and at the same time secure to respondent a just, fair, and complete compensation. If the extent of such compensation could be ascertained and its reasonable limitations determined, from evidence offered by appellant in support of the measure of damages for which it contended, that evidence should have been admitted and a proper measure of damages should have been predicated thereon. Mr. Sutherland, in the third edition of his work on Damages, at section 12, says: "The principle of just compensation is paramount. By it all rules on the subject of compensatory damages are tested and corrected. They are but aids and means to carry it out; and when in any instance such rules do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable or turned aside by an exception." At section 45 he further says: "In an action founded upon a contract, only such damages can be recovered as are the natural and proximate consequence of its breach; such as the law supposes the parties to it would have apprehended as following from its violation if at the time they made it they had bestowed proper attention upon the subject, and had full knowledge of all the facts. As otherwise expressed, the damages which are recoverable must be incidental to the contract and be caused by its breach; such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was entered into."

Adopting the principles thus announced, we hold, under the peculiar circumstances of this case, that the appellant corporation was entitled to have that measure of damages applied which would protect it and which at the same time would fully compensate respondent for any actual loss he may have sustained. The evidence offered by appellants was therefore competent. Had it been admitted and had its weight and credibility been sufficiently convincing to show that the decrease in value of respondent's lots resulting from the partial regrading coupled with damage to his buildings and his loss of rentals, would have been less than the cost of completing the regrading to the contemplated depth desired by respondent, then the measure of damages for which the appellant corporation contended should have been adopted and applied by the trial court as it would compensate respondent for all losses by him sustained, and at the same time protect appellant from punitive or spec-

which, without fault on its part, became impossible of full performance, a contingency which it is manifest all the parties contemplated. In admitting evidence of values of the lots prior to and after the partial regrading, any increase or decrease that may have resulted from changes such as arise or fall in general market values should be eliminated and ignored. In other words, only such changes in values should be considered as were produced by, or directly resulted from, the partial performance of the work of regrading.

Although this cause is now before us for trial de novo, we cannot enter final judgment in the absence of competent evidence which was offered by appellants and erroneously excluded by the trial judge.

The judgment is therefore reversed, and the cause is remanded, with instructions to dismiss as to W. H. Lewis and Clifford Wiley, administrator of the estate of Charles S. Wiley, deceased, and for a new trial between respondent and the Lewis Construction Company.

DUNBAR, C. J., and MORRIS, ELLIS, and CHADWICK, JJ., concur.

WINDSOR et ux. v. SARSFIELD et ux.  
(Supreme Court of Washington. Jan. 13, 1912.)

1. BOUNDARIES (§ 37\*)—ESTOPPEL—EVIDENCE—SUFFICIENCY.

While evidence to sustain an estoppel in a boundary controversy must be clear and convincing, the rule is not applicable to a case where the evidence on both sides is of the same kind, in which case the court must be governed by the ordinary rules of evidence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. § 193; Dec. Dig. § 37.\*]

2. BOUNDARIES (§ 46\*)—AGREED LINES.

Where, at the time plaintiffs sold certain land in controversy, they pointed out the boundaries to the vendee, measured the land, and fences were set in accordance therewith, which remained without objection for 17 years, the line then established would be regarded as an agreed boundary, and sufficient to overcome any right that the vendors might have had in the land.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 212-226, 249-251; Dec. Dig. § 46.\*]

Department 2. Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Suit by William R. Windsor and wife against P. J. Sarsfield and wife. Judgment for defendants, and plaintiffs appeal. Affirmed.

McWilliams, Weller & McWilliams and Robertson & Miller, for appellants. Cannon, Ferris, Swan & Lally, for respondents.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

CHADWICK, J. This is a suit over a disputed boundary line. In 1890, the property being owned by appellants, a fence was built a part of the way along the east boundary of the tract of land now owned by respondents. In 1892 the land was sold to a man named Cook, who began the erection of a fence along the east line, to connect with the fence already erected. He was told that the fence was east of what was, perhaps, the true line, and accordingly set his fence over so that, when he came to the fence that had been erected by appellants, he made a right-angled turn, or, as it is described, a jog of six or eight feet. Cook and one of the appellants had measured the boundaries of the land with a rope. For reasons not now material, Cook gave up the land, and it reverted to the vendors. In 1900 the land was sold by appellant W. R. Windsor to these respondents. No survey was made, but respondents were taken on the land, which was fenced in one inclosure, its boundaries were pointed out, and they were told that it contained 50 acres, more or less. Respondents have erected valuable improvements thereon; a dwelling house costing about \$7,000 being erected near the east boundary as defined by the fence, but which is without the boundary of the government subdivision, as ascertained by a survey which appellants had made in 1907; the true line being about 108 feet west of the fence at the south boundary of the quarter section corner, and about 50 feet west of the fence at the north boundary of the quarter section corner.

While there is some conflict in the evidence, the testimony of respondents, upon which the findings of the trial judge are predicated, shows that, aside from the fact that respondents were led to believe that they were purchasing all of the land within the inclosure, they have since gone into possession, cultivated or occupied all of the land that was tillable up to the line fence as it had been established, and appellants had made no protest, either as to the use of the land, or to the making of the improvements aforementioned. While there are two distinct suits brought to this court, they are governed by the same legal principles, and will be treated as one. The court below held appellants estopped to maintain an action to recover the land, and an appeal is prosecuted; appellants relying upon the established principle that evidence of estoppel in this class of cases should be of such clear and convincing character as to leave no doubt in the mind of the court.

[1] While the appellants have said that they informed respondents before and while building their house that it was upon dis-

puted ground, and that they should have the line surveyed, the trial judge, by reference, no doubt, to the undisputed facts and manner and demeanor of the witnesses, was satisfied that equity would not be done, if appellants were allowed to prevail. While it is true that evidence to sustain an estoppel in cases of this character should be clear and convincing, yet the rule is generally applied, where the conduct of parties is relied on to overcome some writing out of which the rights or relations of the parties originated. Where the evidence on both sides is of the same kind, it follows that a court must be governed by the ordinary rules of evidence. When so considered, we have no doubt of the correctness of the court's conclusion. *Edwards v. Fleming*, 83 Kan. 653, 112 Pac. 836, 33 L. R. A. (N. S.) 923; *Lydick v. Gill*, 68 Neb. 273, 94 N. W. 109; *Ross v. Ferree*, 95 Iowa, 604, 64 N. W. 683; *Redmond v. Excelsior Savings Co.*, 194 Pa. 643, 45 Atl. 422, 75 Am. St. Rep. 714; *Marines v. Goblet*, 31 S. C. 153, 9 S. E. 803, 17 Am. St. Rep. 22; *Leifheit v. Neylon*, 139 Iowa, 82, 117 N. W. 4; 5 Cyc. 930.

[2] While the foregoing discussion disposes of the contentions of all of the appellants, W. R. Windsor and wife are precluded from recovering by reference to another rule—that of agreed boundaries. The measurement of the land at the time Cook set his fences, and the pointing out of the boundaries to respondents at the time they purchased and went into possession, are sufficient to overcome any right that the last-named appellants may have had in the land. "Practical or agreed location of a boundary line may result from long acquiescence in its location, or when drawn and acted upon by the parties, as where valuable improvements are placed with reference to it, and before it is denied by either party." *Turner v. Creech*, 58 Wash. 439, 108 Pac. 1084. In that case we adopted the rule laid down in *Flynn v. Glenny*, 51 Mich. 580, 17 N. W. 65. "The question afterwards is, not whether the stakes were where they should have been, in order to make them correspond with the lot lines as they should be, if the platting were done with absolute accuracy, but it is whether they were planted by authority, and the lots were purchased and taken possession of in reliance upon them. If such was the case, they must govern, notwithstanding any errors in locating them." See, also, *Steinhilber v. Holmes*, 68 Kan. 607, 75 Pac. 1019.

Finding no error, the judgment of the lower court is affirmed.

DUNBAR, C. J., and MORRIS, ELLIS, and CROW, JJ., concur.

# HOLLENBAEK v. CLEMMER.

(Supreme Court of Washington. Jan. 12, 1912.)

## 1. THEATERS AND SHOWS (§ 6\*)—INJURIES TO PATRONS.

The owner of a place of public entertainment must maintain it in a reasonably safe condition.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 6; Dec. Dig. § 6.\*]

## 2. THEATERS AND SHOWS (§ 6\*)—INJURIES TO PATRONS.

The owner of a moving picture show, who maintained a step about seven inches at a side exit to the floor of a corridor, over which a bright light was burning, and who directed a patron who had entered the front door to leave by this side exit, was not negligent.

[Ed. Note.—For other cases, see Theaters and Shows, Cent. Dig. § 6; Dec. Dig. § 6.\*]

Department 1. Appeal from Superior Court, Spokane County; John B. Yakey, Judge.

Action by Mary L. Hollenbaek against J. H. Clemmer. Judgment for defendant, and plaintiff appeals. Affirmed.

Harris Baldwin, for appellant. Skuse & Morrill, for respondent.

MOUNT, J. The plaintiff brought this action to recover for personal injuries. At the close of plaintiff's case, the trial court sustained defendant's motion for a directed verdict, and dismissed the action. Plaintiff has appealed.

It appears that on October 11, 1910, the respondent was conducting a moving picture show in the city of Spokane. The plaintiff and two other ladies purchased tickets, and entered the room where the pictures were being shown. The exhibition was in progress when they entered. The room was darkened. When they entered, an usher met them at the entrance, and conducted them to seats about two-thirds of the way down an aisle. They remained seated until the pictures had all been shown and a repetition was begun, when the plaintiff stated to her companions that it was time to go. Plaintiff walked into the aisle on her way out of the building, and proceeded a short distance out by the way she had entered, when she was met by an usher and directed to go out through an exit at the side of the room. She proceeded to the exit indicated, where a bright light was located directly in the corridor, and where there was a step down of about seven inches—an ordinary step to the floor of the corridor. She did not notice this step. She testified that the bright light dazzled her as she came out of the darkened room, and as she stepped into the corridor she fell and broke her leg. The plaintiff had never been in the place before, and was not acquainted with the arrangement thereof.

[1, 2] It is argued by the appellant that it was negligence to maintain the step at that

place, and also negligence to direct the plaintiff to depart by a way other than the way by which she had entered. There is no merit in these contentions. It is no doubt the rule that an owner of a place of public entertainment is charged with the duty to maintain a reasonably safe place for his patrons. 38 Cyc. 268. The mere fact that a step up or one down, or a flight of steps up or down, is maintained at the entrance or exit is no evidence of negligence, especially if the step is in good repair and in plain view. There is no claim in this case that the step was in bad order, or not properly lighted, or was not in plain view of any person who might use it. In *Dunn v. Kemp & Hebert*, 36 Wash. 183, 78 Pac. 782, we held that it was not negligence per se to maintain a stairway in a store or public place. It is not uncommon to find a step up at the entrance of places where the public is invited, and it is certainly not negligence, as a matter of law, to construct floors above the level of the streets or sidewalks. It follows that it was not negligence to maintain a step down at the exit in question. It is apparent that it was the plain duty of the plaintiff to use her sense of sight and look where she was stepping. If it was not negligence to maintain the step, it was not negligence for the defendant to direct the plaintiff to retire by that exit.

There was no error, and the judgment is therefore affirmed.

DUNBAR, C. J., and PARKER, FULLERTON, and GOSE, JJ., concur.

## ROTHROCK v. HUNTER et al.

(Supreme Court of Washington. Jan. 10, 1912.)

## 1. SALES (§ 64\*)—CONSTRUCTION OF CONTRACT—OPTIONS.

A contract, by which defendants agreed to sell to plaintiff certain sheep, after reciting the conditions of a sale of ewes, recited that plaintiff contracted further to purchase from defendants 3,000 head of lambs to be selected by plaintiff and to be delivered at the same time and place as the ewes, and that plaintiff "hereby grants defendants an option of 10 days time, in which it is agreed by plaintiff that defendants may dispose of the lambs mentioned to party or parties other than those mentioned in the contract, but at the expiration of said option said lambs can be sold by defendants to plaintiff only." Held, that the contract bound the defendants to sell the lambs, with the exception of an opportunity to sell within the 10 days to others, and did not give them an option, after not selling to others within 10 days, to refuse to sell to plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 156; Dec. Dig. § 64.\*]

## 2. SALES (§ 418\*)—"MARKET VALUE."

Where the seller failed to deliver sheep, and there was no "market value" at the place

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

of delivery, other evidence might be resorted to to show value at that place.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1174-1201; Dec. Dig. § 418.\*]

### 3. EVIDENCE (§ 568\*)—OPINION EVIDENCE.

The testimony of experienced sheep men as to the value of lambs at the time and place of delivery was sufficient to support a judgment for the buyer in an action for failure to deliver, though they did not state the market value at other places and the expense of transportation, which they knew, and on which they relied in testifying to the value at the place of delivery.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2392-2394; Dec. Dig. § 568.\*]

Department 1. Appeal from Superior Court, Grant County; R. S. Steiner, Judge.

Action by F. M. Rothrock against Ray Hunter and another. From a judgment for plaintiff, defendants appeal. Affirmed.

Daniel T. Cross and McGuire & Hannan, for appellants. W. E. Southard, for respondent.

PARKER, J. This is an action to recover damages alleged to have resulted to the plaintiff by the failure of the defendants to deliver to him 3,000 lambs in compliance with the terms of the following written contract: "This contract entered into this day between F. M. Rothrock, party of the first part, and Allyn & Hunter, parties of the second part, is hereby agreed to be satisfactory to both parties and binding to them. The party of the first part agrees and contracts to purchase from the parties of the second part, two thousand ewes (sheep), to be classed as follows: Fifteen hundred of the ewes must be three years old, and the remaining five hundred to be either two or four years old. The said ewes are to be delivered either at McCue's corrals in Douglas creek in Douglas county, or at the Rudeo place in Grant county, on October fifteenth, nineteen hundred and nine. The party of first part contracts and agrees to pay the parties of the second part four and one-half dollars per head upon delivery of said ewes. Party of the first part contracts further to purchase from the parties of the second part three thousand head of lambs, said lambs to be selected by the party of the first part from lamb bands now owned by parties of the second part, said band containing about forty-four hundred lambs. Said lambs are to be delivered at the same time and place as ewes mentioned in this contract. Said first party contracts and agrees to pay said parties of the second part three dollars per head upon delivery of lambs. Party of the first part hereby grants parties of the second part an option of ten days time, in which it is agreed by party of the first part that parties of the second part may dispose of the three thousand lambs mentioned in this contract to party or parties other than those mentioned in this contract. At the expiration of said

option said lambs can be sold by parties of second part to party of the first part only. It is understood and agreed by both parties that both ewes and lambs mentioned in this contract are to be selected from bands now owned by parties of the second part. Receipts of five thousand dollars (\$5,000) is hereby acknowledged by parties of the second part to be paid on this contract. Dated and signed this second day of July, nineteen hundred nine. [Signed] F. M. Rothrock, Allyn & Hunter." A trial before the court without a jury resulted in findings and judgment in favor of the plaintiff for \$2,250 damages. From this judgment, the defendants have appealed.

[1] It is contended by counsel for appellants that the trial court erred in overruling the appellants' demurrer to the complaint. This involves only the construction of the contract. It appears from the allegations of the complaint that appellants did not sell the lambs during the 10-day option period specified in the contract, nor at all. Appellants' counsel state their position as follows: "We contend that the contract is one whereby plaintiff agrees to purchase and defendants to sell and deliver the ewes mentioned unconditionally; that the item as to the ewes is distinct from that regarding the lambs; that plaintiff agrees to purchase the lambs mentioned; but that defendants do not bind themselves to sell or deliver. The defendants were not compelled to sell. They had a choice to sell to third persons during said 10 days; but, if the lambs were not sold during those 10 days, then defendants could do but two things—sell to plaintiff or keep the lambs. They could not, however, sell to any person other than plaintiff after the expiration of said 10 days." It seems to us that to give this construction to the contract would be to render the making of that part of it relating to the lambs a mere waste of words. What possible purpose could there have been in mentioning the lambs in the contract in this manner, if it was not to make an agreement for the sale of them by appellants to respondent, subject to be defeated by the "option of ten days time, in which it is agreed by party of the first part that parties of the second part may dispose of the three thousand lambs mentioned in this contract to party or parties other than those mentioned in this contract." Counsel rely particularly upon the words: "At the expiration of said option said lambs can be sold by parties of second part to parties of first part only." From this it is argued that appellants are only obligated not to sell to any one else. This would mean that the only object to be attained by the language of the contract relating to the lambs was to limit the selling of them to respondent, but leave appellants free to elect whether or not they would sell at all. We agree with the learned trial court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

that more than this was meant by these parties in the execution of this contract. Its language is somewhat involved; but we think it clearly evidences an intention to bind appellants to sell the lambs to respondent, subject only to the 10-day option permitting a sale to others. In 2 Page on Contracts, § 1122, we find, applicable to these provisions, the rule of construction as follows: "If terms in a contract appear on their face to be inserted for the benefit of one of the parties, he will be considered as having inserted such terms and as having chosen the language thereof. Any ambiguity in such language is therefore to be construed more strongly against the party making use of such language."

[2] The trial court found that there was no market or market price for the lambs at the time and place of agreed delivery; that there were markets and a market price at other places, some distance away; that there were ready and convenient means of transportation between the agreed place of delivery and such places; that there would be some expense incident to such transaction; but that there was no evidence of the amount of the market value of the lambs at such places nor of the amount of the expense of such transportation. The language of these findings seems to us to be somewhat involved, but we believe the above is a fair statement of their substance. The court did find, however, in addition: "That the lambs in question were at the time the defendant agreed to deliver them to the plaintiff, to wit, October 15, 1909, of the value of \$3.75 per head." This, it will be noticed, is 75 cents per head more than the contract price, and accounts for the judgment being for \$2,250 upon the theory that respondent's damage was the difference between the contract price and the value of the lambs at the time of agreed delivery. The contention upon these findings is, in substance, that they are erroneous because not based upon market value and not supported by the evidence. It does appear that they are not based upon market value at the place of delivery; but this, we think, under the circumstances, is no reason for excluding all consideration of the value at that place. There being no market value at that place, other evidence may be resorted to to prove their value at that place. 35 Cyc. 636; 24 Am. & Eng. Ency. of Law (2d Ed.) 1154.

[3] The question of the sufficiency of the evidence is discussed in the briefs as though we had before us a statement of facts. No such statement, however, has been sent to this court. Enough appears by the uncontroverted statements in the briefs, however, to show that testimony of experienced sheep men was introduced stating the value of these lambs at the time and place of delivery, which would be sufficient to support the judgment, though such testimony was not as to the market value at that place. It was

not necessary that the amount of the market value at other places and the expense of transportation should be testified to in detail by those witnesses, though apparently they had knowledge of those facts and relied thereon in testifying to the value at the place of delivery. Prof. Wigmore, in his work on Evidence (section 1922), says: "There is no principle and no orthodox practice which requires a witness having personal observation to state in advance his observed data before he states his inference from them; all that needs to appear in advance is that he had an opportunity to observe and did observe, whereupon it is proper for him to state his conclusions, leaving the detailed grounds to be drawn out on cross-examination." The argument seems not to be directed against the weight of the evidence, but against the sufficiency of the evidence because of its failure to show market value at the place of agreed delivery. We think the value of the lambs at the place of delivery could be shown by evidence of the nature above mentioned, and it is not disputed that there was such evidence. This enables us to dispose of this contention in the absence of a statement of facts.

The judgment is affirmed.

DUNBAR, C. J., and MOUNT and GOSE, JJ., concur.

MORGAN et ux. v. BANKERS' TRUST CO.  
(Supreme Court of Washington. Jan. 15, 1912.)

On petition for rehearing. Petition denied.

For former opinion, see 115 Pac. 1047.

Hayden & Langhorne, for appellants.  
Kerr & McCord and Hudson & Holt, for respondent.

PER CURIAM. A petition for rehearing in this case having been granted, argument thereon before the court en banc was heard on December 28, 1911. A majority of the court being of the opinion that the judgment should be affirmed for the reason stated in the majority opinion of department 1 rendered June 8, 1911, it is so ordered.

CHADWICK, J. The dissenting opinion written by Judge Gose (115 Pac. 1049), when this case was first decided (115 Pac. 1047), so clearly indicates the error of the majority that to add another reason for a reversal of the judgment may be considered a work of supererogation on my part. But the court has gone so far afield that, in conscience, I cannot allow this case to pass without recording a protest against what I conceive to be a misapprehension of the law, as well as a denial of the legal right of plaintiff to have the merit of her case passed upon by this court. The rules announced in the



majority opinion are good rules when properly applied. Judge Parker rightly says that the exact question presented on this appeal has never been passed upon by this court, but finds support for his conclusion that the judgment of the lower court should be affirmed by reference to certain cases which, in his judgment "by analogy, support" the majority opinion. These cases are generally correct, and were pronounced in order to do justice, not to defeat it. This case is simple, and in my opinion the opinion of the court does not touch the true issue. The majority says that "we are led to conclude, in the absence of evidence upon which the verdict and judgment were rendered, the presumptions in support of the judgment overcome the presumption of prejudice arising from erroneous instructions in this case, assuming for argument's sake only that the instructions complained of do not correctly state the law."

Reference to Judge Gose's dissenting opinion will disclose the character of the instructions complained of, and the error of the majority lies in this: That they assume that the instructions are correct statements of legal propositions that might apply to some state of facts, whereas the instructions do not state legal propositions, and therefore could not apply to any conceivable state of facts. No judge on earth could sustain them on any theory of the law, or apply them to any possible condition in human affairs, without inviting the just criticism of the profession. Indeed, counsel do not seriously contend that the instructions state the law under any state of facts. Then, why have a statement of facts that will admittedly show plaintiff to have been a weak and neurasthenic woman, when the conception of the case by the trial judge was so erroneous that we would not take the trouble to read it? If appellant was in bad health, the instructions are unsound. If she was in good health at the time of the injury, the instructions are immaterial to any issue, and prejudicial. Does it require a statement of facts to demonstrate this? The rule is—I state it because the majority has not seen fit to do so: "When the evidence is not in the record, the court will go a great way to sustain the judgment of the circuit court. If, upon any probable state of facts, the instructions complained of could be correct, the acceptance of such facts will be presumed. But if the instructions are, in themselves, radically wrong under any state of facts, directing the minds of the jury to an improper basis on which to place their verdict, it would be hazardous to presume that the jury had, notwithstanding such erroneous instructions, arrived at the correct verdict." *Murray v. Fry*, 6 Ind. 371; *Grantz v. City of Deadwood*, 20 S. D. 496, 107 N. W. 832; *Myers v. Longstaff*, 14

S. D. 98, 84 N. W. 238; *Galveston H. & S. Ry. Co. v. Perkins* (Tex. Civ. App.) 73 S. W. 1068; *Rapp v. Keester*, 125 Ind. 79, 25 N. E. 141; *Lindley v. Dempsey*, 45 Ind. 246; *Evans v. Gallantine*, 57 Ind. 367; *Terry v. Shively*, 64 Ind. 106; *Willis v. State*, 27 Neb. 98, 42 N. W. 920; *Godfrey v. Grocery Co.*, 12 Okl. 459, 71 Pac. 627.

The judgment of the lower court should be reversed, and this case remanded for a new trial.

GOSE, ELLIS, and MORRIS, JJ., concur in the views expressed by CHADWICK, J.

# LEE v. K. W. STEINHART LUMBER CO. et al.

(Supreme Court of Washington. Jan. 18, 1912.)

## 1. CORPORATIONS (§ 190\*)—ACTION AGAINST STOCKHOLDER—MINORITY STOCKHOLDER—RIGHT TO SUE.

The rule that a stockholder, as such, cannot maintain an action against another stockholder for an injury to the corporation, but that all such wrongs must be redressed by the corporation itself and in the corporate name, does not prevent the maintenance of such a suit by a minority stockholder, where the corporate authorities representing the majority stock refuse to act.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 723-731; Dec. Dig. § 190.\*]

## 2. CORPORATIONS (§ 190\*)—MAJORITY STOCKHOLDER—ACCOUNTING.

After defendant's co-incorporators had obtained possession of the books of the corporation by legal process, defendant gave the experts such assistance as they needed to make up a statement from the books, but at no time acknowledged the correctness of the statement; nor did he admit a liability to the corporation for the amount of its assets claimed to have been overpaid by him on the debts of a partnership which the corporation had succeeded. *Held*, that defendant's acts did not constitute an accounting or defeat the right of a minority stockholder to maintain a suit against him, in the name of the corporation, for an accounting.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 723-731; Dec. Dig. § 190.\*]

## 3. CORPORATIONS (§ 30\*)—ORGANIZATION—PARTNERSHIP DEBTS—PAYMENT—AMOUNT.

Evidence held to warrant a finding that defendant, in organizing a corporation to take over the assets of a partnership, was authorized to pay out of the corporate assets only specified debts owing by the partnership, and not all the debts that the partnership owed.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 97-100; Dec. Dig. § 30.\*]

Department 1. Appeal from Superior Court, Thurston County; R. F. Sturdevant, Judge pro tem.

Action by Martin Lee, vice president and minority stockholder of the K. W. Steinhart Lumber Company, a corporation, against the K. W. Steinhart Lumber Company, B. E. Loomis, its secretary and treasurer, and K. W. Steinhart, president. From a judgment

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

in favor of complainant, defendant Steinhart appeals. Affirmed.

Frank C. Owings and Thos. O'Leary, for appellant. E. N. Steele, for respondent.

FULLERTON, J. This is an action for an accounting. To an understanding of the controversy, a somewhat extended statement of the facts is necessary. It appears that for some time prior to January 23, 1906, the appellant, K. W. Steinhart, owned and operated a factory for the manufacture of porch columns and certain other forms of wood products, the factory being located at Bucoda, Wash. On that day he sold a one-half interest in the business to one B. E. Loomis for a specified consideration, and entered into an agreement with Loomis to the effect that he (Steinhart) should conduct the business of the factory at a fixed salary per month, and divide the net profits of the business with Loomis. This relation continued until January 23, 1908, when the respondent, Lee, became interested in the business. At that time a corporation was formed with a capital stock of \$12,000, of which Lee, Loomis, and Steinhart each subscribed for one-third. Loomis and Steinhart paid for their shares by turning into the corporation the factory and stock on hand, subject to an indebtedness, as Lee and Loomis understood it, of \$1,706.19, and, as Steinhart contends, of \$9,214.97, owing by the partnership. Lee agreed to pay for his stock \$4,000, and actually paid thereon \$3,800.36. On the formation of the corporation, Steinhart was elected president, Lee vice president, and Loomis secretary. Steinhart, however, was put in charge of the business, and managed it, without hindrance or control, until the factory was destroyed by fire on June 28, 1908. The factory and stock were insured, and after the fire Steinhart collected for the corporation from the insurance companies some \$13,030.95, and collected from sales of the remnants left after the fire several hundred dollars more. He then paid the corporation's obligations, and reported to the other stockholders that the funds of the corporation were exhausted. Thereupon Lee and Loomis, in their own names and in the name of the corporation, began an action against Steinhart for an accounting. Loomis also instituted an action against Steinhart for an accounting of the partnership business. After issue had been joined in the actions, the several parties secured expert accountants, and had them go over the books of the concern. On their report, Loomis instructed his counsel to dismiss his action for an accounting of the partnership affairs, and also the action brought in the name of the corporation for an accounting of the corporation's business. Such a motion was made by his counsel, but Lee, who was represented by his private counsel, resisted the motion, in so far as it applied to an accounting of the business of the corporation. The court granted

the motion, allowing Lee, however, to continue the action in his own name, on behalf of the corporation, against both Steinhart and Loomis. Lee thereupon filed an amended complaint for an accounting against Steinhart, making Loomis a party defendant thereto. Issue was joined on the complaint and an accounting had, in which it was found that Steinhart had expended some \$9,214.97 on debts incurred by the partnership prior to the formation of the corporation, whereas he was only authorized to expend \$1,706.19 for such debts, and judgment was rendered against him, in the name of the corporation, for the difference between these sums, less a small balance due the partnership, which was collected and intermingled with the funds of the corporation. Steinhart appeals from the judgment so entered.

[1] The appellant first assigns that the court erred in permitting Lee to maintain an action for an accounting after the action begun for that purpose by the corporation had been dismissed. He argues that a stockholder of a corporation, as such, cannot maintain an action against another stockholder of the corporation for an injury to the corporation, but contends that all such wrongs must be redressed by the corporation itself, and in the corporate name. Such, undoubtedly, is the general rule, and such is the rule of the case of *Ninneman v. Fox*, 43 Wash. 43, 86 Pac. 213, cited by the appellant to maintain his contention. But the rule has an exception, recognized, also, by the case cited. A stockholder may maintain such an action where he is a minority stockholder, and the corporate authorities representing the majority stock refuse to act. The case at bar falls within the exception. No accounting was desired by either Steinhart or Loomis, and they represented, not only the majority of the stock of the corporation, but constituted a majority of its trustees also. It is true Loomis at first joined with the respondent in the action against Steinhart, but he discovered, as soon as the books were experted, his own probable liability for the return of the money paid on the partnership indebtedness by Steinhart in excess of the amount agreed upon to be paid at the time the corporation was formed—that is, he discovered that his interests lay with Steinhart—and hence refused to further consent to any proceeding, on behalf of the corporation, that might establish a liability on his part to the corporation. His refusal to act left Lee in the minority, and Lee was thereafter entitled to maintain the proceedings in his own name, on behalf of the corporation.

[2] In this same connection, it is urged that an accounting was never refused by Steinhart, but the facts hardly justify this contention. After his co-incorporators had obtained possession of the books by legal process, he gave the experts such assistance as they needed to make up a statement from the books; but he at no time acknowledged

the correctness of any such statement, much less did he admit liability to the corporation for the amount he had overpaid on the partnership debts. This did not constitute an accounting, and did not defeat the right of the minority stockholder to maintain an action against him, in the name of the corporation, for an accounting.

[3] The second principal contention is that the evidence does not warrant the conclusion that Steinhart was not authorized to pay all of the debts of the partnership out of the earnings and assets of the corporation. But we think the evidence overwhelming on this question. Lee, as well as his wife and daughter, testify that the only debts mentioned consisted of a note for \$1,000, due a certain bank, and the labor bills contracted during the preceding month, which were afterwards ascertained to be \$706.19. Loomis, testifying against his interest, made the same statement also. Opposed to this is the testimony of the appellant; and his evidence is much weakened by the fact that he does not pretend that he stated to either Lee or Loomis the exact amount the partnership was indebted, but asserts that it was agreed that all of the partnership indebtedness should be paid. But, conceding this to be true, it is evident that both Lee and Loomis understood him to mean that the specific debts enumerated were all of the debts owed by the partnership. In either case, he paid the excess without right, and is obligated to return it to the corporation.

On the whole of the record, we think the judgment should be affirmed, and it will be so ordered.

DUNBAR, C. J., and GOSE, PARKER, and MOUNT, JJ., concur.

### POWELL v. POWELL

(Supreme Court of Washington. Jan. 12, 1912.)

#### 1. DIVORCE (§ 101\*)—PLEADING—ADULTERY.

A cross-complaint in an action for divorce, which alleged that complainant left her home at various times, and remained away for weeks at a time, and would give the respondent no information on her return as to her whereabouts or as to the persons with whom she associated while gone, did not charge adultery; and complainant was not entitled to have the allegations made more definite.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 822-827; Dec. Dig. § 101.\*]

#### 2. DIVORCE (§ 152\*)—JUDGMENT—PLEADINGS TO SUPPORT—ALLEGATIONS AS TO JURISDICTION.

Where a complaint for divorce set forth the statutory requirements as to residence, and showed jurisdiction in the court over the subject-matter and the defendant appeared personally, the court had jurisdiction to grant him a decree of divorce on his cross-complaint.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. § 514; Dec. Dig. § 152.\*]

#### 3. APPEAL AND ERROR (§ 889\*)—REVIEW—AMENDMENTS REGARDED AS MADE.

Where a divorce was granted on a cross-complaint, which did not allege jurisdictional facts which were alleged in the complaint, and the evidence showed jurisdiction, the Supreme Court will treat the pleadings as amended to conform to the proofs.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3621, 3622; Dec. Dig. § 889.\*]

#### 4. DIVORCE (§ 150\*)—FINDINGS—RESPONSIVENESS TO ISSUES.

Where a cross-complaint in a suit for divorce did not charge adultery, a finding of adultery was not fatal as not responsive to the issues; facts sufficient to sustain the decree and which were within the allegations being found by the court.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 499-508; Dec. Dig. § 150.\*]

#### 5. DIVORCE (§ 252\*)—DIVISION OF PROPERTY—AUTHORITY OF COURT.

Where the community property was badly incumbered and of such a nature that it could hardly be divided, it was proper for the court to award it to the husband, and charge him with alimony to the wife.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 713-715; Dec. Dig. § 252.\*]

Department 1. Appeal from Superior Court, Benton County; O. R. Holcomb, Judge.

Action by Lula Powell against James Powell for divorce. From a judgment granting respondent a divorce on a cross-complaint, complainant appeals. Affirmed.

J. W. Callicotte, for appellant. Andrew Brown, for respondent.

FULLERTON, J. The appellant brought this action against the respondent for a divorce and for such division of the property of the parties as to the court should seem meet and just. In her complaint she set forth the statutory requirements as to residence and sought a divorce on the grounds of cruel treatment and personal indignities, rendering her life burdensome. The respondent answered, denying the allegations of cruel treatment, and by a cross-complaint sought a divorce from the appellant on grounds similar to those set forth in the complaint. He did not, however, allege residence in the state for one year, nor residence in the county in which the action was brought. The appellant moved against the complaint, asking that certain paragraphs therein be made more definite and certain. The motion was overruled, whereupon she replied, putting in issue the new matter in the complaint. A reference was thereupon had for a report upon the facts and law of the case. The referee took and reported the evidence into court, and recommended that neither party be granted a divorce. Each of the parties thereupon moved the court to set aside the referee's findings in so far as he recommended that no divorce be granted. The court reheard the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

case and granted a divorce to the respondent, awarding the appellant her costs expended in the proceedings, \$75 for attorney's fees, and \$20 per month alimony, and awarded to the respondent the corporeal property held by them in community. From the decree this appeal is prosecuted.

[1] The appellant first assigns that the court erred in overruling her motion to make the respondent's cross-complaint more definite and certain. It is assumed by the appellant that the paragraphs complained of made charges of adultery against her and she claimed that she was entitled to a statement of the times, places, and persons at which and with whom the adultery was committed. But we think the cross-complaint sufficiently certain. It contained no charge of adultery. True, it alleged that the appellant left her home at various times and remained away for weeks at a time, and would give the respondent no information on her return as to her whereabouts, or as to the persons with whom she associated while gone. It may be that adultery could be inferred from these facts, but they contain no definite charge of adultery, and the respondent was not obligated to make them more definite and certain in that respect.

[2.] It is next asserted that the court erred in granting a decree of divorce to the respondent, since he did not allege that he had been a resident of the state of Washington for more than one year prior to filing his cross-complaint, and did not allege that he was a resident of the county in which the action was brought. But this allegation was not necessary to support the cross-complaint. Where the plaintiff's complaint shows jurisdiction in the court over the subject-matter, and the defendant appears personally in the action, the court has jurisdiction to award such relief as the facts warrant, even to granting a divorce to the defendant on a cross-complaint. *Ferry v. Ferry*, 9 Wash. 239, 37 Pac. 431; *Pine v. Pine*, 72 Neb. 463, 100 N. W. 938; 9 Am. & Eng. Ann. Cas. 1198. The case of *Van Alstine v. Van Alstine*, 23 Wash. 310, 63 Pac. 248, is not contrary to this view. In that case neither party was a resident of the state of Washington, and hence neither of them could maintain an action therein for divorce. Moreover, in the case at bar, the evidence disclosed that each of the parties had been residents of the state of Washington for many years prior to the commencement of the action, and that each of them resided in the county in which the action was brought. In such a case we will treat the pleadings as amended to conform to the proofs. *Ramsdell v. Ramsdell*, 47 Wash. 444, 92 Pac. 278.

[4] It is next objected that the findings on which the decree rests are not responsive to the issues, but we think otherwise.

It is true that the court found that the appellant was guilty of having illicit intercourse with a certain man named, and that no allegation to that effect was made in the cross-complaint. But this does not avoid the decree. Other facts sufficient to sustain the decree which were within the allegations of the cross-complaint were found by the court, and the fact that the court may have made findings outside of the allegations of the complaint does not destroy the effect of those properly found.

[5] Finally, it is complained that there was not an equitable distribution of the property of the parties, and that the attorney fee awarded was too small. With reference to the property the record shows that it was badly incumbered and otherwise of such a nature that it could hardly be divided. In such a case it is proper for the court to award the property to the husband, and charge the husband with the duty of paying alimony to the wife. The allowance of alimony was abundantly large under the circumstances. The attorney fee also was sufficient.

The decree appealed from is affirmed.

DUNBAR, C. J., and PARKER, MOUNT, and GOSE, JJ., concur.

#### ELDRIDGE v. COMPTON.

(Supreme Court of Oklahoma. Nov. 14, 1911.)

(*Syllabus by the Court.*)

##### 1. DEPOSITIONS (§ 83\*)—CERTIFICATE OF OFFICER—RELATIONSHIP.

A deposition should not be suppressed because the officer taking it does not certify that he is not related to either of the parties, unless there is some affirmative showing of such relationship; the presumption being that the officer is qualified.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 219-226; Dec. Dig. § 83.\*]

##### 2. DEPOSITIONS (§ 111\*)—OBJECTIONS—FAILURE TO RAISE.

When a deposition has been read in evidence at one trial, without objection, it is too late thereafter to raise purely technical objections which were apparent on the face of the deposition prior to the first trial.

[Ed. Note.—For other cases, see *Depositions*, Cent. Dig. §§ 329-339; Dec. Dig. § 111.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Oklahoma County; R. H. Loofbourrow, Judge.

Action by C. A. Compton against G. C. Eldridge. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Thorp & Thorp, for plaintiff in error. O. C. Tarpenning, for defendant in error.

AMES, C. This case was originally filed in the probate court of Oklahoma county, on December 20, 1905, by C. A. Compton, plaintiff and defendant in error, against G. C. Eld-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

ridge, defendant and plaintiff in error. The defendant took depositions at Tulsa, Indian Territory, on May 15, 1906; both parties being present. The notary public certified "that I am not attorney for either of said parties, or otherwise interested in the event of said action," but did not certify that she was not related to either of the parties. The case was tried in the probate court in March, 1907, where this deposition was read, without objection to the certificate. Judgment was rendered for the plaintiff, and the defendant appealed to the district court, where he was entitled to a trial de novo. 1 Wilson's Statutes 1903, § 1881; 2 Wilson's Statutes, § 5046; Pinson v. Prentise, 8 Okl. 143, 56 Pac. 1049. On November 18, 1908, on motion of the plaintiff, the deposition was suppressed upon a motion alleging, as reasons therefor, that it failed to show the witness was of legal age to testify, or that the deposition was reduced to writing; and that the certificate did not show that the notary was not related to either party. A continuance was granted the defendant, who discovered that the witness had removed to Detroit and the notary to Kansas, and at the time the case was set for trial he had been unable to secure an amended certificate, or another deposition from the same witness, and was compelled to go to trial without this testimony. The testimony of the witness was material.

[1] The only ground of objection to the deposition, which is supported by an inspection of it, is that the notary public does not certify that she was not related to either party. The statute provides that "the officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding." Snyder's St. 1909, § 5870. And further that: "The officer taking the deposition shall annex thereto a certificate, showing the following facts: That the witness was first sworn to testify the truth, the whole truth, and nothing but the truth; that the deposition was reduced to writing by some proper person, naming him; that the deposition was written and subscribed in the presence of the officer certifying thereto; that the deposition was taken at the time and place specified in the notice." Snyder's St. § 5879. It thus appears that, while the officer must not be a relative of either party, the statute does not require him to so certify in his return; and, in the absence of any showing to the contrary, we think there is a presumption that the officer is not related, particularly where his certificate follows the

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form prescribed by the statute. Gregg v. Mallett, 111 N. C. 74, 15 S. E. 936.

[2] But, even if this were not true, the objection raised is one which was apparent at all times on the face of the deposition, and as the deposition had been read in evidence in the probate court, without objection, we think it was too late after the appeal to raise a purely formal objection.

In Brackett v. Nikirk, 20 Ill. App. 525, 526, this question arose. The deposition there had been read in a justice court, and on appeal to the county court a motion to suppress, based on some formal objection, was presented. In passing, the court say: "The rule seems to be well recognized that after a deposition taken in a cause has been read, without objection, upon one trial, it cannot afterward be objected to on account of any defect existing at the time it was so used. Evans v. Hettich, 7 Wheat. 453 [5 L. Ed. 496]; Spence v. Smith, 18 N. H. 587; Hill v. Meyers, 43 Pa. 170; McMillan v. B. & M. R. Co., 56 Iowa, 421 [9 N. W. 347]; Woodruff v. Munroe, 33 Md. 146; [Pettibone v. Rose] Brayton (Vt.) 77. This is upon the principle that a party, by allowing a deposition to be read without objection, thereby waives any defect or irregularity in the mode in which it has been taken, and is precluded from afterward alleging or taking advantage of what he has thus waived."

In 6 A. & E. Encyclopedia of Pleading and Practice (page 601), it is said: "Objections which are waived by failure to make them at the proper time cannot be made when a deposition is offered on the retrial." In 13 Cyc. at page 1020, it is said: "Objection to a deposition should be made when the opportunity first presents itself, or it will be considered waived; and especially is this the case where there has been a former trial of the cause, and no objection was therein noted. By allowing a deposition to be read once, without objection, a party waives all objections to any informality or irregularity in the taking of which he has knowledge; and thereafter he can only raise objections to the competency of the witness or the subject-matter of the deposition." See, also, McMillan v. B. & M. R. Co., 56 Iowa, 421, 9 N. W. 347; Spence v. Smith, 18 N. H. 587; Bartlett v. Hoyt, 33 N. H. 151; Hill v. Meyers, 43 Pa. 170; Walsh v. Pierce, 12 Vt. 130; Peshine v. Shepperson, 58 Va. 472, 94 Am. Dec. 468, 471.

As there was some material evidence in the deposition, we think the case should be reversed and remanded for a new trial.

PER CURIAM. Adopted in whole.

**MERRELL v. WALTERS.**

(Supreme Court of Oklahoma. Nov. 14, 1911.)

*(Syllabus by the Court.)***APPEAL AND ERROR (§ 336\*)—NECESSARY PARTIES—DISMISSAL.**

When an action is brought to recover the possession of real estate, and by the consent of the plaintiff and the defendant the defendant's warrantor is made a party to the case, and issues are raised by the pleadings involving his liability on his warranty, and the decree of the court is against the plaintiff, the warrantor is a necessary party to the appeal, as his interests will be affected by a reversal; and where he is not made a party the appeal should be dismissed on motion of the defendant in error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1870; Dec. Dig. § 336.\*]

Commissioners' Opinion, Division No. 1. Error from District Court, Washita County; James R. Tolbert, Judge.

Action by Georgia Crenshaw Merrell against Alexander W. Walters to recover possession of real estate. Judgment for defendant, and plaintiff brings error. Dismissed.

S. C. Burnette, for plaintiff in error. Massingale & Duff, for defendant in error.

**AMES, C.** This action was brought by the plaintiff in error, plaintiff below, against the defendant in error, defendant below, to recover the possession of real estate. The defendant filed an answer and cross-petition, in which he set up the nature of his title, and alleged, amongst other things, that he had purchased the lands from one Fightmaster, and that he held equitable title, and prayed that the legal title, which was vested in the plaintiff, should be held to inure to his benefit, and that the plaintiff should be required to convey it to him.

By stipulation between the plaintiff and the defendant, Fightmaster was permitted to appear in the case and "file such pleadings as he may find necessary to assist the defendant in his defense, by reason of the fact that the said Wallace E. Fightmaster is probably liable on his covenants of warranty contained in the deed of conveyance from himself to the defendant." Pursuant to this stipulation, Fightmaster filed an answer and cross-petition, in which he pleaded the facts on which he based the title which he had conveyed to the defendant; the cross-petition raising an issue as to his liability to the defendant, even though the plaintiff should prevail. Issues were made up on these pleadings, and the cause, as between the plaintiff and the defendant, was tried, and judgment rendered for the defendant. Fightmaster was not present at this trial, although the court entered final judgment that the plaintiff take nothing by his suit, and that he be required to convey his legal

title to the defendant and pay the costs of the cause.

From this brief statement, it is apparent that if the decree stands Fightmaster is not liable to the defendant on his warranty; while if the decree should be reversed the question of his liability would be open. It is therefore manifest that he has an interest in the result of this action. In *Chase v. Christenson*, 92 Iowa, 405, 60 N. W. 640, the syllabus is as follows: "Where, in an action to quiet title, defendant files a cross-bill against his grantor, who is made a party, praying that a mortgage given him as a part of the purchase price of the land be canceled if plaintiff recovers, such grantor is an adverse party, on whom notice of appeal by plaintiff from a judgment dismissing his petition must be served."

*Massie v. Louque*, 109 La. 769, 33 South. 764, was also a similar case. It being true that Fightmaster's interests are materially affected by the appeal, he was a necessary party. *John v. Paullin*, 24 Okl. 636, 104 Pac. 365; *Jones v. Balsley*, 25 Okl. 344, 106 Pac. 830, 138 Am. St. Rep. 921; *First National Bank of Holdenville v. Jacobs*, 26 Okl. 840, 111 Pac. 303.

The plaintiff in error, in opposition to the conclusion which we have reached, refers us to *Hallwood Cash Register Company v. Dailley*, 70 Kan. 620, 79 Pac. 158, and *Zinkelsen v. Lewis*, 71 Kan. 837, 83 Pac. 28, which hold that, where a defendant is in default, and does not appear and take part in the proceedings in the court below, he is not a necessary party on the appeal; but both of these cases are based upon a Kansas statute of 1901, which we do not have. *Jones v. Balsley*, 25 Okl. 344, 349, 106 Pac. 830, 138 Am. St. Rep. 921.

In view of the authorities cited, it is our opinion that the motion to dismiss should be sustained.

PER CURIAM. Adopted in whole.

**WICKER v. DENNIS et al.**

(Supreme Court of Oklahoma. Oct. 10, 1911.)

*(Syllabus by the Court.)***1. APPEAL AND ERROR (§ 185\*)—OBJECTIONS NOT MADE BELOW—WAIVER.**

In a case where there are several parties defendant, and one or more seek and obtain a change of judge in the manner provided by law, neither the plaintiff nor the other defendants making objection to such change, and the case goes to and is tried by such special judge, it will be too late, after the case comes to this court on appeal, for the plaintiff below to raise any objection to the jurisdiction of said judge to the parties, or of the subject-matter of the controversy, but he will be deemed to have waived any objection he may have had, and the special judge so selected will have full and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

complete jurisdiction over both the parties and the subject-matter of the controversy.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1166-1178, 1375; Dec. Dig. § 185.\*]

## 2. APPEAL AND ERROR (§ 1010\*)—REVIEW—FINDINGS OF FACT.

This court will not disturb the finding of fact by a jury, or by a court sitting in place of a jury, if there is any evidence reasonably tending to establish the allegations of the petition, or, as in the case at bar, the answer and counterclaim.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982; Dec. Dig. § 1010.\*]

## 3. APPEAL AND ERROR (§ 1015\*)—REVIEW—FINDINGS OF FACT BY COURT—NEW TRIAL.

Where a case is tried by the court without a jury, and the court overrules a motion for a new trial pro forma, refusing to hear it on its merits, the finding of fact and the judgment of the court thereon will not be disturbed by this court if the evidence is sufficient to sustain such findings and judgment of the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876; Dec. Dig. § 1015.\*]

Commissioners' Opinion, Division No. 1. Error from Custer County Court; Walter S. Mills, Judge pro tem.

Action by W. M. Wicker against J. H. Dennis and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Andrew J. Welch, for plaintiff in error. M. L. Holcombe, for defendants in error.

ROBERTSON, C. This case presents error from the county court of Custer county. Plaintiff in error, who was plaintiff below, commenced an action on June 29, 1908, in the county court of said county against the defendants in error to recover \$271 alleged to be due on a promissory note. The defendants answered, admitting the execution of the note sued on, but denied liability thereon, because of a failure of consideration and fraud, and set up a counterclaim and damages amounting to \$832.50. The answer and counterclaim alleged that the consideration of the note sued on was for a part purchase price of a stallion and jack; the entire purchase price being \$1,000. The defendants alleged that they bought the animals for breeding purposes only. The jack had no value aside from that of a breeder. Plaintiff had warranted him to be a good breeder and an average colt-getter. The warranty was in writing. The defendants allege in their answer and counterclaim that the jack was worthless as a breeder. Plaintiff replied by general denial, and upon the issues thus joined trial was had to the court before Hon. W. S. Mills, special judge, without a jury, which resulted in a verdict for the defendant on a counterclaim in the sum of \$266.70. From this judgment plaintiff appeals, and in his brief relies upon four assignments of error for a reversal. The first is: "First. The defendant J. H. Dennis made no appli-

cation for a change of judge. Therefore the court had no jurisdiction over him, and no right to adjudicate in this cause relative to him. Jurisdiction cannot be conferred by agreement, and jurisdictional matters can be taken advantage of at any time. Hence this cause should be reversed as to J. H. Dennis for want of jurisdiction." The record on page 19 shows that on August 16, 1909, the defendants Roger and Stanley filed an affidavit charging the regular judge of said court with bias and prejudice, and alleging that they could not have a fair and impartial trial should he continue to preside, etc., which was considered sufficient by the court, and a change of judge was ordered. "Whereupon, plaintiff and defendants agreed upon W. S. Mills as a special judge to try said cause, and thereupon said W. S. Mills took the oath of office, as required by law, and assumed the duties of trying said cause, as a special judge, and the defendants declared ready for trial." Record, p. 20.

[1] We fail to see any merit in the contention of plaintiff in error that the court had no jurisdiction over the defendant Dennis. This being a joint action against all three defendants, and two of them having secured a change of judge in the manner provided by law, the whole case was thereby taken before the special judge, and he had full and complete jurisdiction of both subject-matter and parties. It also appears that the same counsel represented all three defendants throughout the entire trial, and no objection of any kind was made by Dennis, or any one else, to the special judge or to the manner of his selection, but, on the contrary, it affirmatively appears in the record that Dennis, together with his codefendants, and this plaintiff in error, in open court, agreed upon W. S. Mills as a special judge, and certainly he will not now be heard for the first time to object.

The next assignment of error is: "The court erred in refusing to sustain the demurrer of the plaintiff to the evidence of the defendants, and in refusing to sustain the motion of the plaintiff for judgment."

[2] It is a well-established rule that an appellate court will not disturb the finding of fact by a jury, or by a court sitting in the place of a jury, if there is evidence reasonably tending to establish the allegations of the petition, or, as in this case, the answer and counterclaim. "When there is any evidence introduced at the trial of a cause reasonably tending to establish the allegations of plaintiff's petition, it is error for the court to sustain a demurrer to such evidence and render judgment in favor of the defendant." *Cole v. M., K. & T. Ry. Co.*, 20 Okl. 227, 94 Pac. 540, 15 L. R. A. (N. S.) 268. "Where any evidence has been presented tending to prove issues, it is proper to overrule a demurrer to the evidence, or deny a peremptory

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

instruction." *St. L. & S. F. Ry. Co. v. Jamieson*, 20 Okl. 654, 95 Pac. 417. We have carefully examined the evidence and find that 14 witnesses testified in the case; and, while the testimony is conflicting and on some points unsatisfactory, yet we cannot say there was no evidence reasonably tending to support the finding of the court.

[3] The next assignment of error to be noticed is: "Plaintiff in error next complains that the trial court erred in refusing to hear argument of counsel on the motion for a new trial and in overruling same pro forma." This subject has been before this court several times in the past, and is no longer an open question in this state. In *Pinson & Sunday v. Prentiss*, 8 Okl. 143, 56 Pac. 1049, the court, speaking through Mr. Justice Hainer, said: "Where a case is tried by the court without a jury and the court overrules a motion for a new trial pro forma, refusing to hear it on its merits, the findings of facts and the judgment of the court thereon will not be disturbed by this court if the evidence is sufficient to sustain such findings and judgment of the court." In *Lewis v. Hall*, 11 Okl. 684, 69 Pac. 890, the court in discussing this identical question said: "The true rule in such cases when brought to this court by appeal is to determine whether or not the trial court rendered a correct judgment in the case. If this court, upon an examination of the record, finds that a correct judgment was rendered, then it becomes immaterial whether or not the court below gave the cause proper consideration in passing upon the motion for a new trial. If the judgment was correct, no good purpose could be served by reversing the case, but, on the contrary, great injury would be done to the defendant in error." It there held that it was not reversible error for a trial court to peremptorily overrule a motion for a new trial in a case tried before the court without a jury, where there was no error shown to have occurred at the trial. Our own court since statehood has followed the rule laid down in the above case, and in *Linson v. Spaulding*, 23 Okl. 254, 108 Pac. 747, the court, speaking through Mr. Justice Dunn, said: "The overruling of a motion for a new trial pro forma by a trial court is not in itself, and in the absence of any claim that the judgment of the court on the merits of the case is erroneous, sufficient to require a reversal of the cause." See, also, the case of *Oklahoma Portland Cement Co. v. Anderson et al.*, recently decided by Mr. Justice Kane, reported in 28 Okl. 650, 115 Pac. 767, to the same effect.

The other assignments of error are not properly raised in the motion for the new trial or otherwise, and are not discussed in the brief of the plaintiff in error, and hence will not be considered in the determination of this cause.

After a careful examination of the entire

record, we fail to discover any error that would warrant a reversal, and the judgment of the county court of Custer county should therefore be affirmed.

PER CURIAM. Adopted in whole.

### FRIEL v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 17, 1912.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 377\*)—EVIDENCE—CHARACTER OF ACCUSED.

Where a defendant is on trial charged with violating the prohibitory liquor law, it is error for the trial court to refuse to allow the defendant to prove his general reputation in the community in which he resides as to being a law-abiding citizen, and that the defendant did not have the reputation of being a whisky peddler, or a person engaged in the business of violating the prohibitory liquor law.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 836, 837, 840; Dec. Dig. § 377.\*]

#### 2. WITNESSES (§ 410\*)—CORROBORATION.

Where the testimony of a witness is contradicted in the trial of a cause, it is competent, for the purpose of supporting his testimony, to introduce evidence as to the general reputation of the witness for truth and veracity.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. § 1284; Dec. Dig. § 410.\*]

Appeal from Canadian County Court; H. L. Fogg, Judge.

Frank Friel was convicted of an unlawful sale of liquor, and appeals. Reversed and remanded.

W. A. Maurer, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. On the 26th day of November, 1910, appellant was found guilty by the jury of having unlawfully sold intoxicating liquors, and his punishment was assessed at a fine of \$50 and 30 days imprisonment in the county jail.

[1, 2] Upon the trial of this cause, it was proven that appellant owned and conducted a livery barn in Calumet, in Canadian county, Okl. The prosecuting witness testified that he purchased a bottle of whisky from appellant at said livery barn on the date named in the information. Appellant took the stand as a witness in his own behalf, and directly denied that he had sold the whisky as testified to by the prosecuting witness. Appellant then placed a witness upon the stand who testified that he had been acquainted with appellant between six and seven years—ever since appellant resided in Canadian county, Okl.; that he lived on an adjoining farm to appellant, and was intimately acquainted with him. Appellant then offered to prove by said witness that during this time appellant had enjoyed the



general reputation in the community in which he resided of being a law-abiding citizen, and that the general reputation of appellant in that community for truth and veracity was good; that appellant did not have, and never had had, the reputation in the community where he resided and did business of being a whisky peddler, or of selling intoxicating liquors. The county attorney objected to all of this evidence, upon the ground that it was incompetent, irrelevant, and immaterial. The objection was by the court sustained, and appellant was not permitted to prove his reputation touching these matters, to which ruling of the court appellant excepted. Under the testimony in this case, we think that all of this evidence was material and should have been received.

The judgment of the lower court is therefore reversed, and the cause is remanded for a new trial.

ARMSTRONG and DOYLE, JJ., concur.

#### RICHARDSON v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 15, 1912.)

(Syllabus by the Court.)

#### HOMICIDE (§ 257\*) — EVIDENCE — FELONIOUS ASSAULT.

The evidence upon a trial for assault with intent to kill examined, and held sufficient to support a verdict convicting the defendant of a felonious assault.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 543-552; Dec. Dig. § 257.\*]

Appeal from District Court, Jefferson County; Frank M. Bailey, Judge.

R. F. Richardson was convicted of assault with intent to kill, and appeals. Affirmed.

J. A. Moore, for appellant. Smith C. Matson, for the State.

DOYLE, J. The plaintiff in error was informed against for the crime of assault with intent to kill, and was convicted of a felonious assault, and sentenced to be imprisoned in the penitentiary for a term of one year and one day. The judgment and sentence was entered on March 3, 1910. No briefs have been filed, and when the case was called on the regular assignment of this term no appearance was made on behalf of the plaintiff in error, and the Attorney General moved to affirm for failure to prosecute the appeal.

While we do not consider it the duty of this court to examine the evidence, yet, owing to the fact that the conviction was for a felony, we have carefully examined the record and the evidence, and we have discovered no error. The evidence abundantly sustains the verdict. No exception was taken on the admission of the evidence or to the instructions of the court. The defendant had

the benefit of able counsel, and had a fair trial. It appears that the appeal is wholly without merit.

The judgment of the district court of Jefferson county is therefore affirmed, and the cause remanded thereto, with direction to enforce its judgment therein.

FURMAN, P. J., and ARMSTRONG, J., concur.

#### CLOYD v. STATE.

(Criminal Court of Appeals of Oklahoma. Jan. 16, 1912.)

(Syllabus by the Court.)

#### 1. CRIMINAL LAW (§ 1109\*) — APPEAL — RECORD — NOTICE OF APPEAL — DISMISSAL.

An appeal to the Criminal Court of Appeals may be taken by the defendant, as a matter of right, from any judgment against him, but the manner of taking and perfecting such appeal is a proper matter for legislative control, and the appeal must be taken in the manner prescribed by the law; and, where the record before this court fails to show notices of appeal and proof of service as required by law, the case will be dismissed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1897-2902; Dec. Dig. § 1109.\*]

#### 2. CRIMINAL LAW (§ 1081\*) — APPEAL — NOTICE.

Under the law now in force, notice of appeal in felony cases must be served within six months from date of sentence; and this must affirmatively appear before jurisdiction will be acquired on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2722-2724; Dec. Dig. § 1081.\*]

Appeal from District Court, McIntosh County; Preslie B. Cole, Judge.

Carl Cloyd was convicted of violating the prohibitory law, and appeals. Dismissed.

C. H. Tully, for appellant. Smith C. Matson, Asst. Atty. Gen., for the State.

FURMAN, P. J. On the 23d day of September, 1910, appellant was convicted by a jury in the district court of McIntosh county for the offense of manslaughter in the first degree, and his punishment was assessed at 39 years confinement in the state penitentiary at hard labor. On the 28th day of September following, appellant was duly sentenced by the court in accordance with said verdict. From this sentence, appellant prosecuted an appeal to this court. This appeal was filed on January 26, 1911. On October 24, 1911, the Attorney General filed a motion to dismiss this appeal, because notices of appeal were not served, as the law requires, upon the county attorney and the clerk of the district court of McIntosh county.

[1] Sections 6948 and 6949 of Snyder's Comp. Laws of Okla. 1909 are as follows:

"In misdemeanor cases the appeal must be taken within sixty days after the judgment

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

is rendered; Provided, however, that the trial court or judge may, for good cause shown, extend the time in which such appeal may be taken not exceeding sixty days. In felony cases the appeal must be taken within six months after the judgment is rendered, and a transcript in both felony and misdemeanor cases must be filed as hereinafter directed.

"An appeal is taken by the service of a notice upon the clerk of the court where the judgment was rendered, stating that the appellant appeals from the judgment. If taken by the defendant, a similar notice must be served upon the prosecuting attorney. If taken by the state, a similar notice must be served upon the defendant, if he can be found in the county; if not there, by posting up a notice three weeks in the office of the clerk of the district court."

In the case of *Bonaparte v. United States*, 3 Okl. Cr. 345, 106 Pac. 347, Judge Doyle, speaking for this court, said: "An appeal to the Criminal Court of Appeals may be taken by the defendant, as a matter of right, from any judgment against him, but the manner of taking and perfecting such appeal is a proper matter of legislative control, and the appeal must be taken in the manner prescribed by the law; and, where the record before this court fails to show notices of appeal and proof of service as required by law, the case will be dismissed."

[2] We find that the motion filed by the Attorney General is well taken, and as the record does not show that notices of appeal were served as required by law we have never acquired jurisdiction of the cause, and the appeal is therefore dismissed, with directions to the district court of McIntosh county to proceed with the execution of its judgment.

ARMSTRONG and DOYLE, JJ., concur.

#### MRS. A. K. ROSS & CO. v. GERMAN ALLIANCE INS. CO. OF NEW YORK.

(Supreme Court of Kansas. Jan. 16, 1912.)

#### APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.

A finding on conflicting evidence will not be disturbed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

On petition for rehearing. Petition overruled.

For former opinion, see 119 Pac. 366.

PER CURIAM. In a petition for a rehearing it is stated that all three of the arbitrators testified to an agreement by Anderson and Potts to call in the umpire; but the abstracts show that Anderson testified that Potts called in the umpire, and that he

(Anderson) thought the umpire was out of place—that he was supposed to act only in case of difference. It is true that Potts testified that "we," probably meaning himself and Anderson, called in the umpire; and the umpire testified that his memory was not clear, but he thought that both the appraisers called for him. Thus it appears that the testimony was conflicting upon this matter.

Again, it is said that the evidence shows that Anderson quit because of the meddling conduct of Mrs. Ross, and testimony is referred to purporting to relate statements made by him to that effect; but Anderson himself testified to other reasons, as stated in the opinion. Here, again, there was a conflict in the evidence, and the district court must have believed that which supports the findings.

Other matters referred to in the petition for a rehearing have been carefully considered, and the petition is overruled.

#### URMY et al. v. ARNOLD, Police Judge.

(Supreme Court of Kansas. Jan. 8, 1912.)

#### QUO WARRANTO (§ 24\*)—OUSTER FROM PUBLIC OFFICE—PARTIES ENTITLED TO RELIEF.

Under the soldier and sailor preference law (Gen. St. 1909, § 7879), which creates a preferred class from which appointments to the office of police judge shall be made, there is no paramount right between members of the class who may apply for the office and are found to be competent, and one of them cannot maintain an action to oust the incumbent of the office.

[Ed. Note.—For other cases, see Quo Warranto, Cent. Dig. § 27; Dec. Dig. § 24.\*]

Quo warranto by S. S. Urmey and intervening petition by J. M. Dumenil against N. B. Arnold, Judge of the Police Court of the City of Topeka. Demurrers to petition and to intervening petition sustained.

J. G. Waters, J. J. Schenck, and P. H. Coney, for plaintiffs. J. M. Dumenil (Jasper H. Moss, of counsel), for intervening petitioner. W. C. Ralston and Hazen & Gaw, for defendant.

PER CURIAM. This is an action to oust the defendant from the office of police judge of the city of Topeka and to install the plaintiff therein under the soldier and sailor preference law. Gen. Stat. 1909, § 7879. The intervening petitioner, J. M. Dumenil, pleads the same right and asks for the same remedy. The law referred to creates a preferred class from which appointments shall be made, but there is no paramount right between members of the class who may apply for the office and are found to be competent; and one of them cannot maintain an action therefor. *Campbell v. Sargent*, 85 Kan. 590, 118 Pac. 71.

The demurrer to the petition and the demurrer to the intervening petition are sustained.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes

## MEMORANDUM DECISIONS

**CITY OF HELENA v. ERNST.** (Supreme Court of Montana. Sept. 8, 1911.) Appeal from District Court, Lewis and Clark County. Edward Horsky, for appellant.

**PER CURIAM.** The appeal in the above-entitled cause is hereby upon appellant's motion dismissed.

**EDWARDS v. ENGLISH.** (Supreme Court of Montana. June 7, 1911.) Appeal from District Court, Lewis and Clark County; J. Miller Smith, Judge. Walsh & Nolan, for appellant.

**PER CURIAM.** The appeal in the above-entitled cause is hereby dismissed in accordance with motion of counsel for appellants.

**MORTON v. d'AUTREMONT.** (Supreme Court of Montana. Sept. 19, 1911.) Appeal from District Court, Fergus County; E. K. Cheadle, Judge. De Kalb & Mettler and O. W. Belden, for appellant.

**PER CURIAM.** It is ordered that the appeal in the above-entitled cause be and the same is hereby dismissed on motion of appellant.

**PRUETT v. MINNEAPOLIS STEEL & MACHINERY CO.** (Supreme Court of Montana. April 17, 1911.) Appeal from District Court, Silver Bow County; J. J. Lynch, Judge. Kremer, Sanders & Kremer, for appellant.

**PER CURIAM.** It is ordered that the appeal in the above-entitled cause be and it is hereby dismissed in accordance with stipulation of counsel on file herein.

**R. M. COBBAN REALTY CO. v. BLACK.** (Supreme Court of Montana. May 8, 1911.) Appeal from District Court, Missoula County; F. C. Webster, Judge. Elmer E. Hershey and Wm. F. Wayne, for appellant.

**PER CURIAM.** It is ordered that the appeal in the above-entitled cause be and the same is hereby dismissed in accordance with stipulation on file herein.

**STATE v. BLAIR.** (Supreme Court of Montana. May 27, 1911.) Appeal from District Court, Teton County; H. H. Ewing, Judge. David J. Ryan, for appellant. Albert J. Galen, Atty. Gen., for the State.

**PER CURIAM.** Respondent's motion to dismiss the appeal herein is after due consideration sustained, and the appeal hereby dismissed.

**STATE v. VAN.** (Supreme Court of Montana. Sept. 19, 1911.) Appeal from District Court, Dawson County; Sydney Sanner, Judge. C. C. Hurley and Loud & Campbell, for appellant.

**PER CURIAM.** It is ordered that the appeal in the above-entitled cause be and the same is hereby dismissed in accordance with motion of respondent.

**STATE ex rel. CASEY v. DISTRICT COURT OF CASCADE COUNTY et al.** (Supreme Court of Montana. Sept. 25, 1911.)

Original application for writ of supervisory control, running to the District Court of Cascade County and the judges thereof. Victor R. Griggs, for relator.

**PER CURIAM.** Relator's petition for a writ of supervisory control herein is after due consideration denied.

**STATE ex rel. ROCHESTER v. DISTRICT COURT OF SILVER BOW COUNTY et al.** (Supreme Court of Montana. June 13, 1911.) Original application for writ of supervisory control to the District Court of Silver Bow County and one of the judges thereof. C. M. Parr, for relator.

**PER CURIAM.** The relator's petition for writ of supervisory control herein, heretofore submitted, is after due consideration by the court denied.

**TERRITORY v. EYLES.** (Supreme Court of New Mexico. Dec. 19, 1911.) Appeal from District Court, Santa Fé County; before Justice McFie. Otto J. Eyles was convicted of embezzlement, and appeals. Reversed and remanded. Renehan & Davies, for appellant. Frank W. Clancy, Atty. Gen. (Francis C. Wilson, of counsel), for the Territory.

**WRIGHT. J.** The defendant was convicted of embezzlement at the September, 1910, term of the district court for Santa Fé county. The indictment is in the usual form, charging embezzlement under the statute of the sum of \$150 of the property of one Bronson M. Cutting, which said sum it is alleged came into the possession of the defendant by reason of his employment as an agent by the said Bronson M. Cutting. At the conclusion of the evidence for the territory the defendant moved for a peremptory instruction of not guilty, upon the failure of proof as to agency and felonious intent. This motion was denied. It was again presented at the close of the case, and again denied, to which rulings the defendant excepted. The same questions were again presented to the trial court in the motion for new trial and in arrest of judgment. Numerous errors in the instructions given by the court and in the refusal to give instructions requested by the defendant are assigned. However, in view of our holding in this case, it will not be necessary to consider anything beyond the question raised on the motion for peremptory instructions preserved in the motions for new trial and arrest of judgment. The prosecution of this case was had under the provisions of section 1122 of the Compiled Laws of 1907, which reads as follows: "If any officer, agent, clerk or servant of any incorporated company, or if any clerk, agent or servant of a private person, or of any copartnership, except apprentices, and other persons under the age of sixteen years, shall embezzle or fraudulently convert to his own use, any money or property of another, which shall have come to his possession or shall be under his care, by virtue of such employment, he shall be deemed, by so doing, to have committed the crime of larceny." The sole question for determination in this case is, Does the testimony establish the elements of the crime of embezzlement as defined in the section of the statute above quoted, so as to warrant the verdict of guilty returned by the jury in this case? We have carefully examined the record in this case, and feel constrained to hold

that the evidence upon the question of agency and intent is so meager as not in law to justify the verdict returned in this case. The record discloses that the defendant was guilty of nothing more serious than a breach of trust. As no useful purpose could be served by a discussion of the evidence or the lack of evidence upon these two points, we content ourselves with a statement of our conclusions therefrom. The judgment of the lower court is reversed, and the cause remanded.

POPE, C. J., and PARKER, ABBOTT, MEACHEM, and ROBERTS, JJ., concur. McFIE, J., having tried the case below, did not participate.

**BRISLEY v. MAHAFFEY.** (Supreme Court of Oklahoma. Jan. 10, 1911.) Error from District Court, Tillman County; J. T. Johnson, Judge. Action by William Mahaffey against Ben Brisley. Judgment for plaintiff, and defendant brings error. Dismissed. Hudson & Mounts, for plaintiff in error. McGuire & Mosier, for defendant in error.

TURNER, J. On September 14, 1910, attorneys for defendant in error filed a motion to dismiss this proceeding in error. One of the grounds set forth in the motion is: "That the case-made in said cause was not presented to the trial judge to be settled and signed upon the date designated in the notice served upon defendant in error, nor was the same presented, signed, and settled at the place or in the county designated in said notice." On this point the record discloses that on June 13th the sheriff of Tillman county, on the day it came into his hands, served on the attorneys for defendant this notice (omitting caption): "To William Mahaffey, or His Attorney of Record, W. H. Dial: You will please take notice, that the defendant, Ben Brisley, in the above entitled and numbered case, will present the case-made as made out in this case, a copy of which was served on you on the 12th day of June, 1909, and will offer the same to the Honorable J. T. Johnson, judge of the district court of Tillman county, Oklahoma, at his chambers in the courthouse in the city of Frederick, Tillman county, and state of Oklahoma, for settlement, allowance, and signature on the 14th day of June, 1909. Hudson & Mounts, Attorneys for Defendant." As the certificate of the trial judge shows the case-made to have been settled and signed by him in the city of Lawton, county of Comanche, on July 14, 1909, said motion is sustained, and this proceeding dismissed, for the reason that said notice in legal effect was no notice of the time and place of the signing and settling of said case-made. All the Justices concur.

**WESTERN UNION TELEGRAPH CO. v. THOMPSON.** (Supreme Court of Oklahoma. Dec. 12, 1911.) Commissioners' Opinion. Division No. 1. Error from Garvin County Court; W. B. M. Mitchell, Judge. Action by J. B. Thompson against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. Dismissed. Rennie, Hocker & Moore, for plaintiff in error. J. B. Thompson, for defendant in error.

AMES, C. The petition in error was filed in this court on the 24th day of January, 1910, and no briefs have been filed on behalf of either the plaintiff in error or the defendant in error. The appeal is therefore dismissed for want of prosecution.

PER CURIAM. Adopted in whole.

**BEGLEY v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 6, 1912.) Appeal from Stephens County Court; W. H. Admire Judge. John Begley was convicted of violat-

ing the prohibitory law, and appeals. Dismissed. Womack & Brown, for appellant.

PER CURIAM. John Begley, plaintiff in error, was convicted of a violation of the prohibition law, and on January 20, 1911, was sentenced to serve a term of 30 days in the county jail and to pay a fine of \$500. An appeal was attempted to be taken by filing in this court on May 5, 1911, a petition in error, with case-made, which was beyond the limit of time allowed by law to take an appeal. Wherefore this court did not acquire jurisdiction, for which reason the attempted appeal is hereby dismissed. Mandate to issue forthwith.

**BRAZIEL v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 6, 1912.) Appeal from Carter County Court; M. F. Winfrey, Judge. Bob Braziel was convicted of violating the prohibitory law, and appeals. Affirmed. Wm. Pfeiffer, for appellant.

PER CURIAM. Bob Braziel, plaintiff in error, was convicted in the county court of Carter county of a violation of the prohibition law, and was on February 17, 1911, in pursuance to the verdict of the jury, sentenced to serve a term of 90 days in the county jail and pay a fine of \$100, from which judgment an appeal was taken by filing in this court on April 15, 1911, a petition in error, with case-made. When the case was called for final submission on the regular assignment of this day, there was a withdrawal by counsel of record of further appearance in the case. Whereupon the Attorney General moved to affirm for failure to prosecute the appeal. Wherefore the judgment of the lower court is affirmed, for failure to prosecute the appeal. Mandate to issue forthwith.

**CARPENTER v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 17, 1912.) Appeal from Love County Court. Henry Carpenter was convicted of violating the prohibitory law, and appeals. B. C. Logsdon, for appellant. Chas. West, E. G. Spilman and Smith O. Matson, for the State. Dismissed.

PER CURIAM. Appellant was convicted for violating the prohibitory liquor law, and his punishment was assessed at a fine of \$50 and 30 days' imprisonment in the county jail. What purports to be the record in this case does not show that the case-made was ever served upon the county attorney. The judgment was rendered on the 6th day of April, 1911. The transcript of the record was not filed in this court until the 19th day of June, 1911. This being more than 60 days after the rendition of the judgment, and as the time for filing the appeal in this court was not extended by the trial court beyond the 60 days allowed by law, this court has never acquired jurisdiction of the appeal. The appeal is therefore dismissed, with directions to the county court of Love county to proceed with the execution of its judgment.

**BROWN v. STATE.** (Criminal Court of Appeals of Oklahoma. Dec. 30, 1911.) Appeals from Canadian County Court; H. L. Fogg, Judge. G. C. Brown was convicted of a violation of the prohibition law in two cases, and appeals. Affirmed. Forrest & Sansom, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

PER CURIAM. The plaintiff in error was convicted in the county court of Canadian county of a violation of the prohibition law in two cases. May 25, 1910, he was sentenced to serve a term of six months in the county jail and to pay a fine of \$500 in one, and to serve a term of 30 days in the county jail and to pay a fine of \$50 in the other. To reverse

these judgments appeals were taken. The only question presented in each case by the briefs was decided adversely to plaintiff in error's contention in another one of his cases, *G. C. Brown v. State*, 7 Okl. Cr. —, 119 Pac. 447, decided at this term. On the authority of that case, the judgments appealed from are hereby affirmed.

**BURNS v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 16, 1912.) Appeal from Kiowa County Court; J. W. Mansell, Judge. C. E. Burns was convicted of violating the prohibitory law, and appeals. Affirmed. Zink & Cline, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted in the county court of Kiowa county at the January, 1911, term, on a charge of violating the prohibitory law, and his punishment fixed by the jury at a fine of \$300 and imprisonment in the county jail for a period of six months. No briefs have been filed and no appearance made for oral argument on behalf of plaintiff in error. For this reason the Attorney General has moved to affirm for want of prosecution. The motion is well taken, and is sustained. The judgment of the trial court is affirmed.

**CANADY v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 6, 1912.) Appeal from Pottawatomie County Court; Ross F. Lockeridge, Judge. Red Canady was convicted of violating the prohibitory law, and appeals. Affirmed. Clyde Pittman and A. M. Baldwin, for appellant.

**PER CURIAM.** Red Canady, plaintiff in error, was convicted of a violation of the prohibition law. March 7, 1911, he was sentenced to serve a term of 60 days in the county jail and to pay a fine of \$300. An appeal was taken by filing in this court on May 2, 1911, a petition in error, with case-made. When the case was called for final submission on the assignment, the Attorney General moved in open court to affirm for failure to prosecute. No briefs have been filed and no appearance made in this court on plaintiffs in error's behalf. The appeal having been abandoned, the motion to affirm is hereby sustained. Mandate to issue forthwith.

**COFFER et al. v. STATE.** (Criminal Court of Appeals of Oklahoma. Dec. 4, 1911.) Appeal from District Court, Mayes County; T. L. Brown, Judge. Walter Coffey and Buck Nelson were convicted of crime, and appeal. Dismissed as to Coffey. Preston S. Davis, O. L. Rider, and O. F. Mason, for plaintiffs in error.

**PER CURIAM.** Appellant Walter Coffey was convicted at the June, 1910, term of the district court of Mayes County, and sentenced to the penitentiary for a period of five years. He has filed a motion in this court to dismiss his appeal. The motion is sustained, and his appeal dismissed. The appeal is continued as to Buck Nelson.

**BRASHEAR v. STATE.**<sup>1</sup> (Criminal Court of Appeals of Oklahoma. Jan. 27, 1912.) Appeal from Oklahoma County Court; John W. Hayson, Judge. A. C. Brashear was convicted of violating the prohibitory law, and appeals. Affirmed. Warren K. Snyder and Ross N. Lillard, for plaintiff in error. Smith C. Matson, and E. G. Spilman, Asst. Attys. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted in the county court of Oklahoma coun-

ty, at the April, 1911, term, on a charge of having unlawful possession of intoxicating liquors with intent to sell the same, and his punishment fixed at a fine of \$300 and imprisonment in the county jail for a period of 60 days. The appeal was perfected in this court on the 21st day of June, 1911. A careful examination of the record in this case discloses facts upon which the jury could not have reached any other conclusion than that the defendant was guilty as charged. The instructions of the trial court are subject to criticism, but we do not think the errors therein are sufficient to justify a reversal of the judgment. The court should follow the rule laid down in the case of *Billingsley v. State*, 4 Okl. Cr. 597, 113 Pac. 241, and *Hendrix v. State*, 4 Okl. Cr. 611, 113 Pac. 244. If this were a close case on the facts, the judgment would have to be reversed on the errors in the instruction of the court. The proof discloses the fact that plaintiff in error had sold whisky at this identical place a short time before this offense is alleged to have been committed, and that he had paid the special revenue tax required by the United States government from retail liquor dealers, which in itself, together with possession, is sufficient to justify a conviction. Let the judgment be affirmed.

**CRAWFORD et al. v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 17, 1912.) Appeal from Okfuskee County Court; W. A. Husen, Judge. J. M. Crawford and George Dexter were convicted of violating the prohibitory law, and appeal. Reversed and remanded. Huddleston & Hockensmith, for plaintiffs in error. E. G. Spilman and Smith C. Matson, Asst. Attys. Gen., for the State.

**PER CURIAM.** The Attorney General has filed a confession of error, based upon the following instruction given by the trial court: "You are instructed that when the state has proved beyond a reasonable doubt, as charged in the information, that the defendant had the designated liquors in his possession, it is incumbent upon the defendant to show such liquors were a lawful purchase; and if you believe from all the evidence beyond a reasonable doubt that he was in the possession of the liquors, and the same were not a lawful purchase, you should convict the defendant." The instruction supra does not state any rule of law applicable to the trial of the issues raised in this case. Let the judgment be reversed, and the cause remanded for a new trial.

**CRUNK v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 11, 1912.) Appeal from District Court, Stephens County; Frank M. Bailey, Judge. Dock Crunk was convicted of larceny of domestic animals, and appeals. Affirmed. Womack & Brown, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted at the April, 1910, term of the district court of Stephens county on a charge of larceny of domestic animals, and his punishment fixed at one year in the state penitentiary. The appeal was filed in this court on the 7th day of July, 1910. No briefs have been filed and no appearance made for oral argument on behalf of plaintiff in error. The Attorney General has moved to affirm the judgment for want of prosecution. The motion is sustained, and the judgment is affirmed. The clerk will issue the mandate forthwith.

**ELMS v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 16, 1912.) Appeal from Caddo County Court; C. Ross Hume, Judge. Ed Elms was convicted of violating the prohibitory law, and appeals. Appeal dismissed. Bristow & McAdyen, for plaintiff in

<sup>1</sup> This case is here inserted in place of Cowherd v. State, in which opinion was withdrawn. For substituted opinion in Cowherd v. State, see 120 Pac. 1021.

error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted in the county court of Caddo county at the January, 1911, term on a charge of having the possession of intoxicating liquor with the unlawful intent to sell the same, and his punishment fixed at a fine of \$250 and imprisonment in the county jail for a period of 90 days. Following the rule laid down in the Stumpf Case, 117 Pac. 648, the Attorney General has filed a motion to dismiss the appeal. The motion is well taken, and is sustained. The appeal is accordingly dismissed.

**FAUCETT et al. v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 17, 1912.) Appeal from Tulsa County Court; N. J. Gubser, Judge. Walter Faucett and Robert Gilliam were convicted of violating the prohibitory law, and appeal. Reversed and remanded. Davidson & Williams, for plaintiffs in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

**PER CURIAM.** Plaintiffs in error were convicted in the county court of Tulsa county, at the January, 1911, term, of violating the prohibitory law, and Walter Faucett's punishment fixed at a fine of \$300 and 30 days' imprisonment in the county jail, and Robert Gilliam's punishment fixed at a fine of \$50 and 30 days' confinement in the county jail. Following the doctrine laid down by this court in the cases of Barr v. State, 6 Okl. Cr. —, 115 Pac. 1009, Harper v. State, 6 Okl. Cr. —, 115 Pac. 1009, and McDaniels v. State, 6 Okl. Cr. —, 115 Pac. 1010, we think the judgment of the trial court should be reversed, and the cause remanded, with directions to cause the county attorney to file a proper information and try the case anew. It is so ordered.

**GOINS v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 6, 1912.) Appeal from Payne County Court; P. D. Mitchell, Judge. J. W. Goins was convicted of violating the prohibitory law, and appeals. Dismissed. Springer & Oursler, for appellant.

**PER CURIAM.** J. W. Goins, plaintiff in error, was convicted of a violation of the ordinance of the city of Stillwater prohibiting the possession of intoxicating liquor with the unlawful intention of disposing of the same, and was sentenced to serve a term of 30 days in the city jail and pay a fine of \$50. The judgment and sentence was entered on November 28, 1910. To reverse this judgment an appeal was perfected. The plaintiff in error has filed a written statement requesting that his appeal be dismissed. The appeal is therefore dismissed. Mandate to issue forthwith.

**GOODNIGHT v. CITY OF PAWNEE.** (Criminal Court of Appeals of Oklahoma. Jan. 17, 1912.) Appeal from Pawnee County Court; N. E. McNeill, Judge. Art Goodnight was convicted of violating the prohibitory law, and appeals. Affirmed. L. V. Orton, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** After a careful examination of the record in this case, we think the judgment of the trial court should be affirmed. It is so ordered.

**HAMILTON v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 6, 1912.) Appeal from Johnston County Court; Nick Wolfe, Judge. J. C. Hamilton was convicted of violating the prohibitory law, and appeals. Affirmed. Young & Stobaugh, for plaintiff in

error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

**PER CURIAM.** The judgment of the trial court is affirmed.

**HITT v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 16, 1912.) Appeal from Oklahoma County Court; John W. Nayson, Judge. P. M. Hitt was convicted of violating the prohibitory law, and appeals. Reversed and remanded. Charles Watkins, Joe Jaynes, and Taylor, Frulett & Sniggs, for plaintiff in error. Chas. West, Atty. Gen., and Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was tried and convicted at the October, 1910, term of the county court of Oklahoma county on a charge of having the unlawful possession of whisky with intent to sell the same, and on the 26th day of November thereafter his punishment was fixed at a fine of \$150 and imprisonment in the county jail 60 days. The testimony upon which this conviction is based tends to show that the plaintiff in error had possession of a certain restaurant in Edmond about the time alleged in the information; but there is no proof that any sale was ever made, or any offer to make a sale, and no other circumstances of an incriminating nature sufficient to sustain this judgment. The transaction out of which the conviction grew shows that less than a bottle of whisky was found in the place at the time the charge is laid. Let the judgment be reversed, and a new trial awarded.

**JOHNSTON v. STATE** (three cases). (Criminal Court of Appeals of Oklahoma. Jan. 4, 1912.) Appeals from Coal County Court; R. H. Wells, Judge. G. A. Johnston was convicted in three cases of violations of the prohibitory law, and appeals. Affirmed. Charles T. Gibson, for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

**PER CURIAM.** No material errors appearing from the records, the judgments of the trial court are hereby affirmed.

**JOHNSTON v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 11, 1912.) Appeal from Coal County Court; R. H. Wells, Judge. G. A. Johnston was convicted of violating the prohibition law, and appeals. Affirmed. Charles T. Gibson, for plaintiff in error.

**PER CURIAM.** G. A. Johnston was convicted in the county court of Coal county of a violation of the prohibition law, and was on May 2, 1910, sentenced to serve a term of four months in the county jail and to pay a fine of \$450, from which judgment he appeals. From an examination of the record, our conclusion is that this appeal is without merit. The judgment of the lower court is therefore affirmed.

**JOHNSTON v. STATE** (three cases). (Criminal Court of Appeals of Oklahoma. Jan. 11, 1912.) Appeals from Coal County Court; R. H. Wells, Judge. G. A. Johnston was convicted of violations of the prohibitory law, and appeals. Affirmed. Charles T. Gibson, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen. (Andrew Wood, of counsel), for the State.

**PER CURIAM.** No material errors appearing from the records, the judgments of the trial court are hereby affirmed.

**JUSTUS v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 5, 1912.) Appeal from McCurtain County Court; T. J. Barnes, Judge. J. W. Justus was convicted of a violation of the prohibition law, and appeals. Affirmed. Armstrong & Etheredge and C. M. Anderson, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**FURMAN, P. J.** Under all the circumstances disclosed by the record in this case, we think the judgment of the trial court should be affirmed. It is so ordered.

**ARMSTRONG and DOYLE, JJ., concur.**

**KNIGHT v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 16, 1912.) Appeal from Hughes County Court; P. W. Gardner, Judge. John Knight was convicted of violating the prohibitory law, and appeals. Reversed and remanded. B. N. Hicks, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted at the January, 1911, term of the county court of Hughes county on a charge of selling intoxicating liquor, and his punishment fixed at a fine of \$100 and imprisonment in the county jail for a period of 30 days. The transcript before us is certified as complete. There is no case-made. It appears that the plaintiff in error was tried in the court below without counsel, and that the testimony taken upon the trial was not preserved by reporter. A motion for a new trial was filed, which sets up facts tending to show that the rights of the accused were not properly preserved, and as an affirmative defense to the charge. In view of the fact that the testimony was not taken by the court stenographer, and that the record does not show that the court preserved the rights of the plaintiff in error, we think a new trial should be awarded. The judgment is reversed, and the cause remanded for a new trial.

**MATHIS v. STATE. KELLY v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 17, 1912.) Appeals from McClain County Court; E. E. Glasco, Judge. Art Mathis and W. A. Kelly were separately convicted of illegal sale of liquor, and appeal. Judgments in both cases reversed. J. F. Sharp and A. W. Wadlington, for plaintiffs in error.

**PER CURIAM.** The plaintiffs in error were convicted upon informations which charged the unlawful possession of intoxicating liquor with the unlawful intent to sell the same. The same witnesses testified and their testimony was the same in these cases. The only proof of defendants' possession of intoxicating liquor attempted to be made by the state was a number of freight delivery receipts and orders to deliver shipments, indorsed on the back of bills of lading, which were by the agent and cashier of the Santa Fé System at Purcell identified. They testified that said receipts were delivered to the person paying the charges against any shipment; that they had nothing to do with the actual delivery of the freight themselves, which was made by the warehouseman, in a different depot from the one in which their offices were; that they had no personal knowledge or independent recollection of the shipments or the delivery of the same. We believe this testimony is insufficient to show possession. There was no evidence introduced tending to prove the payment of the special tax required of liquor dealers by the United States, neither was any evidence offered that tended to prove unlawful intention to sell. The testimony being insufficient to support the verdict and judgment, it is unnecessary to notice other assignments

of error. The judgments in these cases are therefore reversed.

**MILLION v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 5, 1912.) Appeal from Creek County Court; Josiah G. Davis, Judge. Charles Million was convicted of violating the prohibitory law, and appeals. Affirmed. Thompson & Smith, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** A careful examination of the record discloses no error sufficiently prejudicial to justify a reversal of this judgment. It is therefore affirmed.

**MOBLEY v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 5, 1912.) Appeal from Jackson County Court; W. T. McConnell, Judge. Frank Mobley was convicted of violating the prohibitory law, and appeals. Dismissed. H. E. Johnson and P. K. Morrill, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Judgment was rendered in the trial court on the 20th day of December, 1910, at which time the trial court allowed 60 days in which to file the appeal in this court. The appeal was filed on the 20th day of February, 1911, more than 60 days after the rendition of the judgment. The Attorney General has moved to dismiss the appeal on this ground. The motion is sustained, and the appeal accordingly dismissed.

**NELSON v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 6, 1912.) Appeal from Superior Court, Muskogee County; Farrar L. McCain, Judge. R. L. Nelson was convicted of violating the prohibitory law, and appeals. Affirmed. G. W. Wheatley, for appellant.

**PER CURIAM.** R. L. Nelson, plaintiff in error, was convicted in the superior court of Muskogee county for the crime of selling intoxicating liquor, and was on January 4, 1911, sentenced to serve a term of four months in the county jail and to pay a fine of \$400. To reverse this judgment an appeal was taken by filing in this court on May 4, 1911, a petition in error, with case-made. When the case was called on the regular assignment for final submission, the Attorney General moved to affirm for failure to prosecute the appeal. No briefs have been filed and no appearance made on behalf of plaintiff in error in this court. The appeal having been abandoned, the motion to affirm is sustained. Mandate to issue forthwith.

**O'NEAL v. CITY OF McALESTER.** (Criminal Court of Appeals of Oklahoma. Jan. 17, 1912.) Appeal from Pittsburg County Court; B. P. Hammond, Judge. Will O'Neal was convicted of selling whisky, and appeals. Harley & Miller, for appellant. T. D. Davis, for appellee. Dismissed.

**PER CURIAM.** This case originated by complaint filed in the police court of the city of McAlester, before J. Read Moore, police judge, wherein plaintiff in error was charged with selling a half pint of whisky. From a conviction there had an appeal was taken to the county court of Pittsburg county. Upon a trial there had the jury returned a verdict of guilty, and assessed the punishment at a fine of \$100 and confinement in the city jail of McAlester for 30 days. Judgment was entered in accordance with the verdict, and an appeal was perfected by filing in this court on June 15, 1911, a petition in error, with case-



assignment of the term, no appearance was made on behalf of the plaintiff in error. It is evident that the appeal has been abandoned. The appeal is therefore dismissed, and the cause remanded to the county court of Pittsburgh county.

**PATTON v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 16, 1912.) Appeal from Bryan County Court; J. L. Rappolee, Judge. G. W. Patton was convicted of violating the prohibitory law, and appeals. Affirmed. J. Q. A. Harrod, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** The judgment is affirmed.

**PENNER v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 17, 1912.) Appeal from Beckham County Court; Jno. C. Hendrix, Judge. W. H. Penner was convicted of a violation of the prohibition law, and appeals. Reversed. John B. Harrison, for plaintiff in error.

**PER CURIAM.** The plaintiff in error was convicted on an information which charged the unlawful conveyance of intoxicating liquor, and was on April 12, 1911, sentenced in accordance with the verdict of the jury to serve a term of 30 days in the county jail and to pay a fine of \$50. To reverse this judgment an appeal was perfected by filing in this court on June 15, 1911, a petition in error, with case-made attached. From the record it appears that on April 5th the case was called for trial and a jury was selected and sworn to try the case. The county attorney made the opening statement. The first witness for the state was duly sworn and called as a witness for the state. Thereupon the defendant interposed an objection to the introduction of testimony, for the reason that said information had been amended after the defendant had entered his plea thereto. Whereupon the court discharged the jury, and the defendant was arraigned and entered a plea of not guilty to the amended information, and another jury was sworn to try the case. The defendant then entered a plea of former jeopardy, which was overruled by the court. From an examination of the record we think the plea of former jeopardy as a matter of law was well taken. It further appears that there was not sufficient testimony to show the commission of the offense charged, or any other offense against the laws of Oklahoma. For the reasons stated, the judgment is reversed, and the cause remanded, with direction to dismiss.

**PERKINS v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 11, 1912.) Appeal from Oklahoma County Court; John W. Hayson, Judge. H. M. Perkins was convicted of violation of the prohibitory law, and appeals. Dismissed. F. W. Fischer, for plaintiff in error.

**PER CURIAM.** H. M. Perkins, plaintiff in error, was convicted of a violation of the prohibition law, and, September 27, 1911, was sentenced to serve a term of 90 days in the county jail and to pay a fine of \$250. An appeal was properly perfected. January 9, 1912, his counsel of record filed a motion to dismiss the appeal. The motion to dismiss is sustained, and the cause remanded to the county court of Oklahoma county, with direction to enforce the judgment therein.

**PEYTON v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 17, 1912.) Appeal from Delaware County Court; W. C.

Reversed. G. W. Goad, O. L. Rider, and H. L. Marshall, for plaintiff in error.

**PER CURIAM.** The plaintiff in error was convicted on an indictment returned in the district court and duly transferred to the county court of Delaware county, wherein he was charged with the unlawful sale of one quart of whisky. The jury returned a verdict of guilty. April 21, 1911, the court sentenced him to serve a term of 30 days in the county jail and to pay a fine of \$250. From an order overruling a motion for a new trial an appeal was perfected. The material testimony on the part of the prosecution is substantially as follows: Jim Meredith testified that he was acquainted with the defendant, and met him on the street and told him that he wanted some whisky for Lon Smith, his brother-in-law, who was down sick with the measles, and that the doctor said that he needed it; that the defendant told him that he did not have any, but said to wait a minute and he would see if he could not find some; that he went up the street, and was gone a little while, and came back and told him to look in an old tub in the back of Dr. Holland's building; that he asked him what it was worth, and he said about \$1.50; that he went to Dr. Holland's building and found a flat quart bottle of whisky, and that he left \$1.50 on an old counter that was there; that he did not pay the defendant any money, or tell him that he had left any money there. Over the objection of the defendant the Frisco Railway agent at Grove was permitted to testify that he had in his custody the records of that station, and among them was a delivery sheet showing the delivery of a shipment of two boxes of whisky; that he would hesitate to say the name on the delivery receipt; that he thought it was the name of the defendant; that he had no personal knowledge as to what the shipment contained; or as to whether or not the signature was that of the defendant. Defendant testified on his own behalf in substance the same as the prosecuting witness, except that he stated that he told him that Dr. Holland had some whisky in the back end of his building; that he was in there and saw it; that he never sold any whisky, and never received any money from the prosecuting witness, and did not know whether or not he found the whisky there. Dr. J. C. Holland testified that he was acquainted with the defendant; that in April, 1910, he owned a building which had been used as a meat market; that his office had been burned, and, the building being vacant, he had placed his desk in the front part of this building, and was having some repairs made; that at the time in question he had a quart of whisky in a box or tub in the back end of the room, and somebody stole it; that he had given the defendant a drink out of this bottle the day before he missed it. The foregoing is all the testimony offered on the trial. The first assignment is that the court erred in permitting the state to introduce the freight delivery receipts, without any identification of the defendant's signature. We cannot conceive of any principle of the law of evidence that would justify the admission of the freight delivery record of the Frisco station at Grove against the defendant, with no pretense of proof whatever that the signatures thereon were that of the defendant. We think that this document was clearly inadmissible, and when we consider the doubtful character of the testimony of the prosecuting witness, as tending to show the commission of the offense charged, we are of the opinion that it cannot be held that this error was not prejudicial to the substantial rights of the defendant, and should therefore be disregarded. It is further insisted that the evidence is insufficient to sustain the verdict. The jury must have concluded that the defendant placed the bottle of whisky



in Dr. Holland's building, and that the prosecuting witness left the money there when he took the whisky, and that the defendant subsequently returned there and secured the money. This inference, we believe, is not warranted from a fair consideration of the evidence. However, the judgment of the trial court must be reversed for the error already pointed out. The judgment is therefore reversed, and the cause remanded.

**POZZINI v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 5, 1912.) Appeal from Coal County Court; R. H. Wells, Judge. Angelo Pozzini was convicted of violating the prohibitory law, and appeals. Appeal dismissed. C. M. Threadgill, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted in the county court of Coal county on the 21st day of November, 1910, on a charge of having the unlawful possession of intoxicating liquors with intent to sell, and thereafter on the 22d day of November was sentenced by the court to pay a fine of \$200 and serve 30 days in the county jail. The appeal was filed in this court on the 9th day of February, 1911, more than 60 days after the rendition of the judgment. The Attorney General has moved to dismiss the appeal, on the ground that the same was not filed within the time allowed by law. The motion is well taken, and is sustained. The appeal is accordingly dismissed.

**SCOTT v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 11, 1912.) Appeal from Caddo County Court; C. Ross Hume, Judge. W. A. Scott was convicted of violating the prohibitory law, and appeals. Affirmed. Bristow & McFadyen, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** The judgment of the trial court is affirmed.

**SMITH v. STATE.** (Criminal Court of Appeals of Oklahoma. Dec. 30, 1911.) Appeal from Kay County Court; Claude Duval, Judge. W. A. Smith was convicted of a violation of the prohibition law, and appeals. Affirmed. Herman S. Gurley, for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

**PER CURIAM.** The plaintiff in error was convicted of selling whisky. No error of law appears, and, while the proof on the part of the prosecution consists of the testimony of a single witness of doubtful credibility, it was the province of the jury to pass upon the weight and credibility of the evidence. The judgment is therefore affirmed.

**SMITH v. STATE** (two cases). (Criminal Court of Appeals of Oklahoma. Jan. 16, 1912.) Appeals from Rogers County Court; H. Tom Kight, Judge. Geo. Smith was convicted of a violation of the prohibition law, on two informations, and appeals. H. Jennings, for appellant. Chas. West, Atty. Gen., and Smith C. Matson, for the State. Dismissed.

**PER CURIAM.** The plaintiff in error in the first case was convicted on an information which charged the unlawful sale of one-half pint of whisky. The jury returned a verdict of guilty. April 11, 1911, he was sentenced to serve a term of 6 months in the county jail and to pay a fine of \$500. To reverse this judgment an appeal was attempted to be taken by filing in this court on June 13, 1911, a purported transcript, which fails to show a copy

of the judgment appealed from. The Attorney General has filed a motion to dismiss the appeal, for the reason that the same was not filed in this court within 60 days after the rendition of the judgment. The motion is well taken, and is sustained. The attempted appeal is therefore dismissed. In the second case he was convicted on an information which charged the unlawful sale of one-half pint of whisky. The jury returned a verdict of guilty. April 11, 1911, he was sentenced to serve a term of 6 months in the county jail and to pay a fine of \$500. To reverse this judgment an appeal was attempted to be taken by filing in this court on June 13, 1911, a purported transcript without petition in error. The Attorney General has filed a motion to dismiss the appeal, for the reason that the same was not filed in this court within 60 days from the rendition of the judgment. The motion is well taken, and is sustained. The attempted appeal is therefore dismissed, and both cases are remanded to the county court of Rogers county.

**STATE v. BROWN.** (Criminal Court of Appeals of Oklahoma. Jan. 11, 1912.) In response to a communication submitted by the Governor, the following opinion is submitted by ARMSTRONG, J.:

Hon. Lee Cruce, Governor of Oklahoma: Your official communication of December 16, 1911, transmitting a transcript of the record and evidence taken in the trial of the cause of State of Oklahoma, Plaintiff, v. Governor Brown, Defendant, wherein said defendant was charged and convicted of the crime of murder, and his punishment fixed at death, received. Replying to that portion of your communication wherein you say, "I shall be glad to know, at your convenience, whether these proceedings have been in accordance with the laws of the state, and whether or not, in your opinion, the judgment of this court should stand," we beg to advise that we have carefully examined the entire record, including transcript of the proceedings and evidence, and find that all the rights of the defendant were properly preserved by the district court of Logan county, and the punishment fixed by the jury. The evidence sustains the verdict and judgment, and we find no legal reason why the judgment of the trial court should not stand.

FURMAN, P. J., concurs. DOYLE, J., not participating.

**THOMASON v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 6, 1912.) Appeal from Alfalfa County Court; F. M. Gustin, Judge. Ed Thomason was convicted of violating the prohibitory law, and appeals. Reversed and remanded. A. J. Stevens, for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Attys. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted in the county court of Alfalfa county, sitting at Cherokee, on a charge of furnishing intoxicating liquor, and his punishment fixed at a fine of \$100 and confinement in the county jail for a period of 40 days. The case is well briefed and was orally argued. Upon a careful examination of the record we are impelled to the conclusion that plaintiff in error did not have a fair and impartial trial as contemplated by law. The judgment is reversed, and a new trial awarded.

**THOMPSON v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 17, 1912.) Appeal from Tulsa County Court; N. J. Gubser, Judge. D. S. Thompson was convicted of violating the prohibitory law, and appeals. Reversed and remanded. Davidson & Williams, for plaintiff

in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted in the county court of Tulsa county at the January, 1911, term, on a charge of having the unlawful possession of intoxicating liquor with intent to sell the same, and his punishment fixed at a fine of \$300 and 30 days' imprisonment in the county jail. Following the doctrine laid down by this court in the cases of *Barr v. State*, 6 Okl. Cr. —, 115 Pac. 1009, *Harper v. State*, 6 Okl. Cr. —, 115 Pac. 1009, and *McDaniel v. State*, 6 Okl. Cr. —, 115 Pac. 1010, we think the judgment of the trial court should be reversed, and the cause remanded, with directions to cause the county attorney to file a proper information and try the case anew. It is so ordered.

**TUCKER v. STATE.** (Criminal Court of Appeals of Oklahoma. Dec. 4, 1911.) Appeal from Grady County Court; N. M. Williams, Judge. A. W. Tucker was convicted of violating the prohibitory law, and appeals. Dismissed. Charles J. West, Atty. Gen., and John H. Venable, Co. Atty., for the State.

**PER CURIAM.** A. W. Tucker, plaintiff in error, was convicted in the county court of Grady county of a violation of the prohibition law, and was on April 29, 1911, sentenced to serve a term of 90 days in the county jail and to pay a fine of \$100. To reverse this judgment an appeal was taken by filing in this court on July 14, 1911, a petition in error, with case-made. October 30th on behalf of the state there was filed a motion to dismiss the appeal for the following reason: "That the appeal herein was not filed within the limit of time allowed by law or an extension of time granted by the court; the same being one day too late." The record shows that the trial court allowed 75 days in which to perfect an appeal to this court, which time expired on July 13th. The appeal was not filed until one day later. No response has been made to the motion to dismiss. The motion is therefore sustained, and the appeal dismissed, and the cause remanded to the county court of Grady county, with direction to enforce its judgment therein. Mandate to issue forthwith.

**TUCKER v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 16, 1912.) Appeal from Oklahoma County Court; Sam Hooker, Judge. Ben Tucker was convicted of violating the prohibitory law, and appeals. Reversed and remanded. Guthrie & Cardwell, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted in the county court of Oklahoma county on the 6th day of September, 1910, on a charge of violating the prohibitory law, and his punishment fixed at a fine of \$100 and 30 days in the county jail. The proof in this case clearly establishes possession, but there is an entire lack of proof on the question of intent. This court has held in a number of cases that possession alone is insufficient to sustain a conviction. The trial court, over the objection of plaintiff in error, permitted the state to prove by hearsay that the plaintiff in error paid the special tax to the government. Every line of proof in the record on this point is incompetent, and should not have been admitted. The judgment is reversed, and the cause remanded, with directions to grant a new trial in accordance with law.

**WELLS v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 16, 1912.) Appeal from Marshall County Court; J. W. Falkner,

Judge. Joe Wells was convicted of violating the prohibitory law, and appeals. Reversed and remanded. Kennamer & Coakley, for plaintiff in error. Smith C. Matson and E. G. Spilman, Asst. Atty. Gen., for the State.

**PER CURIAM.** Plaintiff in error was convicted in the county court of Marshall county, at the January, 1911, term, of selling intoxicating liquor, and on the 18th day of February thereafter was adjudged to pay a fine of \$50 and be confined in the county jail for a period of 30 days. The proof upon which the conviction is based is very unsatisfactory. There are other irregularities complained of, and upon the whole record we think this judgment should be reversed, and the cause remanded for a new trial. It is so ordered.

**WHITE v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 6, 1912.) Appeal from Creek County Court; Josiah G. Davis, Judge. W. E. White was convicted of violating the prohibitory law, and appeals. Affirmed. Byrne & Don Carlos, for appellant.

**PER CURIAM.** W. E. White, plaintiff in error, was convicted in the county court of Creek county of a violation of the prohibition law, and was sentenced to serve a term of 30 days in the county jail and to pay a fine of \$100. December 12, 1910, judgment and sentence was entered. To reverse this judgment an appeal was taken. When the case was this day called on the regular assignment for final submission, the Attorney General moved to affirm for failure to prosecute the appeal. No briefs have been filed and no appearance made on behalf of the plaintiff in error. The appeal having been abandoned, the motion to affirm is hereby sustained. Mandate to issue forthwith.

**WILSON v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 11, 1912.) Appeal from Cleveland County Court; F. B. Swank, Judge. John Wilson was convicted of violating the prohibitory law, and appeals. Affirmed. B. F. Wolf, for plaintiff in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** The judgment of the trial court is affirmed.

**WILSON et al. v. STATE.** (Criminal Court of Appeals of Oklahoma. Jan. 17, 1912.) Appeal from Tulsa County Court; N. J. Gubser, Judge. Leon Wilson, Walt Steen, Ola McDaniels, and A. Moore were convicted of violating the prohibitory law, and appeal. Dismissed. Schaeffer & Kerrigan, for plaintiffs in error. Smith C. Matson, Asst. Atty. Gen., for the State.

**PER CURIAM.** Appellants were convicted in the county court of Tulsa county on a charge of violating the prohibitory law, and on the 30th day of December, 1910, adjudged to pay a fine of \$100 and be imprisoned in the county jail for a period of 30 days each, at which time the court allowed 30 days to make and serve case-made, 10 days for amendments, 5 days for settlement, and 15 days after settlement in which to file the appeal in this court. The Attorney General has filed a motion to dismiss the appeal on the following grounds: "Because the record shows that this is an attempted appeal from a judgment of conviction for a misdemeanor, rendered in the county court of Tulsa county on the 30th day of December, 1910, and the petition in error and case-made were not filed in this court until the 10th day of April, 1911, more than 60 days after the rendition of such judgment; no order having been made extending the time within which to file petition in

error and case-made in this court beyond the time allowed by law." The motion is well taken, and the appeal must be dismissed, because this court is without jurisdiction to review it. Dismissed.

**BROWN v. ROGERS et al.** (Supreme Court of Washington. Dec. 16, 1911.) Department 1. Appeal from Superior Court, King County; Boyd J. Tallman, Judge. Action by R. B. Brown against George F. Rogers and others. From a judgment for defendants, plaintiff appeals. Affirmed. Walter S. Fulton, George V. Ostroth, and R. B. Brown, for appellant. El. H. Kohlhasse, for respondents.

**PARKER, J.** This is an action to rescind an executed trade contract, by which the plaintiff traded to the defendant Kidd certain rooming house furniture and the business in which it was used for certain land and \$100 in cash. A trial upon the merits resulted in a decree in favor of the defendants, dismissing the case, from which the plaintiff has appealed. The trial court made no findings. The ground upon which appellant seeks a rescission of the contract is that he was induced to enter into the contract by false and fraudulent representations, made by certain of the defendants, touching the condition, location, and value of the land. The evidence warrants the conclusion that the value of the property exchanged, including the money, was about equal on each side, and there is serious conflict in the testimony of the witnesses as to the making of false representations by respondents, inducing the trade. We agree with the learned trial court that appellant is not entitled to the relief prayed for. No useful purpose could be served by a detailed review of the evidence here. The judgment is affirmed.

**DUNBAR, C. J., and MOUNT and FULLERTON, JJ., concur.**

**SANDERSON v. STAY.** (Supreme Court of Washington. Dec. 26, 1911.) Department 1. Appeal from Superior Court, King County; M. L. Clifford, Judge. Action by W. H. Sanderson against A. H. Stay. From a judgment for plaintiff, defendant appeals. Affirmed. Douglas, Lane & Douglas, for appellant. William Wray, for respondent.

**PER CURIAM.** The respondent brought this action against the appellant to recover upon a promissory note given by the appellant

to one Paul Brockmeier, and by Brockmeier indorsed to the respondent before maturity. The appellant defended on the ground that the note was obtained from him by fraudulent representation made by Brockmeier. He alleged that the note was given as the purchase price of certain shares of stock in a coal mining company, and that he was induced to purchase the stock because of certain representations made by Brockmeier, which he alleges were false and fraudulent; further alleging that the respondent acted in collusion with Brockmeier in the sale of the stock, and knew of such false representations at the time he purchased the note. At the conclusion of the evidence offered on the trial, the court, on the motion of the respondent, directed a verdict in respondent's favor on the ground that the appellant had not established his defense, or rather, had offered no evidence to rebut the evidence of the respondent to the effect that he was a holder of the note for value and in due course. The appellant excepted, and brings the case here, contending that the case should have been submitted to the jury. We think the action of the court was justified by the record. It would serve no useful purpose to review the evidence; but, as we read it, there is but little to impeach the note, were it in the hands of Brockmeier himself. Much less is there anything to impeach it in the hands of the respondent, who purchased for value and before maturity. The judgment is affirmed.

**CUNNINGHAM et al. v. CITY OF IOLA et al.** (Supreme Court of Kansas. Feb. 10, 1912.) On petition for rehearing. Denied. For former opinion, see 119 Pac. 317.

**WEST, J.** Plaintiffs apply for rehearing on the sole ground that the opinion assumed that they conceded the power of the city to pass the ordinance in question if it were reasonable, and call our attention to certain statements in their brief to the effect that they did not make such concession, but denied such power in toto. While in the opinion it was assumed that such power existed, it would have been so decided, had we not understood it to be conceded. Section 750, Gen. St. 1909, fully empowers the city to construct and operate gas plants, and to construct and maintain pipe lines for the purpose of supplying its citizens with gas; and this by necessary intendment carries with it the power to fix the rates therefor, and, of course, the proper method of fixing rates is by the enactment of an ordinance. Application for rehearing is denied.



# INDEX-DIGEST



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It Supplements the Decennial Digest, the Key-Number Series and  
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See Vendor and Purchaser, § 231.

### III. OPERATION AND EFFECT.

§ 57 (Okl.) Certificate of acknowledgment, taken in another state, held sufficient to admit the instrument to record under law in force in Indian Territory prior to statehood.—Skelton v. Dill, 119 P. 267.

### ACQUIESCENCE.

See Appeal and Error, § 882; Boundaries, §§ 35, 48; Injunction, § 21.

### ACTION.

See Abatement and Revival; Dismissal and Nonsuit.

### I. GROUNDS AND CONDITIONS PRECEDENT.

§ 1 (Mont.) "Cause of action" defined.—Cohen v. Clark, 119 P. 775.

### II. NATURE AND FORM.

§ 27 (Colo.) Cause of action alleged held to sound in contract and not in tort.—Bailey v. College of Sacred Heart, 119 P. 1067.

### III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

§ 38 (Cal.App.) A complaint by stockholders of a corporation setting up a misappropriation of corporate funds, fraudulent issues of shares of stock, etc., by majority stockholders, held not open to objection on the ground that it set up several causes of action.—Harvey v. Meigs, 119 P. 941.

§ 38 (Mont.) Where a complaint states but a single contract with one or more branches, it is immaterial as to how the complaint is paragraphed.—Cohen v. Clark, 119 P. 775.

§ 48 (Idaho) Under Rev. Codes, § 4169, uniting several causes of action arising out of the same transaction or of separate items of damages growing out of the same facts as

a part of the same cause of action *held* proper.—*Unfried v. Libert*, 119 P. 885.

§ 53 (Mont.) While suit may be brought on several claims arising out of the same contract as they mature, where suit is delayed until more than one is due, all must be sued for in one action.—*Cohen v. Clark*, 119 P. 775.

A plaintiff may not split a single cause of action.—*Id.*

## ADEQUATE REMEDY AT LAW.

See Equity.

## ADJOINING LANDOWNERS.

See Boundaries; Frauds, Statute of, § 70.

## ADJUDICATION.

See Courts, § 95.

## ADMISSIONS.

See Criminal Law, § 351; Evidence, §§ 222-264.

## ADULTERY.

See Divorce, § 101.

§ 1 (Cal.App.) Under Civ. Code, § 93, an unmarried man *held* incapable of committing the offense denounced by Pen. Code, § 269a, as amended by Act March 21, 1911 (St. 1911, p. 426).—*Ex parte Sullivan*, 119 P. 526.

## ADVERSE CLAIM.

See Mines and Minerals, §§ 23-41.

## ADVERSE POSSESSION.

See Easements; Highways, § 7; Limitation of Actions; Waters and Water Courses, §§ 15, 138.

## I. NATURE AND REQUISITES.

### (G) Payment of Taxes.

§ 90 (Cal.) Payment of taxes on lands according to the descriptions in deeds, after an agreement establishing the boundary line, *held* to establish title by adverse possession.—*Price v. De Reyes*, 119 P. 893.

## AFFIDAVITS.

See Appeal and Error, §§ 562, 675; Chattel Mortgages, § 97; Counties, § 35; Criminal Law, §§ 942, 1156; Depositions, §§ 83, 90, 111; Judges, § 51; Judgment, §§ 158, 159; New Trial, § 150; Perjury, § 10; Pleading, § 317; Records, § 18; Taxation, § 662.

## AGENCY.

See Principal and Agent.

## AGREEMENTS.

See Contracts.

## AGRICULTURE.

See Public Lands, § 184½; Waters and Water Courses.

§ 1 (Kan.) Provision of Gen. St. 1909, §§ 8727-8739, authorizing expense of abating orchard nuisance to be collected as other taxes, *held* not unconstitutional.—*Balch v. Glenn*, 119 P. 67.

Gen. St. 1909, §§ 8727-8739, creating the Entomological Commission and providing for extermination of orchard pests, *held* a valid exercise of the police power.—*Id.*

## AIDERS AND ABETTERS.

See Criminal Law, § 59.

## ALIENATION.

Of affections, see Limitation of Actions, § 197.

## ALIENS.

See Constitutional Law, §§ 207, 208; Indians; Limitation of Actions, § 4.

## I. DISABILITIES.

§ 9 (Mont.) An alien may not inherit lands, except by grace of the state where it is situated.—*In re Colbert's Estate*, 119 P. 791.

Rev. Codes, § 4835, *held* not in conflict with Const. art. 8, § 25, relating to the right of aliens to inherit.—*Id.*

## ALIMONY.

See Divorce, §§ 182, 246, 252; Husband and Wife, §§ 279, 299.

## ALTERATION OF INSTRUMENTS.

§ 12 (Okl.) It is not necessary that consent to an alteration of a written instrument be in writing.—*Barnett v. Effenberg*, 119 P. 135.

§ 13 (Okl.) It is not necessary that ratification of an alteration of a written instrument be in writing.—*Barnett v. Effenberg*, 119 P. 135.

## AMENDMENT.

See Appeal and Error, §§ 361, 889, 959, 1041; Judgment, § 303; Pleading, §§ 192, 236, 238, 356.

## AMOUNT IN CONTROVERSY.

See Courts, §§ 120, 212, 222.

## ANIMALS.

See Carriers, § 228; Exemptions, § 65; Fences, § 25.

## ANNULMENT.

See Appeal and Error, §§ 994, 1010; Marriage, §§ 58, 60.

## ANSWER.

See Pleading, §§ 93-129, 372.

## APPEAL AND ERROR.

See Certiorari; Costs, § 254; Courts, §§ 207-240½; Criminal Law, §§ 1020-1186; Divorce, § 182; Elections, § 305; Exceptions. Bill of; Executors and Administrators, § 256; Homicide, §§ 325-340; Justices of the Peace, § 155; Mandamus, § 4; New Trial, § 157; Prohibition, § 8.

## I. NATURE AND FORM OF REMEDY.

§ 2 (Okl.) Statute modifying law relating to right of appeal *held* not to apply to judgment previously rendered, unless such intent is evident.—*Rolater v. Strain*, 119 P. 992.

## II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

§ 19 (Colo.) The Supreme Court will not, as a rule, decide moot questions.—*Bailey v. College of Sacred Heart*, 119 P. 1067.

§ 19 (Okl.) The Supreme Court will not decide hypothetical cases.—*Cleveland Trinidad Paving Co. v. Wood*, 119 P. 123.

§ 19 (Okl.) Abstract cases disconnected from the granting of actual relief will not be decided by the Supreme Court.—*Bryan v. Sullivan*, 119 P. 124.

**III. DECISIONS REVIEWABLE.****(E) Nature, Scope, and Effect of Decision.**

§ 113 (Cal.App.) An order setting aside a default is not appealable.—*Rose v. Leland*, 119 P. 532.

**V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.****(A) Issues and Questions in Lower Court.**

§ 171 (Cal.App.) In an action for broker's commissions, plaintiff *held* not entitled to claim for the first time on appeal that there was no denial of his allegation that he had procured a purchaser.—*Pehl v. Fanton*, 119 P. 400.

§ 171 (Mont.) A defendant, who acquiesced in plaintiff's treatment of a claim as constituting but a single cause of action, *held* precluded from insisting on appeal that the claim consists of more than one cause.—*Cohen v. Clark*, 119 P. 775.

§ 173 (Cal.App.) A defendant, in an action for the dissolution of a firm and for an accounting, *held* not entitled to urge on appeal that the judgment was in excess of the amount demanded by the complaint.—*Brandt v. Salmonson*, 119 P. 946.

**(B) Objections and Motions, and Rulings Thereon.**

§ 185 (Okl.) Plaintiff, not objecting to change of judge on motion of defendants, *held* not entitled to raise objection for the first time on appeal.—*Wicker v. Dennis*, 119 P. 1122.

§ 190 (Colo.) A defendant in a suit for an injunction who did not raise a question in the trial court *held* not entitled to raise it in the Supreme Court.—*Kirby v. Union Pac. Ry. Co.*, 119 P. 1042; *Same v. Colorado & S. Ry. Co.*, *Id.* 1056.

§ 192 (Cal.App.) A defect in a pleading, setting up a judgment of an inferior court as a defense, cannot be raised for the first time on appeal.—*Kriste v. International Savings & Exchange Bank*, 119 P. 666.

§ 192 (Idaho) A party cannot fail to raise seasonable objections and thereafter take advantage of defects on appeal.—*Nobach v. Scott*, 119 P. 295.

§ 193 (Kan.) Where the question of misjoinder is raised for the first time in the Supreme Court, it will not be considered.—*Livermore v. Ayres*, 119 P. 549.

§ 194 (Or.) In a suit to determine adverse claims, plaintiff *held* not entitled to object for the first time on appeal that the answer did not charge a forfeiture for plaintiff's failure to do assessment work.—*Merchants' Nat. Bank v. McKeown*, 119 P. 334.

§ 197 (Colo.) Proof having been admitted without question of the sufficiency of the replication to permit it, *held*, its sufficiency to permit such proof could not be questioned on appeal.—*Reno v. Reno & Juchem Ditch Co.*, 119 P. 473.

§ 215 (Mont.) Insurer, not having objected to an instruction submitting a question to the jury, and not having requested a proper instruction, *held* not entitled to object to the instruction given on appeal.—*Pelican v. Mutual Life Ins. Co. of New York*, 119 P. 778.

§ 216 (Okl.) In action against bank for loss of diamonds, instruction defining duty of bank as to employment of fit men *held* not reversible error, in absence of request for further instruction.—*First Nat. Bank v. Tevis*, 119 P. 218.

§ 232 (Cal.App.) Where a writing offered in evidence was objected to as incompetent, irrelevant, and immaterial, it cannot be objected to on appeal for insufficient execution.—*French v. Atlas Milling Co.*, 119 P. 203.

§ 232 (Mont.) Where plaintiff sued for expenses in repairing damages caused by the flooding of a mine, an objection that certain items sued for had not been proved to have been reasonable was not sufficient to justify a review of an instruction, authorizing a recovery of the expenditures, on the ground that the reasonableness thereof was not proved.—*Kelly v. City of Butte*, 119 P. 171.

**VI. PARTIES.**

§ 327 (Or.) An appeal from a judgment disallowing a claim against a corporation in the hands of a receiver *held* not a separate proceeding against the receiver, but a proceeding against the fund.—*Hafer v. Medford & C. L. R. Co.*, 119 P. 337.

§ 334 (Okl.) Where plaintiff obtained judgment, and, after her death, petition in error was filed by defendant, making her a sole party, it will be dismissed.—*St. Louis & S. F. R. Co. v. Nelson*, 119 P. 625.

§ 336 (Okl.) Writ of error dismissed for failure to join necessary parties.—*Saunders v. Mullen*, 119 P. 963.

§ 336 (Okl.) Where, in action to recover real estate, defendant's warrantor is made a party, and the decree is against plaintiff, the warrantor is a necessary party to the appeal.—*Merrell v. Walters*, 119 P. 1122.

**VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.****(A) Time of Taking Proceedings.**

§ 338 (Okl.) Amendment to St. 1893, § 4452, contained in Sess. Laws 1910-11, c. 13, reducing time for appeal, *held* not to apply to judgments entered before its passage.—*Rolater v. Strain*, 119 P. 992.

§ 349 (Okl.) Where an infant is plaintiff in error, and statutory period of one year provided by Comp. Laws 1909, § 6082, has expired before error brought, the one year begins to run after removal of disability, and is not an additional period granted during its existence.—*Reinhardt v. Whitmire*, 119 P. 126.

**(B) Petition or Prayer, Allowance, and Certificate or Affidavit.**

§ 361 (Okl.) Within the time allowed for bringing proceedings in error, amendment to a petition in error is generally allowed as of course.—*Haynes v. Smith*, 119 P. 246.

**(C) Payment of Fees or Costs, and Bonds or Other Securities.**

§ 376 (Wash.) Under Rem. & Bal. Code, § 1721, requiring a bond on appeal, an "adverse party" *held* to be one whose interests will be affected by a reversal.—*Bruhn v. Steffins*, 119 P. 29.

§ 390 (Wash.) Under Rem. & Bal. Code, § 1721, a bond on appeal *held* so defective as to amount to no bond, so that appellant could not file a new bond, under section 1734, but the appeal must be dismissed.—*Bruhn v. Steffins*, 119 P. 29.

§ 394 (Idaho) Under Rev. Codes, § 4909, when two appeals are taken, one undertaking is sufficient.—*Nobach v. Scott*, 119 P. 295.

**(D) Writ of Error, Citation, or Notice.**

§ 417 (Or.) A notice of appeal, when aided by the undertaking on appeal, *held* sufficient.—*MacMahon v. Hull*, 119 P. 348.

§ 430 (Okl.) Petition in error dismissed for failure to file praecipe and obtain summons.—*Hudson v. Lapsley*, 119 P. 125.

**IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.**

§ 459 (Kan.) Supersedeas bond *held* not to stay execution, where there has been no serv-

119 P. 543.

§ 465 (Wash.) Under Rem. & Bal. Code, § 1722, a bond on appeal from a judgment of nonsuit which taxed costs at \$23, in the form of an appeal and supersedeas bond, in a penalty of \$200 only, *held* insufficient.—Smith v. Porter, 119 P. 824.

## **X. RECORD AND PROCEEDINGS NOT IN RECORD.**

### **(C) Necessity of Bill of Exceptions, Case, or Statement of Facts.**

§ 554 (Wash.) Appeal from order denying motion to open judgment dismissed for absence of statement of facts.—Sakai v. Keeley, 119 P. 190.

### **(D) Contents, Making, and Settlement of Case or Statement of Facts.**

§ 556 (Okla.) "Case-made" defined.—Thompson v. Fulton, 119 P. 244.

§ 562 (Wash.) Affidavits used on a motion for a new trial do not become part of the record by being filed, but can be considered on appeal only when embodied in the statement of facts and covered by the certificate of the trial judge.—Hale v. City Cab, Carriage & Transfer Co., 119 P. 837.

§ 564 (Okla.) Settlement of case-made at instance of one defendant without notice to co-defendant *held* not valid.—Thompson v. Fulton, 119 P. 244.

§ 564 (Okla.) Case-made, not served within three days after judgment or within extension of time granted, will not be considered.—Haynes v. Smith, 119 P. 246.

An order granting an extension of time in which to file a case-made after expiration of time originally granted is void.—Id.

§ 564 (Okla.) A case-made *held* signed in due time, under Comp. Laws 1909, §§ 6074, 6075.—Denver, W. & M. Ry. Co. v. Adkinson, 119 P. 247.

A case-made, being filed within less than 60 days after signing and settlement, is filed in time.—Id.

§ 564 (Okla.) Where one party to a joint judgment brings error, but fails to serve case-made or give notice of the settling of the same to the other judgment debtor, the court on appeal is without jurisdiction.—Price v. Covington, 119 P. 626.

§ 565 (Okla.) Notice to all parties to action of presentation of case-made for settlement *held* necessary.—Thompson v. Fulton, 119 P. 244.

§ 568 (Okla.) A writ of error will be dismissed on motion where it does not appear that defendant in error was present or had notice when the case-made was settled.—J. K. Cobb & Co. v. Hancock, 119 P. 627.

§ 569 (Okla.) Under the facts, judge *held* authorized to settle case-made.—Atchison, T. & S. F. Ry. Co. v. Robinson, 119 P. 238.

Judge from one district appointed to hold court in another district may, after expiration of the term, settle case-made outside of the district in which it was tried.—Id.

### **(E) Abstracts of Record.**

§ 585 (Kan.) Statement in appellant's abstract *held* not a challenge as to sufficiency of evidence requiring a counterabstract.—Livermore v. Ayres, 119 P. 549.

### **(F) Making, Form, and Requisites of Transcript or Return.**

§ 596 (Cal.App.) Where an appeal is sought under Code Civ. Proc. § 953a, a notice to the clerk of an intent to appeal and a request for a transcript is necessary to require the clerk

section Co. v. Sainsbury, 119 P. 941.

§ 604 (Kan.) The practice of shortening the transcript by agreement between the parties as to what parts of the record are material on appeal is commendable.—Readicker v. Denning, 119 P. 533.

§ 607 (Cal.) Code Civ. Proc. §§ 941a, 941b, 941c, enacted by St. 1907, p. 753, and sections 953a, 953b, 953c, enacted by St. 1907, p. 750, *held* independent, and a party taking an appeal by filing notice thereof or as authorized by section 940 may file a printed transcript and copies as required by the rules of the Supreme Court.—Lang v. Lilley & Thurston Co., 119 P. 100.

### **(G) Authentication and Certification.**

§ 612 (Cal.App.) The clerk of the superior court is not required to certify the transcript containing the reporter's notes.—Rose v. Leland, 119 P. 532.

§ 612 (Okla.) Transcript on appeal must show by certificate of clerk that it is a complete transcript.—Fortune v. Parks, 119 P. 134.

§ 616 (Cal.App.) The clerk of the superior court is not required to certify the papers desired to be included in the transcript containing the reporter's notes, not included in the judgment roll.—Rose v. Leland, 119 P. 532.

### **(H) Transmission, Filing, Printing, and Service of Copies.**

§ 622 (Or.) Under L. O. L. §§ 550, 554, a transcript on appeal *held* filed in time.—MacMahon v. Hull, 119 P. 348.

§ 625 (Or.) Under L. O. L. § 1113, construed with section 547, the clerk of the Circuit Court *held* not authorized to waive the payment of the prescribed fee as a condition to filing a transcript on appeal in a will contest.—Hart v. Prather, 119 P. 489.

§ 627 (Okla.) Appeal dismissed for failure to file and serve case-made within time allowed.—Altus Alfalfa Milling Co. v. Tappan, 119 P. 204.

§ 627 (Or.) In view of L. O. L. § 554, subd. 2, failure to file a transcript in the appellate court within 30 days perfecting the appeal, as required by subdivision 1, requires a dismissal.—Hart v. Prather, 119 P. 489.

### **(I) Defects, Objections, Amendment, and Correction.**

§ 635 (Wash.) That order denied motion to open judgment because matter had been formerly adjudicated *held* not to prevent dismissal of appeal, where evidence to show contrary was not brought into the record.—Sakai v. Keeley, 119 P. 190.

§ 639 (Or.) An appellant *held* entitled to be relieved from his failure to attach to the abstract a table of its contents.—MacMahon v. Hull, 119 P. 348.

§ 655 (Idaho) Motion for new trial acted upon, though not signed, will not be stricken from the transcript on appeal.—Nobach v. Scott, 119 P. 295.

### **(K) Questions Presented for Review.**

§ 671 (Wash.) Where a transcript failed to contain an order referred to in the notice of appeal or any motion or other proceeding invoking the court's action on the question referred to, it could not be considered on appeal.—Hale v. City Cab, Carriage & Transfer Co., 119 P. 837.

§ 675 (Cal.App.) On conflicting affidavits alone, *held* the denial of a motion for change of venue could not be disturbed.—Carpenter v. Sibley, 119 P. 391.



§ 684 (Wash.) Denial of application for change of venue, on the ground that defendants were residents of another county than that in which the action was brought, cannot be reviewed; the evidence on such issue not being brought up by statement of fact or bill of exceptions.—*Critler v. Jacobson & Lindstrom*, 119 P. 819.

§ 695 (Kan.) The burden *held* upon an appellant contending that there is no evidence to support the judgment to file a transcript containing all of the evidence introduced pursuant to Code Civ. Proc. § 574 (Gen. St. 1909, § 6169), or a statement therein that the transcript contains all of the material evidence.—*Readicker v. Denning*, 119 P. 533.

### **XI. ASSIGNMENT OF ERRORS.**

§ 724 (Ok.) Rulings on demurrer to pleading *held* not "errors of law occurring at trial," within St. 1893, § 4196 (Comp. Laws 1909, § 5825).—*Haynes v. Smith*, 119 P. 246.

§ 754 (Ok.) Where the appellant fails to assign as error the overruling of a motion for a new trial, errors alleged to have occurred during the trial cannot be reviewed.—*Burrus v. Funk*, 119 P. 976.

### **XII. BRIEFS.**

§ 757 (Ok.) Plaintiff in error having failed to comply with rule 25 (95 Pac. viii), relating to abstracts in briefs, an abstract filed by defendant in error showing no error, the judgment of the lower court will be affirmed.—*Arnold v. Idiker*, 119 P. 125.

§ 757 (Ok.) Where plaintiff in error does not comply with Supreme Court rule 25 (95 Pac. viii), requiring abstract of transcript in brief, his appeal will be dismissed.—*Diacon v. Bank of Commerce of Coweta*, 119 P. 204.

§ 773 (Cal.App.) On appellant's failure to file briefs as required by Supreme Court rule 2, subd. 4 (78 Pac. vii), appellee was entitled to a dismissal.—*Barnhart v. Conley*, 119 P. 200.

§ 773 (Ok.) Writ of error will be dismissed for failure to file briefs within the time limited by rule 7 of the Supreme Court (95 Pac. vi).—*Bank of Taft v. Thompson*, 119 P. 124.

§ 773 (Ok.) Writ of error dismissed for failure to file briefs as required by Supreme Court rule 7 (20 Okl. viii, 95 Pac. vi).—*Bruce v. Ketcham*, 119 P. 124.

§ 773 (Ok.) Failure to file brief, as required by rule 7 of Supreme Court (20 Okl. viii, 95 Pac. vi), *held* ground for dismissal.—*Lugrand v. Harris*, 119 P. 127.

§ 773 (Ok.) Where plaintiff in error fails to file briefs as required by Supreme Court rule 7 (95 Pac. vi), the appeal will be dismissed.—*Cox v. Rogers*, 119 P. 205.

§ 773 (Ok.) Where plaintiff in error files no brief, as required by Supreme Court rule 7 (95 Pac. vi), the appeal will be dismissed.—*McClelland v. Witherall*, 119 P. 205.

§ 773 (Ok.) Writ of error dismissed for failure of plaintiff in error to file brief.—*Bender v. Bender*, 119 P. 205.

§ 773 (Ok.) Writ of error dismissed for failure to file brief in compliance with rules of court.—*Mayo v. Mills*, 119 P. 960.

### **XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.**

§ 781 (Colo.) A defendant in writ of error to review a judgment docketed as authorized by Code Civ. Proc. § 251, who obtained a supersedeas staying execution, *held* to have voluntarily paid the judgment necessitating a dismissal.—*Bull v. Doss Bros. Electric Const. Co.*, 119 P. 156.

§ 781 (Ok.) Appeal will be dismissed as involving only abstract questions, where judg-

ment appealed from is satisfied.—*Tinker v. McLaughlin-Farrar Co.*, 119 P. 238.

§ 790 (Colo.) Facts called to the attention of the Supreme Court by a plea in bar *held* to necessitate the dismissal of writ of error.—*Londoner v. City and County of Denver*, 119 P. 156.

§ 800 (Cal.App.) Motion to dismiss appeal for failure to transmit a copy of the judgment roll denied in view of Supreme Court rule 15 (78 Pac. x).—*Poole v. Grand Circle Women of Woodcraft*, 119 P. 201.

§ 805 (Nev.) Facts stated *held* to warrant an inference of abandonment of an appeal, making affirmance of the judgment proper.—*Potosi Zinc Mining Co. v. Mahoney*, 119 P. 775.

### **XVI. REVIEW.**

#### **(A) Scope and Extent in General.**

§ 837 (Or.) The undertaking on appeal may be examined to identify the judgment appealed from, to sustain the sufficiency of the notice of appeal.—*MacMahon v. Hull*, 119 P. 348.

§ 866 (Wash.) In determining whether the trial court erred in denying a motion for a nonsuit, the appellate court may only consider plaintiff's evidence.—*Mallett v. Seattle, R. & S. Ry. Co.*, 119 P. 748.

#### **(B) Interlocutory, Collateral, and Supplementary Proceedings and Questions.**

§ 870 (Idaho) Denial of nonsuit at close of plaintiff's evidence *held* not reviewable on appeal from judgment or order denying new trial, where defendant offered evidence after the denial of the nonsuit.—*Rippetoe v. Feely*, 119 P. 465.

#### **(C) Parties Entitled to Allege Error.**

§ 882 (Colo.) Where a cause is submitted to the jury on a theory adopted and acquiesced in by both parties, neither will be heard to complain that it was error.—*Mountz v. Apt*, 119 P. 150.

#### **(D) Amendments, Additional Proofs, and Trial of Cause Anew.**

§ 889 (Wash.) On a decree for a divorce on a cross-complaint not alleging jurisdictional facts, *held*, that the Supreme Court would regard the pleadings as amended to conform to the proofs.—*Powell v. Powell*, 119 P. 1119.

§ 894 (Or.) Court *held* not entitled to review decision in divorce suit, awarding custody of daughter to the wife, in view of the state of the record.—*Matthews v. Matthews*, 119 P. 768.

#### **(E) Presumptions.**

§ 900 (Wash.) On appeal parties are presumed to have made all the showing at their command in the trial court.—*Scammon v. Scammon*, 119 P. 383.

§ 907 (Wash.) The court on appeal on a short record *held* required to accept the findings as true, and determine only the correctness of the decree based on them.—*Architectural Decorating Co. v. Nicklason*, 119 P. 177.

§ 909 (Cal.App.) The record on appeal by plaintiff in an action for malicious prosecution not showing all the evidence, *held*, it would have to be presumed that there was a sufficient showing of probable cause.—*Carpenter v. Sibley*, 119 P. 391.

§ 917 (Kan.) Where judgment sustaining demurrer to petition is sustained by the Supreme Court on the ground of misjoinder of causes, it will be presumed that the district court decided the demurrer on the same ground.—*New v. Smith*, 119 P. 380.

§ 925 (Wash.) On appeal, prejudice of the trial judge cannot be presumed on mere in-

nuendo, based on language used by the trial judge in a ruling.—*Wiles v. Northern Pac. Ry. Co.*, 119 P. 810.

§ 928 (Cal.App.) The record not purporting to contain all instructions given, *held* refusal of requested instructions may be presumed to have been justified by instructions given.—*Carpenter v. Sibley*, 119 P. 391.

§ 928 (Wash.) Where the instructions are not made a part of the record, the Supreme Court will assume that a specified issue was properly submitted.—*Norwegian Danish Methodist Episcopal Church of Spokane Falls v. Home Telephone Co.*, 119 P. 834.

§ 935 (Mont.) Every presumption in favor of the trial court's ruling on a motion to set aside a default judgment will be indulged in.—*Swilling v. Cottonwood Land Co.*, 119 P. 1102.

#### (F) Discretion of Lower Court.

§ 954 (Cal.App.) The issuance of a preliminary injunction is in the discretion of the trial court and will not be interfered with in the absence of an abuse.—*Marre v. Union Oil Co. of California*, 119 P. 104.

§ 957 (Colo.) The discretion of the trial court as to vacating a default being a legal and not an arbitrary one, when the appellate court is convinced that such discretion has not been properly exercised, it may review the judgment.—*Gumaer v. Bell*, 119 P. 681.

§ 957 (Mont.) In the absence of manifest abuse of discretion, the court on appeal will not interfere with the exercise of the trial court's discretion as to setting aside a default judgment.—*Swilling v. Cottonwood Land Co.*, 119 P. 1102.

§ 959 (Cal.) Whether complainant shall be permitted to file an amended complaint is within the discretion of the trial court.—*Dunphy v. Dunphy*, 119 P. 512.

§ 959 (Cal.App.) An order denying relief under Code Civ. Proc. § 473, authorizing the court to allow amendments, will not be interfered with on appeal, where a clear abuse of the trial court's discretion is not shown.—*Blumer v. Mayhew*, 119 P. 202.

§ 960 (Mont.) Error *held* not liable to be predicated on a ruling of the trial court on a motion for a more specific bill of particulars where no manifest abuse of discretion was shown.—*Cohen v. Clark*, 119 P. 775.

§ 966 (Colo.) Refusal to grant a continuance is reversible only for a manifest abuse of discretion.—*Mounts v. Apt*, 119 P. 150.

§ 977 (Okla.) Grant of new trial not be reversed, unless it can be seen, beyond reasonable doubt, that trial court has manifestly erred as to unmixed question of law.—*Jacobs v. City of Perry*, 119 P. 243.

§ 982 (Cal.App.) An order denying relief under Code Civ. Proc. § 473, authorizing the court to relieve from a judgment, will not be interfered with on appeal, where a clear abuse of the trial court's discretion is not shown.—*Blumer v. Mayhew*, 119 P. 202.

#### (G) Questions of Fact, Verdicts, and Findings.

§ 994 (Cal.) Weight of nonexpert opinions as to the mental capacity of plaintiff in a suit to annul a marriage admissible under Code Civ. Proc. § 1870, subd. 10, *held* for the trial court.—*Dunphy v. Dunphy*, 119 P. 512.

§ 999 (Cal.) On appeal to the Supreme Court, the decisions of the jury on questions of fact are conclusive.—*Cordier v. Keffel*, 119 P. 658.

§ 999 (Idaho) Where the only question was the good faith of a purchaser before maturity, the verdict will not be disturbed.—*Winter v. Hutchins*, 119 P. 883.

§ 1001 (Colo.) A judgment, sustained by sufficient evidence, will not be disturbed, where the errors assigned involve only the evidence.—*Columbia Savings & Loan Ass'n v. Cambron*, 119 P. 152.

§ 1001 (Idaho) Appellate court *held* required to set aside verdict, not sustained by evidence, or where but one conclusion can be deduced from the evidence.—*Rippetoe v. Feely*, 119 P. 465.

§ 1001 (Okla.) Where there is evidence reasonably tending to sustain the verdict, the judgment will not be disturbed.—*American Well & Prospecting Co. v. Spear*, 119 P. 536.

§ 1001 (Okla.) Judgment will not be reversed, where there was evidence reasonably tending to support the verdict.—*First Nat. Bank v. Houston*, 119 P. 587.

§ 1001 (Okla.) A verdict reasonably supported by the evidence will not be disturbed.—*Allen v. Kenyon*, 119 P. 960.

§ 1001 (Or.) A verdict sustained by evidence cannot be disturbed under Const. art. 7, § 3, as amended November 8, 1910 (*Laws* 1911, p. 7).—*Purdy v. Vankeuren*, 119 P. 149.

§ 1001 (Wash.) A verdict based upon proper instructions and sustained by substantial evidence is conclusive on appeal.—*Wiles v. Northern Pac. Ry. Co.*, 119 P. 810.

§ 1002 (Cal.) A verdict as to the value of assessment work, based on conflicting evidence, will not be set aside on appeal.—*Galbreath v. Simas*, 119 P. 86.

§ 1002 (Cal.) A finding on conflicting evidence will not be reversed.—*Beckman v. Waters*, 119 P. 922.

§ 1002 (Cal.App.) In an action to charge a principal with the acts of his agent, the evidence of the agent's authority being conflicting, the finding of the jury is conclusive on appeal.—*Robinson v. American Fish & Oyster Co.*, 119 P. 388.

§ 1002 (Cal.App.) The Supreme Court cannot say that findings on conflicting evidence were without sufficient support.—*Gregory v. Lantz*, 119 P. 948.

§ 1002 (Idaho) Verdict on conflicting evidence will not be set aside.—*Thomason v. Lane-Potter Lumber Co.*, 119 P. 875.

§ 1002 (Mont.) The finding of a jury upon a disputed question of fact *held* conclusive on appeal.—*Cohen v. Clark*, 119 P. 775.

§ 1005 (Wash.) The verdict, being on conflicting evidence, and the trial court having refused to interfere with it, cannot be disturbed on appeal.—*Critler v. Jacobson & Lindstrom*, 119 P. 819.

§ 1008 (Or.) The court on appeal, if trying a case de novo, must give peculiar weight to the findings of the trial judge, trying the case without a jury, where his findings are based on evidence and on a view.—*Sun Dial Ranch v. May Land Co.*, 119 P. 758.

§ 1009 (Cal.) In a suit to specifically perform a contract to convey, the trial court's finding that relief should be denied for inadequacy of the consideration should not be disturbed on appeal, unless clearly unsupported by the evidence.—*Wilson v. White*, 119 P. 895.

§ 1010 (Cal.) In a suit to annul a marriage, a finding that plaintiff had not sufficient mental capacity to contract it would be sustained on appeal unless there was a total lack of substantial evidence to support it.—*Dunphy v. Dunphy*, 119 P. 512.

§ 1010 (Cal.) Findings responsive to the issues *held* conclusive on appeal.—*Kellogg v. Mallory*, 119 P. 937.

§ 1010 (Okla.) The court on appeal will not disturb findings of fact which there is any evidence reasonably tending to establish.—*Wicker v. Dennis*, 119 P. 1122.

§ 1010 (Or.) A finding of the line of high-water mark of a river in the establishment of a boundary *held* based on a consideration of all the circumstances and natural conditions.—Sun Dial Ranch v. May Land Co., 119 P. 758.

Where a cause is tried by the trial court without a jury, the court on appeal can only examine the testimony to ascertain whether or not there is any competent evidence supporting the findings.—Id.

§ 1011. A finding on conflicting evidence will not be disturbed.

—(Kan.) McCullagh v. Stone, 119 P. 874; Mrs. A. K. Ross & Co. v. German Alliance Ins. Co. of New York, 119 P. 1128;

(Wash.) Mohr v. Pierce County, 119 P. 747.

§ 1011 (Ok.) Finding that a woman and her deceased child were of Creek blood will not be disturbed on appeal.—Skelton v. Dill, 119 P. 287.

§ 1011 (Wash.) The trial court's finding upon somewhat conflicting evidence will not be disturbed if supported by the evidence.—Tribou v. School Dist. No. 35 of Columbia County, 119 P. 838.

§ 1015 (Ok.) The finding of fact in case tried by the court and judgment after overruling motion for new trial will not be disturbed if there is evidence sufficient to sustain them.—Wicker v. Dennis, 119 P. 1122.

§ 1015 (Wash.) Where there is a substantial conflict in the testimony, the appellate court will not disturb the order of the trial judge granting a new trial on the ground that the evidence was insufficient to justify the verdict.—McGraw v. Manhattan Co., 119 P. 822.

§ 1019 (Ok.) In action in United States court of Indian Territory before admission of state, findings by court, sitting as master in chancery, *held* presumed correct, and not to be set aside, unless clearly erroneous.—Kellman v. Kennedy, 119 P. 1000.

§ 1024 (Mont.) A general order denying a motion to set aside a default judgment is a finding in favor of plaintiff on every disputed question of fact which is conclusive on appeal.—Swilling v. Cottonwood Land Co., 119 P. 1102.

#### (H) Harmless Error.

§ 1026 (Kan.) Under Code Civ. Proc. §§ 141, 581 (Gen. St. 1909, §§ 5734, 6176), errors must be prejudicial, and the prejudice must affirmatively appear.—Saunders v. Atchison, T. & S. F. Ry. Co., 119 P. 552.

§ 1029 (Cal.App.) In view of uncontradicted facts, *held* any error in ruling on evidence or instructions was harmless.—Carpenter v. Sibley, 119 P. 391.

§ 1031 (Idaho) On complaint on appeal against overruling challenge to juror, party *held* presumed not to have been compelled to exercise all his peremptory challenges.—Rippetoe v. Feely, 119 P. 465.

§ 1032 (Kan.) A judgment will not be reversed because of the admission of irrelevant evidence, where it is not also shown to be prejudicial to appellant.—Roach v. Skelton, 119 P. 315.

§ 1039 (Kan.) Defendant *held* not prejudiced by filing of improper reply.—Bear v. Kenyon, 119 P. 713.

§ 1041 (Kan.) Allowing pleadings to be amended after verdict to conform to proof *held* not prejudicial error.—Pohl v. Fulton, 119 P. 716.

§ 1042 (Colo.) Evidence having been admitted as though the cross-complaint was not struck out, *held*, any error in striking it out was harmless.—Reno v. Reno & Juchem Ditch Co., 119 P. 473.

§ 1047 (Colo.) A party has the right to require the trial court to observe the usual rules

of evidence in the trial of a case, whether the facts are in slight or serious dispute.—Mountz v. Apt, 119 P. 150.

§ 1050 (Cal.) In an action for injuries to an employe, the error in admitting certain evidence *held* prejudicial.—Arnold v. California Standard Portland Cement Co., 119 P. 913.

§ 1050 (Colo.) The error, if any, in allowing a witness to state his conclusions not relating to the important issues in the case, is not reversible.—Mountz v. Apt, 119 P. 150.

§ 1050 (Colo.) Whether a witness was interested in the result of an action against an executrix, so as to disqualify him under Mills' Ann. St. § 4816, is immaterial, if his testimony was not prejudicial to the estate.—Cone v. Eldridge, 119 P. 616.

§ 1051 (Ok.) Admission of incompetent evidence to corroborate uncontradicted evidence *held* not reversible error.—First Nat. Bank v. Tevis, 119 P. 218.

§ 1056 (Colo.) Error in preventing defendant from testifying as to the value of the lands of the parties *held* not prejudicial.—Mountz v. Apt, 119 P. 150.

§ 1058 (Cal.) Exclusion of question, in an action for personal injuries, *held* harmless.—Cordier v. Keffel, 119 P. 658.

§ 1058 (Cal.App.) One *held* not harmed by the sustaining of objection to his question, where witness thereafter testified fully as to the matter.—Carpenter v. Sibley, 119 P. 391.

§ 1058 (Ok.) Exclusion of evidence *held* harmless error, where the witness was subsequently permitted to testify to the same subject.—Steward v. Commonwealth Nat. Bank, 119 P. 216.

§ 1058 (Wash.) In an action for personal injuries, *held*, that the exclusion of evidence offered by defendant as to the nature of the injuries was not prejudicial.—Campbell v. Winslow Lumber Co., 119 P. 832.

§ 1064 (Cal.) Instruction, in an action for personal injuries, *held* harmless.—Cordier v. Keffel, 119 P. 658.

§ 1067 (Mont.) In an action against a city for flooding plaintiff's mine, defendant *held* not prejudiced by the refusal of an instruction that plaintiff could not recover the part of the damages reimbursed by his cotenant, D.—Kelly v. City of Butte, 119 P. 171.

§ 1068 (Idaho) Instruction, in action on note, that presence of suspicious circumstances means bad faith, in connection with other instructions and evidence, *held* not ground for reversal.—Park v. Johnson, 119 P. 52.

§ 1068 (Ok.) The contention of defendant that error in instructions was harmless *held* not sustainable, where a verdict for appellant would not be set aside for want of evidence.—Ladow v. Oklahoma Gas & Electric Co., 119 P. 250.

§ 1071 (Ok.) Where the evidence is undisputed and merely a question of law is presented, refusal of a request to state in writing conclusions of fact found is harmless error.—Smith v. Roads, 119 P. 627.

#### (I) Error Waived in Appellate Court.

§ 1078 (Colo.) Defendant, by not arguing a ground of demurrer to the complaint for misjoinder of plaintiffs, waived the assignment.—Bailey v. College of Sacred Heart, 119 P. 1067.

### XVII. DETERMINATION AND DISPOSITION OF CAUSE.

#### (A) Decision in General.

§ 1119 (Or.) Certain defendants not appealing from decree in a suit to establish water rights *held* to be bound by the decision of the

(B) Affirmance.

§ 1135 (Idaho) Where there appears no reversible error in the record, the judgment must be affirmed.—*Thomason v. Lane-Potter Lumber Co.*, 119 P. 875.

§ 1140 (Or.) Where the amount erroneously allowed as damages in an action for breach of contract is certain, the Supreme Court may affirm the judgment on condition that plaintiff will remit such amount.—*Hagestrom v. Sweeney*, 119 P. 725.

(C) Modification.

§ 1151 (Idaho) Though Rev. Codes, § 3818, authorizes the Supreme Court to modify order or judgment appealed from, an action for conversion *held* to be remanded for new trial under circumstances stated.—*Unfried v. Libert*, 119 P. 885.

(D) Reversal.

§ 1170 (Colo.) Error in overruling a motion to strike a claim against the estate and a demurrer thereto *held* not prejudicial to the estate, and hence not reversible under Mills' Ann. Code, § 78.—*Cone v. Eldridge*, 119 P. 616.

§ 1170 (Idaho) Under Rev. Codes, § 4231, immaterial errors or defects in pleadings or proceedings must be disregarded.—*Nobach v. Scott*, 119 P. 295.

§ 1170 (Okla.) Under Wilson's Rev. & Ann. St. 1903, § 4344, Supreme Court *held* required to disregard errors not affecting substantial rights of adverse party.—*City of Pawhuska v. Rush*, 119 P. 239.

§ 1175 (Cal.) In an action upon an insurance policy, *held*, that findings would not, where a judgment for insured has been reversed on appeal, authorize rendition of judgment for insurer.—*Fidelity & Casualty Co. of New York v. Fresno Flume & Irrigation Co.*, 119 P. 646.

§ 1177 (Cal.) Effect of reversal of a judgment for plaintiff, and an order refusing a new trial, stated.—*Stein v. Leeman*, 119 P. 663.

§ 1178 (Cal.) The court on appeal *held* not authorized to order a decree for appellant, but will reverse the case so that the facts may be established.—*Humboldt Savings Bank v. McCleverty*, 119 P. 82.

(F) Mandate and Proceedings in Lower Court.

§ 1195 (Or.) All questions which could have been raised and adjudicated on an appeal *held* deemed adjudicated.—*William Hanley Co. v. Combs*, 119 P. 333.

## APPEARANCE.

See Costs, § 154; Judgment, § 143.

§ 9 (Wash.) A foreign corporation *held* to have appeared generally so as to waive defects in the service of summons.—*Steenstrup v. Toledo Foundry & Machine Co.*, 119 P. 16; *Elliot v. Same*, *Id.* 19.

§ 23 (Colo.) The right to a change of venue *held* waived by a general appearance and pleading to the merits.—*Kirby v. Union Pac. Ry. Co.*, 119 P. 1042; *Same v. Colorado & S. Ry. Co.*, *Id.* 1056.

A motion for a change of venue must be made as soon as the moving party acquires knowledge of the facts.—*Id.*

## APPLIANCES.

See Master and Servant, §§ 88-207.

## APPLICATION.

See Removal of Causes, §§ 81, 97.

See Waters and Water Courses.

## ARBITRATION AND AWARD.

See Insurance, §§ 662, 665.

## ARGUMENT OF COUNSEL.

See Appeal and Error, § 1078; Criminal Law, §§ 656, 1171, 1178; Trial, § 109.

## ARREST.

See Bail.

## ARREST OF JUDGMENT.

See Criminal Law, §§ 968, 1023.

## ASSAULT AND BATTERY.

See Carriers, §§ 283, 318; Criminal Law, §§ 108, 448, 814; Homicide, §§ 257, 340; Indictment and Information, §§ 110, 189.

## I. CIVIL LIABILITY.

### (B) Actions.

§ 40 (Kan.) In an action for assault and battery, verdict *held* inadequate.—*Sundgren v. Stevens*, 119 P. 322.

## II. CRIMINAL RESPONSIBILITY.

### (B) Prosecution and Punishment.

§ 89 (Cal.App.) In a prosecution for abusing a female child, her evidence *held* admissible to show that prior to their meeting at the time in question she and defendant were strangers.—*People v. Barlow*, 119 P. 940.

§ 90 (Wash.) In an action for assault and battery, exclusion of evidence as to the character of the wound, and as to the actual cause of the assaulted person's death *held* proper.—*State v. O'Brien*, 119 P. 609.

§ 92 (Cal.App.) Evidence *held* to warrant a conviction of abusing a female child eight years of age.—*People v. Barlow*, 119 P. 940.

## ASSESSMENT.

See Drains; Municipal Corporations, §§ 239, 294, 425-514; Waters and Water Courses, § 231.

## ASSIGNMENT OF ERRORS.

See Appeal and Error, §§ 724, 754.

## ASSIGNMENTS.

See Bills and Notes, § 427; Frauds, Statute of, §§ 63, 129; Landlord and Tenant, § 204; Municipal Corporations, §§ 353, 376; Trusts, § 43; Turnpikes and Toll Roads, § 28; Vendor and Purchaser, § 214.

## ASSOCIATIONS.

See Taxation, § 356.

§ 1 (Kan.) The Anti-Horse Thief Association of Kansas is a voluntary, benevolent association.—*McLaughlin v. Wall*, 119 P. 541.

§ 3 (Kan.) Articles of agreement of benevolent association *held* to constitute a contract between the members, which the court will enforce, if not immoral or contrary to public policy.—*McLaughlin v. Wall*, 119 P. 541.

Under constitution of Anti-Horse Thief Association, State Order *held* the supreme tribunal, without the sanction of which no subordinate order can exist.—*Id.*

§ 25 (Kan.) Decision of state order of Anti-Horse Thief Association that a subordinate order has ceased to exist *held* final.—*McLaughlin v. Wall*, 119 P. 541.

**ASSUMPSIT, ACTION OF.**

See Money Received.

**ASSUMPTION.**

Of risk, see Master and Servant, §§ 205-226, 260, 288.

**ATTACHMENT.**

See Fraudulent Conveyances, § 96; Garnishment.

**ATTORNEY AND CLIENT.**

See Attorney General; Continuance, § 20; Contracts, § 111; Criminal Law, § 598; Execution, § 228; Pleading, § 288.

**IV. COMPENSATION AND LIEN OF ATTORNEY.**

(A) Fees and Other Remuneration.

§ 141 (Wash.) Certain charges by an attorney held not reasonable fees.—Baldwin v. Mills, 119 P. 816.

(B) Lien.

§ 189 (Kan.) Under Laws 1905, c. 68, § 1 (Gen. St. 1909, § 435), attorneys for plaintiff held entitled to enforce a lien against defendant, notwithstanding settlement of another suit on the same cause of action.—Anderson v. Metropolitan St. Ry. Co., 119 P. 379.

**ATTORNEY GENERAL.**

See Quo Warranto, §§ 33, 52.

§ 7 (Kan.) Gen. St. 1909, § 8906, relating to duties of Attorney General on requirement of Governor, held mandatory.—State v. Dawson, 119 P. 360.

Proceeding for examination of witnesses under prohibitory law (Gen. St. 1909, § 4366) held a matter in which the Attorney General has no discretion to refuse to prosecute, when required by the Governor.—Id.

It is within authority of Governor to name witness to be subpoenaed by the Attorney General, in proceeding under prohibitory law (Gen. St. 1909, § 4366), for the examination of witnesses.—Id.

The word "prosecute," within Gen. St. 1909, § 8906, providing that the Attorney General shall appear for the state in certain cases, defined.—Id.

**AUTHORITY.**

See Appeal and Error, § 1002; Banks and Banking, § 109; Brokers, § 8; Corporations, §§ 432, 646; Counties, § 178; Principal and Agent, §§ 51, 97-124, 147.

**BAIL.****II. IN CRIMINAL PROSECUTIONS.**

§ 73 (Okl.) Wilson's Rev. & Ann. St. 1903, § 5774, relating to deposit in lieu of bail, held repugnant to Bill of Rights, § 8.—Whiteaker v. State, 119 P. 1003.

Under Wilson's Rev. & Ann. St. 1903, §§ 5403, 5413, 5774, deposit by third person held conclusively presumed to be the money of defendant and to be treated accordingly.—Id.

Denial of petition of third person depositing money for defendant in lieu of bail, pursuant to Wilson's Rev. & Ann. St. 1903, § 5774, for an order upon the clerk of the court to turn the money over to him, held not error.—Id.

Failure of judge to sign order for release of defendant, as required by Wilson's Rev. & Ann. St. 1903, § 5773, held not to render unlawful prisoner's discharge so as to save forfeiture of money deposited in lieu of bail under section 5774.—Id.

§ 77 (Okl.) Under Wilson's Rev. & Ann. St. 1903, § 5776, failure of court to make entry on minutes held not to save forfeiture of deposit in lieu of bail.—Whiteaker v. State, 119 P. 1003.

§ 79 (Wash.) A verdict of acquittal in a prosecution for selling liquor without a license held to discharge a previous default on a bail bond entered upon the discovery of the absence of the defendant from the courtroom at the time the jury was ready to return a verdict.—State v. Main, 119 P. 844.

**BAILMENT.**

See Carriers, §§ 155-177; Warehousemen.

**BALLOTS.**

See Elections, §§ 162, 181.

**BANKS AND BANKING.**

See Appeal and Error, § 216; Bills and Notes, §§ 427, 516; Estoppel, § 118; Evidence, § 21; Trusts, § 35; Warehousemen.

**II. BANKING CORPORATIONS AND ASSOCIATIONS.**

(E) Insolvency and Dissolution.

§ 84 (Idaho) Rev. Codes, § 2985, held to make officer of bank receiving deposit while bank is insolvent liable as principal even if the distinction between principals and accessories be recognized.—State v. Cramer, 119 P. 30.

"Insolvent," as used in Rev. Codes, § 2985, relating to criminal responsibility for receiving deposits in bank while insolvent, defined.—Id.

Rev. Codes, § 2985, held intended to make all officers who have knowledge of insolvent condition of bank responsible for acts of employees in receiving deposits.—Id.

Under Rev. Codes, § 2985, vice president and business manager of bank, permitting it to receive deposits while insolvent, held criminally responsible though not personally receiving deposits.—Id.

**III. FUNCTIONS AND DEALINGS.**

(B) Representation of Bank by Officers and Agents.

§ 109 (Or.) A cashier of a bank cannot delegate to an officer of another bank authority to accept drafts in such cashier's name.—United States Nat. Bank of Vale v. First Trust & Savings Bank of Brogan, 119 P. 343.

An acceptance by an officer of a national bank held not to bind a state bank, and hence not to be evidence of an acceptance required by L. O. L. § 5965.—Id.

(D) Collections.

§ 171 (Cal.App.) In an action for damages for failure of a bank to collect a note, held, in view of Civ. Code, § 3149, that the bank was liable.—Kriske v. International Savings & Exchange Bank, 119 P. 666.

**BAR.**

See Appeal and Error, § 790; Corporations, § 217; Counties, § 200; Limitation of Actions.

**BATTERY.**

See Assault and Battery.

**BENEFICIAL ASSOCIATIONS.**

See Associations.

**BENEFITS.**

See Escrows.

See Evidence, §§ 157-178.

## BIAS.

See Appeal and Error, § 925; Judges, § 51; Witnesses, § 372.

## BILL OF EXCEPTIONS.

See Exceptions, Bill of.

## BILL OF EXCHANGE.

See Bills and Notes, § 513.

## BILL OF PARTICULARS.

See Appeal and Error, § 960; Pleading, § 317.

## BILLS AND NOTES.

See Appeal and Error, § 1068; Banks and Banking, §§ 109, 171; Chattel Mortgages, § 41; Corporations, § 432; Criminal Law, §§ 1169, 1172; Estoppel, § 118; Evidence, § 21; Executors and Administrators, § 227; Guaranty; Principal and Agent, §§ 104, 156; Principal and Surety, § 200; Subrogation; Trial, §§ 194, 235; Witnesses, § 268.

### I. REQUISITES AND VALIDITY.

(B) Form and Contents of Promissory Notes and Duebills.

§ 29 (Okla.) A note dated in Texas and payable there *held* a Texas contract.—Steward v. Commonwealth Nat. Bank, 119 P. 216.

## IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

§ 157 (Wash.) A note *held* a negotiable instrument, within Rem. & Bal. Code, §§ 3392, 3393.—Barker v. Sartori, 119 P. 611.

§ 163 (Wash.) A demand note *held* a negotiable instrument within 2 Rem. & Bal. Code, §§ 3392, 3394.—First Nat. Bank v. Sullivan, 119 P. 820.

§ 167 (Wash.) Provisions of mortgages *held* not imported into notes, so as to make them nonnegotiable.—Barker v. Sartori, 119 P. 611.

## V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

(A) Indorsement Before Delivery to or Transfer by Payee.

§ 226 (Cal.) One signing a note as accommodation indorser, before its execution, *held* bound, though he personally received no consideration from the payee.—Consolidated Lumber Co. v. Fidelity & Deposit Co. of Maryland, 119 P. 506.

(D) Bona Fide Purchasers.

§ 327 (Wash.) One *held* a holder in due course of a negotiable note.—Barker v. Sartori, 119 P. 611.

§ 339 (Idaho) Those executing note *held* chargeable with a higher degree of diligence than those who purchase it in due course.—Vaughn v. Johnson, 119 P. 879.

Purchaser of note in due course *held* chargeable only with facts actually known, or such as would lead to further inquiry.—Id.

§ 342 (Wash.) The purchasers of a negotiable instrument were only bound to inquire into the regularity of the indorsement thereon, if the only irregularity on the face of the note was that it was not indorsed by the payee.—Barker v. Sartori, 119 P. 611.

§ 345 (Idaho) In action on note, the jury *held* entitled to consider the circumstances surrounding the transaction in determining wheth-

Instruction, in action on note, that presence of suspicious circumstances means bad faith, *held* erroneous.—Id.

§ 370 (Wash.) A negotiable note *held* only void for failure of consideration in the hands of the original parties or persons chargeable with notice of the want of consideration.—Barker v. Sartori, 119 P. 611.

## VII. PAYMENT AND DISCHARGE.

§ 427 (Cal.App.) Sale of certain land by defendant and payment of the price on a mortgage without the consent of plaintiff bank, to which defendant's vendor had assigned defendant's purchase-money notes, *held* not a satisfaction of the notes.—Exchange Nat. Bank v. Ross, 119 P. 398.

## VIII. ACTIONS.

§ 492 (Or.) Where the execution of a note is denied, there is no presumption in favor of its regularity or the fairness of the transaction.—Long v. Hoedle, 119 P. 484.

§ 497 (Idaho) Mere evidence of fraud in procuring note *held* not to raise presumption of bad faith of purchaser.—Vaughn v. Johnson, 119 P. 879.

Evidence of fraud in procuring note *held* to shift burden of proof as to good faith of purchaser.—Id.

§ 503 (Okla.) In action on note by indorsee before maturity for value, evidence that consideration had failed *held* inadmissible where it was not shown that indorsee had knowledge thereof before purchase.—Steward v. Commonwealth Nat. Bank, 119 P. 216.

§ 509 (Idaho) Evidence in action on note of representations by agent of payee *held* admissible under circumstances stated.—Park v. Brandt, 119 P. 877.

§ 509 (Idaho) Evidence of fraud in procuring note *held* admissible to shift burden of proof as to good faith of purchaser.—Vaughn v. Johnson, 119 P. 879.

§ 509 (Idaho) In an action on a note by an alleged purchaser for value, he may introduce the canceled check which he claims to have given in payment of the note.—Winter v. Hutchins, 119 P. 883.

§ 513 (Or.) In an action upon a bill of exchange certain evidence *held* immaterial under L. O. L. §§ 5960, 6022.—United States Nat. Bank of Vale v. First Trust & Savings Bank of Brogan, 119 P. 343.

§ 516 (Cal.) In an action for money received by defendant bank, which plaintiff claimed under orders given to plaintiff for street repairs, and accepted by it, evidence *held* to show that plaintiff and the bank contemplated that the acceptance should only apply to the general contractor's equities at the completion of the contracts.—Whittier v. Home Savings Bank of Los Angeles, 119 P. 92.

§ 525 (Idaho) Mere evidence of fraud in procuring note *held* not to be considered by jury in determining purchaser's knowledge of defects in note.—Vaughn v. Johnson, 119 P. 879.

Evidence of fraud in procuring note *held* not to tend to establish bad faith of purchaser.—Id.

§ 526 (Cal.) Evidence *held* to authorize a finding that an option given by a note to declare its principal due for nonpayment of interest was not exercised.—Consolidated Lumber Co. v. Fidelity & Deposit Co. of Maryland, 119 P. 506.

§ 537 (Cal.) Evidence that an indorser of a note did not waive its presentment to the maker when due *held* sufficient to go to the jury.—Consolidated Lumber Co. v. Fidelity & Deposit Co. of Maryland, 119 P. 506.

§ 538 (Idaho) In an action on note, instruction covering Rev. Codes, § 3509, defining a holder in due course, and adding that if title of payees was defective for any reason the holder must show that he was a holder in due course, *held* erroneous.—Park v. Johnson, 119 P. 52.

§ 538 (Idaho) In action on note, instruction on issue whether plaintiff was a holder in good faith *held* proper.—Park v. Brandt, 119 P. 877.

§ 538 (Idaho) In action by indorsee of note, instruction as to effect of knowledge of like transactions *held* erroneous.—Vaughn v. Johnson, 119 P. 879.

## BOARDS.

See Counties, §§ 47, 53, 177, 178, 200; Criminal Law, § 507; Municipal Corporations, § 498; Schools and School Districts, § 103; Woods and Forests.

## BONA FIDE PURCHASERS.

See Bills and Notes, §§ 327-370; Ejectment, § 17; Vendor and Purchaser, § 231.

## BONDS.

See Appeal and Error, §§ 376-394, 417, 459, 465; Bail; Commerce, § 46; Corporations, § 482; Counties, §§ 177, 178; Mandamus, §§ 55, 103; Municipal Corporations, §§ 910-935; Principal and Surety, § 139; Statutes, § 123.

## BOOKS.

See Evidence, §§ 354, 376.

## BOUNDARIES.

See Adverse Possession; Appeal and Error, § 1010; Frauds, Statute of, § 70; Navigable Waters, § 36.

## II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§ 35 (Cal.) In an action to quiet title, evidence as to acquiescence and knowledge of plaintiff *held* admissible.—Price v. De Reyes, 119 P. 893.

§ 36 (Cal.) In an action to quiet title, surveyor's map *held* admissible.—Price v. De Reyes, 119 P. 893.

§ 37 (Wash.) In an action to quiet title to a strip of land, evidence *held* insufficient to establish the line contended for by plaintiffs.—Ripsey v. Harrison, 119 P. 178.

§ 37 (Wash.) The rule that evidence to establish an estoppel in a boundary line controversy must be clear and convincing does not apply, where the evidence on both sides is of the same kind.—Windsor v. Sarsfield, 119 P. 1112.

§ 46 (Wash.) Evidence *held* to establish an agreed boundary line, precluding the vendors from recovering any part of the land on the further side of the line so fixed.—Windsor v. Sarsfield, 119 P. 1112.

§ 47 (Wash.) Builders of a line fence *held* estopped from denying it as a monument, as against adjoining innocent purchasers.—Ripsey v. Harrison, 119 P. 178.

§ 48 (Cal.) Parol agreement between owners of adjoining lands as to the boundary line between them *held* to establish the line so agreed upon as the true boundary line.—Price v. De Reyes, 119 P. 893.

In an action to establish a boundary between coterminous lands, *held*, that the line had been

boundary line by agreement of parties that the true line be unascertainable, or that there should have been a dispute as to it prior to the agreement.—Id.

§ 53 (Wash.) A purchaser of land has a right to have it as bounded by original monuments and locations.—Ripsey v. Harrison, 119 P. 178.

§ 53 (Wash.) The measure of damages for the negligent error of a surveyor in ascertaining the boundaries of a lot stated.—Taft v. Rutherford, 119 P. 740.

Certain matters *held* no defense to an action for damages caused by a surveyor's negligence in ascertaining the boundaries of a lot.—Id.

In an action against a surveyor for a negligent error in ascertaining the boundaries of a lot, evidence *held* to show that due care was not used.—Id.

§ 54 (Kan.) Under Laws 1891, c. 89, §§ 9, 10 (Gen. St. 1909, §§ 2274, 2275), report of written survey *held* to have been filed by county surveyor as to any person having knowledge of the facts at the time it is left in the office for filing, though not indorsed as filed till a subsequent date.—Anderson v. Roberts, 119 P. 354.

## BREACH.

See Contracts, §§ 346, 350; Covenants, § 127.

## BRIBERY.

See Criminal Law, § 507.

§ 1 (Cal.) "Bribery" at common law defined.—People v. Coffey, 119 P. 901.

The acceptance by an officer of a gift after the official act is consummated without any prior corrupt understanding does not constitute bribery.—Id.

§ 1 (Wash.) The word "person," in Rem. & Bal. Code, § 2320, *held* to extend to police officers, not being restricted to officers mentioned under preceding clauses of the section.—State v. Nick, 119 P. 15.

§ 6 (Wash.) Under Rem. & Bal. Code, § 2320, an indictment for bribing a police officer *held* not insufficient for failing to set forth the officer's powers and duties.—State v. Nick, 119 P. 15.

## BRIDGES.

See Municipal Corporations, §§ 425, 454; Navigable Waters, §§ 19, 20.

## BRIEFS.

See Appeal and Error, §§ 757, 773; Criminal Law, §§ 1109, 1130.

## BROKERS.

See Appeal and Error, § 171; Frauds, Statute of, §§ 110, 112; Insurance, §§ 88, 103, 129, 142, 238, 665.

## II. EMPLOYMENT AND AUTHORITY.

§ 8 (Wash.) In an action for commissions for a sale of stock as a subagent of defendant, evidence *held* not to show that the officer appointing defendant as agent had authority, or that the sale was beneficial to defendant.—Dempsey v. United Wireless Telegraph Co., 119 P. 1.

## IV. COMPENSATION AND LIEN.

§ 49 (Cal.App.) Where a broker, employee sell property, only procured an option from proposed purchaser, he was not entitled to commissions.—Pehl v. Fanton, 119 P. 400.

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## **Brokers**

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**CERTIFICATE.**

See Acknowledgment; Appeal and Error, §§ 562, 612, 616; Depositions, § 76; Intoxicating Liquors, § 39; Partnership, § 64; Receivers, § 122.

**CERTIFICATION.**

See Depositions, § 83.

**CERTIORARI.****I. NATURE AND GROUNDS.**

§ 5 (Wash.) Certiorari does not lie to review orders reviewable on appeal.—State v. Superior Court, Spokane County, 119 P. 383.

**CHANCERY.**

See Equity.

**CHANGE OF VENUE.**

See Venue, § 68.

**CHARACTER.**

See Criminal Law, § 776.

**CHARGE.**

To jury, see Trial, §§ 194-206.

**CHARTER.**

See Corporations, § 370; Municipal Corporations, §§ 46, 48, 223, 910-918.

**CHASTITY.**

See Rape, § 40.

**CHattel MORTGAGES.**

See Exemptions, § 65.

**I. REQUISITES AND VALIDITY.**

(A) Nature and Essentials of Transfers of Chattels as Security.

§ 12 (Okl.) Under Mansf. Dig. § 4749 (Ind. T. Ann. St. 1899, § 3060), mortgage of crop to be grown in 1907 executed in January, 1906, by tenant holding for one year *held* valid.—Smith v. Lafayette & Bro., 119 P. 979.

(B) Form and Contents of Instruments.

§ 41 (Kan.) An oral chattel mortgage, given by the purchaser of mules to a bank to secure a loan to meet a check, given in payment for the mules, *held* valid.—Dosbaugh Nat. Bank v. Jelf, 119 P. 538.

§ 47 (Okl.) Description in chattel mortgage sufficient to enable third person to ascertain property included *held* good.—Smith v. Lafayette & Bro., 119 P. 979.

§ 48 (Okl.) Description of crops mortgaged *held* sufficient as against a subsequent mortgagee of the same property.—Smith v. Lafayette & Bro., 119 P. 979.

**II. FILING, RECORDING, AND REGISTRATION.**

(A) Original.

§ 90 (Wash.) Where a chattel mortgage is filed and recorded under Rem. & Bal. Code, § 3065, it is not necessary that it be kept on file, as required by section 3661, with reference to mortgages described therein.—Van Winkle v. Mitchum, 119 P. 748.

(B) Renewal.

§ 97 (Okl.) Renewal affidavit filed January 15, 1907, pursuant to Mansf. Dig. § 4751 (Ind. T. Ann. St. 1899, § 3062), *held* filed within 30 days before expiration of year from filing of

chattel mortgage filed January 15, 1906.—Smith v. Lafayette & Bro., 119 P. 979.

**IV. RIGHTS AND LIABILITIES OF PARTIES.**

§ 169 (Idaho) Plaintiffs *held* entitled to recover in conversion the market value of property taken under chattel mortgage and unaccounted for.—Unfried v. Libert, 119 P. 885.

§ 176 (Idaho) Evidence in trover *held* not to show willful malice or fraud, or gross negligence in the taking of the property.—Unfried v. Libert, 119 P. 885.

**V. RIGHTS AND REMEDIES OF CREDITORS.**

§ 190 (Wash.) A chattel mortgage on a stock of goods permitting the mortgagor to remain in possession, sell the property, and use part of the proceeds to pay expenses, and replenish the stock, is not fraudulent as to other creditors, unless made with the intent to defraud them.—Van Winkle v. Mitchum, 119 P. 748.

**CHEAT.**

See Fraud.

**CHILDREN.**

See Guardian and Ward; Infants; Parent and Child.

**CIRCULARS.**

See Injunction, § 101.

**CITIES.**

See Municipal Corporations.

**CITIZENS.**

See Aliens; Executors and Administrators, § 29; Indians; Removal of Causes, § 49.

**CLAIMS.**

See Counties, § 200; Executors and Administrators, §§ 202-256, 437; Mines and Minerals, §§ 23-41; Receivers, § 154.

**CLASS LEGISLATION.**

See Constitutional Law, § 208.

**CLERKS OF COURTS.**

See Appeal and Error, §§ 596, 612, 616, 625; Bail, § 73; Evidence, § 178; Mandamus, § 55.

**CLOUD ON TITLE.**

See Quieting Title.

**CLUBS.**

See Intoxicating Liquors, § 146.

**COLLECTION.**

See Banks and Banking, § 171; Taxation, § 608.

**COLLEGES AND UNIVERSITIES.**

See Eminent Domain, § 202.

**COLOR OF TITLE.**

See Adverse Possession.

**COMBINATIONS.**

See Conspiracy.

**COMMERCE.**

See Intoxicating Liquors, § 146.

§ 46 (Okla.) Business of plaintiff corporation, carried on through agents, *held* interstate business, so that failure to designate resident agent, as required by Act Feb. 18, 1901, c. 379, §§ 4, 5, did not render void a bond by one of the agents.—Chicago Crayon Co. v. Rogers, 119 P. 630.

Failure of foreign corporation to designate resident agent in Arkansas, as required by Kirby's Dig. §§ 825, 829a, *held* not to constitute defense to sureties on bond of agent of the corporation.—Id.

A state cannot require a foreign corporation to designate a resident agent, upon whom service may be had, as a condition precedent to its engaging in interstate commerce with residents of the state.—Id.

### III. MEANS AND METHODS OF REGULATION.

§ 54 (Idaho) Rev. Codes, §§ 1475, 1476, relating to public printing, *held* not an interference with or regulation of commerce in violation of Const. U. S. art. 1, § 8.—Ex parte Gemmill, 119 P. 208.

### COMMERCIAL PAPER.

See Bills and Notes.

### COMMISSION.

See Agriculture; Constitutional Law, §§ 62, 320; Courts, § 240½; Eminent Domain, § 2; Indians, § 27; Railroads, §§ 6, 9, 58, 223, 227.

### COMMISSIONERS.

See Counties, §§ 47, 58, 177, 178, 200; Municipal Corporations, §§ 451, 495, 514; Schools and School Districts, § 108.

### COMMISSIONS.

See Appeal and Error, § 171; Brokers, §§ 8, 49-82.

### COMMON CARRIERS.

See Carriers.

### COMMON LAW.

See Criminal Law, § 507.

### COMMUNITY PROPERTY.

See Husband and Wife, § 262.

### COMPENSATION.

See Appeal and Error, § 171; Attorney and Client; Brokers, §§ 8, 49-82; Constitutional Law, §§ 80, 245; Eminent Domain, §§ 74-163; Master and Servant, § 11; Officers, §§ 94, 100.

### COMPETENCY.

See Evidence, §§ 90-568; Marriage, §§ 58, 60.

### COMPLAINT.

See Criminal Law, § 260; Lewdness; Pleading.

### COMPOUND INTEREST.

See Interest, § 60.

### COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction; Attorney and Client.

### CONCEALMENT.

See Insurance, § 261.

See Evidence, §§ 471, 472.

### CONDEMNATION.

See Eminent Domain.

### CONDITIONAL SALES.

See Sales, § 479.

### CONDITIONS.

See Wills, § 647.

### CONDUCT.

See Estoppel, §§ 68, 99.

### CONFESSION.

See Criminal Law, §§ 517, 519.

### CONFIRMATION.

See Municipal Corporations, § 514; Taxation, § 685.

### CONNECTING CARRIERS.

See Carriers, § 177.

### CONNIVANCE.

See Injunction, § 21.

### CONSENT.

See Alteration of Instruments; Easements.

### CONSIDERATION.

See Appeal and Error, § 1009; Bills and Notes, §§ 228, 370, 503; Corporations, § 425; Exchange of Property, § 3; Frauds, Statute of, § 108; Fraudulent Conveyances, § 96; Vendor and Purchaser, § 18.

### CONSPIRACY.

#### II. IN CRIMINAL PROSECUTIONS.

##### (A) Offenses.

§ 41 (Okla. Cr. App.) Conspiracy to commit robbery *held* to continue until the conspirators have divided the proceeds.—Holmes v. State, 119 P. 430.

Responsibility of co-conspirators *held* to extend to all collateral acts incident to and growing out of the common design.—Id.

All persons engaging in conspiracy to do unlawful act *held* responsible for all that is done by any of the co-conspirators.—Id.

### CONSTITUTIONAL LAW.

See Aliens; Appeal and Error, § 1001; Commerce, § 54; Corporations, § 217; Counties, §§ 24, 81, 112; Courts, §§ 8, 120, 207, 212; Criminal Law, § 1020; Elections, § 18; Eminent Domain, §§ 2, 122, 275; Intoxicating Liquors, §§ 15, 17; Jury; Master and Servant, § 11; Municipal Corporations, §§ 48, 64, 73, 223, 680-682; Navigable Waters, § 37; Officers, § 100; Prohibition, § 3; Railroads, §§ 6, 58, 225, 226; Schools and School Districts; States, §§ 9, 41, 94; Statutes, § 199; Taxation, § 25; Trial, §§ 823, 887; Waters and Water Courses, § 216.

#### II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

§ 20 (Okla.) The contemporaneous interpretation given to Const. art. 9, § 18, by Act May 20, 1908 (Laws 1908, c. 18), *held* entitled to great weight.—Missouri, O. & G. Ry. Co. v. State, 119 P. 117.

§ 42 (Okl.) Before a party can assail the constitutionality of a statute, he must be affected by its enforcement.—*Rea v. State*, 119 P. 235.

§ 45 (Utah) A provision of a statute which has for many years been applied and given effect, without challenge, will not be held unconstitutional, except on a compelling belief of its invalidity.—*Park v. Rives*, 119 P. 1034.

§ 48 (Utah) Where the language of a statute is equally susceptible to two meanings, one rendering the statute valid and the other invalid, the court must adopt the one which renders the statute valid.—*Park v. Rives*, 119 P. 1034.

### III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

#### (A) Legislative Powers and Delegation Thereof.

§ 55 (Utah) Comp. Laws 1907, § 4355, relating to evidence of larceny, *held* not invalid as an encroachment upon the prerogatives of the judiciary.—*State v. Potello*, 119 P. 1023.

The Legislature *held* empowered to declare that certain facts shall be prima facie evidence of another and substantive fact essential to a conviction.—*Id.*

§ 55 (Utah) Comp. Laws 1907, § 4355, relating to proof of larceny, *held* a valid exercise of the Legislature's power.—*State v. Converse*, 119 P. 1030.

§ 62 (Kan.) Gen. St. 1909, §§ 8727-8739, *held* not invalid, though it delegates to the Entomological Commission the power to declare the existence of conditions which call into operation the provisions of the statute.—*Balch v. Glenn*, 119 P. 67.

§ 63 (Cal.) Irrigation act of 1897 *held* not unconstitutional for delegating powers, etc., to certain county officers.—*In re Bonds of South San Joaquin Irr. Dist.*, 119 P. 198.

§ 63 (Kan.) Legislature *held* authorized to declare that to be a nuisance which is detrimental to the welfare of its citizens, and to authorize local tribunals to exercise police power when such a nuisance exists.—*Balch v. Glenn*, 119 P. 67.

#### (B) Judicial Powers and Functions.

§ 70 (Idaho) Rev. Codes, §§ 1475, 1476, *held* not invalid, as in violation of any public policy of the state.—*Ex parte Gemmill*, 119 P. 298.

§ 70 (Utah) The defects, if any, in Laws 1909, c. 74, as amended by Laws 1911, c. 53, afford no ground for holding the statute invalid.—*Lundberg v. Green River Irrigation Dist.*, 119 P. 1039.

#### (C) Executive Powers and Functions.

§ 80 (Mont.) Miners' compensation act *held* not unconstitutional, as lodging judicial power in the State Auditor.—*Cunningham v. Northwestern Improvement Co.*, 119 P. 554.

§ 80 (Utah) Laws 1909, c. 74, as amended by Laws 1911, c. 53, *held* not to confer judicial power in violation of Const. art. 8, § 1.—*Lundberg v. Green River Irrigation Dist.*, 119 P. 1039.

### IV. POLICE POWER IN GENERAL.

§ 81 (Mont.) Police power defined.—*Cunningham v. Northwestern Improvement Co.*, 119 P. 554.

### V. PERSONAL, CIVIL, AND POLITICAL RIGHTS.

§ 89 (Idaho) Rev. Codes, §§ 1475, 1476, relating to public printing, *held* not to interfere with the right of any person to contract.—*Ex parte Gemmill*, 119 P. 298.

### VI. VESTED RIGHTS.

§ 93 (Nev.) St. 1911, c. 133, §§ 217, 218, relating to houses of ill fame, *held* not unconstitutional as interfering with vested rights.—*Ex parte Ah Pah*, 119 P. 770.

### VII. OBLIGATION OF CONTRACTS.

#### (C) Contracts of Individuals and Private Corporations.

§ 152 (Kan.) Judgment for trespass, which benefited tort-feasor's estate to the extent of the damages recovered, *held* to be on a cause of action so far contractual as to bring the judgment within the constitutional provision against legislation impairing obligation of contract.—*Douglass v. Loftus*, 119 P. 74.

### IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

§ 206 (Or.) Legislation requiring railroad corporations to furnish reasonable and adequate facilities for the transportation of freight and passengers is not violative of Const. Amend. U. S. 14.—*Southern Pac. Co. v. Railroad Commission of Oregon*, 119 P. 727.

§ 207 (Mont.) An alien who has never been a resident of any of the states *held* not entitled to invoke Const. U. S. art. 4, § 2.—*In re Colbert's Estate*, 119 P. 791.

§ 208 (Mont.) Laws 1909, c. 67, creating a state industrial accident insurance fund for employes engaged in coal mining, was not invalid as improper class legislation.—*Cunningham v. Northwestern Improvement Co.*, 119 P. 554.

Classification for purpose of taxation for regulation under the police power is a legislative function, with which the courts may not interfere, unless clearly arbitrary and unreasonable.—*Id.*

§ 208 (Mont.) Rev. Codes, § 4835, *held* not invalid as discriminating between foreigners and citizens.—*In re Colbert's Estate*, 119 P. 791.

### X. EQUAL PROTECTION OF LAWS.

§ 225 (Idaho) Rev. Codes, §§ 1475, 1476, relating to public printing, *held* not to deny to any person the equal protection of the law, in violation of Const. U. S. Amend. 14, § 1.—*Ex parte Gemmill*, 119 P. 298.

§ 241 (Or.) Legislation requiring railroad corporations to furnish reasonable and adequate facilities for the transportation of freight and passengers is not violative of Const. U. S. Amend. 14.—*Southern Pac. Co. v. Railroad Commission of Oregon*, 119 P. 727.

§ 245 (Mont.) Miners' compensation act *held* unconstitutional, as depriving mine operators paying indemnity under the act of the equal protection of the laws.—*Cunningham v. Northwestern Improvement Co.*, 119 P. 554.

### XI. DUE PROCESS OF LAW.

§ 251 (Kan.) "Due process of law" defined.—*Balch v. Glenn*, 119 P. 67.

§ 251 (Mont.) Due process of law defined.—*Cunningham v. Northwestern Improvement Co.*, 119 P. 554.

§ 287 (Mont.) The scheme, providing for the collection of funds necessary to carry out Laws 1909, c. 67, for the benefit of injured employes engaged in coal mining, *held* to constitute due process of law.—*Cunningham v. Northwestern Improvement Co.*, 119 P. 554.

§ 289 (Utah) Laws 1909, c. 74, as amended by Laws 1911, c. 53, *held* not violative of Const. art. 1, § 7, requiring due process of law.—*Lundberg v. Green River Irrigation Dist.*, 119 P. 1039.

§ 297 (Or.) Legislation requiring railroad corporations to furnish reasonable and adequate facilities for the transportation of freight

and passengers is not violative of Const. U. S. Amend 14.—*Southern Pac. Co. v. Railroad Commission of Oregon*, 119 P. 727.

§ 318 (Kan.) Gen. St. 1909, §§ 8727-8739, relating to extermination of orchard pests, *held* to afford due process of law, though no separate tribunal is provided by which owner may contest amount of expense.—*Balch v. Glenn*, 119 P. 87.

§ 320 (Kan.) Gen. St. 1909, §§ 8727-8739, creating the Entomological Commission and providing for extermination of orchard pests, *held* not unconstitutional as a taking of property without due process of law.—*Balch v. Glenn*, 119 P. 87.

## CONSTRUCTION.

See Constitutional Law, §§ 20-48; Contracts, §§ 164-178; Covenants, § 42; Insurance, §§ 173, 335; Pleading, § 34; Sales, §§ 64, 82; Statutes, §§ 181-225; Wills, §§ 439-647.

Of findings, see Trial, § 404.

Of instructions, see Trial, §§ 295, 296.

## CONTEMPT.

See Courts, § 240½.

## CONTEST.

See Elections, §§ 291-307.

## CONTINGENT REMAINDERS.

See Wills, §§ 629, 634.

## CONTINUANCE.

See Appeal and Error, § 966; Criminal Law, §§ 586-598, 1151.

§ 7 (Colo.) Refusal to grant a continuance rests in the discretion of the trial court.—*Mountz v. Apt*, 119 P. 150.

§ 15 (Wash.) A continuance on the ground of the failure of plaintiff to answer interrogatories served on him *held* properly denied.—*Steenstrup v. Toledo Foundry & Machine Co.*, 119 P. 16; *Elliott v. Same*, *Id.* 19.

§ 20 (Wash.) Denial of a continuance on the ground of the absence of a nonresident attorney of a foreign corporation *held* not an abuse of discretion.—*Steenstrup v. Toledo Foundry & Machine Co.*, 119 P. 16; *Elliott v. Same*, *Id.* 19.

The court *held* not required to continue a case on the ground of the absence of a nonresident attorney permitted, under Rem. & Bal. Code, § 120, to appear for a party.—*Id.*

§ 26 (Colo.) An application for a continuance on the ground of the absence of a witness *held* properly denied for want of prompt application.—*Mountz v. Apt*, 119 P. 150.

§ 30 (Okl.) Under Wilson's Rev. & Ann. St. 1903, § 4346, surprise *held* not ground for continuance, unless it cannot be obviated by ordinary care.—*Missouri, K. & T. Ry. Co. v. Horton*, 119 P. 233.

§ 40 (Kan.) Refusal of postponement of trial to grant hearing upon application to revoke letters of administration issued to plaintiff *held* not an abuse of discretion.—*Livermore v. Ayres*, 119 P. 549.

§ 46 (Cal.) Denial of an application for a continuance for absence of plaintiff *held* not an abuse of discretion.—*Beckman v. Waters*, 119 P. 922.

## CONTRACTS.

See Accord and Satisfaction; Action, §§ 27, 38, 53; Adverse Possession; Alteration of Instruments; Appeal and Error, §§ 604, 1009, 1140; Associations; Bills and Notes; Bound-

aries, §§ 46, 48; Brokers, §§ 49, 94; Cancellation of Instruments; Carriers, §§ 155, 158, 253; Chattel Mortgages; Constitutional Law, §§ 89, 152; Corporations, § 432; Counties, §§ 112, 114, 178; Covenants; Damages, §§ 40, 121, 124; Estoppel, § 68; Evidence, §§ 397-455, 498; Exchange of Property; Fraud; Frauds, Statute of; Guaranty; Insurance; Interest, §§ 50, 60; Mechanics' Liens; Money Received; Mortgages; Municipal Corporations, §§ 244, 353, 376; Principal and Agent; Sales; Specific Performance; Subrogation; Trusts, §§ 43, 359; Vendor and Purchaser; Waters and Water Courses, § 24.

## I. REQUISITES AND VALIDITY.

### (E) Validity of Assent.

§ 94 (Kan.) Where a false representation by a vendor is presumably within his knowledge, and made as a positive assertion of an existing fact, the vendee is not bound to make inquiries for himself.—*Westerman v. Corder*, 119 P. 868.

### (F) Legality of Object and of Consideration.

§ 108 (Wash.) The legal effect of a contract, rather than the intention of the parties, *held* to determine whether it is void as against public policy.—*Delbridge v. Beach*, 119 P. 856.

§ 111 (Wash.) An agreement to facilitate the bringing of an action for divorce in order to obtain a settlement of property rights *held* void as against public policy, which discourages actions for divorce.—*Delbridge v. Beach*, 119 P. 856.

Rem. & Bal. Code, § 474, *held* not to validate an agreement to compensate an attorney for the enforcement of a settlement of property rights upon a wife by a husband by coercion and treat as a suit for divorce.—*Id.*

An agreement employing an attorney to secure a division of the separate property of a husband by means of a suit for divorce, where no grounds for divorce are shown, *held* void as in contravention of public policy.—*Id.*

§ 138 (Wash.) Agreements against public policy and sound morals will not be enforced by the courts.—*Delbridge v. Beach*, 119 P. 856.

## II. CONSTRUCTION AND OPERATION.

### (A) General Rules of Construction.

§ 164 (Wash.) The rule as to construing instruments together *held* not to be applied, so as to import the provisions of one instrument into another, contrary to the intention of the parties.—*Barker v. Sartori*, 119 P. 611.

§ 169 (Cal.App.) Where there is any uncertainty in a contract or the application thereof, it is competent, in aid of its interpretation, to show the situation of the parties and the surrounding circumstances at the time of the execution of the contract.—*Blaeholder v. Guthrie*, 119 P. 524.

§ 170 (Okl.) Subsequent acts showing construction put upon agreement by the parties *held* to be looked to by the court.—*Rider v. Morgan*, 119 P. 958.

§ 172 (Okl.) When contracts are optional in respect to one party, they are strictly construed in favor of the party that is bound and against the party that is not bound.—*Frank Oil Co. v. Belleview Gas & Oil Co.*, 119 P. 260.

§ 175 (Wash.) Provision, in a contract for excavation of lots to grade, that the owner would waive claim for damage to the property, *held* under the evidence to have contemplated future damages only.—*Sweeney v. Lewis Const. Co.*, 119 P. 1108.

§ 176 (Okl.) Construction of contract which depends upon extrinsic facts *held* a mixed question of law and fact for the jury.—*Rider v. Morgan*, 119 P. 958.

**VI. ACTIONS FOR BREACH.**

§ 346 (Or.) A defendant, in an action for services rendered under contract, *held* required to specially plead that the services were performed gratuitously, to render the defense available.—Purdy v. Vankeuren, 119 P. 149.

§ 350 (Wash.) In an action for breach of contract to excavate lots to grade, evidence *held* to show that plaintiff contracted with defendant corporation, and not with defendant stockholders as individuals.—Sweeney v. Lewis Const. Co., 119 P. 1108.

**CONTRIBUTORY NEGLIGENCE.**

See Negligence, §§ 65-83.

**CONVERSION.**

Wrongful conversion, see Trover and Conversion.

**CONVEYANCES.**

See Chattel Mortgages; Corporations, § 448; Fraudulent Conveyances; Vendor and Purchaser, § 151.

**CONVICTS.**

§ 6 (Kan.) Where an action is commenced by the trustee of the estate of a person confined in the penitentiary, revivor in her name on her restoration to civil rights by a pardon is not authorized by law.—New v. Smith, 119 P. 880.

**COPY.**

See Appeal and Error, § 800; Criminal Law, §§ 627, 1172; Depositions, § 64; Evidence, § 174.

**CORAM NON JUDICE.**

See Judgment, §§ 17, 18.

**CORPORATION COMMISSION.**

See Railroads, §§ 6, 58, 227.

**CORPORATIONS.**

See Abatement and Revival; Action, § 38; Appeal and Error, § 327; Appearance; Banks and Banking; Carriers; Commerce, § 46; Constitutional Law, §§ 206, 241, 297; Contracts, § 350; Courts, § 240½; Drains; Executors and Administrators, §§ 202, 437; Forcible Entry and Detainer, § 4; Judgment, § 858; Limitation of Actions, §§ 34, 58; Municipal Corporations; Parent and Child, § 7; Partnership, § 41; Railroads; Removal of Causes, § 89; Street Railroads; Telegraphs and Telephones; Waters and Water Courses, § 33.

**I. INCORPORATION AND ORGANIZATION.**

§ 25 (Okl.) A party *held* to have acquired all the interests of his associates in an intended corporation.—Lynch v. Perryman, 119 P. 229.

§ 30 (Wash.) Evidence *held* to warrant a finding that defendant, in the organization of a corporation to succeed a partnership, was not authorized to pay more of the partnership debts out of the corporate assets than was specially designated.—Lee v. K. W. Steinhart Lumber Co., 119 P. 1117.

**II. CORPORATE EXISTENCE AND FRANCHISE.**

§ 32 (Colo.) Prima facie proof of plaintiff's corporate existence *held* made by the evidence.

—Reno v. Reno & Juchem Ditch Co., 119 P. 473.

§ 34 (Okl.) Party taking lease from a concern acting as a corporation *held* estopped to claim that it was without power to take title to the land leased or to make a lease thereof.—Lynch v. Perryman, 119 P. 229.

**IV. CAPITAL, STOCK, AND DIVIDENDS.****(B) Subscription to Stock.**

§ 82 (Wash.) In an action for profits from the sale of land, *held*, that there could be no recovery.—Allen v. Granger, 119 P. 817.

**V. MEMBERS AND STOCKHOLDERS.****(A) Rights and Liabilities as to Corporation.**

§ 190 (Cal.App.) A complaint by stockholders for misappropriation of corporate funds *held* sufficient, though it did not show that directors, through whom the defendants were alleged to have accomplished their purposes, were in control at all times mentioned in the complaint, where such facts appeared inferentially.—Harvey v. Meigs, 119 P. 941.

Directors are proper parties to an action by stockholders for a misappropriation of corporate funds.—Id.

Stockholders may bring an action for the misappropriation of corporate funds even though they became stockholders after such misappropriation.—Id.

A complaint in an action for misappropriation of corporate funds *held* to sufficiently charge the defendants by allegations that they appeared on the books of the corporation as owning a majority of the stock thereof.—Id.

A complaint in an action by stockholders for a misappropriation of corporate funds against persons alleged to appear on the corporate books as majority stockholders *held* not ambiguous for failing to show who were the directors of the corporation.—Id.

A complaint charging majority stockholders with a misappropriation of corporate funds *held* to charge with sufficient certainty the manner and times of the conversion.—Id.

§ 190 (Wash.) Assistance given by defendant to experts to audit books of a corporation *held* not to constitute an accounting, nor to defeat the right of a minority stockholder to maintain an action against defendant in the name of the corporation for an accounting.—Lee v. K. W. Steinhart Lumber Co., 119 P. 1117.

A minority stockholder may sue another stockholder for injury to the corporation, where the authorities representing the majority stock refuse to act.—Id.

**(D) Liability for Corporate Debts and Acts.**

§ 217 (Kan.) Right of judgment creditor to maintain suit on judgment against stockholder, under statute existing when cause of action accrued, *held* preserved by Gen. St. 1909, § 9037, subd. 1, though no proceeding was commenced till after the repeal of the statute.—Douglass v. Loftus, 119 P. 74.

Right of action of judgment creditor of corporation against stockholder, under statute existing when the cause of action accrued, *held* not barred by Laws Sp. Sess. 1898, c. 10, § 14, Laws 1903, c. 152, nor constitutional amendment of 1906, limiting stockholder's liability.—Id.

§ 245 (Kan.) Estate of deceased stockholder *held* liable on stock to the same extent as he was liable.—Douglass v. Loftus, 119 P. 74.

**VI. OFFICERS AND AGENTS.****(A) Election or Appointment, Qualification, and Tenure.**

§ 289 (Cal.) Under Civ. Code, § 290, directors of a corporation *held* at least de facto directors.—Chandler v. Hart, 119 P. 516.

**(C) Rights, Duties, and Liabilities as to Corporation and Its Members.**

§ 320 (Cal.) A minority stockholder of a corporation may sue to enforce a claim of the corporation against one who is in control of the board of directors.—Gosewisch v. Doran, 119 P. 556.

**VII. CORPORATE POWERS AND LIABILITIES.****(A) Extent and Exercise of Powers in General.**

§ 370 (Okla.) The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers.—Overholser v. Oklahoma Interurban Traction Co., 119 P. 127.

§ 370 (Or.) The powers of a corporation are defined and limited by its articles, and, as against a stranger, it cannot go beyond them.—Caviness v. La Grande Irr. Co., 119 P. 731.

**(B) Representation of Corporation by Officers and Agents.**

§ 404 (Wash.) The trustees of a corporation *held* entitled, as against the objection of minority stockholders, to sell coal lands belonging to the corporation.—Smith v. Flathead River Coal Co., 119 P. 858.

§ 424 (Cal.) A lease, executed pursuant to an order of the board of directors of a corporation, *held* valid as against one not having the status of a stockholder.—Chandler v. Hart, 119 P. 516.

§ 425 (Cal.) The objection that the consideration for corporate stock, represented by certificates regularly issued to persons elected directors, was not lawfully sufficient cannot be raised to invalidate the action of the directors, when third persons have dealt in good faith with them.—Chandler v. Hart, 119 P. 516.

§ 432 (Cal.) Where the corporate seal is affixed to a contract, purporting to be regularly executed for a corporation by an officer, the seal *held* prima facie evidence of the officer's authority.—Chandler v. Hart, 119 P. 516.

§ 432 (Kan.) In an action on an account for oil well supplies, evidence *held* to sustain a verdict for plaintiff.—Oil Well Supply Co. v. Ajax Portland Cement Co., 119 P. 355.

§ 432 (Kan.) Evidence of custom of milling company to execute its notes by the general manager *held* competent to show his authority.—Livermore v. Ayres, 119 P. 549.

**(D) Contracts and Indebtedness.**

§ 448 (Mont.) Where owners of a mining claim conveyed the same to a corporation, that certain of them had knowledge of plaintiff's equitable interest did not charge the corporation with notice.—Ropes v. Nilan, 119 P. 479.

§ 482 (Or.) Certain facts *held* not to require mortgage bondholders to share in the proceeds of the mortgage foreclosure sale on the basis of the price paid for the bonds, which was less than par.—Sabin v. Phoenix Stone Co., 119 P. 724.

A certain mortgage bondholder *held* entitled to share pro rata with other bondholders to the extent stated, but payment of certain of its bonds should be postponed until the bonds held by preferred claimants were paid.—Id.

**(F) Civil Actions.**

§ 518 (Mont.) A general denial in an action by a corporation *held* not to raise an issue of the capacity of the corporation to sue.—First Nat. Bank of Iowa City, Iowa, v. Smith, 119 P. 784.

**XII. FOREIGN CORPORATIONS.**

§ 646 (Mont.) Under Laws 1901, p. 150, § 1, and section 2, now Rev. Codes, § 4414, construed with Laws 1893, p. 91, repealing Comp. St. 1887, div. 5, § 443, and with Laws 1893, p. 98, § 10, a foreign corporation may revoke the authority of its statutory agent to receive process, even after a cause of action has accrued against it.—United Missouri River Power Co. v. Wisconsin Bridge & Iron Co., 119 P. 796.

§ 661 (Colo.) The statute of 1902 (Laws 1902, p. 43) *held* void so far as it relates to a foreign corporation which has paid the entrance tax, and has received permission to do business in the state.—Kirby v. Union Pac. Ry. Co., 119 P. 1042; Same v. Colorado & S. Ry. Co., Id. 1056.

**CORRECTION.**

See Judgment, § 303.

**CORROBORATION.**

See Criminal Law, §§ 507, 511, 934, 935; Divorce, § 127; Rape, § 54; Witnesses, § 410.

**COSTS.**

See Appeal and Error, § 465; Elections, § 307.

**I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.**

§ 12 (Cal.App.) The right to recover costs is purely statutory, and the right of a court to exercise a discretion in the awarding of costs depends on whether the Legislature has committed such discretion to the court.—Duley v. Peacock, 119 P. 1088.

**V. AMOUNT, RATE, AND ITEMS.**

§ 154 (Idaho) Party failing to appear and cross-examine at taking of deposition *held* not entitled to costs for the taking of a subsequent deposition.—Vaughn v. Johnson, 119 P. 879.

§ 178 (Mont.) Reasonable cost of making a map, necessary to explain the situation in a suit, may be taxed as a disbursement, under Rev. Codes, § 7169.—Kelly v. City of Butte, 119 P. 171.

**VI. TAXATION.**

§ 207 (Mont.) An original verified memorandum of the cost of a map used in an action is prima facie evidence that the amount specified was necessarily expended.—Kelly v. City of Butte, 119 P. 171.

**VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.**

§ 254 (Idaho) Costs will be taxed for printed abstract on appeal at the heretofore allowed rate, under rules of Supreme Court; the right to print not being affected by Sess. Laws 1911, cc. 117, 118, 119.—Ulbright v. Baslington, 119 P. 294.

**COUNTERCLAIM.**

See Set-Off and Counterclaim.

**COUNTIES.**

See Constitutional Law, § 63; Courts, §§ 120, 160; Fish; Game; Highways; Schools and School Districts, § 108; Woods and Forests.

§ 20 (Mont.) While a county is not strictly a municipal corporation, yet, in the sense that it is a body corporate with such powers only as are expressly conferred by statute, it is within the rules applicable to such corporations.—*Morse v. Granite County*, 119 P. 286.

§ 24 (Idaho) Const. art. 7, § 6, *held* to prohibit Legislature from imposing taxes for county purposes.—*Fenton v. Board of Com'rs of Ada County*, 119 P. 41; *Independent School Dist. No. 1 of Kootenai County v. Board of County Com'rs*, Id. 52.

#### (B) County Seat.

§ 35 (Okl.) Act April 17, 1908, § 12, relating to county seat location elections, construed in connection with Act May 29, 1908, art. 7, § 5, *held* mandatory, rendering ballots cast under circumstances stated illegal.—*Incorporated Town of Ryan v. Town of Waurika*, 119 P. 220.

§ 35 (Okl.) Under Sess. Laws 1907-08, c. 31, art. 4, § 12, ballots cast in county seat election *held* not invalid because of failure to take formal oath to affidavit required, in view of Comp. Laws 1909, § 2182.—*Town of Checotah v. Town of Eufaula*, 119 P. 1014.

Affidavits of electors at county seat election *held* in substantial compliance with Sess. Laws 1907-08, c. 31, art. 4, § 12.—*Id.*

#### (C) County Board.

§ 47 (Mont.) A county board of commissioners is a body of limited powers and must find legislation conferring powers exercised; but if the power exists, and no mode of exercise is prescribed, it may adopt its own mode.—*Morse v. Granite County*, 119 P. 286.

§ 53 (Idaho) Compliance with Rev. Codes, §§ 1911, 1912, by keeping record in minute book of all orders and decisions, *held* not essential to validity of acts of county commissioner.—*Sims v. Milwaukee Land Co.*, 119 P. 37.

#### (D) Officers and Agents.

§ 81 (Idaho) Const. art. 18, § 11, relating to county organization and government, *held* to require officers to perform such duties as shall be prescribed by law.—*Fenton v. Board of Com'rs of Ada County*, 119 P. 41; *Independent School Dist. No. 1 of Kootenai County v. Board of County Com'rs*, Id. 52.

### III. PROPERTY, CONTRACTS, AND LIABILITIES.

#### (B) Contracts.

§ 112 (Idaho) Rev. Codes, §§ 1475, 1476, relating to county printing, *held* to refer only to work to be done and not to purchase of material, and to be constitutional.—*Ex parte Gemmill*, 119 P. 298.

§ 114 (Okl.) *Wilson's Rev. & Ann. St.* 1903, § 6021, *held* to authorize county treasurer to contract for publication of delinquent tax lists.—*Stillwater Advance Printing & Publishing Co. v. Board of Com'rs of Payne County*, 119 P. 1002.

### IV. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

§ 177 (Mont.) Under Rev. Codes, § 2934, where county commissioners determined to issue bonds to provide funds to obtain a suitable site and to erect and furnish a new courthouse, it was not required that they determine the amount requisite for each item.—*Morse v. Granite County*, 119 P. 286.

An order for a special meeting of a board of county commissioners under Rev. Codes, §

Where all the members of a county board signed a call for a special meeting and were all present, whether the call covered the issuance of county bonds was not material to the validity of bonds ordered at that meeting.—*Id.*

§ 178 (Mont.) Under Rev. Codes, §§ 2894, 2905, 2933, 2934, a board of county commissioners may proceed to determine whether it is necessary to procure a loan for the construction of county buildings, and the amount required, without petition.—*Morse v. Granite County*, 119 P. 286.

Rev. Codes, § 2894, *held* not to prohibit a county board from ordering an election to authorize courthouse bonds until the terms for the purchase of a site had been agreed on.—*Id.*

Under Rev. Codes, § 2933, authority granted county commissioners by electors to issue bonds *held* not defeated by the fact that the ballot did not state the proposition in the exact form of the proclamation, or because an option to redeem was not reserved in the terms stated.—*Id.*

Subject to the mandatory requirements for county bonds, prescribed by Rev. Codes, §§ 2905, 2911, 2912, a county board may, without submission to electors, fix the date of the bonds, rate of interest, and option to redeem.—*Id.*

A commissioners' order for an election to authorize county bonds need only give notice of the proposed issue and the time and place at which the electors may vote on the proposition.—*Id.*

That a form of county bond adopted by the commissioners was incorporated in the proposition as unnecessarily printed on the ballot used at a referendum election did not invalidate the vote.—*Id.*

Under Const. art. 13, § 5, and Rev. Codes, §§ 2933, 2937, county bonds may be issued if authorized by a majority of the votes cast at a referendum election, and do not require a majority of all the electors in the county.—*Id.*

§ 190 (Kan.) Maintenance of a county road, under Laws 1911, c. 248, § 33, *held* not a part of the current expenses of the county, within Laws 1909, c. 245, § 5.—*State v. Board of Com'rs of Cowley County*, 119 P. 321.

### V. CLAIMS AGAINST COUNTY.

§ 200 (Okl.) Claim for compensation for publishing delinquent tax list not presented to county commissioners for more than four years after last publication, *held* barred by *Wilson's Rev. & Ann. St.* 1903, § 1253.—*Stillwater Advance Printing & Publishing Co. v. Board of Com'rs of Payne County*, 119 P. 1002.

### COUNTY BOARDS.

See Counties, §§ 47, 53, 177, 178, 200.

### COUNTY SEATS.

See Counties, § 35.

### COURTS.

See Appeal and Error; Constitutional Law, §§ 55, 70, 208, 318; Costs, § 12; Criminal Law, §§ 108, 260, 304, 1020, 1048; Divorce §§ 152, 249; Executors and Administrator §§ 29, 202; Indians, § 27; Judges, Judgment, § 17; Justices of the Peace; Marriages, §§ 28, 51; Municipal Corporations 495, 508; Prohibition; Public Lands, § Records, § 17; Removal of Causes.

### I. NATURE, EXTENT, AND EXE' OF JURISDICTION IN GENE'

§ 8 (Okl.) A cause of action for a railroad employé, accruing in Kar

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Laws Kan. 1907, c. 281, § 1, *held* enforceable in Oklahoma, in view of Const. art. 9, § 38.—Chicago, R. I. & P. Ry. Co. v. McIntire, 119 P. 1008.

## II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

### (D) Rules of Decision, Adjudications, Opinions, and Records.

§ 95 (Utah) That a statute has been upheld by the court of last resort of a sister state furnishes a strong reason why a similar statute of this state should be upheld if attacked on the same grounds.—Lundberg v. Green River Irrigation Dist., 119 P. 1039.

## III. COURTS OF GENERAL ORIGINAL JURISDICTION.

### (A) Grounds of Jurisdiction in General.

§ 120 (Okl.) Jurisdiction of county courts in civil cases, conferred by Const. art. 7, § 12, *held* not changed by Act June 4, 1908 (Sess. Laws 1907-08, c. 27, art. 1, §§ 1, 2; Snyder's Comp. Laws 1909, §§ 1977, 1978), so as to deprive such courts of jurisdiction, where amount did not exceed \$200.—Cooper v. Austin, 119 P. 206.

## IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.

§ 160 (Okl.) Sess. Laws 1907-08, c. 27, art. 1, § 2 (Comp. Laws 1909, § 1978), defining the jurisdiction of the county court does not apply to an action pending before the passage and approval of the act.—Rudolph v. Jurgensen, 119 P. 640.

§ 160 (Okl.) Comp. Laws 1909, § 1978, conferring upon county courts exclusive jurisdiction in certain cases, *held* not to affect action pending at enactment of statute.—Mullen v. Renzleman, 119 P. 641.

§ 169 (Cal.App.) Where a complaint contains a count not stating a cause of action, and the remaining counts demand an aggregate sum of less than \$300, the superior court has no jurisdiction.—Reeg v. McArthur, 119 P. 105.

## VI. COURTS OF APPELLATE JURISDICTION.

### (A) Grounds of Jurisdiction in General.

§ 207 (Okl.Cr.App.) Mandamus to an inferior court to direct its action is an exercise of appellate jurisdiction.—Brown v. State, 119 P. 447.

Under the Constitution and Comp. Laws 1909, §§ 1918, 1917, the Criminal Court of Appeals has exclusive jurisdiction to issue mandamus in proceedings to disqualify the presiding judge in a criminal case.—Id.

### (B) Courts of Particular States.

§ 212 (Cal.App.) Where appellate jurisdiction depends on the amount in controversy, the ad damnum clause of the complaint is the sole test.—Erving v. Napa Valley Brewing Co., 119 P. 940.

Under Const. art. 6, § 4, an appeal in an action to recover property of the value of \$6,000 should be taken directly to the Supreme Court.—Id.

§ 222 (Kan.) Gen. St. 1909, § 6161 (Code Civ. Proc. § 566), limiting right of appeal to Supreme Court according to amount in controversy, *held* not to apply to action to recover specific personal property.—McLaughlin v. Wall, 119 P. 541.

§ 240½ (Okl.) Sess. Laws 1907-08, c. 229, § 3, allows an appeal to the Supreme Court by any person or corporation adjudged guilty of contempt by the Corporation Commission.—

Atchison, T. & S. F. Ry. Co. v. State, 119 P. 961.

Sess. Laws 1907-08, c. 229, providing for appeal to the Supreme Court by any person or corporation found guilty of contempt by the Corporation Commission, *held* not repealed by Sess. Laws 1907-08, c. 28, or Sess. Laws 1909, c. 14, art. 2, creating and continuing the Court of Criminal Appeals.—Id.

## COVENANTS.

See Frauds, Statute of, §§ 63, 129.

## II. CONSTRUCTION AND OPERATION.

### (B) Covenants of Title.

§ 42 (Cal.) Both generally, and under Civ. Code, §§ 1113, 1114, a restrictive covenant against the use of firearms on premises *held* an incumbrance within a covenant against incumbrances.—Fraser v. Bentel, 119 P. 509.

## IV. ACTIONS FOR BREACH.

§ 127 (Cal.) Only nominal damages may be recovered by a grantee because of an incumbrance which results in no actual damage to him.—Fraser v. Bentel, 119 P. 509.

The damages recoverable for breach of a covenant against incumbrances by the existence of a restrictive covenant on the use of land *held* those naturally and proximately resulting to the covenantee by the existence of the incumbrance; the general rule prescribed by Civ. Code, § 3305, not applying.—Id.

Under Civ. Code, § 3300, a grantee *held* not entitled to recover, as damages from breach of a covenant against incumbrances, his loss from inability to resell because of the existence of an incumbrance.—Id.

## COVERTURE.

See Husband and Wife; Marriage.

## CREDIBILITY.

See Witnesses, §§ 317-410.

## CREDITORS.

See Chattel Mortgages, § 190; Descent and Distribution, § 126.

## CRIMINAL LAW.

See Adultery; Assault and Battery, §§ 89-92; Attorney General; Bail; Banks and Banking, § 84; Bribery; Burglary; Conspiracy; Constitutional Law, § 65; Convicts; Courts, § 207; Elections, § 328; Embezzlement; Fraudulent Conveyances, §§ 329, 331; Grand Jury; Homicide; Indictment and Information; Intoxicating Liquors; Larceny; Lewdness; Perjury; Rape; States, § 9; Statutes, § 258; Witnesses.

## I. NATURE AND ELEMENTS OF CRIME AND DEFENSES IN GENERAL.

§ 21 (Mont.) Where an action is made punishable in general terms, a criminal intent is not essential, unless a purpose to require such intent is discoverable from the statute.—State v. District Court, Silver Bow County, 119 P. 1103.

§ 32 (Mont.) Ignorance of the law is not an excuse for its violation.—State v. District Court, Silver Bow County, 119 P. 1103.

## III. PARTIES TO OFFENSES.

§ 59 (Cal.App.) Pen. Code, § 31, *held* not to declare a person guilty of aiding and abetting another in the commission of a crime, where such person by reason of his status is himself



cessary may be prosecuted as principals.—State v. Cramer, 119 P. 30.

§ 59 (Okl.Cr.App.) Persons acting in concert on a common design which is unlawful *held* all to be guilty as principals.—Holmes v. State, 119 P. 430.

## V. VENUE.

### (A) Place of Bringing Prosecution.

§ 108 (Okl.Cr.App.) Jurisdiction of district court of Le Flore county to try indictment for assault with intent to kill, pending on the admission of Oklahoma as a state, determined.—Mendenhall v. United States, 119 P. 594.

## VIII. PRELIMINARY COMPLAINT, AFFIDAVIT, WARRANT, EXAMINATION, COMMITMENT, AND SUMMARY TRIAL.

§ 260 (Wash.) Amendment of a complaint, on which accused was tried on appeal from a justice, so as to charge accused with the offense for which he was actually tried before the justice, *held* not to deprive the superior court of jurisdiction.—State v. McKinney, 119 P. 179.

## IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

§ 292 (Colo.) A plea of former jeopardy *held* required to state that the offense for which accused is prosecuted is the same offense for which he has been previously convicted.—Epley v. People, 119 P. 1062.

A plea of former jeopardy *held* sufficient to call for a reply and trial by jury of the issues raised.—Id.

## X. EVIDENCE.

### (A) Judicial Notice, Presumptions, and Burden of Proof.

§ 304 (Okl.Cr.App.) The courts take judicial notice of the location of an Indian agency.—Hunter v. State, 119 P. 445.

§ 304 (Wash.) The courts of Washington take judicial notice of the contents of the charter of the city of Seattle.—State v. Nick, 119 P. 15.

§ 306 (Utah) One presumption or inference cannot rest upon another.—State v. Potello, 119 P. 1023.

### (B) Facts in Issue and Relevant to Issues, and Res Gestæ.

§ 351 (Cal.) A letter written by one accused of crime while incarcerated *held* admissible as an admission of guilt.—People v. Schafer, 119 P. 920.

### (C) Other Offenses, and Character of Accused.

§ 369 (Okl.Cr.App.) On trial for rape on female under age of consent, evidence of similar prior acts within the year preceding the act charged *held* admissible.—Myers v. State, 119 P. 136.

In prosecution for rape, evidence of pregnancy of prosecutrix and defendant's efforts to conceal her pregnancy *held* admissible.—Id.

§ 377 (Okl.Cr.App.) On trial for violating prohibitory law, defendant *held* entitled to show his general reputation as a law-abiding citizen, and that he did not have reputation for violating prohibitory law.—Friel v. State, 119 P. 1124.

### (E) Best and Secondary and Demonstrative Evidence.

§ 404 (Cal.) Evidence in a homicide case *held* sufficient prima facie evidence of the identity of

### (I) Opinion Evidence.

§ 448 (Wash.) In an assault and battery trial, exclusion of a question asked a witness, as to whether the person assaulted was peaceable, *held* proper.—State v. O'Brien, 119 P. 609.

### (J) Testimony of Accomplices and Codefendants.

§ 507 (Cal.) At common law an accomplice includes all participes criminis, whatever the degree or character of their offense.—People v. Coffey, 119 P. 901.

The persons designated in Pen. Code, § 31, as principals to an offense, *held* also accomplices.—Id.

The fact that one cannot be convicted as a principal does not prevent him from being an accomplice within the rule as to accomplice's testimony.—Id.

In view of Pen. Code, §§ 31, 654, the fact that the particular act of participation in an offense by an accessory or accomplice is also made a separate crime *held* not to prevent him from being indicted as a principal, and hence prevent him from being an accomplice.—Id.

The test of whether one is an accomplice is whether his participation in the offense has been criminally corrupt.—Id.

One who acted as intermediary in offering a bribe to a member of a board of supervisors prosecuted under Pen. Code, § 165, was an accomplice requiring his evidence to be corroborated.—Id.

§ 511 (Cal.) While the corroboration of an accomplice's testimony may be slight, it must of itself, wholly independent of the accomplice's testimony, tend to show accused's guilt.—People v. Coffey, 119 P. 901.

An accomplice's evidence *held* not corroborated.—Id.

### (K) Confessions.

§ 517 (Okl.Cr.App.) Confessions of the defendant freely and voluntarily made are competent evidence against him.—Holmes v. State, 119 P. 430.

§ 519 (Cal.) Confession obtained from defendant in jail *held* not voluntary and inadmissible in evidence.—People v. Borello, 119 P. 500.

### (L) Evidence at Preliminary Examination or at Former Trial.

§ 543 (Cal.App.) Evidence *held* to warrant a finding that a witness could not be produced with due diligence, so as to authorize the admission of the reporter's record of the testimony of the witness at a preliminary examination.—People v. Lederer, 119 P. 949.

Under Pen. Code, § 686, whether a foundation laid for the admission of the record of the testimony of an absent witness, taken at a preliminary examination, is sufficient is a matter of discretion.—Id.

### (M) Weight and Sufficiency.

§ 562 (Utah) Accused cannot complain of insufficiency of the evidence to sustain a conviction, though the state failed to make a case, if he himself proved one for it.—State v. Potello, 119 P. 1023.

§ 564 (Cal.App.) In a prosecution for embezzlement, evidence *held* to justify a finding that the embezzlement occurred in the city or county of San Francisco, where accused tried.—People v. Robinson, 119 P. 527.

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**XI. TIME OF TRIAL AND CONTINUANCE.**

§ 586 (Colo.) Rulings on application for a continuance rest in the discretion of the trial court.—Epley v. People, 119 P. 153, 155.

§ 584 (Wash.) The trial court *held* not to have abused its discretion in refusing accused a continuance asked on account of absence of a witness.—State v. O'Brien, 119 P. 609.

§ 596 (Wash.) A continuance *held* properly denied in order to procure certain witnesses.—State v. Rackich, 119 P. 843.

§ 598 (Colo.) Refusal of a continuance, on the ground that accused's counsel could not try the case, *held* within the court's discretion.—Epley v. People, 119 P. 153, 155.

§ 598 (Wash.) To entitle accused to a continuance on the ground of absence of witnesses, diligence to procure their attendance must be shown.—State v. O'Brien, 119 P. 609.

**XII. TRIAL.****(A) Preliminary Proceedings.**

§ 627 (Okl.Cr.App.) Right of accused under Bill of Rights, § 20, to copy of accusation, *held* waived, unless he demands a copy before announcing ready for trial.—Stouse v. State, 119 P. 271.

**(B) Course and Conduct of Trial in General.**

§ 655 (Cal.) A remark by the trial court in refusing a challenge for cause *held* not objectionable.—People v. Schafer, 119 P. 920.

§ 656 (Cal.) Remarks of the court *held* not a comment on the weight of any evidence, but to refer to useless discussion by counsel of the incompetency of the interpreter, after the court had stated another would be provided.—People v. Szafcsur, 119 P. 1083.

§ 656 (Okl.Cr.App.) Remark of court, in response to motion to advise jury to return verdict for accused, *held* improper.—Stuedle v. State, 119 P. 1022.

**(C) Reception of Evidence.**

§ 662 (Okl.Cr.App.) Testimony of witness before committing court, subscribed in the presence of defendant, *held* admissible on his trial, where the witness was dead.—Mendenhall v. United States, 119 P. 594.

§ 678 (Wash.) Where, on a trial for statutory rape, the state proved three distinct offenses at different times and places, the state, at the request of accused, must elect on which act it will rely for a conviction.—State v. Workman, 119 P. 751.

§ 683 (Wash.) Ruling admitting in rebuttal, rather than in chief, will not be disturbed, in absence of abuse of discretion.—State v. Copeland, 119 P. 607.

**(F) Province of Court and Jury in General.**

§ 742 (Cal.) Where the facts are undisputed, *held* a question of law for the court to determine whether a witness is an accomplice.—People v. Coffey, 119 P. 901.

§ 742 (Wash.) In a prosecution for selling intoxicants to a half-blood Indian, the fact that the prosecuting witness, to whom the liquor was sold, was employed as a government detective, did not, as a matter of law, make his evidence unworthy of belief.—State v. Rackich, 119 P. 843.

§ 753 (Mont.) An accused who pleads not guilty is entitled to have the jury's verdict upon the question of guilt, however clear and uncontroverted the evidence may be.—State v. District Court, Silver Bow County, 119 P. 1103.

§ 753 (Okl.Cr.App.) Where there is a total absence of evidence to sustain the charge, the court should instruct to acquit.—Huffman v. State, 119 P. 644.

§ 757 (Cal.) If the evidence requires it, the court should charge the law as to accomplices, leaving the question of whether a witness is an accomplice for the jury.—People v. Coffey, 119 P. 901.

§ 757 (Okl.Cr.App.) The court may instruct that a witness on whose testimony the state relies is an accomplice.—Chappell v. State, 119 P. 139.

§ 768 (Wash.) Cautionary instructions *held* not prejudicial to accused.—State v. Harsted, 119 P. 24.

**(G) Necessity, Requisites, and Sufficiency of Instructions.**

§ 776 (Okl.Cr.App.) Instruction on the subject of character of defendant *held* not required where the evidence is such that it could not be of benefit to defendant.—Holmes v. State, 119 P. 430.

§ 780 (Okl.Cr.App.) An instruction defining accomplice *held* necessary on request.—Chappell v. State, 119 P. 139.

§ 789 (Wash.) A charge on reasonable doubt *held* correct.—State v. Harsted, 119 P. 24.

§ 800 (Okl.Cr.App.) In instructing to assess punishment at death or imprisonment at hard labor for life, as in their discretion the jury may see fit, the court *held* not required to define "discretion."—Holmes v. State, 119 P. 430.

§ 814 (Okl.Cr.App.) Instructions on the hypothesis that defendant's testimony is true *held* required only where such testimony presents issues on which he might be acquitted.—Holmes v. State, 119 P. 430.

Where the evidence is such that there is no reason to believe that the jury would arrive at a given conclusion, refusal of instructions relating thereto *held* not error.—Id.

§ 814 (Wash.) It is not error to refuse an instruction, when there is no evidence to support it.—State v. Harsted, 119 P. 24.

§ 814 (Wash.) In a prosecution for first-degree assault, *held* not error to refuse to submit the issue of common assault and battery.—State v. Copeland, 119 P. 607.

§ 822 (Colo.) Instructions must be considered as a whole in determining their correctness.—Epley v. People, 119 P. 153, 155.

§ 823 (Okl.Cr.App.) Error in an instruction, in a prosecution for having liquors in possession, with intent to sell, *held* not cured by an instruction that intent must be made out to the satisfaction of the jury, beyond a reasonable doubt.—McCarthy v. State, 119 P. 1020; Hinchman v. Same, Id. 1022.

**(J) Custody, Conduct, and Deliberations of Jury.**

§ 857 (Colo.) The jury, in determining the weight of the testimony of accused, may consider his demeanor on the stand.—Epley v. People, 119 P. 153, 155.

**(K) Verdict.**

§ 893 (Or.) A verdict should be reasonably construed, and not to be held insufficient, unless it is doubtful, or finds upon immaterial issues, or manifestly tends to work injustice.—State v. Setser, 119 P. 346.

**XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.**

§ 907 (Mont.) The court cannot grant a new trial after an acquittal.—State v. District Court Silver Bow County, 119 P. 1103.

§ 923 (Okl.Cr.App.) Verdict will not be set aside for disqualification of juror, unless ac-

was had upon the uncorroborated evidence of an accomplice presents a legal question, under Pen. Code, § 1181, authorizing the granting of a new trial on the ground that the verdict is contrary to the law.—*People v. Coffey*, 119 P. 901.

§ 935 (Cal.) A contention that a conviction was had upon the uncorroborated evidence of an accomplice presents a legal question, under Pen. Code, § 1181, authorizing the granting of a new trial on the ground that the verdict is contrary to the evidence.—*People v. Coffey*, 119 P. 901.

§ 935 (Colo.) When the trial court should grant a new trial for insufficiency of the evidence to sustain the verdict, stated.—*Piel v. People*, 119 P. 687.

§ 939 (Wash.) An application for new trial on the ground of newly discovered evidence held required to show diligence to procure the evidence at the former trial.—*State v. O'Brien*, 119 P. 600.

§ 942 (Okla. Cr. App.) Where, after conviction, a witness for the state makes an affidavit that her testimony was false, a new trial should have been granted.—*Chappell v. State*, 119 P. 139.

§ 968 (Colo.) A motion in arrest of judgment, which does not affect the real merits of the offense, should be denied.—*Piel v. People*, 119 P. 687.

#### XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

§ 987 (Wash.) Rem. & Bal. Code, § 2196, rather than section 2145, held to determine the necessity for the presence of the defendant in a prosecution for a felony when the verdict is returned, for the purpose of judgment thereon.—*State v. Main*, 119 P. 844.

Under Rem. & Bal. Code, § 2196, a defendant in a prosecution for selling liquor without a license, held entitled to a judgment on a verdict of acquittal, though not present at the time the verdict was returned and published.—*Id.*

#### XV. APPEAL AND ERROR, AND CERTIORARI.

##### (A) Form of Remedy, Jurisdiction, and Right of Review.

§ 1020 (Cal.) Under Const. art. 6, § 4, an appeal by the people from an order setting aside an information for murder before any judgment, should have been taken to the District Court of Appeal, and not to the Supreme Court.—*People v. White*, 119 P. 79.

§ 1023 (Cal. App.) No appeal lies from an order denying a motion in arrest.—*People v. Robinson*, 119 P. 527.

##### (B) Presentation and Reservation in Lower Court of Grounds of Review.

§ 1032 (Okla. Cr. App.) Objection to information not presented by plea in abatement or motion to quash or set aside, but only by objection to the reading of the information to the jury, will not be reviewed.—*Myers v. State*, 119 P. 136.

§ 1043 (Cal.) Where accused objected generally to the admission of an incriminatory letter, he cannot on appeal complain that isolated portions of the letter are inadmissible.—*People v. Schafer*, 119 P. 920.

§ 1048 (Colo.) The Supreme Court has no power to decide matters which have not been submitted for its consideration in a legal manner.—*Piel v. People*, 119 P. 687.

der denying a new trial having been authorized by Pen. Code, § 1237, but no procedure having been prescribed, the court is authorized, by Code Civ. Proc. § 187, to consider any approved method adopted by accused.—*People v. Robinson*, 119 P. 527.

§ 1081 (Okla. Cr. App.) Where the record shows that notices of appeal were not served on the county attorney and the clerk of the district court within the time required by law, the appeal will be dismissed.—*McDaniel v. State*, 119 P. 270.

§ 1081 (Okla. Cr. App.) Notice of appeal in a felony case must, under Comp. Laws 1909, §§ 6948, 6949, be served within six months from sentence.—*Cloyd v. State*, 119 P. 1125.

##### (D) Record and Proceedings Not in Record.

§ 1087 (Cal. App.) An appeal from an order denying a new trial, under Pen. Code, § 1237, perfected in the method prescribed for an appeal from a judgment of final conviction, held proper.—*People v. Robinson*, 119 P. 527.

§ 1109 (Cal. App.) Where there is no evidence in the record of an appeal from a judgment or an order denying defendant's motion for a new trial, and no briefs, the record will be stricken from the files.—*People v. Tate*, 119 P. 939.

§ 1109 (Okla. Cr. App.) Appeal dismissed for failure of record to show notice of appeal and proof of service as required by Comp. Laws 1909, §§ 6948, 6949.—*Cloyd v. State*, 119 P. 1125.

§ 1114 (Colo.) Where the printed abstract of the record fails to show any objections to evidence, the admission thereof is not reviewable.—*Epley v. People*, 119 P. 153, 155.

§ 1117 (Okla. Cr. App.) Overruling of application for change of venue will not be reviewed where the case-made does not contain a transcript of testimony taken on the application.—*Myers v. State*, 119 P. 136.

§ 1120 (Okla. Cr. App.) Objections to exclusion of testimony to be considered must show what the excluded testimony would have been.—*Stouse v. State*, 119 P. 271.

§ 1122 (Cal. App.) Where there is no evidence in the record of the existence of an alleged fact, the court on appeal cannot consider whether there was error in the instructions given referring to such fact.—*People v. Lederer*, 119 P. 949.

##### (E) Assignment of Errors and Briefs.

§ 1130 (Cal. App.) On a failure to present a brief within a time granted there is nothing for review.—*People v. Merle*, 119 P. 674.

##### (G) Review.

§ 1147 (Cal.) Pen. Code, § 461, making a burglary in the first degree punishable by imprisonment for not less than 1 and not more than 15 years, accused sentenced to 10 years imprisonment cannot complain that the sentence was an abuse of discretion.—*People v. Schafer*, 119 P. 920.

• § 1151 (Colo.) Rulings on application for a continuance will not be disturbed, unless there has been an abuse of discretion.—*Epley v. People*, 119 P. 153, 155.

§ 1153 (Cal. App.) The exercise of the trial court's discretion, under Pen. Code, § 680, in determining whether a foundation laid for the admission of the record of the testimony of an absent witness, taken at a preliminary examination, is sufficient, will not be reviewed, if there is any evidence to support the conclusion.—*People v. Lederer*, 119 P. 949.

§ 1156 (Okl.Cr.App.) Refusal of new trial because of statements of juror, the affidavits relating thereto being conflicting, will not be disturbed in the absence of abuse of discretion.—*Stouse v. State*, 119 P. 271.

§ 1156 (Wash.) Appellate courts will rarely control the discretion of a trial court in granting or denying a new trial on the ground of newly discovered evidence.—*State v. O'Brien*, 119 P. 609.

§ 1159 (Cal.App.) A conviction in a criminal case will be reversed for insufficient evidence only when there is an entire absence of evidence to support the verdict.—*People v. Barlow*, 119 P. 940.

§ 1159 (Okl.Cr.App.) Conviction will not be reversed, unless court finds as a matter of law that evidence is insufficient to warrant the conviction.—*Ragland v. State*, 119 P. 277.

§ 1159 (Wash.) The weight of the evidence is for the jury in the trial court.—*State v. O'Brien*, 119 P. 609.

§ 1160 (Colo.) The Supreme Court will not permit a verdict to stand unless both the jury and the trial court could have properly approved it.—*Piel v. People*, 119 P. 687.

§ 1166½ (Cal.) The refusal of a challenge for cause held harmless, if erroneous.—*People v. Schafer*, 119 P. 920.

§ 1166½ (Cal.) Abruptness of the court in rulings and its emphatic remarks to defendant's counsel in respect thereto held not subject to review, where it cannot be said that they tended to prejudice defendant.—*People v. Szafcsur*, 119 P. 1083.

§ 1169 (Cal.App.) In a prosecution for transferring a stock of goods with intent to defraud creditors, defendant held not prejudiced by parol evidence that, while witness was working for defendant, he gave a salesman a check, dated ahead.—*People v. Lederer*, 119 P. 949.

§ 1169 (Okl.Cr.App.) Error in admission of evidence of confessions held harmless, where the defendant testifies to the truthfulness of every material statement therein.—*Holmes v. State*, 119 P. 430.

§ 1171 (Mont.) Argument by prosecuting attorney held not reversible error.—*State v. Roberts*, 119 P. 566.

§ 1172 (Cal.App.) In a prosecution for conveying a stock of goods in fraud of creditors, defendant held not prejudiced by an objectionable instruction as to the character of evidence which a note furnishes of the debt which it represents.—*People v. Lederer*, 119 P. 949.

§ 1172 (Okl.Cr.App.) Where the evidence of accused shows his guilt, an erroneous instruction held not ground for reversal.—*Maynes v. State*, 119 P. 644.

§ 1172 (Wash.) It was not reversible error to give instructions requested by the state, though copies thereof were not filed with the clerk, nor served upon defendant's counsel, as required by a local rule of court.—*State v. O'Brien*, 119 P. 609.

§ 1173 (Wash.) Any error in refusing instructions, as having been requested too late, held harmless.—*State v. O'Brien*, 119 P. 609.

§ 1175 (Okl.Cr.App.) If error has been committed by conviction of defendant for crime in second degree when he should have been convicted of crime in the first degree, he cannot complain.—*Hunter v. State*, 119 P. 445.

§ 1178 (Cal.App.) On a failure to argue points on appeal, there is nothing for review.—*People v. Merle*, 119 P. 674.

§ 1180 (Utah) A decision of the Supreme Court on appeal in a criminal case is the law of the case on a subsequent trial.—*State v. Vance*, 119 P. 309.

#### (H) Determination and Disposition of Cause.

§ 1186 (Okl.Cr.App.) Where testimony for the state is conflicting, and the record discloses errors calculated to mislead the jury, a new trial should be awarded.—*Stuedle v. State*, 119 P. 1022.

### CROPS.

See Chattel Mortgages, §§ 12, 48; Life Estates, § 25; Vendor and Purchaser, § 194.

### CROSS COMPLAINT.

See Pleading, § 129.

### CROSS-EXAMINATION.

See Witnesses, §§ 268-410.

### CROSSINGS.

See Railroads, §§ 301, 352.

### CUSTODY.

See Divorce, §§ 303, 312.

### CUSTOMS AND USAGES.

See Corporations, § 432; Evidence, § 21.

### DAMAGES.

See Action, § 48; Appeal and Error, §§ 232, 1067, 1140; Assault and Battery, § 40; Boundaries, § 53; Carriers, § 382; Contracts, § 175; Covenants, § 127; Eminent Domain, §§ 74-163, 203, 243, 262, 275; Exchange of Property, § 8; Forcible Entry and Detainer, §§ 27, 30, 34; Municipal Corporations, §§ 385-404, 663; Sales, § 418; Trial, §§ 242, 296; Trover and Conversion; Vendor and Purchaser, § 351; Waters and Water Courses, § 62.

### III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

#### (A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

§ 40 (Cal.) The profits of collateral enterprises in which a party claiming damages for breach of contract has been induced to engage by relying upon the performance of the contract are not recoverable if the other party had no notice of such collateral undertaking.—*Fraser v. Bentel*, 119 P. 509.

§ 40 (Kan.) Damages for loss of profits for interruption of business of skating rink held neither speculative nor uncertain.—*Mensing v. Wright*, 119 P. 374.

#### (B) Aggravation, Mitigation, and Reduction of Loss.

§ 62 (Mont.) One injured by another's negligence held not entitled to recover for damages which might have been prevented by the exercise of ordinary care after the injury.—*Tigerman v. City of Butte*, 119 P. 477.

### V. EXEMPLARY DAMAGES.

§ 91 (Idaho) Exemplary or punitive damages held not recoverable unless the action of the wrongdoer is wanton or gross or outrageous, or implies malice and oppression.—*Unfried v. Libert*, 119 P. 885.

### VI. MEASURE OF DAMAGES.

#### (A) Injuries to the Person.

§ 99 (Okl.) Measure of damages recoverable by parent for loss of services of minor child stated.—*Missouri, K. & T. Ry. Co. v. Horton*, 119 P. 233.

of contract to excavate lots to grade.—Sweeney v. Lewis Const. Co., 119 P. 1108.

§ 124 (Okl.) Building contractor *held* entitled to recover for breach of contract by owner amount expended on faith of contract and anticipated profits.—First Nat. Bldg. Co. v. Vandenberg, 119 P. 224.

In an action by a building contractor for breach of contract, evidence of subcontracts is incompetent to prove anticipated profits.—Id.

## VII. INADEQUATE AND EXCESSIVE DAMAGES.

§ 132 (Wash.) Four thousand five hundred dollars *held* not excessive recovery for personal injury to a sawmill employe.—King v. Page Lumber Co., 119 P. 180.

§ 132 (Wash.) Four thousand four hundred and ninety-five dollars and ninety-five cents *held* not excessive recovery for personal injury to a carpenter.—Martin v. Hill, 119 P. 849.

## VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

### (A) Pleading.

§ 158 (Mont.) A complaint in an action for personal injuries *held* sufficient to justify admission of evidence of an internal injury.—Jenkins v. Northern Pac. Ry. Co., 119 P. 794.

### (C) Proceedings for Assessment.

§ 214 (Mont.) Instruction in a personal injury action as to mitigating damages by plaintiff's failure to exercise due care to minimize the injury *held* substantially correct, and not to impose too great a burden upon plaintiff.—Tiggerman v. City of Butte, 119 P. 477.

## DAWES COMMISSION.

See Indians, § 27.

## DEATH.

See Assault and Battery, § 90; Criminal Law, §§ 662, 800; Master and Servant, §§ 106-286; Parent and Child, § 7.

## DEBTOR AND CREDITOR.

See Chattel Mortgages, § 190; Fraudulent Conveyances.

## DECEDENTS.

See Descent and Distribution.

## DECEIT.

See Fraud.

## DECLARATION.

See Pleading.

## DECREE.

See Mortgages, § 497.

## DEDICATION.

### I. NATURE AND REQUISITES.

§ 19 (Okl.) Where lots are sold with reference to recorded plat, dedication of the streets and alleys as laid out *held* perfect.—Revard v. Hunt, 119 P. 589.

## DEEDS.

See Adverse Possession; Escrows; Estoppel, § 22; Evidence, § 441; Fraudulent Conveyances, § 98; Mortgages; Taxation, §§ 663, 704, 734, 762-788; Vendor and Purchaser, §§ 116, 140, 141, 151.

## DEFAULT.

See Appeal and Error, §§ 113, 957, 1024; Judgment, §§ 139-159.

## DELEGATION OF POWER.

See Municipal Corporations, § 591.

## DELIVERY.

See Escrows; Gifts, § 23; Insurance, § 646; Sales, §§ 82, 174.

## DEMAND.

See Embezzlement.

## DEMONSTRATIVE EVIDENCE.

See Criminal Law, § 404.

## DEMURRER.

See Pleading, §§ 1, 192-220, 406, 418; Trial, § 150.

## DE NOVO.

See Appeal and Error, § 1008.

## DEPOSITIONS.

See Costs, § 154; Perjury, § 10.

§ 64 (Mont.) Where a question on a deposition called for the deponent to produce hotel records in his custody or which he could procure, the production of copies *held* not responsive and improperly admitted.—Cohen v. Clark, 119 P. 775.

§ 76 (Cal.) A notary's certificate to a deposition under Code Civ. Proc. § 2032, sealed, but unsigned, *held* insufficient.—Beckman v. Waters, 119 P. 922.

§ 83 (Okl.) Officer taking deposition need not certify that he is not related to either of the parties, where there is no affirmative showing of such relationship.—Eldridge v. Compton, 119 P. 1120.

§ 99 (Cal.) A deposition, though taken on stipulation, waiving notice and affidavit required by Code Civ. Proc. § 2031, *held* admissible in another action under section 2022.—Consolidated Lumber Co. v. Fidelity & Deposit Co. of Maryland, 119 P. 506.

The stipulation under which a deposition was taken, by providing it "may be used on the trial of said action," *held* not to have limited its use to the action in which it was taken, so as to take it out of Code Civ. Proc. § 2022.—Id.

Two actions, both on the same joint and several obligations, *held* between the same parties, as regards use of a deposition, under Code Civ. Proc. § 2022, though the first was against both the obligors, while the second was against only one of them.—Id.

§ 101 (Idaho) Admission of deposition, taken by defendant after deposition of same witness taken by plaintiff, as part of plaintiff's case and before defendant has opened, *held* error.—Vaughn v. Johnson, 119 P. 879.

§ 111 (Cal.) Notice and affidavit required by Code Civ. Proc. § 2031, for taking deposition *held* waived by stipulation for taking and using.—Consolidated Lumber Co. v. Fidelity & Deposit Co. of Maryland, 119 P. 506.

§ 111 (Okl.) Where deposition has been read at one trial, without objection, it is too late at second trial to raise purely technical objections apparent on the face of the deposition prior to the first trial.—Eldridge v. Compton, 119 P. 1120.

**DEPOSITS.**

See Bail, §§ 73, 77; Banks and Banking, § 84.

**DEPOTS.**

See Carriers, § 316; Railroads, §§ 38, 225, 226.

**DEPUTIES.**

See Officers, § 100.

**DESCENT AND DISTRIBUTION.**

See Aliens; Executors and Administrators; Indians, § 18; Wills.

**I. NATURE AND COURSE IN GENERAL.**

§ 6 (Mont.) The right to inherit rests in public policy, and is dependent on the will of the Legislature, except as restricted by the Constitution.—In re Colbert's Estate, 119 P. 791.

**III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTEES.**

(A) Nature and Establishment of Rights in General.

§ 91 (Okl.) Under Manuf. Dig. § 2522 (Ind. T. Ann. St. 1899, § 1820), heirs *held* entitled to maintain action to recover personalty of intestate.—First Nat. Bank v. Tevis, 119 P. 218.

(C) Debts of Intestate and Incumbrances on Property.

§ 126 (Kan.) Heirs at law or devisees of deceased stockholder *held* liable to the extent of property received.—Douglass v. Loftus, 119 P. 74.

**DESCRIPTION.**

See Brokers, § 82; Chattel Mortgages, §§ 47, 48; Frauds, Statute of, § 110.

**DESERTION.**

See Divorce, § 127.

**DETECTIVES.**

See Criminal Law, § 742.

**DETINUE.**

See Replevin.

**DILIGENCE.**

See Criminal Law, § 939.

**DIRECTING VERDICT.**

See Trial, § 178.

**DIRECTORS.**

See Corporations, §§ 289, 320, 424, 425.

**DISABILITIES.**

See Aliens.

**DISCHARGE.**

See Accord and Satisfaction; Master and Servant, § 41.

**DISCOVERY.**

See Continuance, § 15.

**DISCRETION OF COURT.**

See Appeal and Error, §§ 954-982; Continuance; Costs, § 12; Criminal Law, §§ 543, 586, 594, 598, 683, 1147, 1151, 1153, 1156; Divorce, § 312; Evidence, § 471; Exceptions, Bill of, § 43; Injunction, § 21; Judgment, §§ 139, 344; Pleading, § 236.

**DISMISSAL AND NONSUIT.**

See Appeal and Error, §§ 334, 336, 390, 430, 465, 554, 568, 627, 635, 757, 773, 781-800, 866, 870; Criminal Law, §§ 1081, 1109; Elections, § 305; Mandamus, § 16; Records, § 9; Trial, §§ 143, 163, 165.

**II. INVOLUNTARY.**

§ 53 (Idaho) The purpose and object of the law is to try actions on their merits, and not to dismiss cases on technicalities which do not go to the merits.—Nobach v. Scott, 119 P. 295.

§ 58 (Or.) The court, on motion to dismiss for failure to state cause of action, must take as true every allegation of the complaint.—Henderson v. Lemke, 119 P. 482.

**DISORDERLY HOUSE.**

See Intoxicating Liquors, § 15; Statutes, § 258.

**DISPENSARIES.**

See Intoxicating Liquors, § 146.

**DISQUALIFICATION.**

See Judges, § 51.

**DISSOLUTION.**

See Partnership, § 327.

**DISTRIBUTION.**

See Descent and Distribution; Executors and Administrators, § 315.

**DISTRICT AND PROSECUTING ATTORNEYS.**

See Quo Warranto, § 38.

**DITCHES.**

See Drains; Waters and Water Courses, §§ 12, 247.

**DIVERSE CITIZENSHIP.**

See Removal of Causes, § 49.

**DIVORCE.**

See Appeal and Error, §§ 889, 894; Contracts, § 111; Execution, § 228.

**II. GROUNDS.**

§ 31 (Cal.App.) Facts *held* not to entitle plaintiff to a divorce for nonsupport.—Johnston v. Johnston, 119 P. 403.

§ 31 (Wash.) Defendant's refusal for three months to support plaintiff *held* under Rem. & Bal. Code, § 982, to entitle her to a divorce.—Garland v. Garland, 119 P. 386.

**IV. JURISDICTION, PROCEEDINGS, AND RELIEF.****(C) Pleading.**

§ 101 (Wash.) Allegations in a cross-complaint *held* not to charge adultery, so that complainant was not entitled to have the charge made more specific.—Powell v. Powell, 119 P. 1119.

**(D) Evidence.**

§ 127 (Cal.App.) In a suit for divorce for desertion, evidence *held* insufficient to constitute the corroboration required by Civ. Code, § 130.—Johnston v. Johnston, 119 P. 403.

Corroboration, in an action for divorce, required by Civ. Code, § 130, is sufficient if pertinent to some fact or facts which is or are sufficient to support a decree.—Id.

**(E) Dismissal, Trial or Hearing, and New Trial.**

§ 150 (Wash.) A finding not based on the pleadings *held* not fatal to a decree for divorce supported by other and valid findings.—Powell v. Powell, 119 P. 1119.

**(F) Judgment or Decree.**

§ 152 (Wash.) The court *held* to have jurisdiction to grant respondent a divorce on his cross-complaint.—Powell v. Powell, 119 P. 1119.

**(G) Appeal.**

§ 182 (Cal.) Where a husband appealed from an order denying his application for a divorce and granting the wife alimony, the court can order him to provide for her maintenance pending the appeal and while the alimony judgment was stayed.—Sheppard v. Sheppard, 119 P. 492.

Where plaintiff appealed from an order denying a divorce, and stayed the alimony judgment pending the appeal, an order, requiring payment of \$50 per month for maintenance pending the appeal, should have provided that, in case of affirmance, the payments thereunder should be credited on the judgment for permanent alimony.—Id.

**V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.**

§ 246 (Wash.) An order denying a motion to vacate a divorce decree so far as it applies to property rights is equivalent to a decree on the merits.—Scammon v. Scammon, 119 P. 383.

§ 249 (Cal.App.) Where, in a suit for divorce, plaintiff prayed distribution of certain real estate as her separate property, and on the trial it appeared that the property was homestead, the court's jurisdiction was limited to a distribution under Civ. Code, § 146, which was dependent on the granting of a divorce.—Johnston v. Johnston, 119 P. 403.

§ 252 (Wash.) A decree of divorce granting a husband community property and charging him with alimony *held* proper.—Powell v. Powell, 119 P. 1119.

**VI. CUSTODY AND SUPPORT OF CHILDREN.**

§ 303 (Or.) A provision in a decree of divorce which awards the custody of an infant child to one of the parties *held* merely tentative, and subject to modification on application by the adverse party.—Matthews v. Matthews, 119 P. 766.

§ 303 (Wash.) On application by a divorced husband for modification of the decree so as to give him custody of a minor child, evidence *held* to show his fitness to have custody.—Morin v. Morin, 119 P. 745.

On a divorced wife becoming insane, the husband is entitled to custody of a minor child as against the wife's parents, to whom custody was temporarily awarded, unless he is unfit to have custody.—Id.

§ 312 (Or.) Under L. O. L. § 513, the discretion of the court in awarding to the wife the custody of a minor child, on granting to the husband a divorce, *held* proper.—Matthews v. Matthews, 119 P. 766.

**DOCUMENTS.**

See Evidence, §§ 340-376.

**DOMICILE.**

See Executors and Administrators, § 29; Limitation of Actions, § 4; Removal of Causes, § 49.

**DONATIONS.**

See Gifts.

**DRAINS.**

See Municipal Corporations, § 845.

**II. ASSESSMENTS AND SPECIAL TAXES.**

§ 91 (Cal.) A reclamation district having been held a de facto corporation when it levied certain assessments, a landowner, having instituted quo warranto to test the validity of the district, *held* not entitled to restrain sale of her property pending a determination of the quo warranto proceedings.—McPhee v. Reclamation Dist. No. 765, 119 P. 1077.

**DRAMSHOPS.**

See Intoxicating Liquors.

**DRUNKARDS.**

See Marriage, § 60.

**DUE PROCESS OF LAW.**

See Constitutional Law, §§ 251-320.

**DUPLICITY.**

See Indictment and Information, § 125.

**DYING DECLARATIONS.**

See Homicide, §§ 203, 215.

**EASEMENTS.**

See Dedication; Eminent Domain, §§ 74, 268.

**I. CREATION, EXISTENCE, AND TERMINATION.**

§ 36 (Or.) Where a way has been established by consent, evidence to substantiate a prescriptive right to continue the easement must be clear and conclusive.—A. C. Bohrnstedt Co. v. Scharen, 119 P. 337.

**EJECTION.**

See Carriers, § 382.

**EJECTMENT.**

See Eminent Domain, § 268; Indians, § 27; Limitation of Actions, § 37; Pleading, § 180.

**I. RIGHT OF ACTION AND DEFENSES.**

§ 4 (Kan.) Action *held* to be in form in ejectment, but, in substance, an action for relief on the ground of fraud.—New v. Smith, 119 P. 380.

§ 17 (Kan.) Purchaser in good faith at foreclosure sale *held* entitled to maintain ejectment against grantees of former owner of fee.—Bear v. Kenyon, 119 P. 713.

**III. PLEADING AND EVIDENCE.**

§ 93 (Kan.) The evidence to sustain an action in ejectment, but in substance for relief on the ground of fraud, is the same as would be required if the facts of the transaction were pleaded, instead of the conclusion authorized in ejectment.—New v. Smith, 119 P. 380.

§ 95 (Colo.) Defendant's possession of the entire lot sued for was prima facie evidence of his right to possession, as against plaintiff, of that part of the lot to which plaintiff did not establish title.—Newsom v. Jacobs, 119 P. 623.

**ELECTION.**

See Criminal Law, § 678.

## ELECTIONS.

See Counties, §§ 35, 178; Intoxicating Liquors, § 39; Municipal Corporations, §§ 48, 867, 935; Statutes, § 199; Waters and Water Courses, § 216.

### I. RIGHT OF SUFFRAGE AND REGULATION THEREOF IN GENERAL.

§ 18 (Idaho) Const. art. 6, § 4, *held* to authorize Legislature to prescribe additional qualifications for right of suffrage, but not to annul those prescribed in the article.—*Pioneer Irr. Dist. v. Walker*, 119 P. 304.

### VII. BALLOTS.

§ 162 (Utah) Laws 1911, c. 126, *held* not to repeal the provision of the general election law requiring a blank ticket at the right of the official ballot.—*Park v. Rives*, 119 P. 1034.

§ 181 (Utah) A provision in Laws 1911, c. 126, *held* not to prevent a voter from casting his vote at a general municipal election for a person whose name is not printed on the official ballot.—*Park v. Rives*, 119 P. 1034.

### X. CONTESTS.

§ 291 (Okl.) Where prima facie character of election returns of precinct is destroyed, burden of proof *held* to shift to party claiming benefit of the votes.—*Incorporated Town of Ryan v. Town of Waurika*, 119 P. 220.

§ 305 (Cal.App.) An appeal in a municipal election contest *held* properly dismissed.—*Broadbent v. Keith*, 119 P. 939.

§ 307 (Cal.App.) Code Civ. Proc. § 1125, *held* not to authorize the court in an election contest to direct that each party pay his own costs.—*Duley v. Peacock*, 119 P. 1086.

### XI. VIOLATIONS OF ELECTION LAWS.

§ 328 (Wash.) An information *held* not to charge an offense under Rem. & Bal. Code, § 4775.—*State v. Ross*, 119 P. 20.

## ELECTRICITY.

See Municipal Corporations, § 867.

§ 13 (Okl.) Electric light company *held* to owe the duty to insulate its wires, so as to render them harmless.—*La Dow v. Oklahoma Gas & Electric Co.*, 119 P. 250.

§ 14 (Okl.) Those handling electricity for profit *held* required to use greater precaution than if the property were of a less dangerous character.—*La Dow v. Oklahoma Gas & Electric Co.*, 119 P. 250.

Electric light company using public streets *held* required to exercise the highest degree of care, and to maintain the best appliances.—*Id.*

§ 16 (Okl.) Absence of insulation on an electric wire, in violation of an ordinance, is prima facie evidence of negligence.—*La Dow v. Oklahoma Gas & Electric Co.*, 119 P. 250.

An electric light company maintaining pole, on which wires are strung, so near pole of telephone company that employees of the latter are liable to come in contact with the wires *held* bound to take notice that such employees are liable to come in contact therewith.—*Id.*

§ 18 (Okl.) In an action for injuries from electricity, instruction as to contributory negligence *held* error.—*La Dow v. Oklahoma Gas & Electric Co.*, 119 P. 250.

Employee of telephone company injured by uninsulated wire of electric light company *held* not guilty of contributory negligence.—*Id.*

## EMBEZZLEMENT.

See Criminal Law, § 564.

§ 47 (Cal.App.) In a prosecution for embezzlement, evidence *held* to require submission to

the jury of the question when and where a demand for the return of the money alleged to have been embezzled, and defendant's refusal to repay the same, was made.—*People v. Robinson*, 119 P. 527.

## EMINENT DOMAIN.

See Evidence, §§ 155, 323, 474, 501; Municipal Corporations, § 223.

### I. NATURE, EXTENT, AND DELEGATION OF POWER.

§ 2 (Kan.) Gen. St. 1909, §§ 8727-8739, relating to Entomological Commission, *held* not unconstitutional, though it authorizes the expense of abating orchard nuisances to be charged against the property of the owner.—*Balch v. Glenn*, 119 P. 67.

§ 7 (Colo.) The right to appropriate private property to public uses lies dormant until legislative action is had, pointing out the occasions, modes, conditions, and agencies for its appropriations.—*Londoner v. City and County of Denver*, 119 P. 156.

§ 29 (Utah) The property authorized to be taken by Laws 1909, c. 74, as amended by Laws 1911, c. 53, *held* taken for a public use.—*Lundberg v. Green River Irrigation Dist.*, 119 P. 1039.

§ 41 (Colo.) The acquisition of lands for parks is for a public purpose.—*Londoner v. City and County of Denver*, 119 P. 156.

### II. COMPENSATION.

#### (A) Necessity and Sufficiency in General.

§ 74 (Okl.) Before railroad company condemns a right of way through Oklahoma and Indian Territory, under Act Cong. Feb. 28, 1902, § 15, compensation must be made.—*Denver, W. & M. Ry. Co. v. Adkinson*, 119 P. 247.

#### (B) Taking or Injuring Property as Ground for Compensation.

§ 104 (Idaho) The rule as to consideration of noise from operation of railroad train as element of compensation for property condemned stated.—*Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60.

§ 106 (Okl.) Instruction that abutting owner is entitled to damages for obstruction of right of ingress and egress where property is taken after vacation of street *held* error.—*Arkansas Valley & W. Ry. Co. v. Bullen*, 119 P. 414; *Same v. Johnson*, *Id.* 416.

#### (C) Measure and Amount.

§ 122 (Idaho) Under the constitutional prohibition, compensation *held* necessary whether property has a market value or not.—*Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60.

§ 131 (Idaho) "Market value" recoverable by owner of property in condemnation proceedings defined.—*Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60.

§ 134 (Idaho) Evidence of value for special purpose of property sought to be condemned which has no market value *held* admissible.—*Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60.

§ 138 (Idaho) Under Rev. Codes, § 5220, the damage sustained by remaining parcel of land must be considered in condemnation proceedings.—*Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60.



**(D) Persons Entitled and Payment.**

§ 163 (Okl.) Railway company occupying a street after vacation thereof *held* liable to abutting owners for value of land taken and depreciation to remaining portion.—Arkansas Valley & W. Ry. Co. v. Bullen, 119 P. 414; Same v. Johnson, Id. 416.

**III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.**

§ 202 (Idaho) Evidence in condemnation proceedings as to special value to college of land sought to be condemned *held* admissible.—Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod, 119 P. 60.

§ 203 (Idaho) Evidence of probable damage from most injurious use of property sought to be condemned by railroad company *held* admissible.—Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod, 119 P. 60.

Evidence in condemnation proceedings as to damages that will be sustained *held* admissible.—Id.

§ 243 (Wash.) Parties and their privies are concluded by the judgment as to all matters which were or could have been put in issue in condemnation proceedings.—Casassa v. City of Seattle, 119 P. 13.

A judgment, awarding damages in condemnation proceedings for a change of a street grade, *held* not res judicata of plaintiffs' right to recover additional damages for the taking of additional land, not contemplated by the plan in the construction of plaintiffs' houses.—Id.

§ 262 (Okl.) Where verdict for damages in condemnation proceedings is unsupported by evidence, it will be set aside.—Denver, W. & M. Ry. Co. v. Adkinson, 119 P. 247.

**IV. REMEDIES OF OWNERS OF PROPERTY.**

§ 268 (Okl.) Railroad company taking possession of right of way through Oklahoma and Indian Territory, under Act Cong. Feb. 28, 1902, § 15, before compensation made, *held* liable in ejectment to a subsequent Indian allottee of the land.—Denver, W. & M. Ry. Co. v. Adkinson, 119 P. 247.

§ 275 (Okl.) Owners of lots abutting streets *held* not entitled, under Const. art. 2, § 24, to injunction against laying of track, on the ground that damages have not been first ascertained and paid.—Overholser v. Oklahoma Interurban Traction Co., 119 P. 127.

**EMPLOYES.**

See Master and Servant.

**ENTRY.**

See Bail, § 77.

**EQUITY.**

See Appeal and Error, § 1019; Estoppel, §§ 54-118; Indians, § 27; Injunction; Judgment, § 432; Public Lands, § 39; Receivers; Specific Performance; Subrogation; Trusts.

**I. JURISDICTION, PRINCIPLES, AND MAXIMS.****(B) Remedy at Law and Multiplicity of Suits.**

§ 43 (Okl.) Relief will not be granted in equity, where there is a plain and adequate remedy at law.—Fast v. Rogers, 119 P. 241.

**ERROR, WRIT OF.**

See Appeal and Error.

**ESCROWS.**

§ 14 (Or.) An escrow holder *held* to occupy a fiduciary relation toward the grantor enjoining upon such holder the exercise of the strictest fidelity, as stated.—Sabin v. Phoenix Stone Co., 119 P. 724.

A vendor *held* to have received no benefits from an escrow holder so as to require him to also assume any burden or disadvantage caused from the changed condition by the premature delivery of the deed by the escrow holder.—Id.

**ESTABLISHMENT.**

See Boundaries, §§ 48-64.

**ESTATES.**

See Appeal and Error, § 1170; Corporations, § 245; Descent and Distribution; Executors and Administrators; Life Estates; Wills.

**ESTOPPEL.**

See Boundaries, §§ 37, 47; Corporations, § 34; Exchange of Property, § 5; Injunction, § 42; Judgment, §§ 713, 719; Municipal Corporations, §§ 488, 489; Waters and Water Courses, § 32.

**II. BY DEED.****(A) Creation and Operation in General.**

§ 22 (Okl.) Second chattel mortgagee *held* estopped to deny existence of prior unrecorded chattel mortgage recited in his mortgage.—Nation v. Planters' & Mechanics' Bank, 119 P. 977.

**III. EQUITABLE ESTOPPEL.****(A) Nature and Essentials in General.**

§ 54 (Cal.) Claimant of estoppel must be ignorant of truth of matter or extent of his rights.—Stein v. Leeman, 119 P. 663.

§ 58 (Cal.) Prejudice is an essential of estoppel.—Stein v. Leeman, 119 P. 663.

**(B) Grounds of Estoppel.**

§ 68 (Cal.) One holding an option to purchase an interest in land *held* not estopped to claim that his offer constituted a sufficient tender.—Stein v. Leeman, 119 P. 663.

Essential to constitute equitable estoppel by conduct of a party to a suit, stated.—Id.

Excessive claim under a contract sued on *held* not to estop plaintiff from claiming his lawful right.—Id.

§ 83 (Kan.) Where a vendor has made false representations, he is precluded from denying the truth of such representations and from setting up a claim inconsistent with the facts as represented.—Westerman v. Corder, 119 P. 868.

**(D) Matters Precluded.**

§ 99 (Colo.) The doctrine of estoppel by conduct cannot be relied on except in defense of a legal or equitable right, made in good faith, junior in point of time, against which an older right ought not to be heard to assert itself.—Kirby v. Union Pac. Ry. Co., 119 P. 1042; Same v. Colorado & S. Ry. Co., Id. 1056.

**(E) Pleading, Evidence, Trial, and Review.**

§ 118 (Cal.App.) Evidence *held* insufficient to sustain a finding that plaintiff bank was estopped to assert defendant's liability on purchase-money notes pledged to it.—Exchange Nat. Bank v. Ross, 119 P. 898.

**EVIDENCE.**

See Appeal and Error, §§ 197, 232, 635, 684, 695, 866, 870, 889, 900-935, 994, 1001, 1002,

1005, 1009, 1010, 1011, 1015, 1029, 1032, 1041, 1042, 1047, 1050, 1051, 1056, 1058, 1068, 1071; Assault and Battery, §§ 89, 90, 92; Bail, § 73; Banks and Banking, § 109; Bills and Notes, §§ 492, 497, 503-537, 538; Boundaries, §§ 35-46, 53; Brokers, § 8; Burglary; Cancellation of Instruments; Carriers, §§ 228, 318; Chattel Mortgages, § 176; Constitutional Law, § 55; Contracts, §§ 169, 175, 350; Corporations, §§ 30, 32, 432; Costs, § 207; Criminal Law, §§ 304-564, 656, 662-683, 742, 753, 757, 776, 814, 857, 934, 935, 939, 942, 1043, 1109, 1114, 1117, 1120, 1122, 1153, 1156, 1159, 1169, 1186; Damages, § 158; Depositions; Divorce, §§ 127, 303; Easements; Ejectment, §§ 93, 95; Elections, § 291; Electricity, § 16; Embezzlement; Eminent Domain, §§ 134, 202, 203, 262; Estoppel, § 118; Exchange of Property, § 8; Execution, § 256; Garnishment; Gifts, §§ 47, 49; Homicide, §§ 7, 194-257, 332, 338; Indians, § 27; Insurance, §§ 646, 665; Intoxicating Liquors, §§ 39, 224, 236; Larceny; Libel and Slander, § 104; Malicious Prosecution, §§ 56, 64; Marriage, §§ 40, 60; Master and Servant, §§ 263-281, 330; Mines and Minerals, § 38; Mortgages, § 38; Municipal Corporations, §§ 706, 845; Negligence, §§ 121, 134; New Trial, §§ 104, 140; Pleading, § 380; Principal and Agent, §§ 104, 123, 156; Quieting Title, § 44; Railroads, §§ 9, 481; Rape, §§ 40-54, 57; Sales, §§ 359, 415, 418; Specific Performance, § 121; Taxation, §§ 788, 810; Theaters and Shows, § 6; Trial, §§ 139, 150, 178, 194; Trusts, § 43; Vendor and Purchaser, § 170; Waters and Water Courses, § 247; Wills, §§ 164-166, 288; Witnesses.

Reception of, see Trial, §§ 41-97.

### I. JUDICIAL NOTICE.

§ 21 (Kan.) On issue of extension of note releasing surety, court *held* not to take judicial notice of custom of banks to require renewal of note not paid promptly.—*Livermore v. Ayres*, 119 P. 549.

§ 31 (Mont.) Under Rev. Codes, § 7888, the court *held* required to take judicial notice that the city of Butte was a municipal corporation during 1908.—*Drew v. City of Butte*, 119 P. 279.

### II. PRESUMPTIONS.

§ 80 (Okla.) In the absence of proof as to the law of another state on any question, it will be presumed to be the same as the law of the forum.—*Steward v. Commonwealth Nat. Bank*, 119 P. 216.

§ 83 (Idaho) Ferry license issued by county commissioners and valid on its face *held* prima facie sufficient to show right of licensee to construct and operate a ferry.—*Sims v. Milwaukee Land Co.*, 119 P. 37.

### III. BURDEN OF PROOF.

§ 94 (Okla.) Rule as to burden of proof stated.—*Missouri, K. & T. Ry. Co. v. Horton*, 119 P. 233.

### IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

#### (A) Facts in Issue and Relevant to Issues.

§ 99 (Cal.App.) Evidence which was not relevant to any issue involved *held* properly excluded.—*Gregory v. Lantz*, 119 P. 948.

§ 99 (Idaho) All competent evidence tending to prove material allegations of the complaint or denials of the answer should be received when offered.—*Nobach v. Scott*, 119 P. 295.

#### (C) Similar Facts and Transactions.

§ 129 (Wash.) In an action for injuries to a servant by an explosion of jexite, evidence of the explosive and dangerous character of a kind of jexite different from that furnished to and

used by plaintiff was inadmissible.—*Nelson v. Sibley Contracting Co.*, 119 P. 829.

#### (E) Competency.

§ 155 (Wash.) Part of an answer of a witness in condemnation proceedings on cross-examination, which was stricken as not responsive, *held* insufficient to entitle defendants to the admission of evidence of offers to purchase to show value.—*North Coast R. Co. v. Newman*, 119 P. 823.

### V. BEST AND SECONDARY EVIDENCE.

§ 157 (Wash.) The best evidence rule is not applicable to exclude testimony as to nationality of witness' parents.—*State v. Rackich*, 119 P. 843.

§ 171 (Kan.) Testimony of plaintiff as to receipts and expenses of business *held* not to be secondary.—*Mensing v. Wright*, 119 P. 374.

§ 174 (Mont.) Copies of a hotel keeper's records *held* inadmissible as not the best evidence.—*Cohen v. Clark*, 119 P. 775.

§ 178 (Cal.App.) Where judgment in a justice's court was set up as defense to an action, the justice's clerk *held* a competent witness to prove issuance and service of a summons shown to have been lost.—*Kriste v. International Savings & Exchange Bank*, 119 P. 666.

§ 178 (Idaho) On loss of papers and documents filed and failure to record proceedings, oral evidence of proceedings of county commissioners in issuing ferry license *held* admissible.—*Sims v. Milwaukee Land Co.*, 119 P. 37.

### VII. ADMISSIONS.

#### (B) By Parties or Others Interested in Event.

§ 222 (Cal.) In a will contest between a son and two daughters, the latter of whom were residuary legatees, evidence of statements by one of the daughters as to her influence over testator, their father, made without the other's presence, *held* not admissible.—*In re Lavinburg's Estate*, 119 P. 915.

#### (D) By Agents or Other Representatives.

§ 243 (Cal.App.) In an action on a policy claimed to have been canceled, a declaration between plaintiff's insurance broker and defendant's manager as to the cancellation of the policy in question *held* admissible.—*Stevenson v. Sun Ins. Office*, 119 P. 529.

#### (E) Proof and Effect.

§ 264 (Or.) The testimony of a building contractor *held* an admission that no damages as alleged resulted from his wrongful discharge.—*Hagestrom v. Sweeney*, 119 P. 725.

§ 264 (Wyo.) Where, in an action for loss of goods delivered to a carrier, there were no allegations of negligence causing the loss, an offer to confess judgment *held* not to admit negligence or liability for negligence.—*Oregon Short Line Ry. Co. v. Blyth*, 119 P. 875.

### IX. HEARSAY.

§ 314 (Cal.App.) A question *held* to call for hearsay.—*Carpenter v. Sibley*, 119 P. 391.

§ 320 (Wash.) One may testify as to the nationality of his parents.—*State v. Rackich*, 119 P. 843.

One may testify as to the ages of other members of his family as well as to his own age.—*Id.*

§ 323 (Wash.) In proceedings to condemn land for a railroad right of way, evidence of offers to purchase is inadmissible to prove value.—*North Coast R. Co. v. Newman*, 119 P. 823.

§ 340 (Cal.App.) Under Code Civ. Proc. §§ 911, 912, *held*, that defendant, pleading a judgment in defense, was entitled to have the justice's record of such judgment received in evidence.—*Kriste v. International Savings & Exchange Bank*, 119 P. 666.

(C) Private Writings and Publications.

§ 354 (Okla.) In action by building contractor for damages, contractor's books of original entries *held* competent evidence.—*First Nat. Bldg. Co. v. Vandenberg*, 119 P. 224.

"Ledger" *held* not a book of original entries, within rule as to admissibility of evidence.—*Id.*

§ 358 (Mont.) In an action against a city for damages by a change in the grade of a street, certain evidence *held* admissible to aid in identifying plaintiff's property.—*Drew v. City of Butte*, 119 P. 279.

(D) Production, Authentication, and Effect.

§ 376 (Okla.) Party introducing books of account *held* required to show that the record is an honest one.—*First Nat. Bldg. Co. v. Vandenberg*, 119 P. 224.

Entries in a book of accounts, kept by a bookkeeper employed for that purpose, must be verified by the bookkeeper, if alive and accessible.—*Id.*

**XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.**

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

§ 397 (Wash.) Parol evidence *held* admissible to explain interlineations and material alterations made in a writing before its execution.—*Titus v. Titus*, 119 P. 813.

§ 417 (Cal.) Certain parol evidence *held* not to vary acceptances of orders given plaintiff upon a bank in payment of work done by plaintiff.—*Whittier v. Home Savings Bank of Los Angeles*, 119 P. 92.

§ 425 (Cal.) A contemporaneous parol agreement *held* not to alter the terms of a written contract to complete street improvements.—*Whittier v. Home Savings Bank of Los Angeles*, 119 P. 92.

(C) Separate or Subsequent Oral Agreement.

§ 441 (Cal.) Where a writing is essential to the transfer of land, a reservation of crops cannot be established by parol to impair the effect of a deed conveying the land without reservation.—*Wilson v. White*, 119 P. 895.

(D) Construction or Application of Language of Written Instrument.

§ 450 (Okla.) A written contract *held* so ambiguous as to authorize the admission of evidence as to the construction placed thereon by the parties.—*Rider v. Morgan*, 119 P. 958.

§ 455 (Wash.) A contract of sale *held* ambiguous on the question of liability for freight charges in the event the sale fails, so as to render parol evidence on the subject admissible.—*Steenstrup v. Toledo Foundry & Machine Co.*, 119 P. 16; *Elliott v. Same*, *Id.* 19.

**XII. OPINION EVIDENCE.**

(A) Conclusions and Opinions of Witnesses in General.

§ 471 (Cal.) A question to a witness, though calling for a conclusion, *held* in the discretion of the court.—*Consolidated Lumber Co. v. Fidelity & Deposit Co. of Maryland*, 119 P. 506.

§ 471 (Kan.) Testimony of plaintiff as to receipts and expenses of business *held* not to be conclusions.—*Mensing v. Wright*, 119 P. 374.

§ 471 (Mont.) On an issue as to whether insured had sustained a surgical operation, it was error to permit physicians to testify that the aspiration of his chest was a minor surgical operation.—*Pelican v. Mutual Life Ins. Co. of New York*, 119 P. 778.

§ 472 (Cal.) In an action for injuries to an employé, questions asked the employé while testifying *held* improper as calling for a conclusion.—*Arnold v. California Standard Portland Cement Co.*, 119 P. 913.

§ 472 (Kan.) Testimony as to whether a bridge was a safe place to work *held* inadmissible, where the jury could understand its condition from the evidence.—*Duncan v. Atchison, T. & S. F. Ry. Co.*, 119 P. 356.

§ 474 (Idaho) Witness *held* not required to qualify as an expert before testifying as to value on property sought to be condemned and damages to property not taken.—*Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60.

§ 481 (Cal.) In an action for injuries to an employé, a witness *held* required to be confined to the facts and the usual method of operations in the work and the things necessary to do to avoid danger.—*Arnold v. California Standard Portland Cement Co.*, 119 P. 913.

§ 498 (Or.) A party to a contract, seeking to recover loss of profits by breach of the contract, *held* required to establish probable profits by proof of data from which the extent of the profits may be computed.—*Hagestrom v. Sweeney*, 119 P. 725.

§ 501 (Idaho) Permitting witnesses to explain testimony as to value of land sought to be condemned *held* not error.—*Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60.

§ 502 (Idaho) An expert testifying as to value of property sought to be condemned and damages to property not taken may be cross-examined as to his means of knowing values.—*Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60.

(B) Subjects of Expert Testimony.

§ 512 (Kan.) Expert testimony is admissible on issue of competency of an engineer.—*Saunders v. Atchison, T. & S. F. Ry. Co.*, 119 P. 552.

(C) Competency of Experts.

§ 539½ (Kan.) Opinions of railway employes as to which side of freight trains it was proper for brakemen to alight to give signals *held* properly received.—*Duncan v. Atchison, T. & S. F. Ry. Co.*, 119 P. 356.

§ 543 (Colo.) Witnesses *held* competent to testify as to the value of farm land.—*Mountz v. Apt*, 119 P. 150.

(D) Examination of Experts.

§ 554 (Kan.) Questions submitted to experts as to sufficiency of apparatus to arrest escape of sparks from engine *held* not prejudicial.—*Saunders v. Atchison, T. & S. F. Ry. Co.*, 119 P. 552.

(E) Effect of Opinion Evidence.

§ 568 (Wash.) Testimony of experts as to the value of sheep *held* to sustain a judgment, though they did not testify as to the facts on which their opinion was based.—*Rothrock v. Hunter*, 119 P. 1114.

**XIV. WEIGHT AND SUFFICIENCY.**

§ 588 (Kan.) The jury, while exclusive judges of the weight of the evidence, cannot act from partiality or caprice.—*Sundgren v. Stevens*, 119 P. 322.

**EXAMINATION.**

See Witnesses, §§ 246-275.

**EXCAVATIONS.**

See Contracts, §§ 175, 350; Damages, § 121.

**EXCEPTIONS.**

See Trial, § 91.

**EXCEPTIONS, BILL OF.**

See Appeal and Error, § 684.

**II. SETTLEMENT, SIGNING, AND FILING.**

§ 43 (Cal.App.) The discretion lodged in courts, under Code Civ. Proc. § 473, *held* not abused by denying a motion for relief thereunder, on the ground that a party's attorney did not know of the time within which a bill of exceptions was required to be filed for appeal.—*Blumer v. Mayhew*, 119 P. 202.

§ 53 (Cal.App.) On application by parties for the signature of a trial judge to a bill of exceptions involving his amendment of the judgment, *held*, that a peremptory writ of mandamus would issue.—*Calkins v. Monroe*, 119 P. 680.

**EXCESSIVE DAMAGES.**

See Damages, § 182.

**EXCHANGE OF PROPERTY.**

See Guaranty.

§ 3 (Wash.) Facts *held* to show a failure of consideration for a conveyance by a party to a contract for the exchange of property.—*Blum v. Smith*, 119 P. 183.

A party to a contract for the exchange of property *held* entitled to rely on representations made by the adverse party thereto.—*Id.*

§ 5 (Wash.) A party to a contract for the exchange of property *held* not estopped from exercising the right to rescind.—*Blum v. Smith*, 119 P. 183.

§ 8 (Colo.) In an action for fraud, inducing an exchange of real estate, the court in charging on the measure of damages *held* justified in adopting the theory on which the case was tried without objection.—*Mountz v. Apt*, 119 P. 150.

§ 8 (Idaho) In an action to rescind contract for sale of real estate for certain shares of stock in a corporation, evidence *held* insufficient to show that the corporation was insolvent, or in failing circumstances at the time of the trade.—*Nobach v. Scott*, 119 P. 295.

In action to rescind contract, evidence *held* to authorize judgment of nonsuit.—*Id.*

**EXCUSABLE HOMICIDE.**

See Homicide, § 116.

**EXECUTION.**

See Appeal and Error, § 781; Homestead; Interest, § 22; Judgment, § 903; Mortgages, § 502; New Trial, § 12.

**II. PROPERTY SUBJECT TO EXECUTION.**

§ 27 (Cal.App.) In the absence of provision, or under the express provision of Civ. Code, §

388, *held*, that a toll road franchise was subject to levy on execution.—*People v. Lawley*, 119 P. 1089.

**III. ISSUANCE, FORM, AND REQUISITES OF WRIT.**

§ 75 (Idaho) Under Rev. Codes, § 4470, party in whose favor judgment is given *held* entitled to execution at any time within five years from entry of the judgment.—*Bashor v. Beloit*, 119 P. 55.

**VII. SALE.**

(A) Manner, Conduct, Validity, and Confirming or Vacating.

§ 222 (Wash.) Under Laws 1899, c. 53, § 3, an owner of property is not entitled to personal notice of a judicial sale thereof.—*Johnson v. Johnson*, 119 P. 22.

§ 228 (Wash.) A fiduciary relation of the purchaser to the owner which will avoid a judicial sale to satisfy a judgment for attorney's fees and costs rendered in a divorce suit *held* not to exist between the defendant in divorce and the attorney for his wife.—*Johnson v. Johnson*, 119 P. 22.

§ 250 (Wash.) Inadequacy of price alone is not sufficient to invalidate a judicial sale.—*Johnson v. Johnson*, 119 P. 22.

§ 256 (Wash.) In an action to set aside a judicial sale of property as fraudulent, evidence *held* to show the notice of sale to the owner.—*Johnson v. Johnson*, 119 P. 22.

**EXECUTIVE POWER.**

See Constitutional Law, § 80.

**EXECUTORS AND ADMINISTRATORS.**

See Appeal and Error, § 1050; Continuance, § 40; Descent and Distribution; Life Estates, § 28; Wills.

**II. APPOINTMENT, QUALIFICATION, AND TENURE.**

§ 29 (Kan.) Whether a person appointed administrator is a resident of the state *held* a question of fact for the court.—*Livermore v. Ayres*, 119 P. 549.

Under Gen. St. 1909, § 3463, probate court appointing nonresident as administrator *held* not to lose jurisdiction.—*Id.*

**III. ASSETS, APPRAISAL, AND INVENTORY.**

§ 66 (Mont.) Though the right of an heir to take vests at once on the death of the intestate, yet the property goes under Rev. Codes, §§ 4819, 7493, under the control of the district court and the possession of the administrator for purpose of administration.—*In re Colbert's Estate*, 119 P. 791.

**VI. ALLOWANCE AND PAYMENT OF CLAIMS.**

(A) Liabilities of Estate.

§ 202 (Kan.) The claim of a judgment creditor of a corporation against estate of deceased stockholder is not provable in the probate court until it has been reduced to judgment against the estate.—*Douglass v. Loftus*, 119 P. 74.

(B) Presentation and Allowance.

§ 227 (Colo.) The claim of guarantors against the maker's estate after paying guaranteed notes *held* to be founded upon the notes, and not upon the judgment foreclosing the mortgage securing them, so that it was not necessary to file the exemplification of the judgment with the claim.—*Cone v. Eldridge*, 119 P. 616.

**(C) Disputed Claims.**

§ 256 (Colo.) An objection, in proceedings to enforce a claim against an estate, that the claim was not legally verified will not be considered on appeal, where not made below.—*Cone v. Eldridge*, 119 P. 616.

**VII. DISTRIBUTION OF ESTATE.**

§ 315 (Cal.) Where the construction of a will is necessarily presented for decision, on a petition for final distribution, a decision, construing the will, is conclusive on the beneficiaries.—*In re Fitzgerald's Estate*, 119 P. 96.

**X. ACTIONS.**

§ 437 (Kan.) Limitations applicable on right of action by judgment creditor of corporation to enforce claim against estate of deceased stockholder determined.—*Douglass v. Loftus*, 119 P. 74.

§ 437 (Wash.) An action against an administrator on a rejected claim *held* not brought within three months from the date of rejection, and barred by Rem. & Bal. Code, § 1477.—*Farmers' & Merchants' Bank of Wenatchee v. Lilly*, 119 P. 749.

**EXEMPLARY DAMAGES.**

See Damages, § 91.

**EXEMPTIONS.**

See Homestead.

**I. NATURE AND EXTENT.****(C) Property and Rights Exempt.**

§ 45 (Okl.) A turning lathe weighing 600 pounds used in the business of a machinist *held* exempt under Comp. Laws 1909, § 3846, subd. 5.—*Smith v. Roads*, 119 P. 627.

**(D) Liabilities Enforceable Against Exempt Property.**

§ 65 (Kan.) An oral chattel mortgage, given by the purchaser of mules to secure a loan to meet a check, given in payment for the mules, was superior to exemption rights claimed by the widow of the mortgagor.—*Dosbaugh Nat. Bank v. Jelf*, 119 P. 538.

**EXPERT TESTIMONY.**

See Evidence, §§ 471-568.

**EXPLOSIVES.**

See Evidence, § 129.

**EXPRESS TRUSTS.**

See Trusts, §§ 21-43.

**FACTORS.**

See Brokers.

**FALSE IMPRISONMENT.**

See Malicious Prosecution.

**FALSE PRETENSES.**

See Larceny, § 14.

**FALSE SWEARING.**

See Criminal Law, § 942; Perjury.

**FEDERAL COURTS.**

See Removal of Causes.

**FEES.**

See Appeal and Error, § 625; Attorney and Client; Officers, § 74.

**FELLOW SERVANTS.**

See Master and Servant, §§ 163-201, 254.

**FENCES.**

See Boundaries, § 47; Municipal Corporations, § 671.

§ 16 (Kan.) Fence viewers *held* authorized to assign to each of adjoining owners a certain half of the fence which one had built, he to maintain it but not to include in award to builder anything in excess of its value as a fence.—*Griffith v. Carrothers*, 119 P. 548.

Landowner building needlessly expensive fence *held* not entitled to recover excess over what is necessary to make it a practical fence for the turning of stock, from adjoining owner.—*Id.*

Fence viewers *held* not warranted in including value of trees grown on division line in award against delinquent owner.—*Id.*

§ 25 (Okl.) One who constructed a barbed-wire fence around land in Indian Territory in negligent manner, causing injury to stock running at large, *held* liable to the owner of the stock.—*Mullen v. Rensleman*, 119 P. 641.

Evidence, in action for injuries to animals running at large, *held* to present a question for the jury whether there was negligence in the construction of a fence.—*Id.*

§ 26 (Kan.) Gen. St. 1909, § 3753, authorizing a person who has laid a fence on a division line to remove it, is not applicable to trees and timber grown on the line.—*Griffith v. Carrothers*, 119 P. 548.

**FERRIES.**

See Evidence, §§ 83, 178.

**I. ESTABLISHMENT AND MAINTENANCE.**

§ 14 (Idaho) Ferry license issued by county commissioners *held* valid, though proceedings were not made a matter of record on minute book.—*Sims v. Milwaukee Land Co.*, 119 P. 37.

**FIDUCIARY RELATIONS.**

See Escrows; Execution, § 228.

**FILING.**

See Appeal and Error, §§ 622, 625, 627; Boundaries, § 54; Chattel Mortgages, §§ 90, 97; Criminal Law, § 1172; Exceptions, Bill of, § 43; Pleading, §§ 192, 356.

**FINDINGS.**

See Appeal and Error, §§ 907, 1002, 1008-1024, 1175; Bills and Notes, § 526; Carriers, § 318; Corporations, § 30; Criminal Law, §§ 543, 564; Divorce, § 150; Estoppel, § 118; Judgment, § 211; New Trial, § 128; Trial, §§ 350-359, 395, 404.

**FIREARMS.**

See Covenants, § 42.

**FIRE INSURANCE.**

See Insurance.

**FIRES.**

See Railroads, § 481; Trial, § 194; Woods and Forests.



**FISH.**

See Game; Sales, § 359.

§ 11 (Cal.) Under Pol. Code, § 4149b, an order attempting to remove a county fish and game warden without charges, notice thereof and opportunity to be heard *held* void, entitling him to continued salary.—*Welch v. Ware* 119 P. 1080.

**FORCIBLE DEFILEMENT.**

See Rape.

**FORCIBLE ENTRY AND DETAINER.**

See Justices of the Peace, § 36.

**I. CIVIL LIABILITY.**

§ 4 (Cal.App.) A corporation's manager, having acquired peaceable possession of certain of its real property pursuant to his employment, *held* not guilty of forcible entry within Code Civ. Proc. § 1159, in refusing to voluntarily surrender possession on the termination of his employment.—*San Francisco & Suburban Home Bldg. Society v. Leonard*, 119 P. 405.

§ 27 (Cal.App.) In an action for forcible entry and detainer, it was error to deny plaintiff's application for an amendment of the complaint under Code Civ. Proc. § 473, specifying various elements of special damages.—*San Francisco & Suburban Home Bldg. Society v. Leonard*, 119 P. 405.

Code Civ. Proc. § 1173, authorizing amendments to conform to proof in forcible entry and detainer, does not confer authority to grant amendments for any other purpose than that prescribed.—*Id.*

§ 30 (Cal.App.) Code Civ. Proc. § 1174, authorizes plaintiff in forcible entry and detainer to recover any and all damages which are the natural and proximate consequence of the forcible or unlawful detainer.—*San Francisco & Suburban Home Bldg. Society v. Leonard*, 119 P. 405.

In an action for unlawful detainer, plaintiff *held* entitled to recover damages for injuries to its business.—*Id.*

An allegation of forcible detainer of real property is sufficient to sustain an award of exemplary damages.—*Id.*

§ 34 (Cal.App.) Whether damages should be trebled and exemplary damages thereby awarded in an action for unlawful detainer *held* a question for the court, and not for the jury, under Code Civ. Proc. §§ 735, 1174.—*San Francisco & Suburban Home Bldg. Society v. Leonard*, 119 P. 405.

**FORECLOSURE.**

See Mortgages, §§ 358-538.

**FOREIGN CORPORATIONS.**

See Corporations, §§ 646, 661.

**FOREIGNERS.**

See Aliens.

**FOREIGN LAWS.**

See Evidence, § 80.

**FOREMAN.**

See Master and Servant, §§ 190, 205, 245.

**FORFEITURES.**

See Bail, §§ 73, 77; Insurance, §§ 810, 335, 372, 665, 756; Mines and Minerals, §§ 38, 77, 78; Turnpikes and Toll Roads, § 31.

**FORMER ADJUDICATION.**

See Judgment, §§ 713, 719.

**FORMER JEOPARDY.**

See Criminal Law, § 292.

**FRANCHISES.**

See Execution, § 27; Municipal Corporations, §§ 680, 681, 682; Turnpikes and Toll Roads.

**FRATERNAL INSURANCE.**

See Insurance, § 756.

**FRAUD.**

See Action, § 38; Appeal and Error, §§ 999, 1068; Bills and Notes, §§ 345, 497, 509, 525; Bribery: Cancellation of Instruments; Chat-tel Mortgages, §§ 176, 190; Contracts, § 94; Ejectment, §§ 4, 93; Estoppel, § 83; Exchange of Property, § 8; Fraudulent Conveyances; Insurance, §§ 256-268, 646, 668; Limitation of Actions, §§ 37, 84, 100; Municipal Corporations, §§ 1016, 1034; Principal and Agent, § 156; Vendor and Purchaser, §§ 34, 44, 118; Wills, §§ 164-166.

**I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.**

§ 9 (Wash.) A false representation *held* fraud sufficient to support a suit to rescind a contract made in reliance thereon for an exchange of property.—*Blum v. Smith*, 119 P. 183.

§ 11 (Cal.) A statement by a purchaser as to when a prior option given by the vendor expired *held* a matter of opinion on a question of law, so that the vendor could not predicate fraud thereon, for the purpose of canceling a contract of sale.—*Rheingans v. Smith*, 119 P. 494.

§ 12 (Cal.) Under Civ. Code, § 1572, the mere making of a promise, which the promisor fails or refuses to perform, *held* not to constitute actionable fraud.—*Rheingans v. Smith*, 119 P. 494.

§ 23 (Cal.) Vendor *held* not entitled to predicate fraud upon statements by the purchaser, except as stated.—*Rheingans v. Smith*, 119 P. 494.

**FRAUDS, STATUTE OF.****VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.**

§ 63 (Or.) Under the statute of frauds, L. O. L. §§ 804, 808, an assignee of a leasehold for more than one year *held* not liable on the covenants of the lease, unless the assignment is in writing.—*Culver v. Van Valkenburgh*, 119 P. 753.

An oral assignment of a leasehold for more than one year cannot be construed as a tenancy from year to year, so as to make the assignee liable for breach of the covenants of the lease.—*Id.*

A new and independent parol agreement between a lessee for a term of years and a third person, does not create a liability against the third person, under the statute of frauds (L. O. L. §§ 804, 808), for breach of covenants of the lease.—*Id.*

§ 70 (Cal.) Parol agreement, establishing boundary line between the lands of adjoining owners, although differing from the boundary described in the parties' deeds, *held* not to violate the statute of frauds as a parol conveyance of land.—*Price v. De Reyes*, 119 P. 893.

**VIII. REQUISITES AND SUFFICIENCY OF WRITING.**

§ 107 (Or.) To satisfy the statute of frauds, the memorandum of a contract to sell land must be definite as to the parties, their intentions, and their relation to each other.—*Mossie v. Cyrus*, 119 P. 485.

§ 108 (Or.) A contract in writing, employing a broker, *held* not void, under the statute of frauds (L. O. L. § 808), for failure to state consideration.—*Henderson v. Lemke*, 119 P. 482.

§ 110 (Or.) A contract in writing, employing a broker, *held* not void, under the statute of frauds (L. O. L. § 808), for failure to describe property to be sold.—*Henderson v. Lemke*, 119 P. 482.

§ 112 (Or.) A contract in writing, employing a broker, *held* not void, under the statute of frauds (L. O. L. § 808), for failure to state price to be paid for property.—*Henderson v. Lemke*, 119 P. 482.

**IX. OPERATION AND EFFECT OF STATUTE.**

§ 129 (Or.) Part performance by an assignee of a leasehold for more than one year, holding under a parol assignment, does not take the case out of the statute of frauds (L. O. L. §§ 804, 808), so as to support an action for the assignee's breach of the covenants of the lease.—*Culver v. Van Valkenburgh*, 119 P. 753.

§ 138 (Wash.) Where defendants orally agreed to convey certain land to plaintiffs in the future, but breached such agreement, plaintiffs were entitled to recover the value of improvements erected on the land on the faith of defendants' promise.—*Ernst v. Schmidt*, 119 P. 828.

**FRAUDULENT CONVEYANCES.**

See Criminal Law, § 1169.

**I. TRANSFERS AND TRANSACTIONS INVALID.****(B) Consideration.**

§ 96 (Kan.) Deed by son to mother, without consideration, not recorded until after levy of attachment, *held* void under the statute of frauds (Gen. St. 1909, § 3834).—*First Nat. Bank of Pittsburg, Pa., v. Lawrence*, 119 P. 535.

**IV. CRIMINAL RESPONSIBILITY.**

§ 329 (Cal.App.) An alleged sale of a jewelry business by defendant to his father *held* no defense to a subsequent prosecution of defendant for selling and conveying the property with intent to defraud merchandise creditors.—*People v. Lederer*, 119 P. 949.

§ 331 (Cal.App.) In a prosecution for fraudulently conveying property with intent to defraud creditors, evidence *held* to show an intent on defendant's part to dispose of his stock of goods and to leave his creditor without means of satisfying the debt.—*People v. Lederer*, 119 P. 949.

**GAME.**

See Fish.

§ 6 (Cal.) Under Pol. Code, § 4149b, an order attempting to remove a county fish and game warden without charges, notice thereof and opportunity to be heard *held* void, entitling him to continued salary.—*Welch v. Ware*, 119 P. 1080.

**GARNISHMENT.****VIII. CLAIMS BY THIRD PERSONS.**

§ 218 (Okla.) Where a fund in a garnishee's hand is claimed by a third party, the latter has

the burden of proof.—*Terry v. Parnell*, 119 P. 629.

It is error to sustain an objection to the introduction in evidence of an assignment, regular on its face, under which a third party claims title to a fund.—*Id.*

**GAS.**

See Mines and Minerals, §§ 55-79.

§ 14 (Kan.) Ordinance enacted by city furnishing natural gas to its inhabitants *held* not presumptively unreasonable as to charges.—*Cunningham v. City of Iola*, 119 P. 317.

**GATES.**

See Municipal Corporations, § 433.

**GENERAL DENIAL.**

See Pleading, § 372.

**GENERAL WARRANTY.**

See Insurance, § 268.

**GIFTS.**

See Bribery; Intoxicating Liquors, § 158.

**I. INTER VIVOS.**

§ 18 (Idaho) A declaration of intention to make a gift, unaccompanied by a transfer or delivery of the property, is no gift, and cannot be enforced by the courts.—*Bliss v. Bliss*, 119 P. 451.

§ 23 (Kan.) The requirement of delivery is satisfied by the donor retaining possession as trustee for the benefit of the donee.—*Pohl v. Fulton*, 119 P. 716.

§ 47 (Kan.) The law presumes acceptance of a beneficial gift by one who because of his feebleness of mind is incapable of accepting it.—*Pohl v. Fulton*, 119 P. 716.

§ 49 (Kan.) Evidence *held* sufficient to show a completed gift.—*Pohl v. Fulton*, 119 P. 716.

**GOOD FAITH.**

See Appeal and Error, § 999; Bills and Notes, §§ 327-370, 497, 509, 537, 538; Corporations, § 425; Ejectment, § 17; Estoppel, § 99; Specific Performance, §§ 92, 97.

**GOVERNOR.**

See States, § 41.

**GRAND JURY.**

§ 41 (Cal.App.) The action of a grand juror cannot, in a collateral proceeding, an action for malicious prosecution, be impeached by his testimony that he did not intend to find any such indictment.—*Carpenter v. Sibley*, 119 P. 391.

**GUARANTY.**

See Executors and Administrators, § 227; Subrogation.

**I. REQUISITES AND VALIDITY.**

§ 4 (Cal.App.) An agreement for an exchange of lands *held* not to make codefendant liable as guarantor of a note given by defendant.—*Reeg v. McArthur*, 119 P. 105.

**II. CONSTRUCTION AND OPERATION.**

§ 47 (Colo.) A guarantor *held* only secondarily liable; his contract being to pay or perform if his principal does not do so.—*Cone v. Eldridge*, 119 P. 616.

**GUARDIAN AD LITEM.**

See Insane Persons.

## GUARDIAN AND WARD.

See Indians, § 20.

### III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

§ 44 (Okla.) Under Mansf. Dig. §§ 3502, 3509, 3510, 3511 (Ind. T. Ann. St. 1899, §§ 2398, 2405, 2406, 2407), a guardian's lease of his ward's land, under an order of the probate court, was valid, though it extended beyond minority.—Huston v. Cobleigh, 119 P. 418.

### GUARDS.

See Master and Servant, § 121.

### HARMLESS ERROR.

See Appeal and Error, §§ 1028-1071; Criminal Law, §§ 1166½-1175.

### HEARSAY EVIDENCE.

See Evidence, §§ 314-323.

### HEIRS.

See Descent and Distribution.

### HIGHWAYS.

See Counties, § 190; Municipal Corporations, §§ 289-1084; Statutes, § 123; Turnpikes and Toll Roads.

### I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) Establishment by Prescription, User, or Recognition.

§ 7 (Or.) Slight improvements of a private way held insufficient to impart notice to the owners of the fee of an intention to assert adverse use.—A. C. Bohrnstedt Co. v. Scharen, 119 P. 337.

Where a private way was a cul-de-sac, it was not incumbent on the owners of the fee to place obstructions therein in order to notify users that the right to use was revocable.—Id.

### II. HIGHWAY DISTRICTS AND OFFICERS.

§ 90 (Okla.) Under Act 2d Leg. (Sess. Laws 1909, c. 32, art. 1) §§ 52, 55, 56, written petition for formation of road district held required to be signed by 15 per cent. of electors in district, excluding electors within incorporated towns or cities.—Rea v. State, 119 P. 235.

Sess. Laws 1909, c. 32, art. 1, § 53 (Comp. Laws 1909, § 7805), relating to issuance of bonds by county for improvement road districts, held not to make holding of election condition precedent to forming of road district.—Id.

### V. REGULATION AND USE FOR TRAVEL.

(A) Obstructions and Encroachments.

§ 159 (Wash.) An obstruction of a street, dedicated to a county and used for many years, held unauthorized.—Mohr v. Pierce County, 119 P. 747.

### HOMESTEAD.

See Divorce, § 249; Public Lands, §§ 40, 103, 106.

### I. NATURE, ACQUISITION, AND EXTENT.

(A) Nature, Creation, and Duration of Estate or Right in General.

§ 1 (Okla.) Homesteads exist only by statutory or constitutional provisions.—Maloy v. Wm. Cameron & Co., 119 P. 587.

(C) Acquisition and Establishment.

§ 55 (Wash.) By virtue of Rem. & Bal. Code, §§ 532, 533, a certain property which was declared to be a homestead held exempt from execution on a judgment.—Snelling v. Butler, 119 P. 3.

### II. TRANSFER OR INCUMBRANCE.

§ 118 (Okla.) Alienation or incumbrance of homestead by husband alone held valid, in the absence of statutory provision to the contrary.—Maloy v. Wm. Cameron & Co., 119 P. 587.

Under Wilson's Rev. & Ann. St. 1903, §§ 880, 882, 883, title to a homestead being in the husband, where he mortgages the same without being joined by the wife, his rights therein are concluded.—Id.

Where husband alone incumbers homestead, on foreclosure, where wife is a party, the mortgage could be avoided as to her rights, and foreclosure decreed only against the rights of the husband.—Id.

### HOMICIDE.

See Criminal Law, §§ 108, 404, 1020; Indictment and Information, § 189.

### II. MURDER.

§ 7 (Mont.) Evidence of motive held not essential to a conviction of murder.—State v. Roberts, 119 P. 566.

§ 11 (Mont.) Malice may be inferred in a prosecution for murder from want of considerable provocation.—State v. Roberts, 119 P. 566.

§ 29 (Okla.Cr.App.) Evidence held not to authorize instruction as to law of voluntary withdrawal from conspiracy.—Holmes v. State, 119 P. 430.

Persons confederating together to commit crime of robbery held responsible for murder of person robbed.—Id.

Parties voluntarily acting together in any act resulting in death of another held as guilty of murder as if they had intended the death of the party.—Id.

### III. MANSLAUGHTER.

§ 34 (Or.) "Involuntary," as applied to manslaughter, defined.—State v. Setser, 119 P. 348.

### V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§ 116 (Wash.) Under Rem. & Bal. Code, § 2406, held, that a slayer must have an honest belief of the existence of immediate danger, in order to justify his act.—State v. Bowinkelman, 119 P. 824.

### VI. INDICTMENT AND INFORMATION.

§ 142 (Okla.Cr.App.) Under indictment or information charging murder under Snyder's Comp. Laws 1909, § 2268, subd. 1, conviction held to be sustained, if warranted by the evidence under subdivisions 2 or 3.—Holmes v. State, 119 P. 430.

### VII. EVIDENCE.

(B) Admissibility in General.

§ 194 (Okla.Cr.App.) Where the plea is self-defense, evidence as to whether accused was intoxicated held competent.—Stouse v. State, 119 P. 271.

(C) Dying Declarations.

§ 203 (Colo.) Statements made by deceased in the full realization that death was impending were admissible as dying declarations.—Jamison v. People, 119 P. 474.

§ 215 (Colo.) A remark by deceased after he had been shot held inadmissible as a conclusion.—Jamison v. People, 119 P. 474.



**(E) Weight and Sufficiency.**

§ 257 (Ok!.Cr.App.) Evidence on trial for assault with intent to kill *held* to sustain conviction of felonious assault.—Richardson v. State, 119 P. 1125.

**VIII. TRIAL.****(C) Instructions.**

§ 293 (Ok!.Cr.App.) It is only where issue of self-defense is presented that the court need instruct that jury must view facts from standpoint of defendant.—Holmes v. State, 119 P. 430.

§ 300 (Colo.) It was error to instruct in a homicide case that accused relied upon the plea of self-defense; his evidence tending to show that the killing was accidental.—Wiley v. People, 119 P. 620.

§ 309 (Colo.) Where the defense was accidental, *held* error to instruct that the issue of involuntary manslaughter was not in the case.—Wiley v. People, 119 P. 620.

**(D) Verdict.**

§ 313 (Or.) A verdict, convicting of "involuntary manslaughter," is sufficient as a general verdict convicting of "manslaughter," under L. O. L. §§ 1897-1902, 1905.—State v. Setsor, 119 P. 346.

**X. APPEAL AND ERROR.**

§ 325 (Wash.) In a homicide case, where no instructions were requested, there can be no complaint on appeal of the failure of the trial court to submit all matters of justification.—State v. Bowinkelman, 119 P. 824.

§ 332 (Colo.) The Supreme Court must be certain that a judgment of conviction imposing a death penalty is sustained by the weight of the evidence before it will permit it to stand.—Piel v. People, 119 P. 687.

§ 332 (Ok!.Cr.App.) Where testimony shows aggravated case of murder, Criminal Court of Appeals *held* to have no right to interfere with verdict on ground that death penalty should not have been inflicted.—Holmes v. State, 119 P. 430.

§ 338 (Colo.) Where accused admitted that he shot deceased, the admission of statements by deceased that accused shot him was harmless, if erroneous.—Jamison v. People, 119 P. 474.

The admission of certain testimony *held* prejudicial.—Id.

§ 340 (Colo.) Error in charging that accused testified that he was in fear of life and limb when he struck decedent when he did not so testify *held* prejudicial.—Wiley v. People, 119 P. 620.

§ 340 (Utah) A conviction for assault with intent to murder will not be set aside on the ground that the court erred in submitting the issue of murder because of the insufficiency of the evidence.—State v. Vance, 119 P. 309.

§ 340 (Wash.) Despite Rem. & Bal. Code, § 2406, *held*, that an instruction in a homicide case did not prejudice accused.—State v. Bowinkelman, 119 P. 824.

**HOUSEBREAKING.**

See Burglary.

**HUSBAND AND WIFE.**

See Adultery; Appeal and Error, § 894; Contracts, § 111; Divorce; Homestead; Limitation of Actions, § 197; Marriage.

**VII. COMMUNITY PROPERTY.**

§ 262 (Wash.) Under Rem. & Bal. Code, § 5917, a bill of sale of personalty executed by a wife alone *held* a nullity, in the absence of evi-

dence that the property was her separate property.—Blum v. Smith, 119 P. 183.

**VIII. SEPARATION AND SEPARATE MAINTENANCE.**

§ 279 (Wash.) A separation agreement *held* to entitle the wife to a stipulated sum, though the children, for whose benefit the stipulation was made, were graduated from their colleges before the expiration of a fixed period.—Titus v. Titus, 119 P. 813.

§ 299 (Cal.) In an action for separate maintenance, an order granting alimony and attorney's fees, and making the same a lien on property previously conveyed by the husband, without notice to the grantees, *held* erroneous.—Clopton v. Clopton, 119 P. 651.

**HYPOTHETICAL QUESTIONS.**

See Mandamus, § 16.

**IDEM SONANS.**

See Names, § 16.

**IDENTIFICATION.**

See Appeal and Error, § 837.

**IMPAIRING OBLIGATION OF CONTRACT.**

See Constitutional Law, §§ 89, 152.

**IMPEACHMENT.**

See Grand Jury; Witnesses, §§ 317-410.

**IMPLIED CONTRACTS.**

See Money Received.

**IMPRISONMENT.**

See Bail; Criminal Law, §§ 800, 1147; Parent and Child, § 17.

**IMPROVEMENTS.**

See Frauds, Statute of, § 138; Highways, § 7; Municipal Corporations, §§ 289-514, 918.

§ 4 (Ok!). Heirs of defendant in possession of land *held* entitled to assert rights as occupying claimants, pursuant to Comp. Laws 1909, §§ 6128, 6130.—Hewitt v. Goldsborough, 119 P. 983.

**INCOMPETENCY.**

See Insane Persons.

**INCORPORATION.**

See Corporations, §§ 25, 30.

**INCUMBRANCES.**

See Covenants.

**INDEMNITY.**

See Constitutional Law, § 245; Guaranty; Master and Servant, § 11.

**INDIANS.**

See Appeal and Error, § 1011; Criminal Law, §§ 804, 742; Eminent Domain, § 268; Intoxicating Liquors, § 223; States, § 9.

§ 1 (Ok!). Petition *held* not to state a cause of action to declare a trust in Indian lands allotted to defendant in favor of plaintiff.—Robinson v. Owen, 119 P. 995.

§ 18 (Ok!). Descent and distribution of allotted lands of enrolled Creek Indian, who died before ratification of Original Creek Treaty,

and who had allotment under Curtis' Act, § 11, ratified by section 6 of the treaty, *held* by section 28 of the treaty to be controlled by the law of distribution and descent of the Creek Nation.—*Barnett v. Way*, 119 P. 418.

In determining the heirs of deceased enrolled Creek Indian, whose allotment was ratified by Original Creek Treaty, § 6, laws of descent and distribution of Creek Nation are to be applied as if deceased Indian had received title during life.—*Id.*

Mode of descent of Indian allotment under Original Creek Treaty, § 28, stated.—*Id.*

§ 20 (Okl.) Procedure by guardian of Cherokee minor children for sale of their interests in allotment *held* in substantial compliance with Act Cong. April 26, 1906, § 22.—*Wilson v. Morton*, 119 P. 213.

Act Cong. April 26, 1906, § 22, *held* to prescribe procedure to be followed in making sales of inherited lands of Indian minors.—*Id.*

§ 27 (Okl.) In ejectment by a Cherokee allottee, burden *held* on defendant to controvert plaintiff's rights under her allotment certificate.—*Denver, W. & M. Ry. Co. v. Adkinson*, 119 P. 247.

§ 27 (Okl.) Court of equity of Oklahoma *held* to have power to grant relief, where the Dawes Commission or the Secretary of the Interior were induced to patent land to wrong person.—*Robinson v. Owen*, 119 P. 995.

## INDICTMENT AND INFORMATION.

See Bribery; Burglary; Criminal Law, §§ 1020, 1032; Elections, § 328; Grand Jury; Homicide, § 142; Intoxicating Liquors, §§ 210-223; Lewdness.

## V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§ 110 (Wash.) Under Rem. & Bal. Code § 2414, subd. 6, and section 2456, an information *held* to sufficiently charge an assault with intent to commit sodomy.—*State v. Harsted*, 119 P. 24.

## VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§ 125 (Okl.Cr.App.) Information *held* not duplicitous, since it charges only rape in the second degree.—*Myers v. State*, 119 P. 136.

## X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

§ 189 (Utah) Under Comp. Laws 1907, § 4893, one charged with murder *held* properly convicted of assault with intent to murder.—*State v. Vance*, 119 P. 309.

§ 189 (Wash.) In view of Rem. & Bal. Code, § 2168, one charged with assault in the first degree, under section 2413, *held* properly convicted of second-degree assault, as defined by section 2414.—*State v. Copeland*, 119 P. 607.

## INDORSEMENT.

See Bills and Notes, §§ 226-370.

## INFANTS.

See Appeal and Error, § 349; Assault and Battery, §§ 89, 92; Criminal Law, §§ 369, 678; Divorce, §§ 303, 312; Guardian and Ward; Indians, § 20; Justices of the Peace, § 36; Municipal Corporations, § 706; Parent and Child; Rape, § 13.

## VII. ACTIONS.

§ 115 (Mont.) An infant represented in an action at law as required by Rev. Codes, § 6481, by a guardian ad litem appointed as provided by section 6482, *held* not entitled to complain of errors where no objections were made

and exceptions saved.—*Byrnes v. Butte Brewing Co.*, 119 P. 788.

## INFORMATION.

See Indictment and Information.

## INHERITANCE.

See Aliens; Descent and Distribution.

## INJUNCTION.

See Appeal and Error, §§ 190, 954; Eminent Domain, § 275; Judgment, § 432; Municipal Corporations, § 671; Taxation, §§ 608, 611; Venue, § 13; Waters and Water Courses, § 33.

## I. NATURE AND GROUNDS IN GENERAL.

### (B) Grounds of Relief.

§ 12 (Mont.) An injunction will not issue to restrain an act already committed.—*Iverson v. Dilno*, 119 P. 719.

§ 12 (Okl.) An injunction to prevent a city council from entering into a contract will be denied where prior to the issuance of the writ the contract had been executed.—*Cross v. City of Lawton*, 119 P. 625.

§ 21 (Colo.) Whether connivance, acquiescence, or laches shall affect the issuance of an injunction *held* to rest in the sound discretion of the chancellor.—*Kirby v. Union Pac. Ry. Co.*, 119 P. 1042; *Same v. Colorado & S. Ry. Co.*, *Id.* 1056.

## II. SUBJECTS OF PROTECTION AND RELIEF.

### (B) Property, Conveyances, and Incumbrances.

§ 42 (Colo.) The scalping by scalpers of non-transferable passenger tickets *held* to cause sufficient pecuniary loss to the carriers issuing such tickets to warrant an injunction.—*Kirby v. Union Pac. Ry. Co.*, 119 P. 1042; *Same v. Colorado & S. Ry. Co.*, *Id.* 1056.

The act of a carrier in dealing with ticket scalpers *held* not to prevent it from complaining of subsequent dealings by the scalpers in non-transferable passenger tickets.—*Id.*

Where a carrier sought to enjoin ticket scalpers in the future from dealing in nontransferable passenger tickets, the fact that it had connived at or acquiesced in past wrongful acts of the scalpers *held* immaterial.—*Id.*

In a suit by a carrier to enjoin ticket scalpers from dealing in nontransferable passenger tickets, evidence *held* not to defeat injunctive relief on the theory that the carrier had connived in the wrongful acts.—*Id.*

A carrier *held* not estopped from demanding an injunction against ticket scalpers dealing in nontransferable passenger tickets.—*Id.*

§ 55 (Colo.) The business of a person or corporation is property entitled to protection by injunction from unlawful interference.—*Kirby v. Union Pac. Ry. Co.*, 119 P. 1042; *Same v. Colorado & S. Ry. Co.*, *Id.* 1056.

### (G) Personal Rights and Duties.

§ 101 (Mont.) The publication of a circular which merely advises the public that a particular person or firm is deemed unfair to organized labor will not be enjoined, if it contains no threat to injure such person's business.—*Iverson v. Dilno*, 119 P. 719.

## III. ACTIONS FOR INJUNCTIONS.

§ 113 (Colo.) The right of a carrier to injunctive relief against ticket scalpers dealing in nontransferable passenger tickets *held* not lost by lapse of time.—*Kirby v. Union Pac. Ry. Co.*, 119 P. 1042; *Same v. Colorado & S. Ry. Co.*, *Id.* 1056.

§ 118 (Colo.) A complaint by a railroad company to restrain ticket scalpers from dealing in nontransferable passenger tickets *held* to state a cause of action for an injunction.—*Kirby v. Union Pac. Ry. Co.*, 119 P. 1042; *Same v. Colorado & S. Ry. Co.*, Id. 1058.

#### IV. PRELIMINARY AND INTERLOCUTORY INJUNCTIONS.

##### (A) Grounds and Proceedings to Procure.

§ 135 (Cal.App.) The refusal of a temporary injunction to restrain the laying of a pipe line *held* not an abuse of discretion.—*Marre v. Union Oil Co. of California*, 119 P. 104.

§ 136 (Okl.) Temporary injunction *held* not to be granted because of mere apprehension of petitioner that injury may be done.—*City of Woodward v. Raynor*, 119 P. 964.

§ 143 (Colo.) In a suit for an injunction, affidavits of complainant *held* to show an emergency within the Code authorizing a temporary injunction without notice.—*Kirby v. Union Pac. Ry. Co.*, 119 P. 1042; *Same v. Colorado & S. Ry. Co.*, Id. 1058.

##### (B) Continuing, Modifying, Vaseating, or Dissolving.

§ 163 (Idaho) Injunction to restrain operation of mining claim located on railroad right of way modified, so as to permit mining claimants to retain possession of their claim, not interfering with the operation of the road, until determination of the action.—*Chicago, M. & P. S. Ry. Co. v. Ferrell*, 119 P. 703.

#### INNKEEPERS.

See Depositions, § 64; Evidence, § 174.

#### INNOCENT PURCHASERS.

See Boundaries, § 47; Vendor and Purchaser, § 231.

#### IN PAIS.

See Estoppel, §§ 54-118.

#### INSANE PERSONS.

See Divorce, § 303.

#### IX. ACTIONS.

§ 94 (Cal.) In a suit by an incompetent to annul a marriage, a relative was properly appointed guardian ad litem under Code Civ. Proc. §§ 372, 373.—*Dunphy v. Dunphy*, 119 P. 512.

#### INSOLVENCY.

See Banks and Banking, § 84.

#### INSPECTION.

See Master and Servant, § 124.

#### INSTALLMENTS.

See Vendor and Purchaser, § 185.

#### INSTRUCTIONS.

See Criminal Law, §§ 753-823, 1122, 1172, 1173; Master and Servant, §§ 121, 157, 190, 278, 286; Principal and Agent, § 116; Trial, §§ 194-296.

#### INSTRUMENTS.

See Evidence, §§ 397-455.

#### INSURANCE.

See Appeal and Error, §§ 215, 1175; Constitutional Law, § 208; Evidence, § 243; Master and Servant, § 11; Witnesses, § 269.

#### III. INSURANCE AGENTS AND BROKERS.

##### (A) Agency for Insurer.

§ 88 (Cal.App.) An agreement between an insurer's local manager and defendant *held* beyond the authority of the manager.—*Muller v. Swanton*, 119 P. 200.

##### (B) Agency for Applicant or Insured.

§ 103 (Cal.App.) Under employment of an insurance broker to secure insurance, no authority to cancel the same is given or implied.—*Stevenson v. Sun Ins. Office*, 119 P. 529.

In an action on a policy claimed to have been canceled, an instruction on the requisites of a valid cancellation of the policy sued on *held* proper.—Id.

Whether plaintiff knew that an order to a broker to place \$30,000 insurance had been executed before he modified the order so as to reduce it to \$25,000 *held* not material on the question of plaintiff's right to recover on a policy surrendered to effect the reduction.—Id.

#### V. THE CONTRACT IN GENERAL.

##### (A) Nature, Requisites, and Validity.

§ 129 (Cal.) Where insurance policy provided that no provision could be changed save by the president or secretary, the insured cannot escape payment of the premium because of oral representations of the agent.—*Fidelity & Casualty Co. of New York v. Fresno Flume & Irrigation Co.*, 119 P. 646.

§ 136 (Cal.) Under Civ. Code, § 1589, *held*, that the acceptance of an insurance policy signed only by the insured was conclusive upon both the insured and the insurer.—*Fidelity & Casualty Co. of New York v. Fresno Flume & Irrigation Co.*, 119 P. 646.

§ 142 (Cal.) An action upon a written insurance policy *held* no ratification of the agent's oral representations contrary to its provisions.—*Fidelity & Casualty Co. of New York v. Fresno Flume & Irrigation Co.*, 119 P. 646.

##### (B) Construction and Operation.

§ 173 (Okl.) The "three-fourths value" clause in fire policy *held* to be interpreted by same rules as other contracts, so that a substantial compliance therewith is sufficient.—*Shawnee Fire Ins. Co. v. Thompson & Rowell*, 119 P. 985.

#### VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

§ 236 (Cal.App.) A policy *held* to have been canceled from the date of notice to the insurer, though not physically surrendered until after a loss.—*Stevenson v. Sun Ins. Office*, 119 P. 529.

§ 238 (Cal.App.) Authority to cancel insurance may be conferred on an insurance broker, and, when conferred, his acts and agreements in that regard will bind the insured.—*Stevenson v. Sun Ins. Office*, 119 P. 529.

#### IX. AVOIDANCE OF POLICY FOR MISREPRESENTATION, FRAUD, OR BREACH OF WARRANTY OR CONDITION.

##### (A) Grounds in General.

§ 256 (Mont.) "Representation," defined.—*Pelican v. Mutual Life Ins. Co. of New York*, 119 P. 778.

Where questions in an application for life insurance called for representations founded on applicant's knowledge or belief, a misstatement or omission to answer will not avoid the policy unless willfully made with intent to deceive.—Id.

§ 261 (Mont.) Concealment by insured of a fact material to the risk is equivalent to a false representation that the fact does not exist.—*Pelican v. Mutual Life Ins. Co. of New York*, 119 P. 778.

§ 268 (Mont.) "General warranty," defined.—*Pelican v. Mutual Life Ins. Co. of New York*, 119 P. 778.

(C) **Matters Relating to Person Insured.**

§ 291 (Mont.) Application for life insurance policy *held*, under Rev. Codes, § 5043, to make answers to questions, as to insured's health history, representations and not warranties.—*Pelican v. Mutual Life Ins. Co. of New York*, 119 P. 778.

**X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.**

(A) **Grounds in General.**

§ 310 (Or.) A fire policy *held* to become ipso facto void upon nonpayment of a premium so that the company could not maintain an action to recover an assessment.—*Mutual Fire Co. of Portland v. Maple*, 119 P. 484.

(B) **Matters Relating to Property or Interest Insured.**

§ 335 (Okl.) Stipulation in fire insurance policy for inventories and sets of books and their preservation *held* a reasonable provision.—*Shawnee Fire Ins. Co. v. Thompson & Rowell*, 119 P. 985.

Inventory bunching merchandise without itemizing it *held* not a compliance with provision of fire policy.—*Id.*

"Inventory," as used in fire insurance policy, defined.—*Id.*

The "iron-safe" clause in fire policy *held* to be interpreted by same rules as other contracts, so that a substantial compliance therewith is sufficient.—*Id.*

Provision in fire policy relating to keeping of inventory *held* not complied with.—*Id.*

Books kept by insured *held* not a substantial compliance with provisions of fire policy.—*Id.*

**XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.**

§ 372 (Or.) A fire company by suing for a premium after the policy became void for nonpayment of premiums *held* not to waive the forfeiture.—*Mutual Fire Co. of Portland v. Maple*, 119 P. 484.

§ 383 (Okl.) Provision in fire policy that insured must be unconditional owner of the property insured or that the building insured must be on property so owned *held* not waived.—*Phoenix Ins. Co. v. Ceaphus*, 119 P. 583.

**XVIII. ACTIONS ON POLICIES.**

§ 646 (Mont.) In an action on a life policy, plaintiff *held* not bound to prove that the policy was delivered while insured was in good health; the burden of proving the contrary being on the defendant as provided by Rev. Codes, § 7972.—*Pelican v. Mutual Life Ins. Co. of New York*, 119 P. 778.

Where misrepresentations are alleged in defense of a policy, the burden is on insurer to prove not only the falsity, but that they were made with intent to defraud, and that it was actually defrauded.—*Id.*

§ 662 (Kan.) Circumstances to be considered in determining whether award of arbitrators on insurance policy was fairly made determined.—*Mrs. A. K. Ross & Co. v. German Alliance Ins. Co. of New York*, 119 P. 306.

§ 665 (Cal.App.) Evidence *held* to warrant a finding that an order given to an insurance

broker to reduce plaintiff's insurance authorized him to cancel a policy for \$3,000.—*Stevenson v. Sun Ins. Office*, 119 P. 529.

§ 665 (Kan.) Finding that award of arbitrators was invalid, because of the acts of the arbitrator appointed by the insurance company, sustained.—*Mrs. A. K. Ross & Co. v. German Alliance Ins. Co. of New York*, 119 P. 306.

§ 668 (Mont.) Under Rev. Codes, § 5570, misrepresentations made to secure a policy amounting to actual fraud will avoid the same at the option of the insurer; the question of fraud being a question for the jury under section 4980.—*Pelican v. Mutual Life Ins. Co. of New York*, 119 P. 778.

In an action on a life policy, evidence *held* to require submission to the jury of the question whether insured fraudulently misrepresented the prior state of his health, whether he had undergone a surgical operation, etc.—*Id.*

Where insured represented that he had not suffered a surgical operation, and it appeared that his chest had been aspirated, the court should have charged that such treatment was a surgical operation and submitted only the question of good faith.—*Id.*

**XX. MUTUAL BENEFIT INSURANCE.**

(D) **Forfeiture or Suspension.**

§ 756 (Cal.App.) The failure of a member of a fraternal benefit society to pay dues *held* a forfeiture of the certificate without action by the society or subordinate lodge.—*Valentine v. Grand Lodge, A. O. U. W., of California*, 119 P. 871.

A member of a fraternal benefit society may forfeit his rights under his certificate without being suspended from the society.—*Id.*

**INTENT.**

See Contracts, §§ 108, 164; Criminal Law, §§ 21, 823.

**INTEREST.**

See Bills and Notes, § 526; Counties, § 178; Receivers, § 122; Sales, § 187; Witnesses, § 372.

**I. RIGHTS AND LIABILITIES IN GENERAL.**

§ 22 (Idaho) Rev. Codes, § 4471, subd. 1, *held* to require sheriff under execution to satisfy judgment and all interest due thereon.—*Bashor v. Beloit*, 119 P. 55.

**II. RATE.**

§ 38 (Idaho) Rev. Codes, § 1537, subd. 4, and section 1538, *held* to authorize 7 per cent. interest on judgments.—*Bashor v. Beloit*, 119 P. 55.

**III. TIME AND COMPUTATION.**

§ 50 (Cal.) On specific performance of a contract to convey, the purchaser should not be required to pay interest from the date of a refused tender of payment.—*Stein v. Leeman*, 119 P. 663.

§ 60 (Idaho) Rev. Codes, § 1539, relating to compound interest, *held* intended as a regulation of interest on contracts, and not of interest on judgments.—*Bashor v. Beloit*, 119 P. 55.

**INTERLOCUTORY INJUNCTION.**

See Injunction, §§ 135-163.

**INTERNATIONAL LAW.**

See Aliens.

## INTERPRETATION.

See Constitutional Law, §§ 20-48; Contracts, §§ 164-176; Covenants, § 42; Insurance, §§ 173, 335; Pleading, § 34; Sales, §§ 64, 82; Statutes, §§ 181-225; Wills, §§ 439-647.  
Of instructions, see Trial, §§ 295, 296, 404.

## INTERPRETERS.

See Criminal Law, § 656.

## INTERROGATORIES.

See Depositions; Trial, §§ 350-359.

## INTERSTATE COMMERCE.

See Commerce; Intoxicating Liquors, § 146.

## INTOXICATING LIQUORS.

See Bail, § 79; Criminal Law, §§ 377, 742, 823, 987; Landlord and Tenant, § 29; Municipal Corporations, § 111; Statutes, §§ 107, 114.

### I. POWER TO CONTROL TRAFFIC.

§ 10 (Or.) An ordinance *held* a valid regulation of liquor traffic under Woodburn Charter, c. 4, § 5.—*Bachelors' Club v. City of Woodburn*, 119 P. 339.

### II. CONSTITUTIONALITY OF ACTS AND ORDINANCES.

§ 15 (Or.) An ordinance prohibiting disorderly houses *held* valid.—*Bachelors' Club v. City of Woodburn*, 119 P. 339.

§ 17 (Okl.Cr.App.) *Sess. Laws 1911, c. 70, § 4*, providing that it shall be unlawful for any person to have in excess of one quart of spirituous or malt liquors, *held* not a reasonable exercise of the police power and unconstitutional.—*Ex parte Wilson*, 119 P. 596.

### III. LOCAL OPTION.

§ 39 (Wash.) Under Rem. & Bal. Code, § 6297, *held*, that the result of any local option election might be proven by certificate of the town clerk, which merely states the fact of the election and its result.—*State v. Polk*, 119 P. 846.

### VI. OFFENSES.

§ 138 (Okl.Cr.App.) Whisky purchased at an illegal sale cannot be conveyed from the place of purchase to any other place for any purpose.—*Maynes v. State*, 119 P. 644.

Lawful purchase of liquor for lawful purpose may be transported from one place to another in the state where no other provision of law is violated.—*Id.*

A lawful purchase of whisky cannot be conveyed from one place to another when intended for unlawful purpose.—*Id.*

§ 146 (Okl.Cr.App.) Lawful purchase of liquor, as contemplated by the statute, can be had only by interstate shipment or from an authorized state dispensary.—*Maynes v. State*, 119 P. 644.

§ 146 (Or.) Transactions between a club and its members *held* unlawful sales of intoxicants.—*Bachelors' Club v. City of Woodburn*, 119 P. 339.

§ 156 (Wash.) Local Option Law, §§ 9, 12, *held* to prohibit any gift of intoxicating liquor within dry territory, except to guests in private dwellings.—*State v. Jones*, 119 P. 884.

### VIII. CRIMINAL PROSECUTIONS.

§ 210 (Okl.Cr.App.) Indictment for unlawfully conveying whisky within the state need not allege that it is being conveyed for an unlawful purpose.—*Maynes v. State*, 119 P. 644.

§ 215 (Okl.Cr.App.) Information or indictment for furnishing intoxicating liquor *held* re-

quired to set out specific acts constituting the offense.—*Scott v. State*, 119 P. 1023.

§ 223 (Wash.) That the information charged the sale of a quart of intoxicants to a half-blood Indian, while the proof only showed the sale of a pint, was not a fatal variance.—*State v. Rackich*, 119 P. 843.

§ 224 (Okl.Cr.App.) Where, in a prosecution for having possession of intoxicating liquors, with intent to sell, etc., there is no proof of payment of the special tax required of liquor dealers by the United States, in the absence of evidence of unlawful intent, the court should instruct to acquit.—*McCarthy v. State*, 119 P. 1020; *Hinchman v. Same*, *Id.* 1022.

§ 224 (Wash.) One seeking to justify a sale of intoxicating liquor within a local option territory on the ground that he is a physician has the burden of proving that defense.—*State v. Polk*, 119 P. 846.

§ 236 (Okl.Cr.App.) Accused cannot be convicted of an intent to illegally sell liquor because of the quantity he may have in his possession.—*Johnson v. State*, 119 P. 1019.

§ 236 (Okl.Cr.App.) In prosecutions for unlawfully conveying intoxicating liquor, the state is only required to show beyond a reasonable doubt that it was conveyed as alleged.—*Maynes v. State*, 119 P. 644.

§ 236 (Wash.) In a prosecution for the sale of intoxicating liquor within a local option territory, evidence *held* to warrant a conviction.—*State v. Polk*, 119 P. 846.

§ 239 (Colo.) On a trial for selling liquor in anti-saloon territory, a charge *held* not open to a specified objection, in view of the evidence and the instructions.—*Epley v. People*, 119 P. 153, 155.

## INVENTORY.

See Insurance, § 335.

## IRON-SAFE CLAUSE.

See Insurance, § 335.

## IRRIGATION.

See Statutes, §§ 64, 123; Waters and Water Courses, §§ 24, 33.

## JEOPARDY.

See Criminal Law, § 292.

## JOINDER.

See Action, § 48.

## JOINT TENANCY.

See Appeal and Error, § 1067.

## JUDGES.

See Appeal and Error, §§ 185, 569, 925; Courts, § 207; Justices of the Peace; Mandamus; Trial, § 29.

## I. APPOINTMENT, QUALIFICATION, AND TENURE.

§ 11 (Mont.) Under Rev. Codes, § 9006, construed with section 8992 and Const., art. 5, § 18, *held*, that a police judge could be removed from office for charging and receiving illegal compensation, though he did so in good faith and upon advice from the Attorney General.—*State v. District Court, Silver Bow County*, 119 P. 1103.

A charge, made under Rev. Codes, § 9006, that a police judge acted willfully and intentionally in receiving illegal compensation, was surplusage, and not required to be proved as to the charge of intent.—*Id.*

### III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§ 22 (Mont.) In view of Rev. Codes, §§ 3297 and 3300, a police judge *held* not entitled to receive compensation, other than that provided in section 3241, for services as justice of the peace in proceedings arising under the criminal laws.—*State v. District Court, Silver Bow County*, 119 P. 1103.

### IV. DISQUALIFICATION TO ACT.

§ 51 (Mont.) An affidavit *held* sufficient to disqualify a judge on the ground of bias and prejudice, notwithstanding a mistake in stating his Christian name.—*State v. District Court of the Ninth Judicial Dist. in and for the County of Gallatin*, 119 P. 174.

Under Rev. Codes, § 6315, *held*, that a judge may be disqualified by imputation of bias and prejudice made in the language of the statute.—*Id.*

### JUDGMENT.

See Appeal and Error; Constitutional Law, § 152; Corporations, § 217; Courts, § 95; Criminal Law, § 987; Divorce, §§ 182, 246; Eminent Domain, § 243; Evidence, §§ 264, 340; Execution; Executors and Administrators, §§ 227, 315; Interest; Mandamus, §§ 3, 4, 164, 168; Master and Servant, § 254; Mortgages, § 497; Names, § 18.

### I. NATURE AND ESSENTIALS IN GENERAL.

§ 17 (Kan.) A judgment *held* void for want of jurisdiction of the person of defendant.—*State v. Will*, 119 P. 379.

§ 18 (Kan.) Judgment for defendant for title to property after sustaining demurrer on ground of misjoinder of causes *held* *coram non judice*, and void.—*New v. Smith*, 119 P. 380.

### IV. BY DEFAULT.

#### (B) Opening or Setting Aside Default.

§ 139 (Colo.) The discretion of the trial court as to vacating a default is a legal, and not an arbitrary, one.—*Gumaer v. Bell*, 119 P. 681.

§ 139 (Mont.) Whether a default judgment should be set aside *held* to rest within the sound legal discretion of the trial court.—*Swilling v. Cottonwood Land Co.*, 119 P. 1102.

§ 143 (Colo.) Defendants' failure to file an appearance within the time limited *held* excusable neglect under Rev. Code, § 81, so as to warrant opening a default.—*Gumaer v. Bell*, 119 P. 681.

Under Rev. Code, § 81, and in view of section 478, *held*, that a default judgment should have been set aside and defendants permitted to answer.—*Id.*

§ 145 (Colo.) Before a defendant can have a default set aside, he must show a meritorious defense.—*Gumaer v. Bell*, 119 P. 681.

A showing of a meritorious defense *held* sufficient to entitle defendant to a vacation of the default.—*Id.*

§ 147 (Cal.) Defendant may waive an objection to a default judgment that he was not personally served, and yet have it vacated on the ground of mistake and inadvertence.—*Martz v. American Bran Gold Co.*, 119 P. 909.

§ 153 (Mont.) The refusal to set aside a default judgment *held* not erroneous on the showing made.—*Swilling v. Cottonwood Land Co.*, 119 P. 1102.

§ 155 (Cal.) Motion to vacate a judgment *held* one based upon Code Civ. Proc. § 473, to vacate on the ground of inadvertence and mistake.—*Martz v. American Bran Gold Co.*, 119 P. 909.

§ 158 (Wash.) A motion to vacate a judgment, void for want of jurisdiction, need not

be supported by an affidavit of merits.—*Sakai v. Keeley*, 119 P. 190.

§ 159 (Cal.) Affidavits served with notice of motion to vacate a default judgment *held* to authorize its vacation on the ground of mistake and inadvertence under Code Civ. Proc. § 473.—*Martz v. American Bran Gold Co.*, 119 P. 909.

§ 159 (Mont.) An affidavit in support of a motion to set aside a default judgment *held* to be treated as hearsay.—*Swilling v. Cottonwood Land Co.*, 119 P. 1102.

### VI. ON TRIAL OF ISSUES.

#### (A) Rendition, Form, and Requisites in General.

§ 211 (Kan.) Where special findings as returned are attacked as contrary to the evidence, no judgment can be rendered upon them until they are approved by the trial court.—*Swan v. Bevis Rock Salt Co.*, 119 P. 871.

#### (B) Parties.

§ 240 (Or.) Under L. O. L. §§ 179, 180, a joint judgment for two defendants *held* unobjectionable in form.—*Culver v. Van Valkenburgh*, 119 P. 753.

### VIII. AMENDMENT, CORRECTION, AND REVIEW IN SAME COURT.

§ 303 (Cal.App.) A court may at any time correct a judgment as to immaterial matters, where such amendment does not materially affect the rights of objecting litigants.—*Calkins v. Monroe*, 119 P. 680.

### IX. OPENING OR VACATING.

§ 344 (Cal.App.) An order denying relief under Code Civ. Proc. § 473, authorizing the court to relieve from a judgment, is within the discretion of the court.—*Blumer v. Mayhew*, 119 P. 202.

### X. EQUITABLE RELIEF.

#### (A) Nature of Remedy and Grounds.

§ 432 (Cal.) Where a defense existed that could not be interposed by reason of some rule of law, equity will restrain the enforcement of the judgment until the defense can be made available.—*McPhee v. Reclamation Dist. No. 765*, 119 P. 1077.

### XIV. CONCLUSIVENESS OF ADJUDICATION.

#### (C) Matters Concluded.

§ 713 (Cal.) Where a landowner in an action either litigated the question whether a reclamation district was a de facto corporation when an assessment was levied, or could have done so, she was estopped from thereafter litigating that question in a subsequent proceeding.—*McPhee v. Reclamation Dist. No. 765*, 119 P. 1077.

§ 719 (Kan.) A judgment is conclusive only so far as it determines the matters put in issue or admitted in the pleadings.—*New v. Smith*, 119 P. 380.

### XIX. SUSPENSION, ENFORCEMENT, AND REVIVAL.

§ 858 (Kan.) Revivor of judgment against corporation *held* unnecessary in order to maintain suit to collect amount thereof from stockholder.—*Douglass v. Loftus*, 119 P. 74.

§ 866 (Idaho) Under Rev. Codes, § 4051, action to keep alive any judgment or decree *held* maintainable within six years from entry of judgment.—*Bashor v. Beloit*, 119 P. 55.

Legislature *held* to have power to limit time for action on judgment to revive it and time in which execution may issue and to make such limitations different.—*Id.*

er judgments, stated.—Bashor v. Beloit, 119 P. 55.  
Rev. Codes, § 4474, held not intended as the exclusive method for keeping judgment alive.—Id.  
Rev. Codes, § 4474, provides for enforcement of judgment on motion, or by judgment on supplemental pleadings.—Id.  
§ 870 (Idaho) Under Rev. Codes, § 4611, common-law writ of scire facias is abolished.—Bashor v. Beloit, 119 P. 55.

## XXI. ACTIONS ON JUDGMENTS.

### (A) Domestic Judgments.

§ 903 (Idaho) Under common law, owner of judgment held entitled to bring action thereon, notwithstanding expiration of time for issuing execution.—Bashor v. Beloit, 119 P. 55.

§ 910 (Idaho) Right to maintain action on judgment held not dependent on right to issue execution, but on provisions of statute limiting time for the action.—Bashor v. Beloit, 119 P. 55.

Rev. Codes, § 4051, relating to time for actions on judgments of courts of United States, etc., held to apply to domestic judgments.—Id.

## XXII. PLEADING AND EVIDENCE OF JUDGMENT AS ESTOPPEL OR DEFENSE.

§ 949 (Cal.App.) Allegations in a pleading, attempting to set up the judgment of an inferior court as a defense, held not to comply with Code Civ. Proc. § 450.—Kriste v. International Savings & Exchange Bank, 119 P. 666.

## JUDICIAL NOTICE.

See Criminal Law, § 304; Evidence, §§ 21, 31.

## JUDICIAL POWER.

See Constitutional Law, §§ 70, 80.

## JUDICIAL SALES.

See Execution, §§ 222-256; Taxation, §§ 630-685, 704, 734.

## JURISDICTION.

See Appeal and Error, §§ 19, 564, 889; Courts; Criminal Law, §§ 106, 260, 1020, 1048; Divorce, §§ 152, 249; Executors and Administrators, § 29; Judgment, § 17; Justices of the Peace, §§ 36-58; Railroads, § 6; Receivers, § 133.

## JURY.

See Appeal and Error, § 1031; Criminal Law, §§ 655, 656, 742-763, 857, 923, 1166½; Evidence, § 588; Grand Jury; New Trial, §§ 52, 140, 143; Trial, §§ 139-178, 194-206, 323.

## II. RIGHT TO TRIAL BY JURY.

§ 10 (Mont.) Const. art. 3, § 23, held only to guarantee a right of trial by jury in cases in which it existed at the time the Constitution was adopted.—Cunningham v. Northwestern Improvement Co., 119 P. 554.

§ 11 (Mont.) Const. U. S. Amend. 7 of the amendment, providing that right to trial by jury shall remain inviolate, does not guarantee a trial by jury in a civil action in a state court.—Cunningham v. Northwestern Improvement Co., 119 P. 554.

§ 19 (Mont.) Laws 1909, c. 67, held not invalid as a deprivation of trial by jury.—Cunningham v. Northwestern Improvement Co., 119 P. 554.

§ 28 (Kan.) Plaintiffs held to have waived right to jury.—Cunningham v. City of Iola, 119 P. 317.

See Criminal Law, § 260; Evidence, § 176.  
**III. CIVIL JURISDICTION AND AUTHORITY.**

§ 36 (Ok.) In forcible detainer, introduction by defendant of evidence that plaintiff's grantor was a minor held not to oust the court of jurisdiction to try the right of possession.—Burrus v. Funk, 119 P. 976.

§ 47 (Colo.) A settlement of partnership accounts is an equitable matter, over which a justice of the peace has no jurisdiction, so that the county court would have no jurisdiction on appeal of such question.—Starrett v. Ruth, 119 P. 690.

Evidence in an action originating before a justice of the peace held to show that the payment of a certain sum to defendant was a part of a partnership transaction.—Id.

§ 58 (Cal.App.) Until proof of service of summons, the record of a justice's docket not showing summons does not furnish complete proof in support of the judgment rendered.—Kriste v. International Savings & Exchange Bank, 119 P. 666.

## V. REVIEW OF PROCEEDINGS

### (A) Appeal and Error.

§ 155 (Cal.) Judgment of a justice held, in view of Code Civ. Proc. §§ 891, 893, not "rendered," so as to allow of appeal under section 974, till "entered."—Thomson v. Superior Court of Mendocino County, 119 P. 98.

## JUSTIFIABLE HOMICIDE.

See Homicide, § 116.

## KNOWLEDGE.

See Appearance; Banks and Banking, § 84; Bills and Notes, §§ 503, 525, 538; Boundaries, §§ 35, 54; Contracts, § 94; Corporations, § 448; Criminal Law, § 313; Estoppel, § 54; Master and Servant, §§ 125, 217, 235, 270, 289; Notice.

## LACHES.

See Injunction, §§ 21, 113; Limitation of Actions.

## LAKES.

See Navigable Waters, § 36.

## LANDLORD AND TENANT.

See Chattel Mortgages, § 12; Corporations, §§ 34, 424; Frauds, Statute of, §§ 63, 129; Guardian and Ward; Life Estates; Mines and Minerals, §§ 58-79.

## II. LEASES AND AGREEMENTS IN GENERAL.

### (A) Requisites and Validity.

§ 20 (Cal.) A "lease" defined.—Chandler v. Hart, 119 P. 513.

§ 29 (Wash.) The adoption of local option in the city wherein the demised premises were situated held not to invalidate a lease, permitting premises to be used as a saloon.—Hayton v. Seattle Brewing & Malting Co., 119 P. 739.

§ 31 (Cal.) A lessor held to have waived the formality of signature of a lease by the lessee.—Chandler v. Hart, 119 P. 516.

## VIII. RENT AND ADVANCES.

### (A) Rights and Liabilities.

§ 208 (Wash.) Assignees of a lease held not liable for rent after they surrendered possession under reassignments.—Harvard Inv. Co. v. Smith, 119 P. 864.

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**LAND OFFICE.**

See Mines and Minerals, § 41; Public Lands, §§ 103-109.

**LANDS.**

See Public Lands.

**LARCENY.**

See Constitutional Law, § 55; Embezzlement.

**I. OFFENSES AND RESPONSIBILITY THEREFOR.**

§ 14 (Cal.App.) Evidence *held* to show the commission of a larceny as distinguished from the obtaining of money by false pretenses.—*People v. Harold*, 119 P. 949.

**II. PROSECUTION AND PUNISHMENT.****(B) Evidence.**

§ 55 (Utah) Evidence *held* insufficient to sustain a conviction of horse theft.—*State v. Potello*, 119 P. 1023.

§ 55 (Utah) Evidence *held* to sustain a conviction of larceny of plumes.—*State v. Converse*, 119 P. 1030.

§ 64 (Utah) "Prima facie," as used in Comp. Laws 1907, § 4355, defined.—*State v. Potello*, 119 P. 1023.

In certain circumstances, the state in a larceny trial *held* not entitled to rely on the presumption of guilt provided for by Comp. Laws 1907, § 4355.—*Id.*

**LAW OF THE CASE.**

See Criminal Law, § 1180.

**LEASE.**

See Landlord and Tenant; Mines and Minerals, §§ 58-79.

**LEGISLATIVE POWER.**

See Constitutional Law, §§ 55-63, 208.

**LEWDNESS.**

§ 5 (Cal.App.) Under Civ. Code, § 93, and Pen. Code, § 31, and section 269a, as amended by Act March 21, 1911 (St. 1911, p. 426), a complaint *held* not to state an offense on the theory that accused was a principal because aiding another in the commission of the crime.—*Ex parte Sullivan*, 119 P. 528.

**LIBEL AND SLANDER.****II. PRIVILEGED COMMUNICATIONS, AND MALICE THEREIN.**

§ 38 (Cal.) Allegations in the complaint in a stockholder's action against the president of a corporation, charging him with misappropriation and embezzlement of the corporation's funds *held* material to the inquiry and absolutely privileged under Civ. Code, §§ 45, 47.—*Gosewisch v. Doran*, 119 P. 656.

§ 51 (Cal.) Where alleged libelous statements in a complaint were absolutely privileged, they could not be made actionable because malicious.—*Gosewisch v. Doran*, 119 P. 656.

**IV. ACTIONS.****(B) Parties, Preliminary Proceedings, and Pleading.**

§ 97 (Cal.) That an alleged libelous publication was absolutely privileged may be raised by demurrer where it appears on the face of the complaint.—*Gosewisch v. Doran*, 119 P. 656.

**(C) Evidence.**

§ 104 (Okl.) In an action for slander, evidence that the statement was made on the authority of a third person named at the time *held* admissible to show absence of malice.—*Wallace v. Kopenbrink*, 119 P. 579.

**LICENSES.**

See Bail, § 79; Criminal Law, § 987; Evidence, §§ 83, 178; Ferries; Mandamus, § 14.

**I. FOR OCCUPATIONS AND PRIVILEGES.**

§ 5½ (Colo.) A city council, empowered by Rev. St. 1903, § 6525, subd. 67, to construct, maintain, and operate waterworks, *held* to have implied power to protect them, as by an ordinance requiring one, before doing plumbing work on appliances connected with the water mains, and intended to utilize water therefrom, to obtain a license from the city authorities.—*Greene v. City of Loveland*, 119 P. 622.

§ 40 (Colo.) An ordinance as to plumber's license to do plumbing work "to connect with, or in connection with, any of the pipes of the department of water," construed.—*Greene v. City of Loveland*, 119 P. 622.

An ordinance, prohibiting one doing plumbing work to connect with pipes of the department of waterworks, *held* violated, under the circumstances, by one working as helper to a plumber.—*Id.*

**LIENS.**

See Attorney and Client; Husband and Wife, § 299; Mechanics' Liens; Receivers, § 154.

**LIFE ESTATES.**

§ 25 (Cal. App.) The death of a life tenant does not deprive his tenant for a year or at will of his right, as against the remainderman, to the crops.—*Blaeholder v. Guthrie*, 119 P. 524.

A lease by a remainderman to a tenant in possession under a lease from life tenant *held* to refer to crops produced during the term of the lease, and not to matured crops produced under the lease by the life tenant.—*Id.*

The tenant *held* entitled to show that he was the owner of a crop, because produced while in possession of the property under another lease.—*Id.*

§ 28 (Wash.) Complaint of administrator with will annexed for sale of estate of life tenant under the will because of nonpayment of taxes on the land, whereby the estate in remainder was jeopardized, *held* to state no cause of action; the taxes not having been paid by the administrator or any one he rightfully represents.—*Hayes v. Gaston*, 119 P. 818.

**LIFE INSURANCE.**

See Insurance.

**LIGHTS.**

See Municipal Corporations, § 867.

**LIMITATION OF ACTIONS.**

See Adverse Possession; Counties, § 200; Executors and Administrators, § 437; Taxation, § 810.

**I. STATUTES OF LIMITATION.****(A) Nature, Validity, and Construction in General.**

§ 4 (Mont.) Rev. Code, § 4835, a statute of limitations affecting nonresident foreigners, *held* not invalid.—*In re Colbert's Estate*, 119 P. 791.

§ 6 (Mont.) Statutes of limitations are statutes of repose, and the Legislature may make



**(B) Limitations Applicable to Particular Actions.**

§ 34 (Kan.) Limitations applicable to right of action by judgment creditor of corporation to enforce claim against stockholder determined.—*Douglass v. Loftus*, 119 P. 74.

§ 36 (Colo.) Complainant *held* charged with notice of the decree in certain litigation to which he was not a party, but in which he was interested by reason of an assignment, so that, not having sued to recover his interest within five years thereafter, a subsequent action was barred by laches, under Rev. St. 1908, § 4073.—*Harding v. Burris*, 119 P. 1063.

§ 37 (Kan.) Action in form in ejectment, but in substance for relief on ground of fraud, *held* governed by the 2-year limitation prescribed by Code Civ. Proc. § 17 (Gen. St. 1909, § 5610), and not by the 15-year limitation prescribed by section 15 (Gen. St. 1909, § 5608).—*New v. Smith*, 119 P. 380.

**II. COMPUTATION OF PERIOD OF LIMITATION.**

**(A) Accrual of Right of Action or Defense.**

§ 58 (Kan.) Accrual of right of action by judgment creditor of corporation to enforce claim against stockholder determined.—*Douglass v. Loftus*, 119 P. 74.

**(C) Personal Disabilities and Privileges.**

§ 78 (Or.) Where through a natural obstruction part of the water of a stream was diverted and flowed in a given manner for a time longer than that fixed by the statute of limitations, the water diverted was a permanent stream.—*Pacific Live Stock Co. v. Davis*, 119 P. 147.

**(E) Absence, Nonresidence, and Concealment of Person or Property.**

§ 84 (Kan.) Where defendant, against whom a cause of action for fraud accrued, was in another state, limitations did not begin to run until his return.—*Sherman v. Havens*, 119 P. 370.

**(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.**

§ 100 (Kan.) A cause of action, founded on fraud, for damages is deemed to have accrued at the date the fraud is discovered.—*Sherman v. Havens*, 119 P. 370.

**(H) Commencement of Action or Other Proceeding.**

§ 130 (Kan.) Plaintiff *held* to have failed in action otherwise than on the merits within Code Civ. Proc. § 22 (Gen. St. 1909, § 5615), giving a new action within one year after such failure.—*New v. Smith*, 119 P. 380.

Under Code Civ. Proc. §§ 22, 565 (Gen. St. 1909, §§ 5615, 6160), plaintiff *held* to have one year after determination of appeal for commencement of new action after failure of former action otherwise than on the merits.—*Id.*

**V. PLEADING, EVIDENCE, TRIAL, AND REVIEW.**

§ 197 (Wash.) Evidence in an action for alienating the affections of plaintiff's husband *held* to show that his affections were alienated for more than three years before the beginning of the action, so as to bar it.—*Mullins v. Mullins*, 119 P. 830.

**LIMITATION OF LIABILITY.**

See Carriers, §§ 155, 158.

**LIQUOR SELLING.**

See Intoxicating Liquors.

**LISTS.**

See Taxation, § 630.

**LITTORAL RIGHTS.**

See Navigable Waters, §§ 36-44.

**LIVE STOCK.**

See Carriers, § 228.

**LOANS.**

See Counties, § 178.

**LOCAL LAWS.**

See Statutes, §§ 89-104.

**LOCAL OPTION.**

See Intoxicating Liquors, § 39.

**LOGS AND LOGGING.**

See Master and Servant, §§ 286, 289; Navigable Waters, § 39.

**LOST INSTRUMENTS.**

See Evidence, § 178.

**LUNATICS.**

See Insane Persons.

**MACHINERY.**

See Master and Servant, §§ 88-297.

**MALICE.**

See Damages, § 91; Homicide, § 11; Libel and Slander, § 51.

**MALICIOUS PROSECUTION.**

See Appeal and Error, § 909; Grand Jury; Witnesses, § 275.

**II. WANT OF PROBABLE CAUSE.**

§ 20 (Cal.App.) Statements of what will constitute probable cause, barring an action for malicious prosecution.—*Carpenter v. Sibley*, 119 P. 391.

§ 24 (Cal.App.) Statement when a conviction, though reversed, is conclusive of probable cause on an action for malicious prosecution.—*Carpenter v. Sibley*, 119 P. 391.

**V. ACTIONS.**

§ 56 (Cal.App.) Plaintiff in an action for malicious prosecution *held* to have the burden of proof as to probable cause.—*Carpenter v. Sibley*, 119 P. 391.

§ 59 (Cal.App.) Evidence that a grand juror did not intend to find the indictment has no relation to the question of probable cause for the prosecution by others.—*Carpenter v. Sibley*, 119 P. 391.

A statement which came to the county attorney, and was part of the information on which he acted in prosecuting a case, *held* admissible on the question of probable cause.—*Id.*

One sued for malicious prosecution may, on the question of probable cause, give the sources of his information, and relate in detail facts communicated to him.—*Id.*

That one when sued for malicious prosecution shows that one of the statements on which he acted in bringing the prosecution was partly false does not affect the question of probable cause.—*Id.*

§ 64 (Cal.App.) Evidence *held* to warrant a finding of probable cause for a prosecution.—Carpenter v. Sibley, 119 P. 391.

## MANDAMUS.

See Courts, § 207; Exceptions, Bill of, § 53; Officers, § 85.

### I. NATURE AND GROUNDS IN GENERAL.

§ 1 (Wash.) Under Rem. & Bal. Code, § 999 et seq., mandamus *held* to be a much broader remedy than the old prerogative writ.—State v. Main, 119 P. 844.

§ 3 (Mont.) Remedy by application for writ of supervisory control to set aside a judgment *held* not to lie, if relator has neglected to pursue the remedy available under Rev. Codes, § 6589.—State v. District Court of the Ninth Judicial Dist. in and for the County of Gallatin, 119 P. 174.

§ 3 (Wash.) Under Rem. & Bal. Code, § 999 et seq., mandamus *held* the proper remedy to compel a court to enter a judgment of acquittal and vacate a judgment of default entered upon a bail bond, where an immediate right is shown.—State v. Main, 119 P. 844.

§ 4 (Idaho) Where appeal given by law is not a plain, speedy, and adequate remedy, resort may be had to mandamus.—Fenton v. Board of Com'rs of Ada County, 119 P. 41; Independent School Dist. No. 1 of Kootenai County v. Board of County Com'rs, Id. 52.

§ 4 (Mont.) Remedy by application for writ of supervisory control to set aside a judgment *held* not to lie, if relator has neglected to pursue the remedies available by appeal.—State v. District Court of the Ninth Judicial Dist. in and for the County of Gallatin, 119 P. 174.

§ 14 (Cal.App.) Mandamus *held* not to lie to compel the issuance of a license to conduct a moving picture exhibition where a permit from the board of police commissioners had not been obtained.—Laurelle v. Bush, 119 P. 953.

§ 16 (Okla.) Where questions raised in mandamus have become abstract or hypothetical, the case will be dismissed.—Yeager v. Shelton, 119 P. 994.

### II. SUBJECTS AND PURPOSES OF RELIEF.

#### (A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

§ 28 (Mont.) Mandamus will not lie to direct an officer or tribunal to decide in a particular way, even though the act to be done is ministerial in character, if it involved discretion.—State v. District Court, Silver Bow County, 119 P. 1103.

§ 51 (Idaho) Where a judge of a district court has delayed the decision of case without excuse, a writ of mandate will issue to compel him to render a decision.—McGary v. Steele, 119 P. 448.

§ 51 (Mont.) Mandamus *held* not to lie to compel the entry of a judgment of removal, in proceedings under Rev. Codes, § 9006, to remove an officer for receiving illegal fees, though a violation of the statute is shown by uncontroverted evidence.—State v. District Court, Silver Bow County, 119 P. 1103.

§ 55 (Kan.) Mandamus will lie to compel clerk of district court to issue execution, where no appeal has been taken, notwithstanding filing of supersedeas bond.—Powell v. Bradley, 119 P. 543.

#### (B) Acts and Proceedings of Public Officers and Boards and Municipalities.

§ 77 (Cal.App.) Mandamus will not lie to try title to an office.—Black v. Board of Police & Fire Com'rs of City of San Jose, 119 P. 674.

§ 103 (Wash.) Where the bonds of a school district created a debt in excess of the constitutional limitation and the state became the highest bidder for the bonds, mandamus did not lie to compel the State Auditor to accept so much of the bonds as the district could lawfully issue.—State v. Clausen, 119 P. 797.

### III. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 162 (Cal.App.) Where a return shows that the respondent has complied with an alternative writ of mandamus, the writ will be quashed.—Talmage v. Monroe, 119 P. 526.

§ 164 (Mont.) Matters controverting the petition or supplemental affidavits on application for a writ of supervisory control to set aside a judgment should be raised by a formal answer.—State v. District Court of the Ninth Judicial Dist. in and for the County of Gallatin, 119 P. 174.

§ 168 (Mont.) On application for writ of supervisory control to set aside a judgment, evidence *held* insufficient to show that relators were prevented from instituting appropriate proceedings earlier on account of pecuniary inability to pay the necessary filing fees.—State v. District Court of the Ninth Judicial Dist. in and for the County of Gallatin, 119 P. 174.

§ 174 (Cal.App.) In mandamus to compel payment of the salary attached of captain of police to relator, it was error to omit to find on a pleaded defense that the office was occupied under a claim of right by relator's successor.—Black v. Board of Police & Fire Com'rs of City of San Jose, 119 P. 674.

## MANSLAUGHTER.

See Homicide, §§ 34, 41.

## MARKET VALUE.

See Eminent Domain, §§ 122-134.

## MARRIAGE.

See Appeal and Error, §§ 904, 1010; Divorce; Husband and Wife; Insane Persons.

§ 40 (Kan.) Marriage of parties *held* to be presumed under circumstances stated.—Shepard v. Carter, 119 P. 533.

§ 58 (Cal.) In a suit to annul a marriage for want of capacity, the test is whether the party was capable of understanding the obligations assumed by marriage.—Dunphy v. Dunphy, 119 P. 512.

§ 60 (Cal.) Evidence *held* to warrant a finding that plaintiff by reason of his inebriety was incompetent to contract a marriage.—Dunphy v. Dunphy, 119 P. 512.

## MASTER AND SERVANT.

See Appeal and Error, § 1050; Carriers, §§ 283, 316, 318; Constitutional Law, §§ 208, 245, 287; Courts, § 8; Damages, § 132; Electricity, §§ 16, 18; Evidence, §§ 129, 472, 481; Trial.

### I. THE RELATION.

#### (B) Statutory Regulation.

§ 11 (Mont.) Laws 1909, c. 67, providing for industrial insurance for employes engaged in coal mining, *held* a proper exercise of police power.—Cunningham v. Northwestern Improvement Co., 119 P. 554.

Right of the Legislature to regulate employment as an extrahazardous business, and to provide benefits for workmen killed or injured therein, *held* sustainable, on the theory that they pertain to the peace, order, and morals of the community.—Id.

Laws 1909, c. 67, providing for compensation to injured employes engaged in coal mining, *held*

Laws 1909, c. 67, providing for indemnity to injured persons engaged in coal mining, *held* not objectionable for failure to differentiate between a careful and a careless employer.—Id.

### (C) Termination and Discharge.

§ 41 (Wash.) An employé *held* not damaged by his wrongful discharge before the period of his contract.—Grindeman v. Woodland Shingle Co., 119 P. 615.

## III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

### (A) Nature and Extent in General.

§ 88 (Wash.) On facts stated, *held*, that a prima facie case of a telephone company's responsibility for injuries caused by a construction company was made out.—Norwegian Danish Methodist Episcopal Church of Spokane Falls v. Home Telephone Co., 119 P. 834.

For negligence of an independent contractor, *held*, that an employer might be liable.—Id.

§ 89 (Cal.) Servant injured by falling into a well on defendant's premises, where he was employed, *held* to have been acting within the scope of his employment.—Cordler v. Keffel, 119 P. 658.

§ 97 (Mont.) Where injury to a servant was likely to occur from the negligent method of doing the work, the master *held* liable for injury to a servant, though he could not anticipate the particular injury.—Stewart v. Stone & Webster Engineering Corporation, 119 P. 568.

§ 97 (Wash.) Whether the fall of a gin pole, resulting in injury to an employé, was caused by the foreman releasing a guy rope, or by force of gravity, *held*, the employer was bound to use due care to protect plaintiff.—Martin v. Hill, 119 P. 849.

### (B) Tools, Machinery, Appliances, and Places for Work.

§ 103 (Colo.) An employer's duty to use reasonable care to furnish reasonably safe appliances cannot be delegated, so as to absolve him from liability for negligent performance.—Jackson v. Yak Mining, Milling & Tunnel Co., 119 P. 1058.

§ 106 (Wash.) Where a city authorized the plans for the construction of a retaining wall which collapsed because the plans for the original construction were defective, the city was liable for the death of a servant by the fall of the wall.—Blair v. City of Spokane, 119 P. 839; Nicholls v. Same, Id. 842.

§ 107 (Colo.) Exception to the safe place rule *held* not applicable to an action by a timberman, injured while using a structure as a passageway in a mine drift.—Jackson v. Yak Mining, Milling & Tunnel Co., 119 P. 1058.

§ 107 (Wash.) A master employing men to make a dangerous place safe *held* required to exercise the care of an ordinarily prudent man to make the working place safe.—Blair v. City of Spokane, 119 P. 839; Nicholls v. Same, Id. 842.

§ 118 (Colo.) A structure used by miners as a passageway in a drift *held* to come within the safe place rule.—Jackson v. Yak Mining, Milling & Tunnel Co., 119 P. 1058.

§ 121 (Cal.) A vice principal was negligent toward an employé in failing to either replace a guard over dangerous cogwheels, or to warn him of the peril involved in working near them.—Jacobson v. Oakland Meat & Packing Co., 119 P. 653.

An employer must guard dangerous cogwheels.—Id.

uated stated.—Cordler v. Keffel, 119 P. 658.  
Failure of an owner to inspect a deep well located on his premises, and covered with boards, *held*, under the circumstances, to be negligence.—Id.

Master setting a servant to work on premises upon which a deep well was located, covered with boards, *held* bound to make a reasonably careful inspection to discover its hidden dangers, to which the servant would be exposed.—Id.

§ 125 (Colo.) Knowledge of a mining company's representative of the defective condition of a structure used as a passageway by miners is knowledge of the company.—Jackson v. Yak Mining, Milling & Tunnel Co., 119 P. 1058.

### (C) Methods of Work, Rules, and Orders.

§ 130 (Mont.) A master *held* required as a reasonably prudent person to conduct the work so that the hazard from the character of the appliance or place of work is not enlarged.—Verlinda v. Stone & Webster Engineering Corporation, 119 P. 573.

§ 144 (Kan.) Jury *held* justified in finding that rule of railway company, requiring brakemen to be on top of train when approaching and passing stations, was waived.—Duncan v. Atchison, T. & S. F. Ry. Co., 119 P. 356.

### (D) Warning and Instructing Servant.

§ 157 (Wash.) A master who warned a servant of a danger which did not contribute to the servant's death was not thereby relieved from liability for the death.—Blair v. City of Spokane, 119 P. 839; Nicholls v. Same, Id. 842.

### (E) Fellow Servants.

§ 163 (Mont.) In an action for injuries to a servant, evidence *held* to show the actionable negligence of the master in failing to have a signalman present directing the movements of the engineer operating a derrick.—Stewart v. Stone & Webster Engineering Corporation, 119 P. 568.

§ 185 (Wash.) A sawyer in starting a saw carriage without warning an employé engaged in adjusting a log thereon was a vice principal, and not a fellow servant, of such employé, as affecting the employer's liability for resulting injury.—King v. Page Lumber Co., 119 P. 180.

A lumber company *held* to have owed a non-delegable duty to a sawmill employé not to suddenly start a saw carriage while he was adjusting a log thereon.—Id.

§ 189 (Wash.) Under stated conditions, *held*, that a workman did not become a vice principal as to his fellow workmen.—Frengen v. Stone & Webster Engineering Corporation, 119 P. 193.

§ 190 (Mont.) A master *held* liable for injuries to a servant caused by the negligence of the superintendent in permitting a fellow servant to undertake work which he could not do alone.—Verlinda v. Stone & Webster Engineering Corporation, 119 P. 573.

The duty of a master to furnish suitable appliances *held* primarily the duty of the master.—Id.

§ 190 (Wash.) A master *held* liable for injuries to his servant caused by a vice principal.—Keller v. White River Lumber Co., 119 P. 4.

§ 190 (Wash.) One to whom the master intrusts the duty of warning as to an increased danger of the place where a servant is working *held* a vice principal.—Frengen v. Stone & Webster Engineering Corporation, 119 P. 193.

§ 190 (Wash.) A builder's foreman and a carpenter injured by fall of a gin pole *held* not fellow servants.—Martin v. Hill, 119 P. 849.

§ 196 (Wash.) In an action by a servant for personal injuries, *held* that he and another workman, who had caused a movement of machinery by which plaintiff was injured, were fellow servants.—*Frengen v. Stone & Webster Engineering Corporation*, 119 P. 193.

§ 201 (Mont.) A master guilty of negligence *held* not entitled to escape liability because his negligence combined with the negligence of a fellow servant.—*Stewart v. Stone & Webster Engineering Corporation*, 119 P. 568.

§ 201 (Mont.) A master *held* liable for injuries to a servant because the place in which he worked was rendered unsafe by the failure of the master to exercise reasonable care in selecting an appliance.—*Verlinda v. Stone & Webster Engineering Corporation*, 119 P. 573.

A master who is guilty of negligence, which concurs with the negligence of a servant in causing injury to a fellow servant, is liable for the injuries.—*Id.*

#### (F) Risks Assumed by Servant.

§ 205 (Wash.) Where the foreman of a mill company told an employé not to use a ladder until it was made secure, and himself nailed the ladder in its first position, the employé, after it had been moved and replaced, had a right to assume that it had been made secure in its new position.—*Campbell v. Winslow Lumber Co.*, 119 P. 832.

§ 217 (Cal.) To bar recovery for an injury by unguarded cogwheels, it must appear that the servant knew the unsafe condition, and consented to work, after fully comprehending the risks.—*Jacobson v. Oakland Meat & Packing Co.*, 119 P. 653.

§ 217 (Or.) To defeat a recovery by a servant for an injury caused by a defect in a machine, he must not only have had knowledge of the defect, but also that it was a probable source of danger.—*Nutt v. Isensee*, 119 P. 722.

§ 217 (Wash.) Essential to assumption of risk stated.—*Martin v. Hill*, 119 P. 849.

§ 219 (Cal.) Employé, under certain circumstances, *held* to have assumed risk of his place of work.—*Cordler v. Keffel*, 119 P. 658.

§ 219 (Wash.) A servant killed by the fall of a retaining wall on which he worked *held* not to assume the risk.—*Blair v. City of Spokane*, 119 P. 839; *Nicholls v. Same*, *Id.* 842.

§ 226 (Wash.) A servant *held* to assume only the risks which are obvious after the master has discharged his duty.—*Blair v. City of Spokane*, 119 P. 839; *Nicholls v. Same*, *Id.* 842.

A servant of a city engaged in reconstructing a retaining wall in a street *held* not to assume risks arising from the negligence of the city.—*Id.*

#### (G) Contributory Negligence of Servant.

§ 232 (Wash.) A carpenter, injured by fall of a gin pole which he assisted in lowering, *held* not guilty of contributory negligence in assisting in the work, though not bound to do so.—*Martin v. Hill*, 119 P. 849.

§ 234 (Colo.) Right of one to assume that his employer has used reasonable diligence to provide reasonably safe appliances, if his attention has not been called to a defect, determined.—*Jackson v. Yak Mining, Milling & Tunnel Co.*, 119 P. 1058.

§ 235 (Colo.) An employé *held* not chargeable with notice of a defect, discoverable only by careful inspection.—*Jackson v. Yak Mining, Milling & Tunnel Co.*, 119 P. 1058.

§ 235 (Wash.) A servant *held* to have no right of recovery for an injury caused by the falling of a common pan with which he was thoroughly familiar.—*Cole v. Spokane Gas & Fuel Co.*, 119 P. 831.

§ 236 (Cal.) A servant coming in contact with electric wires of his master *held* guilty of

contributory negligence as a matter of law.—*Ergo v. Merced Falls Gas & Electric Co.*, 119 P. 101.

A servant who momentarily forgets a known danger, merely because he fails to exercise his memory, is guilty of contributory negligence.—*Id.*

§ 236 (Cal.) Momentary forgetfulness of danger under particular circumstances may not constitute contributory negligence.—*Jacobson v. Oakland Meat & Packing Co.*, 119 P. 653.

§ 245 (Wash.) In an action by a servant injured while obeying an order not necessarily dangerous, *held*, that the master could not defend on the ground that the servant ought not to have obeyed the order.—*Campbell v. Winslow Lumber Co.*, 119 P. 832.

§ 245 (Wash.) A master *held* not entitled to escape liability for the death of a servant while obeying the orders of the foreman, on the theory that the servant should have refused to obey the foreman.—*Blair v. City of Spokane*, 119 P. 839; *Nicholls v. Same*, *Id.* 842.

§ 248 (Okl.) In an action for the death of a railroad employé, instructions as to effect of failure of deceased to place signals on car or train on which he was working *held* erroneous.—*Chicago, R. I. & P. Ry. Co. v. McIntire*, 119 P. 1008.

#### (H) Actions.

§ 250½ (Wash.) Laws 1899, c. 35, §§ 1, 2, *held* not to confine a right of action to cases of death through violation of the act, but that, in case of death from a failure to guard frogs and switches as required, the representatives of the parties suing should be the representatives provided for in the sections quoted in the act.—*Alberg v. Campbell Lumber Co.*, 119 P. 6.

§ 254 (Mont.) A servant sustaining a personal injury *held* entitled to proceed against the master, his superintendent, and a fellow servant, and to have judgment against any one of them by whose sole act the injury complained of was caused.—*Verlinda v. Stone & Webster Engineering Corporation*, 119 P. 573.

§ 258 (Cal.) A complaint for personal injuries to an employé by unguarded cogwheels *held* to sufficiently show a breach of duty toward him.—*Jacobson v. Oakland Meat & Packing Co.*, 119 P. 653.

A complaint for personal injury to an employé caused by unguarded cogwheels was not uncertain in stating that plaintiff was led by a vice principal to believe that a guard removed from the wheels would be replaced immediately.—*Id.*

§ 258 (Mont.) A complaint in an action for injuries to a servant *held* to predicate negligence of the master in the general plan of carrying on the work.—*Stewart v. Stone & Webster Engineering Corporation*, 119 P. 568.

§ 260 (Cal.) An employé suing for personal injury need not anticipate a defense of assumption of risk.—*Jacobson v. Oakland Meat & Packing Co.*, 119 P. 653.

§ 261 (Cal.) A complaint for personal injury to an employé caused by unguarded cogwheels *held* not to show that he was guilty of contributory negligence.—*Jacobson v. Oakland Meat & Packing Co.*, 119 P. 653.

§ 264 (Mont.) A complaint in an action for injuries to a servant *held* not to proceed on the theory that a fellow servant was present at his post of duty as a signalman at the time of the accident.—*Stewart v. Stone & Webster Engineering Corporation*, 119 P. 568.

Under Rev. Codes, § 6585, the variance between the complaint in an action for injuries to a servant and the proof *held* not fatal.—*Id.*

A servant suing for a personal injury and alleging various acts of negligence need prove only any one of the acts of negligence pleaded proximately causing the injury.—*Id.*

of negligence, *held* entitled to recover on proof of any one or more of the acts of negligence proximately causing the injury.—*Verlinda v. Stone & Webster Engineering Corporation*, 119 P. 573.

§ 265 (Mont.) A servant suing for injuries sustained through the negligence of the master in failing to provide a reasonably safe place in which to work must show that the place of employment was dangerous and that the master knew of the danger.—*Stewart v. Stone & Webster Engineering Corporation*, 119 P. 568.

§ 265 (Wash.) The doctrine of *res ipsa loquitur* *held* not invocable to raise a presumption of negligence from the mere fact of the injury.—*Cole v. Spokane Gas & Fuel Co.*, 119 P. 831.

§ 265 (Wash.) Where the relation of an employer to a construction company is as consistent with the theory of agency as that of independent contractor, the burden *held* on the employer to show the true relation.—*Norwegian Danish Methodist Episcopal Church of Spokane Falls v. Home Telephone Co.*, 119 P. 834.

§ 270 (Mont.) In an action for injuries to a servant, evidence *held* admissible to show the master's knowledge of the danger before the servant was put to work in a dangerous place.—*Stewart v. Stone & Webster Engineering Corporation*, 119 P. 568.

In an action for injuries to a servant, evidence *held* admissible to show that the general plan pursued by the master was negligent.—*Id.*

§ 270 (Wash.) In an action for the death of a servant of a city caused by the collapse of a retaining wall, evidence of the negligent construction of the wall *held* admissible.—*Blair v. City of Spokane*, 119 P. 839; *Nicholls v. Same*, *Id.* 842.

§ 276 (Wash.) In an action by a servant for injuries received from a falling pan which he was carrying, evidence *held* insufficient to show that the accident was caused by the loss of rivets from the handle.—*Cole v. Spokane Gas & Fuel Co.*, 119 P. 831.

§ 278 (Mont.) In an action for injuries to a servant, evidence *held* to justify a finding of actionable negligence in failing to warn the servant.—*Stewart v. Stone & Webster Engineering Corporation*, 119 P. 568.

§ 281 (Wash.) That other members of a crew escaped injury in the fall of a gin pole *held* not to show that plaintiff, who was injured, was guilty of contributory negligence.—*Martin v. Hill*, 119 P. 849.

§ 285 (Mont.) Whether a master guilty of negligence in adopting a method of doing the work ought to have anticipated injury to a servant *held* for the jury.—*Stewart v. Stone & Webster Engineering Corporation*, 119 P. 568.

§ 286 (Colo.) In an action against a mining company for injury to an employé, caused by a defect in a structure used as a passageway, whether the company was negligent *held*, under the evidence, a jury question.—*Jackson v. Yak Mining, Milling & Tunnel Co.*, 119 P. 1058.

§ 286 (Kan.) Mere use on cab of engine of stirrup, instead of standard step generally used, *held* not to show negligence as a matter of law.—*Duncan v. Atchison, T. & S. F. Ry. Co.*, 119 P. 356.

§ 286 (Mont.) In an action for injuries to a servant, evidence *held* sufficient to authorize submission to the jury of the question of the master's negligence in the general method of carrying on the work.—*Stewart v. Stone & Webster Engineering Corporation*, 119 P. 568.

defendant's negligence *held* for the jury.—*Knudsen v. Moe Bros.*, 119 P. 27.

§ 286 (Wash.) In an action for injury to a sawmill employé caused by unexpected movement of a saw carriage, *held*, under the evidence, a jury question whether defendant was negligent.—*King v. Page Lumber Co.*, 119 P. 180.

§ 286 (Wash.) Whether a servant killed by the fall of a retaining wall on which he stood performing his work had been warned of the danger *held* for the jury.—*Blair v. City of Spokane*, 119 P. 839; *Nicholls v. Same*, *Id.* 842.

§ 288 (Colo.) Whether a timberman working in a mine drift assumed the risk of being injured through the defective condition of a structure upon which he was working *held*, under the evidence, a jury question.—*Jackson v. Yak Mining, Milling & Tunnel Co.*, 119 P. 1058.

§ 288 (Wash.) In an action for injury to a sawmill employé caused by unexpected movement of a saw carriage, *held*, under the evidence, a jury question whether plaintiff assumed the risk.—*King v. Page Lumber Co.*, 119 P. 180.

§ 288 (Wash.) Evidence in a servant's action for injuries *held* to make the question of assumption of risk one for the jury.—*Campbell v. Winslow Lumber Co.*, 119 P. 832.

§ 288 (Wash.) Whether a carpenter, injured through fall of a gin pole, assumed the risk *held*, under the evidence, a jury question.—*Martin v. Hill*, 119 P. 849.

§ 289 (Cal.) In an action for personal injuries, *held*, that the question of plaintiff's contributory negligence was for the jury.—*Cordler v. Keffel*, 119 P. 658.

§ 289 (Colo.) In an action against a mining company for injury to an employé, caused by a defect in a structure used as a passageway, whether plaintiff was guilty of contributory negligence *held*, under the evidence, a jury question.—*Jackson v. Yak Mining, Milling & Tunnel Co.*, 119 P. 1058.

§ 289 (Wash.) On evidence, in an action based on Laws 1899, c. 35, § 1, for personal injuries *held* that the question of contributory negligence was for the jury.—*Alberg v. Campbell Lumber Co.*, 119 P. 6.

§ 289 (Wash.) In an action for injuries to a log loader by the fall from a car of a log, plaintiff's contributory negligence *held* for the jury.—*Knudsen v. Moe Bros.*, 119 P. 27.

§ 289 (Wash.) In an action for injury to a sawmill employé caused by unexpected movement of a saw carriage, *held*, under the evidence, a jury question whether plaintiff was guilty of contributory negligence.—*King v. Page Lumber Co.*, 119 P. 180.

§ 289 (Wash.) Evidence in a servant's action for injuries *held* to make the question of contributory negligence one for the jury.—*Campbell v. Winslow Lumber Co.*, 119 P. 832.

§ 289 (Wash.) Mere knowledge by a servant of a danger causing injury to him *held* not to constitute contributory negligence in law.—*Blair v. City of Spokane*, 119 P. 839; *Nicholls v. Same*, *Id.* 842.

§ 293 (Mont.) In an action for injuries to a servant, a requested instruction *held* properly refused as eliminating issues in view of the theory adopted by the court.—*Verlinda v. Stone & Webster Engineering Corporation*, 119 P. 573.

§ 297 (Mont.) A servant suing his master and his superintendent for a negligent injury

*held* entitled to recover against the master, though the jury disregarded the evidence of the superintendent's negligence.—*Verlinda v. Stone & Webster Engineering Corporation*, 119 P. 573.

In an action against a master and his superintendent for injuries to a servant, a judgment against the master, rendered on a verdict against him, but silent as to the liability of the superintendent, *held* sustainable under the evidence.—*Id.*

A servant sustaining a personal injury who sues the master and his superintendent *held* entitled to elect to take judgment against the master alone on a verdict against the master but silent as to the liability of the superintendent.—*Id.*

§ 297 (Wash.) Verdict *held* not unresponsive to the issues.—*Norwegian Danish Methodist Episcopal Church of Spokane Falls v. Home Telephone Co.*, 119 P. 834.

#### IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

##### (C) Actions.

§ 330 (Mont.) In an action for injuries to a servant, evidence *held* to show that, as a matter of law, a fellow servant was not guilty of actionable negligence.—*Stewart v. Stone & Webster Engineering Corporation*, 119 P. 568.

#### MATERIALITY.

See Alteration of Instruments.

#### MEASURE OF DAMAGES.

See Damages, §§ 90-124.

#### MECHANICS' LIENS.

##### II. RIGHT TO LIEN.

##### (D) Persons Entitled in General.

§ 88 (Wash.) The fact that labor and materials were furnished by a contractor under an indivisible contract, and that he was not entitled to a lien for the materials, did not preclude him from obtaining a lien for the labor, under Rem. & Bal. Code, § 1129.—*Heim v. Elliott*, 119 P. 826.

##### (E) Subcontractors, and Contractors' Workmen and Materialmen.

§ 99 (Wash.) Where a materialman occupied six months in delivering materials for a building under a contract, the mailing of a duplicate statement of all the materials to the owner on the date of the first delivery *held* not a compliance with Rem. & Bal. Code, § 1133.—*Heim v. Elliott*, 119 P. 826.

§ 99 (Wash.) Under Rem. & Bal. Code, § 1133, where a materialman furnished materials to a vendee and failed to give notice to the vendor who held the title, the materialman was not entitled to a lien.—*Hewitt Lea Lumber Co. v. Sandell*, 119 P. 848.

§ 105 (Wash.) Under Rem. & Bal. Code, § 1133, a subcontractor, in order to be entitled to a lien at the time of furnishing materials is required to deliver or mail to the owner of the property a duplicate statement thereof etc.—*Heim v. Elliott*, 119 P. 826.

#### III. PROCEEDINGS TO PERFECT.

§ 118 (Wash.) One *held* not a materialman within Rem. & Bal. Code, § 1133.—*Architectural Decorating Co. v. Nicklason*, 119 P. 177.

A materialman *held* not required to send the duplicate statement required by Rem. & Bal. Code, § 1133.—*Id.*

#### VI. WAIVER, DISCHARGE, RELEASE, AND SATISFACTION.

##### (C) Extinguishment, Release, or Payment.

§ 239 (Wash.) Payments made by a contractor's surety from money belonging to him *held* properly applied to the payment of non-lienable items.—*Heim v. Elliott*, 119 P. 826.

#### MEETINGS.

See Counties, § 177.

#### MEMORANDA.

See Costs, § 207; Frauds, Statute of, §§ 107-112; Specific Performance, § 28; Taxation, § 784; Witnesses, § 255.

#### MINES AND MINERALS.

See Appeal and Error, §§ 232, 1067; Constitutional Law, §§ 80, 208, 245, 287; Corporations, § 448; Injunction, § 163; Master and Servant, §§ 118, 125, 286, 288, 289; Municipal Corporations, §§ 64, 845; Trial, § 194; Waters and Water Courses, § 267.

##### I. PUBLIC MINERAL LANDS.

##### (B) Location and Acquisition of Claims.

§ 23 (Mont.) Neither the pendency of proceedings for a patent in the land office nor of an adverse suit for the possession of a located mining claim *held* to excuse the nonperformance of representation work required by Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426).—*Poore v. Kaufman*, 119 P. 785.

§ 23 (Or.) Whether the expense of a watchman for mining claim is sufficient to constitute annual assessment work depends on the necessity for the watchman and the expense.—*Merchants' Nat. Bank v. McKeown*, 119 P. 334.

Where a superintendent was left in charge of a mine as watchman, the owner could only charge as assessment work for his services as watchman.—*Id.*

§ 38 (Cal.) If the assessment work due on a prior location had not been performed in either 1907 or 1908, complainant was not required to wait until the expiration of the latter year before relocating.—*Galbreath v. Simas*, 119 P. 86.

Evidence *held* to sustain a finding that sufficient assessment work had not been done by prior locators on the land in controversy for the years 1907 and 1908, rendering it subject to relocation by complainant.—*Id.*

§ 38 (Or.) The rule that forfeiture must be specially pleaded does not necessarily obtain in a suit to determine adverse claims to a mining location under Rev. St. U. S. § 2326 (U. S. Comp. St. 1901, p. 1430).—*Merchants' Nat. Bank v. McKeown*, 119 P. 334.

Where no work was done on a mining claim in controversy for the year 1907, the burden was on plaintiff to show that work done outside the claim was for its benefit.—*Id.*

##### (C) Patents.

§ 41 (Mont.) Under Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429), the failure to file claims against a claim for which notice of an application for a patent has been published during the period of publication *held* to determine a right to assert only as to existing claims.—*Poore v. Kaufman*, 119 P. 785.

Rev. St. U. S. § 2325 (U. S. Comp. St. 1901, p. 1429), *held* not to provide an exclusive tribunal in the land office for the hearing of adverse claims arising after the publication of notice of application for a patent.—*Id.*

Under Rev. St. U. S. § 2324 (U. S. Comp. St. 1901, p. 1426), an adverse claim to mineral land, arising by reason of a relocation after the period of publication of notice of application for a patent, *held* to have been properly

brought originally in a state court, rather than the land office.—Id.

Under article 3, § 6, Montana Const., an action by relocators of a mining claim to quiet title and enjoin the original locator from proceeding with his patent proceedings *held* properly brought in the state court.—Id.

## II. TITLE, CONVEYANCES, AND CONTRACTS.

### (B) Conveyances in General.

§ 55 (Okl.) Grant of oil and gas *held* to pass nothing except the right to explore therefor.—Frank Oil Co. v. Belleview Gas & Oil Co., 119 P. 260.

### (C) Leases, Licenses, and Contracts.

§ 58 (Cal.) A lease to a corporation *held* sufficiently executed, though not signed by the corporation.—Chandler v. Hart, 119 P. 516.

§ 73 (Cal.) An oil and gas lease *held* to convey specified rights in land to the lessee.—Chandler v. Hart, 119 P. 516.

§ 73 (Okl.) Oil and gas leases will be construed most strongly against lessee and in favor of lessor.—Frank Oil Co. v. Belleview Gas & Oil Co., 119 P. 260.

§ 74 (Cal.) A lease to develop land for oil, gas, and mineral *held* to give the lessee a present subsisting estate for years, within Civ. Code, § 1044, which he could transfer, and not a mere possibility, not coupled with an interest, within section 1045.—Chandler v. Hart, 119 P. 516.

A sublessor of a lessee in an oil and gas lease *held* entitled to sue for the possession of the land, and to enjoin others from interfering with his rights.—Id.

A lessee of a lessee in an oil and gas lease *held* to acquire a present right of possession for specified purposes.—Id.

§ 77 (Kan.) Notice of forfeiture of an oil and gas lease, given to the former manager of the assignee of the lessee after the assignee had passed into the hands of a receiver, was unavailing.—Young v. Scott, 119 P. 878.

Facts *held* insufficient to establish a forfeiture of an oil and gas lease for nonpayment of rent.—Id.

§ 78 (Cal.) An oil and gas lease *held* not forfeited by the failure of the lessee to develop and extract oil and gas, in the absence of any requirement thereto in the lease.—Chandler v. Hart, 119 P. 516.

§ 79 (Okl.) Oil and gas lease construed as to payments on delay in commencing operations.—Frank Oil Co. v. Belleview Gas & Oil Co., 119 P. 260.

Gas and oil lease giving lessee option to pay a certain sum and extend lease *held* operative only on the payment of such sum.—Id.

Rights of oil and gas lessee *held* terminated on abandonment of lease by failure to make payments and the declaration of forfeiture by lessor.—Id.

Oil and gas lessor *held* not estopped by acceptance of payment by lessee one day after the date therefor to declare forfeiture for failure to make subsequent payment.—Id.

## MINORS.

See Infants.

## MISAPPROPRIATION.

See Corporations, § 190.

## MISCONDUCT.

See Trial, § 29.

## MISJOINDER.

See Parties.

## MISREPRESENTATION.

See Fraud; Insurance, §§ 256-268, 646, 668; Principal and Agent, § 156; Vendor and Purchaser, §§ 34, 44.

## MISTAKE.

See Judgment, §§ 147, 155, 159.

## MITIGATION.

See Damages, § 214.

## MODIFICATION.

See Appeal and Error, § 1151; Divorce, § 303.

## MONEY PAID.

See Bills and Notes, § 516.

## MONEY RECEIVED.

§ 1 (Cal.) The action for money had and received will not lie against a party into whose hands the money is not shown to have come.—Whittier v. Home Savings Bank of Los Angeles, 119 P. 92.

## MOOT QUESTIONS.

See Appeal and Error, § 19.

## MORTGAGES.

See Bills and Notes, §§ 167, 427; Chattel Mortgages; Corporations, § 482; Executors and Administrators, § 227; Homestead; Principal and Agent, § 24; Receivers, § 154; Specific Performance, § 114.

### I. REQUISITES AND VALIDITY.

#### (A) Nature and Essentials of Conveyances as Security.

§ 37 (Cal.) An instrument purporting to convey the title to real or personal property may be shown to have been intended to secure a debt, and to operate as a mortgage.—Beckman v. Waters, 119 P. 922.

§ 38 (Cal.) Evidence *held* to sustain a finding that a deed of real and personal property was intended as a mortgage.—Beckman v. Waters, 119 P. 922.

### IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

§ 358 (Cal.) A deed of trust *held* to give the trustee a discretion to sell as a whole or in parcels, to be exercised in good faith, for the best interests of the beneficiaries.—Humboldt Savings Bank v. McCleverty, 119 P. 82.

A trustee in a deed of trust *held* to abuse his discretion to sell the property as a whole, or in parcels, where he sells the property as a whole after a parcel has passed as a homestead on the debtor's death to his widow, as provided by Civ. Code, § 1265, and Code Civ. Proc. § 1474.—Id.

The parties to a mortgage or deed of trust may contract that the premises shall be sold as a whole, in the absence of any statutory provision requiring the trustees to sell in subdivisions.—Id.

§ 369 (Cal.) Where a sale under a deed of trust was improperly made, the sale should ordinarily be set aside, and a new sale ordered, unless the creditor and trustee placed the property in such a condition that a new sale could not be had.—Humboldt Savings Bank v. McCleverty, 119 P. 82.

In a suit to set aside a sale by a trustee in a deed of trust, the court under the pleadings and findings *held* unauthorized to render a de-

decree adjudging the sale invalid as to a part of the land only.—Id.

One seeking to set aside a sale under a deed of trust *held* not required to offer to pay the entire debt secured by the deed of trust.—Id.

§ 370 (Cal.) One entitled to a decree protecting his rights in a part of the property sold by the trustee in a deed of trust *held* not to waive his right thereto by failing to ask for a resale of the entire property.—Humboldt Savings Bank v. McCleverty, 119 P. 82.

## X. FORECLOSURE BY ACTION.

### (E) Parties and Process.

§ 427 (Or.) The owner of an equity of redemption is a necessary party to an action to foreclose a mortgage.—Johnson v. White, 119 P. 769.

§ 434 (Or.) A grantee of the mortgaged premises after the execution of the mortgage was properly made a defendant in foreclosure.—Johnson v. White, 119 P. 769.

### (F) Pleading and Evidence.

§ 454 (Or.) Answer in mortgage foreclosure proceedings *held* not to allege a title paramount to that of the mortgagor.—Johnson v. White, 119 P. 769.

### (I) Judgment or Decree and Execution.

§ 497 (Idaho) Decrees in foreclosure *held* conclusive against parties thereto in receivership proceedings against the mortgagor corporation.—Hewitt v. Walters, 119 P. 705.

### (J) Sale.

§ 502 (Mont.) Under Rev. Codes, § 6861, a foreclosure sale may be had under the court's decree without the issuance of a formal execution under section 6817.—Thomas v. Thomas, 119 P. 283.

That an order of sale on foreclosure decree ran in the name of "the People of the State of Montana," instead of "the State of Montana," as provided for process by Const. art. 8, § 27, *held* immaterial.—Id.

§ 512 (Mont.) Where mortgaged property is described therein as a single tract, it may be so sold unless a different method is directed by the court.—Thomas v. Thomas, 119 P. 283.

Rev. Codes, § 6830, requiring real property consisting of known lots or parcels to be sold on execution separately, is directory only.—Id.

On foreclosure, the sheriff *held* to have properly sold two separate pieces of property and the buildings thereon en masse.—Id.

§ 538 (Mont.) Rev. Codes, § 6830, requiring real property consisting of known lots or parcels to be sold on execution separately, *held* to render a sale in gross voidable only.—Thomas v. Thomas, 119 P. 283.

## MOTIONS.

See Appearance; Continuance; Criminal Law, §§ 968, 1023; Judgment, §§ 155, 158, 159, 868; New Trial, §§ 12, 128; Pleading, §§ 350-368; Trial, §§ 139, 163, 165.

§ 1 (Idaho) A motion is defined by Rev. Codes, § 4880, as an application for an order.—Nobach v. Scott, 119 P. 295.

§ 14 (Idaho) A motion is not required to be signed.—Nobach v. Scott, 119 P. 295.

## MOTIVE.

See Homicide, § 7.

## MOVING PICTURES.

See Mandamus, § 14; Municipal Corporations, §§ 7, 110, 591, 603; Theaters and Shows.

## MUNICIPAL CORPORATIONS.

See Appeal and Error, § 1067; Counties; Criminal Law, § 304; Elections, §§ 181, 305; Electricity, §§ 14, 16; Eminent Domain, §§ 41, 106, 243; Evidence, §§ 31, 358; Gas; Injunction, § 12; Intoxicating Liquors; Licenses; Master and Servant, §§ 106, 226; Schools and School Districts; Statutes, §§ 89, 93; Street Railroads; Theaters and Shows, § 3.

## I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

### (A) Incorporation and Incidents of Existence.

§ 7 (Cal.App.) A grant of power by ordinance to certain persons to issue permits *held* not arbitrary, though no restrictions be placed on the exercise of the power.—Laurelle v. Bush, 119 P. 953.

A requirement in an ordinance regulating moving picture exhibitions, etc., that an applicant for a permit specify the street and number of the place of business, *held* proper and necessary to the proper enforcement of the ordinance.—Id.

### (C) Amendment, Repeal, or Forfeiture of Charter, and Dissolution.

§ 46 (Idaho) Special charters *held* subject to amendment only by special acts; general laws not being applicable without consent of electors.—Kessler v. Fritchman, 119 P. 692.

§ 48 (Idaho) "General election," as used in Const. art. 12, § 1, defined.—Kessler v. Fritchman, 119 P. 692.

Const. art. 12, § 1, *held* to reserve to city organized under special charter the right to change the form of government by vote of a majority of the electors.—Id.

Act March 13, 1911 (Sess. Laws 1911, p. 280), *held* a general law, but not changing powers of cities previously organized unless the law is adopted by the electors.—Id.

Under Act March 13, 1911 (Sess. Laws, 1911, p. 284) § 8, provisions of act *held* to apply alike to all cities previously organized under special charter and becoming organized under the act.—Id.

## III. LEGISLATIVE CONTROL OF MUNICIPAL ACTS, RIGHTS, AND LIABILITIES.

§ 64 (Colo.) The legislative authority over municipal corporations is plenary, except as limited by the federal or state Constitutions.—Londoner v. City and County of Denver, 119 P. 156.

§ 73 (Idaho) Const. art. 7, § 6, *held* to prohibit Legislature from imposing taxes for purposes of municipal corporations.—Fenton v. Board of Com'rs of Ada County, 119 P. 41; Independent School Dist. No. 1 of Kootenai County v. Board of County Com'rs, Id. 52.

## IV. PROCEEDINGS OF COUNCIL OR OTHER GOVERNING BODY.

### (B) Ordinances and By-Laws in General.

§ 107 (Or.) An ordinance regularly passed by the council of a city and signed by the acting mayor, as authorized by Sp. Laws 1905, p. 133, § 36, *held* to become a valid law 30 days after its approval.—Barton v. Recorder's Court of Vale, 119 P. 349.

§ 111 (Or.) An emergency clause in an ordinance *held* to affect only the time the ordinance shall go into operation, and its invalidity does not render the ordinance invalid.—Barton v. Recorder's Court of Vale, 119 P. 349.

One charged with violating a provision of an ordinance prohibiting the sale of intoxicating liquors without a license *held* not entitled to question the validity of the provisions of the



ordinance creating a monopoly of the traffic.—*Id.*

The provisions of an ordinance forbidding the sale of intoxicating liquors without a license are valid independently of the provisions placing the liquor business in the hands of one person.—*Id.*

§ 116 (Cal.App.) A city ordinance providing for a permit to run a moving picture exhibition *held* not to repeal, but to be in harmony with, an earlier ordinance regulating similar exhibitions.—*Laurelle v. Bush*, 119 P. 953.

## VI. PROPERTY.

§ 223 (Colo.) Under Const. art. 20, the people of the city and county of Denver *held* authorized to adopt a charter containing provisions for the purchase or condemnation of lands for parks and parkways.—*Londoner v. City and County of Denver*, 119 P. 156.

## VII. CONTRACTS IN GENERAL.

§ 244 (Kan.) A contract by a city *held* not invalid because of a variance between the contract and the bids.—*Martin v. City of Chanute*, 119 P. 377.

## IX. PUBLIC IMPROVEMENTS.

### (B) Preliminary Proceedings and Ordinances or Resolutions.

§ 289 (Cal.) Proceedings for street assessments must be based on a compliance with the statute authorizing the assessment.—*Haughawout v. Percival*, 119 P. 649.

§ 294 (Cal.) The posting of notices in street assessment proceedings *held* in compliance with the Vrooman act, as amended by St. 1891, p. 196.—*Haughawout v. Percival*, 119 P. 649.

### (C) Contracts.

§ 353 (Cal.App.) An assignee of a municipal construction contract *held* bound to apply the proceeds to claims of materialmen and subcontractors before applying them to its own claim.—*Wilson v. First Nat. Bank*, 119 P. 957.

§ 376 (Cal.App.) A complaint *held* to be construed to charge defendant as assignee of a municipal construction contract, and not as guarantor of payment of plaintiffs' claims as subcontractors.—*Wilson v. First Nat. Bank*, 119 P. 957.

### (D) Damages.

§ 385 (Wash.) Under Laws 1909, c. 80, § 1 (Rem. & Bal. Code, § 7815), damages cannot be recovered from a city for injuries to private property caused by casting surface water thereon by the original grading of streets and alleys.—*Wood v. City of Tacoma*, 119 P. 859.

§ 394 (Wash.) A city *held* not liable for injuries to a lot by casting water thereon in a diffused, and not in a concentrated, form by the original grading of a street.—*Wood v. City of Tacoma*, 119 P. 859.

A city *held* not bound to furnish temporary drainage for lots pending the original grading and drainage of a street.—*Id.*

§ 404 (Mont.) A complaint, in an action against a city for damages by a change in the grade of a street, and the deed of the property, *held* to sufficiently identify it, in view of the evidence.—*Drew v. City of Butte*, 119 P. 279.

In an action against a city for damages by a change in the grade of a street, evidence *held* to sufficiently connect plaintiff with the title to the property.—*Id.*

### (E) Assessments for Benefits, and Special Taxes.

§ 425 (Wash.) The right of way of a railroad company which ran upon a public street should not be assessed for the erection of a bridge over a canal crossing the street.—*In re City of Seattle*, 119 P. 798.

§ 433 (Wash.) A municipality has no power to levy an assessment on property located outside its boundaries for the construction of a sea gate under the diking act.—*Edmonds Land Co. v. City of Edmonds*, 119 P. 192.

§ 438 (Wash.) Under Rem. & Bal. Code, §§ 7790, 7795, 7796, a special assessment can only be levied against property specially benefited.—*In re City of Seattle*, 119 P. 852.

Under Rem. & Bal. Code, § 7790, the benefit to the public resulting from an improvement for which the public must stand part of the cost, *held* required to be more than the benefit in a general way accruing to the city by virtue of every improvement.—*Id.*

§ 451 (Wash.) Under Laws 1907, c. 153, §§ 9, 20, and section 23 as amended by Laws 1909, c. 211, the council of a city *held* authorized to make the apportionment of special and general benefits, and where it fails to do so the commissioners must do it.—*In re City of Seattle*, 119 P. 852.

§ 454 (Wash.) In proceedings to assess property for the improvement of a street by erecting a bridge, evidence was not admissible of a contemplated bridge at another street on the question of benefits, not being a part of the improvement in question.—*In re City of Seattle*, 119 P. 798.

§§ 488, 489 (Wash.) Owners of lands outside a city *held* not estopped, by their trustee's signature to a petition for a municipal improvement, from questioning the validity of an assessment for benefits.—*Edmonds Land Co. v. City of Edmonds*, 119 P. 192.

§§ 488, 489 (Wash.) Under Rem. & Bal. Code, §§ 7532 and 7533, plaintiffs *held* to have waived objections to a local improvement assessment, on the ground that it exceeded the 50 per cent. limit prescribed by city charter.—*Rucker Bros. v. City of Everett*, 119 P. 807.

§ 495 (Wash.) Courts will not interfere with decisions by a municipal board concerning a street improvement assessment.—*In re City of Seattle*, 119 P. 5.

§ 495 (Wash.) A finding by commissioners under Rem. & Bal. Code, § 7790, that there is no benefit to the public resulting from an improvement for which the public must stand part of the cost, *held* conclusive on courts.—*In re City of Seattle*, 119 P. 852.

§ 503 (Wash.) Under Rem. & Bal. Code, §§ 7790, 7795, 7796, the court in proceedings to confirm an assessment must inquire whether the property was specially benefited.—*In re City of Seattle*, 119 P. 852.

§ 508 (Wash.) The amount to be assessed against property, within a special assessment district subject to assessment, *held* subject to judicial review.—*In re City of Seattle*, 119 P. 852.

An assessment roll returned by commissioners in proceedings to assess special benefits for an improvement *held* evidence of the judgment of the commissioners.—*Id.*

§ 514 (Wash.) An assessment of special benefits for an improvement *held* not based on the judgment of the commissioners, but dependent on the arbitrary direction of the court, and a judgment of confirmation must be set aside.—*In re City of Seattle*, 119 P. 852.

## X. POLICE POWER AND REGULATIONS.

### (A) Delegation, Extent, and Exercise of Power.

§ 589 (Or.) An ordinance of the city of Woodburn authorizing search and seizure *held* void for want of charter authority and as interfering with interstate commerce.—*Bachelors' Club v. City of Woodburn*, 119 P. 339.

§ 591 (Cal.App.) An ordinance regulating moving picture exhibitions *held* not invalid, dele-

gating legislative discretion.—*Laurelle v. Bush*, 119 P. 953.

§ 603 (Cal.App.) An ordinance prohibiting moving picture exhibitions within 200 feet of a church or schoolhouse *held* not to place an unnecessary or unreasonable condition on the conduct of the business.—*Laurelle v. Bush*, 119 P. 953.

## XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

### (A) Streets and Other Public Ways.

§ 663 (Okl.) Railway company occupying a street after vacation thereof *held* liable to abutting owners for value of land taken and depreciation to remaining portion.—*Arkansas Valley & W. Ry. Co. v. Bullen*, 119 P. 414; *Same v. Johnson*, Id. 416.

§ 669 (Mont.) The right to use streets must be exercised with due recognition of the rights of abutting owners to ingress and egress.—*Iverson v. Dilno*, 119 P. 719.

§ 671 (Mont.) Defendants' conduct in obstructing a public street in front of plaintiff's place of business *held* a nuisance, under Rev. Codes, § 6162.—*Iverson v. Dilno*, 119 P. 719.

Equity will interpose by injunction to protect one from the maintenance of a nuisance by interfering with traffic in the street in front of one's place of business.—Id.

The annoyance from the maintenance of a nuisance by interference with traffic on a public street must substantially injure an abutter's ingress and egress.—Id.

§ 671 (Okl.) Defendant by fencing certain streets *held* to have created a public nuisance under Comp. Laws 1909, § 4752, which plaintiff could sue to abate when such acts were specially injurious to her.—*Revard v. Hunt*, 119 P. 589.

Under Comp. Laws 1909, § 4757, no lapse of time estops injured party from bringing action to abate public nuisance.—Id.

§§ 680, 681 (Okl.) Const. art. 18, § 5a, requiring approval of electors to grant extension or renewal of franchise, *held* not to apply to mere extension of the facilities employed.—*Overholser v. Oklahoma Interurban Traction Co.*, 119 P. 127.

§ 682 (Okl.) Amendment of ordinance permitting street railway to extend its tracks generally throughout the city, although original franchise named certain streets which might be used, *held* not repugnant to Const. art. 18, § 5a.—*Overholser v. Oklahoma Interurban Traction Co.*, 119 P. 127.

§ 703 (Mont.) The general public only has the right to use streets for the purpose for which they were created.—*Iverson v. Dilno*, 119 P. 719.

§ 706 (Mont.) In an action for injuries to a child alleged to have been run over by defendant's wagon, evidence *held* to warrant a finding that the child was not injured by the wagon.—*Byrnes v. Butte Brewing Co.*, 119 P. 788.

## XII. TORTS.

### (A) Exercise of Governmental and Corporate Powers in General.

§ 723 (Wash.) A municipal corporation is liable for injuries resulting from the negligent exercise of its powers involving a violation of a duty.—*Wood v. City of Tacoma*, 119 P. 859.

§ 741 (Mont.) Rev. Codes, § 3289, providing for notice of claim for injuries against a city or town by a defect in public works, etc., *held* inapplicable to injuries to property.—*Kelly v. City of Butte*, 119 P. 171.

§ 742 (Okl.) In action against city and private person for damages from nuisance in alley, petition *held* to sufficiently allege notice to

city of the nuisance, and negligence on its part thereafter, to be good against demurrer.—*City of Pawhuska v. Rush*, 119 P. 239.

### (C) Defects or Obstructions in Streets and Other Public Ways.

§ 812 (Mont.) Notice filed with city clerk of a city stating time and place of an injury *held* sufficient within Rev. Codes, § 3289.—*Tiggerman v. City of Butte*, 119 P. 477.

### (D) Defects or Obstructions in Sewers, Drains, and Water Courses.

§ 845 (Mont.) The measure of plaintiff's damages for the negligent flooding of a mine *held* the sum it would cost to replace the mine in the same condition as before it was flooded, with interest, in the discretion of the jury.—*Kelly v. City of Butte*, 119 P. 171.

The flooding of plaintiff's mine by reason of the adoption of a defective plan for the construction of a city sewer *held* not an injury caused by a defect in public work, within Rev. Codes, § 3289, providing for notice.—Id.

In an action against a city for flooding plaintiff's mine, whether flooding resulted from the city's negligence in carrying out a general plan for the extension of sewers *held* for the jury.—Id.

§ 845 (Wash.) Evidence, in an action against a city for damages to plaintiff's property by casting water thereon from an alleged defective storm sewer, *held* to show that the real cause of the water collecting upon plaintiff's lots was the raising of the grade of a street and the alley.—*Wood v. City of Tacoma*, 119 P. 859.

## XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

### (A) Power to Incur Indebtedness and Expenditures.

§ 867 (Okl.) Under Const. art. 10, § 27, proposition submitting to voters of city the question whether it should incur indebtedness for construction of electric light plant *held* to sufficiently apprise the voters of the nature of the utility.—*City of Woodward v. Raynor*, 119 P. 964.

### (C) Bonds and Other Securities, and Sinking Funds.

§ 910 (Cal.App.) Specific charter authority to issue municipal bonds excludes the right to issue for purposes not specified.—*City of Long Beach v. Boynton*, 119 P. 677.

§ 911 (Cal.App.) Long Beach City Charter, § 3, subd. 11, and section 21 of article 11, *held* to authorize bonds to construct a pier, but not to repair one.—*City of Long Beach v. Boynton*, 119 P. 677.

§ 918 (Cal.App.) As construed with Long Beach City Charter, art. 11, § 21, and St. 1901, p. 28, § 3, authority, under Charter, § 3, subd. 8, to issue bonds, *held* limited to the improvements therein mentioned, and not to extend to subdivision 11.—*City of Long Beach v. Boynton*, 119 P. 677.

§ 935 (Cal.App.) St. 1911, p. 421, *held* not to legalize municipal bonds under an affirmative vote of two-thirds of the electors voting on the proposition, but less than two-thirds of those voting at the election.—*City of Long Beach v. Boynton*, 119 P. 677.

St. 1911, p. 421, *held* not to validate municipal bonds insufficiently voted under a charter.—Id.

## XV. ACTIONS.

§ 1016 (Colo.) A city had the legal capacity to sue to cancel municipal water right obligations issued through the fraudulent conspiracy of its officers with others for private profit.—*City of Goldfield v. MacDonald*, 119 P. 1069.

in its name upon the ground of conspiracy of its councilmen with others for the purchase of the property for which the obligations were issued, *held* to state a cause of action.—*City of Goldfield v. MacDonald*, 119 P. 1069.

§ 1034 (Mont.) A complaint in an action for damages by a change in the grade of a street *held* to allege that the city committing the act was at that time a municipal corporation and a body politic, within Rev. Codes, § 3202.—*Drew v. City of Butte*, 119 P. 279.

## MURDER.

See Homicide.

## MUTUAL BENEFIT INSURANCE.

See Insurance, § 756.

## NAMES.

See Partnership, § 64.

§ 16 (Cal.App.) Certain names in a judgment *held* idem sonans with those of parties against whom the judgment was set up as a defense.—*Kriste v. International Savings & Exchange Bank*, 119 P. 666.

§ 18 (Cal.App.) In view of Code Civ. Proc. § 1963, subd. 25, finding that defendants in a judgment set up as a defense were not the same parties as the plaintiffs therein *held* unsupported.—*Kriste v. International Savings & Exchange Bank*, 119 P. 666.

## NAVIGABLE WATERS.

See Ferries; Statutes, § 104; Waters and Water Courses.

### I. RIGHTS OF PUBLIC.

§ 1 (Idaho) Stream sufficient during high-water season to be used for floating logs or timber *held* navigable.—*Idaho Northern R. Co. v. Post Falls Lumber & Mfg. Co.*, 119 P. 1098.

The question of navigability of a stream is one of fact.—*Id.*

The question whether the floating of logs or timber on a stream can be done profitably *held* not to affect the question of navigability of the stream.—*Id.*

Proof that a stream flowing through undeveloped territory has never been utilized for the floating of logs *held* to have little weight in determining its navigability.—*Id.*

§ 19 (Idaho) A railroad building bridges across a stream capable of being used for floating timber must not unreasonably obstruct navigation.—*Idaho Northern R. Co. v. Post Falls Lumber & Mfg. Co.*, 119 P. 1098.

§ 20 (Wash.) Under Act Cong. March 3, 1899, § 9, a bridge may be built over a navigable stream wholly within a state, if authorized by the state or a subdivision thereof, provided the location and plans are approved by the chief of engineers and by the Secretary of War; Act Cong. March 23, 1906, not requiring a special act of Congress.—*In re City of Seattle*, 119 P. 798.

A condition attached to the approval by the Secretary of War of the erection of a bridge over a canal under the jurisdiction of the federal government *held* not to contemplate that the Secretary would subsequently arbitrarily order the bridge to be removed and prohibit another to be erected in its place.—*Id.*

### II. LANDS UNDER WATER.

§ 36 (Idaho) Riparian owner on a meandered stream *held* to take title to the center or thread of the stream.—*Ulbright v. Baslington*, 119 P. 292.

Riparian proprietor on a meandered lake, circular in form, *held* to take to side line ex-

§ 36 (Or.) High-water mark, constituting a boundary between a riparian owner and the public, defined.—*Sun Dial Ranch v. May Land Co.*, 119 P. 758.

The margin of the bed of a river which lies between high and low water mark *held* the beach or shore, actually forming a part of the bed of the river.—*Id.*

The "bank of a river" defined.—*Id.*

Where a stream is intended to be meandered by public surveys, the stream, and not the actual meander line as run on the ground, is the true boundary of the riparian owner.—*Id.*

§ 37 (Cal.) "Tidelands," as used in Const. art. 15, § 3, defined.—*San Pedro, L. A. & S. L. R. Co. v. Hamilton*, 119 P. 1073; *Same v. Nelson*, *Id.* 1077.

Const. art. 15, § 3, *held* not to preclude a lease of tidelands by the state to private persons or corporations for a term of years.—*Id.*

## III. RIPARIAN AND LITTORAL RIGHTS.

§ 39 (Idaho) Care required of railroad building its road along a stream capable of being used for floating timber stated.—*Idaho Northern R. Co. v. Post Falls Lumber & Mfg. Co.*, 119 P. 1098.

One utilizing a stream for floating logs *held* required to exercise care proportionate to natural conditions of the stream, and the liability of inflicting injury upon others.—*Id.*

§ 44 (Or.) "Accretion" defined.—*Sun Dial Ranch v. May Land Co.*, 119 P. 758.

## NEGATIVE PREGNANT.

See Pleading, § 126.

## NEGLIGENCE.

See Boundaries, § 53; Carriers, §§ 228, 283, 318; Chattel Mortgages, § 176; Damages, § 62; Electricity; Evidence, § 264; Master and Servant; Municipal Corporations, §§ 723, 845; Pleading, § 34; Street Railroads, §§ 93-117; Theaters and Shows, § 6; Waters and Water Courses, § 62.

### I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

#### (A) Personal Conduct in General.

§ 1 (Ok.) Elements of actionable negligence stated.—*Chicago, R. I. & P. Ry. Co. v. McIntire*, 119 P. 1008.

### III. CONTRIBUTORY NEGLIGENCE.

#### (A) Persons Injured in General.

§ 65 (Ok.) "Contributory negligence" defined.—*La Dow v. Oklahoma Gas & Electric Co.*, 119 P. 250.

§ 82 (Idaho) In an action for personal injuries, plaintiff, whose contributory negligence was a proximate cause of the injury, *held* not entitled to recover, notwithstanding negligence of defendant.—*Rippetoe v. Feely*, 119 P. 465.

To prevent recovery by reason of contributory negligence want of care of person injured must be a proximate cause of the injury.—*Id.*

§ 83 (Idaho) Where negligence of plaintiff contributes to his injury, negligence of defendant *held* not to relieve plaintiff from effect of his negligence.—*Rippetoe v. Feely*, 119 P. 465.

### IV. ACTIONS.

#### (A) Right of Action, Parties, Preliminary Proceedings, and Pleadings.

§ 111 (Cal.) The complaint, not alleging negligence in respect to the matter which was the

proximate cause of the accident, but only in respect to another matter, *held* to state no cause of action.—*Marsiglia v. Dozier*, 119 P. 505.

(B) Evidence.

§ 121 (Mont.) A plaintiff suing for a personal injury negligently inflicted has the burden of proving defendant's negligence.—*Byrnes v. Butte Brewing Co.*, 119 P. 788.

§ 134 (Kan.) Rule as to sufficiency of circumstances to show negligence stated.—*Duncan v. Atchison, T. & S. F. Ry. Co.*, 119 P. 356.

(C) Trial, Judgment, and Review.

§ 136 (Cal.) The existence of contributory negligence is generally a jury question.—*Jacobson v. Oakland Meat & Packing Co.*, 119 P. 653.

§ 136 (Colo.) It is only when the facts are undisputed, and are such that reasonable men can fairly draw but one conclusion, that negligence is a question for the court.—*Jackson v. Yak Mining, Milling & Tunnel Co.*, 119 P. 1058.

## NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

## NEWLY DISCOVERED EVIDENCE.

See New Trial, § 104.

## NEWSPAPERS.

See Process.

§ 5 (Okla.) Cause of action for publication of delinquent tax list *held* to accrue under Wilson's Rev. & Ann. St. 1903, § 6021, at the time of the last publication.—*Stillwater Advance Printing & Publishing Co. v. Board of Com'rs of Payne County*, 119 P. 1002.

## NEW TRIAL.

See Appeal and Error, §§ 562, 655, 754, 870, 977, 1015, 1151, 1177; Criminal Law, §§ 907-942, 1068½, 1087, 1109, 1156, 1186.

### I. NATURE AND SCOPE OF REMEDY.

§ 12 (Kan.) The pendency of a motion for a new trial, where judgment has been rendered, will not stay execution.—*Powell v. Bradley*, 119 P. 543.

### II. GROUNDS.

(D) Disqualification or Misconduct of or Affecting Jury.

§ 52 (Wash.) That a verdict was reached by the quotient method does not show misconduct of jurors warranting a new trial, unless they agreed in advance to be bound by it.—*Wiles v. Northern Pac. Ry. Co.*, 119 P. 810.

(F) Verdict or Findings Contrary to Law or Evidence.

§ 72 (Wash.) The trial judge may grant a new trial whenever the verdict in his opinion is against the weight of the evidence.—*McGraw v. Manhattan Co.*, 119 P. 822.

(H) Newly Discovered Evidence.

§ 104 (Wash.) Railroad company sued for ejecting a passenger *held* not entitled to a new trial on account of absent witnesses where their evidence was cumulative.—*Wiles v. Northern Pac. Ry. Co.*, 119 P. 810.

### III. PROCEEDINGS TO PROCURE NEW TRIAL.

§ 128 (Kan.) Motion for new trial *held* to mean that special findings are against the evidence.—*Swan v. Bevis Rock Salt Co.*, 119 P. 871.

§ 140 (Wash.) The burden is on movant for a new trial to show misconduct of jurors.—*Wiles v. Northern Pac. Ry. Co.*, 119 P. 810.

§ 143 (Wash.) While under the Washington statute a juror may impeach his own verdict, the evidence must be complete and certain.—*Wiles v. Northern Pac. Ry. Co.*, 119 P. 810.

§ 150 (Wash.) Railroad company sued for ejecting a passenger *held* not entitled to a new trial on account of absent witnesses, where no affidavits were produced.—*Wiles v. Northern Pac. Ry. Co.*, 119 P. 810.

§ 157 (Okla.) The overruling of a motion for a new trial pro forma is not error sufficient to require a reversal.—*Terry v. Parnell*, 119 P. 629.

## NOISE.

See Eminent Domain, § 104.

## NONRESIDENCE.

See Appeal and Error, § 684; Executors and Administrators, § 29; Limitation of Actions, §§ 4, 84; Removal of Causes, § 49; Venue, § 69.

## NONSUIT.

See Dismissal and Nonsuit.

## NONSUPPORT.

See Divorce, § 31.

## NOTARIES.

See Depositions, § 76.

## NOTES.

See Bills and Notes.

## NOTICE.

See Appeal and Error, §§ 417, 564, 565, 568, 596, 607, 671, 837; Bills and Notes, §§ 339, 342, 370; Corporations, § 448; Counties, § 178; Criminal Law, §§ 1081, 1109; Damages, § 40; Depositions, §§ 99, 111; Electricity, § 16; Execution, §§ 222, 256; Fish; Game; Highways, § 7; Husband and Wife, § 299; Insurance, § 236; Limitation of Actions, § 36; Master and Servant, §§ 125, 217, 235, 270, 289; Mechanics' Liens, § 99; Mines and Minerals, § 77; Municipal Corporations, §§ 294, 741, 742, 812; Principal and Surety, § 139; Process; Taxation, §§ 662, 679, 685, 704, 734, 788; Vendor and Purchaser, § 214; Waters and Water Courses, § 17.

§ 2 (Kan.) "Actual notice" defined.—*Nordman v. Rau*, 119 P. 351.

## NUISANCE.

See Agriculture; Constitutional Law, § 63; Eminent Domain, §§ 2, 104; Municipal Corporations, §§ 671, 742.

### I. PRIVATE NUISANCES.

(A) Nature of Injury, and Liability Therefor.

§ 1 (Mont.) Nuisance defined.—*Iverson v. Dilno*, 119 P. 719.

### II. PUBLIC NUISANCES.

(B) Rights and Remedies of Private Persons.

§ 72 (Mont.) Under Rev. Codes, § 6171, *held* immaterial that the acts sought to be restrained as a private nuisance also constituted a public nuisance; plaintiff's injury differing in kind and degree from that to the public.—*Iverson v. Dilno*, 119 P. 719.

**OATH.**

See Counties, § 35.

§ 1 (Okl.) "Oath" defined by Comp. Laws 1909, § 2177.—*Town of Checotah v. Town of Eufaula*, 119 P. 1014.

**OBJECTIONS.**

See Appeal and Error, §§ 185, 192; Criminal Law, §§ 1032, 1043, 1114, 1120; Depositions, § 111; Pleading, §§ 406, 418; Trial, §§ 91, 97.

**OBLIGATION OF CONTRACTS.**

See Constitutional Law, §§ 89, 152.

**OBSTRUCTIONS.**

See Highways, §§ 7, 159; Municipal Corporations, § 671; Navigable Waters, § 19; Waters and Water Courses, § 62.

**OFFICERS.**

See Attorney General; Banks and Banking, §§ 84, 109; Bribery; Constitutional Law, § 63; Counties, §§ 81, 114; Criminal Law, § 507; Fish; Game; Indians, § 27; Judges; Justices of the Peace; Mandamus; Municipal Corporations, §§ 1016, 1034; Quo Warranto; Receivers; Schools and School Districts, § 103; States, § 41; Woods and Forests.

**I. APPOINTMENT, QUALIFICATION, AND TENURE.**

(G) Resignation, Suspension, or Removal.

§ 74 (Mont.) Proceedings under Rev. Codes, § 9006, to remove an officer for receiving illegal fees *held* to be a criminal proceeding.—*State v. District Court, Silver Bow County*, 119 P. 1103.

**III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.**

§ 94 (Mont.) The Legislature may exact extra duties of a public officer without providing compensation for such duties.—*State v. District Court, Silver Bow County*, 119 P. 1103.

§ 95 (Cal.App.) Where a salary of an office is being paid to one holding it under color of right, mandamus will not lie to compel payment of such salary to another until the title to the office has been determined.—*Black v. Board of Police & Fire Com'rs of City of San Jose*, 119 P. 874.

§ 100 (Okl.) A deputy, appointed to hold during pleasure of principal, *held* not to hold for a term, within Const. art. 23, § 10, prohibiting a change of salary of any public officer during his term of office.—*Board of Com'rs of Muskogee County v. Hart*, 119 P. 132.

**OIL.**

See Mines and Minerals, §§ 55-79.

**OPENING.**

See Judgment, § 344.

**OPINION EVIDENCE.**

See Criminal Law, § 448; Evidence, §§ 471-568.

**OPTIONS.**

See Bills and Notes, § 526; Brokers, § 49; Cancellation of Instruments; Contracts, § 172; Counties, § 178; Estoppel, § 68; Vendor and Purchaser, § 18.

**ORAL TESTIMONY.**

See Evidence, § 178.

**ORDERS.**

See Appeal and Error; Bail, § 73; Certiorari; Divorce, § 246; Master and Servant, § 245; Mortgages, § 502; Parent and Child, § 17.

**ORDINANCES.**

See Municipal Corporations, §§ 7, 107-118, 589-603, 682.

**PARDON.**

See Convicts.

**PARENT AND CHILD.**

See Appeal and Error, § 894; Damages, § 99; Divorce, §§ 303, 312; Evidence, § 320; Fraudulent Conveyances, § 96; Guardian and Ward.

§ 7 (Colo.) Both parents may join in a suit for the death of a child resulting from a breach of contract to properly care for him, etc.—*Bailey v. College of Sacred Heart*, 119 P. 1067.

The complaint in an action by parents against a school corporation for breach of contract to care for plaintiffs' child, resulting in its death, *held* not to show that defendant was a purely eleemosynary corporation, and to be sufficient.—*Id.*

§ 17 (Cal.App.) A parent cannot be imprisoned for a failure to obey an order of court directing the support of a child of tender years unless he has the ability to comply with the order.—*Ex parte McCandless*, 119 P. 199.

**PARKS.**

See Eminent Domain, § 41; Municipal Corporations, § 223.

**PAROL EVIDENCE.**

See Evidence, §§ 397-455.

**PARTICULARS.**

Bill of, see Pleading, § 317.

**PARTIES.**

See Appeal and Error, §§ 327-336; Continuance, § 46; Corporations, §§ 190, 217, 320, 518; Descent and Distribution, § 91; Ejectment, § 17; Judgment, § 240; Mortgages, §§ 427, 434; Quo Warranto, § 52.

**V. DEFECTS, OBJECTIONS, AND AMENDMENT.**

§ 75 (Okl.) Under the Code, misjoinder of parties is not a ground for demurrer.—*City of Pawhuska v. Rush*, 119 P. 239.

§ 96 (Or.) Any impropriety in joining one as a defendant in foreclosure was waived by his answer, asking affirmative relief.—*Johnson v. White*, 119 P. 769.

**PARTITION.**

See Contracts, § 111; Divorce, § 249.

**PARTNERSHIP.**

See Appeal and Error, § 178; Corporations, § 30; Justices of the Peace, § 47.

**I. THE RELATION.**

(B) As to Third Persons.

§ 41 (Okl.) Stockholders failing to organize a corporation *held* partners.—*Lynch v. Perryman*, 119 P. 229.

**II. THE FIRM, ITS NAME, POWERS, AND PROPERTY.**

§ 64 (Wash.) An objection that plaintiffs' partners were doing business under an assum-

ed name and had not filed the certificate required by Rem. & Bal. Code, § 8369 et seq., was not available where it was not taken by answer.—*Hale v. City Cab, Carriage & Transfer Co.*, 119 P. 837.

Where plaintiffs' partnership name contained the names of all the partners, plaintiffs were not bound to file a certificate of such names under Rem. & Bal. Code, §§ 8369, 8372.—*Id.*

## VII. DISSOLUTION, SETTLEMENT, AND ACCOUNTING.

### (D) Actions for Dissolution and Accounting.

§ 327 (Cal.App.) A complaint, in an action for the dissolution of a firm and for an accounting, held not to preclude the court from finding the exact condition of the firm accounts.—*Brandt v. Salomonson*, 119 P. 946.

## PART PERFORMANCE.

See Frauds, Statute of, § 129.

## PASSENGERS.

See Carriers, §§ 253-282.

## PATENTS.

See Mines and Minerals, § 41; Public Lands, §§ 114, 184½.

## PAYMENT.

See Accord and Satisfaction; Bills and Notes, §§ 427, 509; Chattel Mortgages, § 41; Insurance; Interest, § 50; Mechanics' Liens, § 239; Mines and Minerals, § 79; Principal and Agent, § 24; Principal and Surety, § 200; Sales, §§ 101, 174, 187; Specific Performance, § 92; Subrogation.

## PENALTIES.

See Homicide, § 332.

## PERJURY.

See Criminal Law, § 942.

## I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 10 (Okl.) "Deposition," as used in Comp. Laws 1909, § 2182, held to include "affidavit" in view of section 2965.—*Town of Checotah v. Town of Eufaula*, 119 P. 1014.

Test of sufficiency of affidavit under Comp. Laws 1909, § 2182, relating to perjury, stated.—*Id.*

## PERSONAL INJURIES.

See Appeal and Error, §§ 1050, 1058, 1064; Carriers, §§ 283, 318; Constitutional Law, § 287; Courts, § 8; Damages, §§ 62, 99, 132, 158, 214; Electricity; Evidence, §§ 129, 472, 481; Master and Servant; Municipal Corporations, § 706; Negligence; Railroads, §§ 301, 352; Street Railroads, §§ 93-117; Trial, § 242.

## PETITION.

See Appeal and Error, § 361; Bail, § 73; Counties, § 178; Highways, § 90; Pleading.

## PHYSICIANS AND SURGEONS.

See Evidence, § 471; Intoxicating Liquors, § 224.

## PICTURES.

See Mandamus, § 14; Theaters and Shows.

## PLEA.

See Criminal Law, § 292.

## PLEADING.

See Accord and Satisfaction; Action, § 38; Appeal and Error, §§ 171, 173, 192-197, 724, 889, 917, 969, 1039, 1041, 1042, 1078, 1170; Appearance; Brokers, § 82; Cancellation of Instruments; Contracts, § 346; Corporations, §§ 190, 518; Courts, §§ 189, 212; Damages, § 153; Dismissal and Nonsuit; Divorce, §§ 101, 150; Ejectment, § 93; Forcible Entry and Detainer, §§ 27, 30; Indians, § 1; Injunction, § 113; Judgment, §§ 888, 949; Libel and Slander, §§ 38, 97; Life Estates, § 28; Mandamus, § 164; Master and Servant, §§ 258-264; Mines and Minerals, § 38; Mortgages, § 454; Municipal Corporations, §§ 404, 742, 1034; Negligence, § 111; Parent and Child, § 7; Parties, § 96; Partnership, §§ 64, 327; Quo Warranto, § 52; Removal of Causes, §§ 86, 89; Sales, §§ 355, 413, 479; Specific Performance, §§ 114, 116, 116½; Taxation, § 611; Waters and Water Courses, § 33.

## I. FORM AND ALLEGATIONS IN GENERAL.

§ 1 (Idaho) Under Rev. Codes, § 4162, the pleadings in an action are the complaint, the demurrer to the complaint, the answer, and the demurrer to the answer.—*Nobach v. Scott*, 119 P. 295.

§ 20 (Okl.) Willful or intentional act of employer and failure to exercise ordinary care held properly pleaded in alternative in one count.—*Chicago, R. I. & P. Ry. Co. v. McIntire*, 119 P. 1008.

§ 34 (Idaho) Under Rev. Codes, §§ 4161, 4207, all pleadings must be liberally construed, with a view to substantial justice.—*Nobach v. Scott*, 119 P. 295.

§ 34 (Okl.) A petition containing general averments of negligence, and stating that the negligence "hereinbefore complained of consisted in this," presents only such issues as are found in the specific allegations.—*Chicago, R. I. & P. Ry. Co. v. McIntire*, 119 P. 1008.

## II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

§ 52 (Kan.) One suing a milling company and a railroad company for joint obstruction of a river held improperly required to separately state and number his causes of action.—*Arnold v. Chicago, R. I. & P. Ry. Co.*, 119 P. 373.

## III. PLEA OR ANSWER, CROSS-COMPLAINT, AND AFFIDAVIT OF DEFENSE.

### (A) Defenses in General.

§ 93 (Mont.) A defendant may plead inconsistent defenses, if they are not so incompatible as necessarily to render one absolutely false.—*O'Donnell v. City of Butte*, 119 P. 281.

§ 93 (Okl.) Defendant in an action for slander may, under Comp. Laws 1909, §§ 5634, 5666, set up as a defense a general denial and that the language used was true.—*Wallace v. Kopenbrink*, 119 P. 579.

### (C) Traverses or Denials and Admissions.

§ 126 (Idaho) "Negative pregnant" defined.—*Nobach v. Scott*, 119 P. 295.

§ 129 (Cal.) The allegations of a cross-complaint in a suit to quiet title, when not denied, stand as admitted.—*Wright v. Anglo-Californian Bank*, 119 P. 651.

## IV. REPLICATION OR REPLY AND SUBSEQUENT PLEADINGS.

§ 180 (Kan.) In ejectment, it was improper to permit plaintiff, over objection, to file a reply setting up a cause of action to quiet title.—*Bear v. Kenyon*, 119 P. 713.

every material allegation constituting plaintiff's cause of action.—O'Donnell v. City of Butte, 119 P. 281.

§ 192 (Colo.) If a complaint states a cause of action, objections thereto for indefiniteness or informality in the allegations, should be taken by motion and not by demurrer.—City of Goldfield v. MacDonald, 119 P. 1069.

§ 208 (Colo.) A special demurrer *held* not to sufficiently point out defects in the complaint complained of so that it would not be considered.—City of Goldfield v. MacDonald, 119 P. 1069.

§ 214 (Colo.) A demurrer admits of all the material facts alleged in the complaint.—City of Goldfield v. MacDonald, 119 P. 1069.

§ 220 (Colo.) Where the complaint was demurred to on several grounds, a general order sustaining the demurrer determined every legal issue tendered in favor of defendant.—City of Goldfield v. MacDonald, 119 P. 1069.

## VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

§ 236 (Cal.App.) An order denying relief under Code Civ. Proc. § 473, authorizing the court to allow amendments, is within the court's discretion.—Blumer v. Mayhew, 119 P. 202.

§ 236 (Cal.App.) Code Civ. Proc. § 473, *held* to confer discretion on a trial court to grant amendments to pleadings at any time before, during, or after the trial in the furtherance of justice.—San Francisco & Suburban Home Bldg. Society v. Leonard, 119 P. 405.

Great liberality should be shown by a trial court in permitting the amendment of pleadings where it can be done without working great delay and will facilitate the production of all the facts bearing on the questions involved in the action.—Id.

§ 238 (Cal.App.) Leave to amend a complaint is properly refused where it is clear that by no amendment could a cause of action be stated within the court's jurisdiction.—Reeg v. McArthur, 119 P. 105.

## VII. SIGNATURE AND VERIFICATION.

§ 288 (Idaho) Under Rev. Codes, § 4198, pleadings must be signed by a resident attorney.—Nobach v. Scott, 119 P. 295.

## IX. BILL OF PARTICULARS AND COPY OF ACCOUNT.

§ 317 (Mont.) In an action for wages and expenses incurred, an affidavit setting up facts showing an account stated *held* sufficient excuse for failure to file a bill of particulars.—Cohen v. Clark, 119 P. 775.

## XI. MOTIONS.

§ 343 (Colo.) A motion for judgment on the pleadings cannot take the place of a general demurrer to the complaint.—Whitehead v. Johnson, 119 P. 472.

§ 356 (Cal.App.) That an amended complaint was filed without previous leave of court can be raised by motion to strike.—Harvey v. Meigs, 119 P. 941.

§ 364 (Idaho) Averments of probative facts as a separate defense which might be proven under general or specific denials should be stricken on motion.—Nobach v. Scott, 119 P. 295.

§ 368 (Mont.) A complaint not showing affirmatively from its face that it stated more than one cause of action *held* sufficient as against a motion to separate.—Cohen v. Clark, 119 P. 775.

A general denial does not raise an issue upon an allegation that a certain person is the duly appointed, qualified, and acting guardian of minor plaintiffs.—Id.

An answer *held* not to have raised an issue on plaintiffs' allegation that their property was located within a city.—Id.

§ 380 (Idaho) Admission of evidence relating to matters stricken from complaint *held* error.—Unfried v. Libert, 119 P. 885.

§ 387 (Or.) Where a complaint based the right to recover upon certain grounds, plaintiff cannot recover upon others, for a party may not alter his theory of action.—United States Nat. Bank of Vale v. First Trust & Savings Bank of Brogan, 119 P. 343.

## XIII. DEFECTS AND OBJECTIONS. WAIVER. AND AIDER BY VERDICT OR JUDGMENT.

§ 406 (Cal.App.) An objection to a complaint for uncertainty is waived by failure to demur on that ground.—Wilson v. First Nat. Bank, 119 P. 957.

§ 406 (Mont.) Under Rev. Codes, § 6539, objection to a complaint on the ground of indefiniteness *held* waived by a failure of a special demurrer to specify such objection.—Cohen v. Clark, 119 P. 775.

§ 418 (Wash.) By answering and proceeding to trial on the merits, defendant *held* to have waived error in overruling a demurrer.—Johnson v. Johnson, 119 P. 22.

## PLEDGES.

See Estoppel, § 118.

## PLUMBERS.

See Licenses.

## POLICE.

See Bribery.

## POLICE JUSTICES.

See Judges, § 11.

## POLICE POWER.

See Agriculture; Constitutional Law, §§ 63, 70, 81, 208.

## POLICY.

See Insurance.

## POLITICAL RIGHTS.

See Elections.

## POSSESSION.

See Adverse Possession; Ejectment, § 95.

## POWERS.

See Mortgages, §§ 358-370.

## PRÆCIPLE.

See Appeal and Error, § 430.

## PREGNANCY.

See Criminal Law, § 369.

## PREJUDICE.

See Appeal and Error, §§ 925, 1026-1071; Criminal Law, §§ 1166½-1175; Estoppel, § 58; Judges, § 51.

**PRELIMINARY EXAMINATION.**

See Criminal Law, § 543.

**PRELIMINARY INJUNCTION.**

See Injunction, §§ 135-163.

**PREMIUMS.**

See Insurance.

**PRESCRIPTION.**

See Adverse Possession; Limitation of Actions; Waters and Water Courses, § 138.

**PRESENTMENT.**

See Bills and Notes, § 537.

**PRESUMPTIONS.**

See Appeal and Error, §§ 900-935, 1019, 1031; Criminal Law, §§ 306, 313; Evidence, §§ 80, 83.

**PRINCIPAL AND ACCESSORY.**

See Banks and Banking; Criminal Law, §§ 59, 507.

**PRINCIPAL AND AGENT.**

See Appeal and Error, §§ 216, 1002; Attorney and Client; Banks and Banking, § 84; Bills and Notes, § 509; Brokers; Commerce, § 46; Corporations, §§ 289, 320, 404-432, 646; Evidence, § 243; Insurance, §§ 88, 103, 129, 142, 238, 665.

**I. THE RELATION.****(A) Creation and Existence.**§ 23 (Wyo.) An agency for the shipment of goods *held* sufficiently established by the testimony of the plaintiff, in an action for the loss of the goods, and the agent for shipment.—Oregon Short Line Ry. Co. v. Blyth, 119 P. 875.§ 24 (Okla.) In action by mortgagor against mortgagee for an accounting, whether payments to one of the defendants were made to him as authorized agent of the mortgagee *held* for the jury.—McNabb v. Hunt, 119 P. 210.**II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.****(A) Execution of Agency.**§ 51 (Kan.) Attorneys in fact appointed by defendant *held* to have authority to give notes in settlement.—Waples-Platter Grocer Co. v. Kinkaid, 119 P. 537.**III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.****(A) Powers of Agent.**§ 97 (Wash.) A power of attorney *held* not to limit authority of appointee to transactions of firm of which principal was a member, but to authorize the appointee to transact personal business of the principal.—Mauk v. Lee, 119 P. 185.§ 104 (Idaho) In action on note, evidence of representations and statements by agent *held* admissible as binding on the principal, where breach of warranty was pleaded as a defense.—Park v. Brandt, 119 P. 877.

§ 116 (Cal.App.) Secret instructions will not lessen the apparent powers of an agent which have been exercised by him without objection by the principal.—Robinson v. American Fish &amp; Oyster Co., 119 P. 388.

§ 123 (Cal.App.) In an action to charge a principal with the contract of his agent, evidence *held* to warrant a finding under Civ.

Code, § 2300, that the agent was possessed of the ostensible power to make the contract.—Robinson v. American Fish &amp; Oyster Co., 119 P. 388.

§ 124 (Okla.) The apparent authority of an agent is a question of fact for the jury.—Allen v. Kenyon, 119 P. 960.

**(C) Unauthorized and Wrongful Acts.**

§ 147 (Cal.App.) Where an agency is known to be special, or the facts are such as to put a person on inquiry, one dealing with the agent is bound to discover the agent's actual authority.—Robinson v. American Fish &amp; Oyster Co., 119 P. 388.

§ 156 (Idaho) In action on note, evidence of representations and statements made by agent *held* admissible as binding on the principal, where fraud and misrepresentations were pleaded as a defense.—Park v. Brandt, 119 P. 877.**PRINCIPAL AND SURETY.**

See Bail; Commerce, § 46; Evidence, § 21.

**IV. REMEDIES OF CREDITORS.**§ 139 (Okla.) Employer *held* not required to notify sureties on bond of agent of his default as a condition precedent to recovery upon the bond.—Chicago Crayon Co. v. Rogers, 119 P. 630.**V. RIGHTS AND REMEDIES OF SURETY.****(C) As to Cosurety.**§ 200 (Kan.) Time for payment of note *held* not presumed to have been extended, so as to release surety.—Livermore v. Ayres, 119 P. 549.**PRINTING.**

See States, § 94.

**PRIVATE NUISANCE.**

See Nuisance, § 1.

**PRIVILEGED COMMUNICATIONS.**

See Libel and Slander, §§ 38-97.

**PROBABLE CAUSE.**

See Malicious Prosecution.

**PROCESS.**

See Appeal and Error, §§ 430, 564; Appearance; Commerce, § 46; Corporations, § 646; Criminal Law, §§ 1081, 1109; Evidence, § 178; Execution; Garnishment; Judgment, § 147; Justices of the Peace, § 58; Mandamus; Quo Warranto.

**II. SERVICE.****(C) Publication or Other Notice.**§ 86 (Or.) Under L. O. L. §§ 399, 414, service of summons by publication *held* proper in a suit to specifically perform a contract to convey.—Hawkins v. Doe, 119 P. 754.**PROFITS.**

See Damages, §§ 40, 124.

**PROHIBITION.**

See Intoxicating Liquors.

**I. NATURE AND GROUNDS.**

§ 1 (Okla.) Prohibition is proper remedy, where inferior tribunal assumes to exercise judicial powers not granted by law.—Atchison, T. &amp; S. F. Ry. Co. v. Love, 119 P. 207.



§ 3 (Cal.App.) A District Court of Appeal will not exercise original jurisdiction where the petitioner has the right of appeal from the judgment in the court where the original proceeding was commenced.—In re Burt, 119 P. 674.

Under Supreme Court Rule 26 (78 Pac. xi), a District Court of Appeal will not issue a writ of prohibition, where appeal lies from judgment denying writ in superior court.—Id.

§ 3 (Mont.) Writ of prohibition *held* not available to prohibit a trial court from hearing an order directing relator to show cause why he did not comply with a judgment because the original judgment was void.—State v. District Court of Silver Bow County, 119 P. 476.

§ 3 (Utah) Under the Constitution and statute, prohibition *held* not to lie to restrain a city court from proceeding with the trial of petitioner, charged in the city court with violating an ordinance alleged by petitioner to be invalid.—Carrigan v. Bowman, 119 P. 1037.

Where the validity of a statute is involved, prohibition will not be granted in advance of the trial in the inferior court, when a plain remedy by appeal is afforded.—Id.

## PROMISSORY NOTES.

See Bills and Notes.

## PROPERTY.

See Adverse Possession; Constitutional Law, §§ 251-320; Dedication; Eminent Domain.

§ 7 (Ok.) Owner of property *held* entitled to its exclusive use and occupation, but subject to conditions imposed for the welfare of others.—La Dow v. Oklahoma Gas & Electric Co., 119 P. 250.

## PROVINCE OF COURT AND JURY.

See Criminal Law, §§ 742-768; Trial, § 194.

## PROVOCATION.

See Homicide, § 11.

## PUBLICATION.

See Injunction, § 101; Newspapers; Process; Taxation, §§ 630, 662.

## PUBLIC DEBT.

See Counties, §§ 177-190.

## PUBLIC IMPROVEMENTS.

See Municipal Corporations, §§ 289-514, 918.

## PUBLIC LANDS.

See Mines and Minerals, §§ 23-41; Navigable Waters, §§ 36-44; Statutes, § 104; Waters and Water Courses, §§ 8-33, 48.

## II. SURVEY AND DISPOSAL OF LANDS OF UNITED STATES.

(B) Entries, Sales, and Possessory Rights.

§ 39 (Ok.) Where town-site commissioners, under Act Cong. March 1, 1901, schedule a lot to a party not entitled to it, equity will inquire whether such title shall be held as trustee for the party entitled to it.—Kellman v. Kennedy, 119 P. 1000.

§ 40 (Wash.) A relinquishment of a homestead entry *held* not induced by the filing of a contest, and the contestant did not acquire a preference right to enter the land.—Kendall v. Long, 119 P. 9.

(I) Proceedings in Land Office.

§ 103 (Idaho) Contestant of homestead entry, whose case was decided and homestead

entry made after destruction of timber by fire set by railway company *held* not entitled to maintain action for the value of the timber.—King v. Great Northern Ry. Co., 119 P. 709.

Uncanceled original homestead entry *held* to preclude contestant from acquiring an inceptive right to the land by virtue of residence thereon.—Id.

Procedure for cancellation of homestead entry and effect thereof, under Rev. St. U. S. § 2297 (U. S. Comp. St. 1901, p. 1398), stated.—Id.

§ 106 (Wash.) A contestant of a homestead entry, *held* not entitled to revive the contest by mere suggestion on the hearing of his protest against a third person's entry under the timber and stone act on the relinquishment of the homestead entry.—Kendall v. Long, 119 P. 9.

§ 109 (Wash.) A party aggrieved by an erroneous decision of the federal Land Department *held* required to resort to the remedies in that department before he can resort to the courts to correct the error.—Kendall v. Long, 119 P. 9.

The right of the courts to interfere in proceedings for the disposition of public lands *held* to arise from their inherent power to correct wrongs done to individuals by an erroneous administration of the law.—Id.

(J) Patents.

§ 114 (Idaho) Right of patentee of public land *held* to relate back only to homestead entry, and not to date of contest of former entry.—King v. Great Northern Ry. Co., 119 P. 709.

## III. DISPOSAL OF LANDS OF THE STATES.

§ 144 (Cal.App.) An excess of 2.24 acres, in an application for school lands, over that allowed by Pol. Code, § 3495, to be sold to one person will not invalidate the application.—Bartree v. Kingsbury, 119 P. 107.

§ 184½ (Wash.) Rem. & Bal. Code, § 6680, *held* not to authorize the state to set aside patents to land sold as agricultural, which in fact contained more than 1,000,000 feet of timber per quarter section, without selling the timber separately from the land.—State v. Ort, 119 P. 21.

The state *held* not entitled to recover land patented to purchasers, in the absence of fraud, for a mere mistake in determining that the land was agricultural, and not chiefly valuable for timber.—Id.

## PUBLIC NUISANCE.

See Nuisance, § 72.

## PUBLIC POLICY.

See Associations; Contracts, §§ 108, 111, 138; Descent and Distribution, § 6.

## PUBLIC SCHOOLS.

See Schools and School Districts.

## PUBLIC SERVICE CORPORATIONS.

See Carriers; Railroads; Street Railroads; Telegraphs and Telephones.

## PUBLIC USE.

See Dedication; Eminent Domain.

## PUBLIC WATER SUPPLY.

See Waters and Water Courses, §§ 213-267.

## PUNISHMENT.

See Criminal Law, §§ 800, 1147; Homicide, § 332.

## PUNITIVE DAMAGES.

See Damages, § 91.

## QUASHING.

See Criminal Law, § 1032; Mandamus, § 162.

## QUESTIONS OF LAW AND FACT.

See Criminal Law, §§ 742-768; Trial, §§ 139-143.

## QUIETING TITLE.

See Boundaries, §§ 35, 36, 37; Pleading, § 129; Records, § 18; Taxation, § 811; Trial, § 194.

## II. PROCEEDINGS AND RELIEF.

§ 44 (Wash.) In an action to quiet title to land, the burden of proof rests on plaintiffs.—*Rippey v. Harrison*, 119 P. 178.

## QUO WARRANTO.

See Drains; Turnpikes and Toll Roads, § 9.

### I. NATURE AND GROUNDS.

§ 24 (Kan.) Under Gen. St. 1909, § 7879, held, that one competent applicant of a preferred class from which appointments to office should be made could not maintain quo warranto to oust the incumbent of the office.—*Urmy v. Arnold*, 119 P. 1126.

### II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§ 33 (Or.) The creation of the office of Attorney General after the passage of L. O. L. §§ 363-377, held not to deprive prosecuting attorneys of the power to begin those actions provided for in place of quo warranto.—*State v. Millis*, 119 P. 763.

The right of prosecuting attorneys to commence those actions provided in place of quo warranto given by L. O. L. §§ 363-377, held not affected by the later enactment of L. O. L. §§ 2666, 2670, creating the office, and defining the duties of the Attorney General.—*Id.*

§ 52 (Or.) Where an action in the nature of quo warranto was erroneously begun in the name of the attorney general, the defect could be taken advantage of by demurrer.—*State v. Millis*, 119 P. 763.

## RAILROADS.

See Carriers; Constitutional Law, §§ 206, 241, 297; Courts, § 8; Eminent Domain, §§ 74, 104, 163, 203, 268, 275; Evidence, §§ 539½, 554; Master and Servant, §§ 144, 248, 286; Municipal Corporations, §§ 425, 663; Navigable Waters, §§ 19, 39; Street Railroads; Trial, §§ 41, 194; Venue, § 13.

### I. CONTROL AND REGULATION IN GENERAL.

§ 6 (Okl.) Act May 20, 1908 (Laws 1908, c. 18), held not to extend jurisdiction of the Corporation Commission beyond that fixed by Const. art. 9, §§ 18-34, inclusive, but to be auxiliary to section 18.—*Missouri, O. & G. Ry. Co. v. State*, 119 P. 117.

§ 9 (Or.) Evidence held to warrant an order of the Railroad Commission, requiring complainant railroad company to put in a spur track at a certain town, which had no other railroad facilities.—*Southern Pac. Co. v. Railroad Commission of Oregon*, 119 P. 727.

### IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

§ 58 (Okl.) Act May 20, 1908 (Laws 1908, c. 18), relating to the powers of a Corporation Commission, held valid, and an order thereun-

der compelling maintenance of a union depot proper, though one of the railroads would be put to an expense of \$50,000.—*Missouri, O. & G. Ry. Co. v. State*, 119 P. 117.

§ 58 (Okl.) Findings of Corporation Commission held to establish the reasonableness of an order requiring the erection of a depot at a certain town.—*Midland Valley R. Co. v. State*, 119 P. 413.

"Station" and "depot," as used in Const. art. 9, § 26, defined.—*Id.*

§ 58 (Okl.) Const. art. 9, § 18, held to require Corporation Commission to compel railroad company to perform duty, imposed by section 26, to maintain suitable passenger and freight depots and buildings.—*St. Louis & S. F. R. Co. v. Sutton*, 119 P. 423.

Corporation Commission held authorized to designate the place for depot, and to approve, reject, or amend the plans therefor.—*Id.*

Order of Corporation Commission, directing erection of depot of brick or cement, rather than a frame building, will not be disturbed.—*Id.*

Order prescribing in advance material to be used in depot building, ordered pursuant to Const. art. 9, § 26, held within the sound discretion of the Corporation Commission.—*Id.*

### X. OPERATION.

#### (A) Duty to Operate.

§ 214 (Or.) A carrier's duty to furnish reasonable transportation facilities exists independent of statute.—*Southern Pac. Co. v. Railroad Commission of Oregon*, 119 P. 727.

#### (B) Statutory, Municipal, and Official Regulations.

§ 223 (Or.) Laws 1907, pp. 71, 86, §§ 12, 30 (L. O. L. §§ 6887, 6908), held to confer on the Railroad Commission power to require railroad corporations to install facilities where none had previously existed.—*Southern Pac. Co. v. Railroad Commission of Oregon*, 119 P. 727.

§ 224 (Wash.) Laws 1899, c. 35, § 1, is not limited only to corporations in existence at the time of its enactment, but in terms applies to a corporation incorporated thereafter.—*Alberg v. Campbell Lumber Co.*, 119 P. 6.

Laws 1899, c. 35, § 1, requiring frogs and switches on railroads to be guarded, held to apply to railroads used in connection with mills and logging camps, as well as common carriers.—*Id.*

§ 225 (Okl.) Under Const. art. 9, § 26, every railroad company within the state is required to provide adequate depots for freight at its several stations.—*Midland Valley R. Co. v. State*, 119 P. 413.

§ 225 (Okl.) Under the common law, a carrier was under no obligation to provide freight houses.—*St. Louis & S. F. R. Co. v. Sutton*, 119 P. 423.

By Const. art. 9, § 26, railroad companies held bound to maintain suitable buildings for freight.—*Id.*

§ 225 (Or.) Legislation requiring railroad corporations to furnish reasonable and adequate facilities for the transportation of freight and passengers held not unconstitutional.—*Southern Pac. Co. v. Railroad Commission of Oregon*, 119 P. 727.

§ 226 (Okl.) Under Const. art. 9, § 26, every railroad company within the state is required to provide adequate depots for passengers at its several stations.—*Midland Valley R. Co. v. State*, 119 P. 413.

§ 226 (Okl.) Under the common law, a carrier was under no obligation to provide passenger depots.—*St. Louis & S. F. R. Co. v. Sutton*, 119 P. 423.

By Const. art. 9, § 26, railroad companies held bound to maintain suitable depot buildings for passengers.—*Id.*

quate facilities for the transportation of freight and passengers *held* not unconstitutional.—Southern Pac. Co. v. Railroad Commission of Oregon, 119 P. 727.

§ 227 (Okl.) Order of Corporation Commission, requiring an interstate train to be stopped on flag at a junction point, sustained on appeal.—St. Louis & S. F. R. Co. v. Langer, 119 P. 123.

#### (F) Accidents at Crossings.

§ 301 (Okl.) Obligations, rights, and duties of railroads and travelers at public crossings *held* mutual and equal.—Missouri, K. & T. Ry. Co. v. Horton, 119 P. 233.

§ 352 (Kan.) In an action for injuries at a crossing, special findings *held* inconsistent, and not furnishing a basis for judgment in favor of either party.—Edwards v. Atchison, T. & S. F. Ry. Co., 119 P. 872.

#### (I) Fires.

§ 481 (Kan.) In action for fire caused by operation of railroad, proof of other fires along the right of way at or near the same time *held* competent.—Tuttle v. Missouri Pac. Ry. Co., 119 P. 370.

### RAPE.

See Criminal Law, §§ 369, 678; Indictment and Information, § 125.

#### I. OFFENSES AND RESPONSIBILITY THEREFOR.

§ 13 (Okl.Cr.App.) Under Comp. Laws 1909, §§ 2353, 2356, 2357, sexual intercourse with female under age of 16 *held* rape in the second degree, whether accomplished by means of force or with consent.—Myers v. State, 119 P. 186.

#### II. PROSECUTION AND PUNISHMENT.

##### (B) Evidence.

§ 40 (Wash.) Under Rem. & Bal. Code, § 2436, the chastity of prosecutrix in statutory rape *held* presumed until the contrary is proved by specific acts of misconduct.—State v. Workman, 119 P. 751.

Evidence of general reputation for unchastity of prosecutrix over 15 and under 18 years of age is admissible as affecting her credibility.—Id.

§ 51 (Wash.) The testimony of prosecutrix that she had intercourse with accused *held* sufficient to prove the offense.—State v. Workman, 119 P. 751.

§ 54 (Wash.) The testimony of prosecutrix *held* sufficiently corroborated, within Rem. & Bal. Code, § 2443.—State v. Workman, 119 P. 751.

§ 54 (Wash.) Where prosecutrix made no complaint immediately after an alleged rape, evidence that her hair and dress were disarranged, and that the faces of prosecutrix and defendant were red on one side, was without corroborative force.—State v. Roberts, 119 P. 836.

##### (C) Trial and Review.

§ 57 (Okl.Cr.App.) Age of complaining witness is a question of fact for the jury.—Hunter v. State, 119 P. 445.

§ 57 (Wash.) In a prosecution for rape, corroboration of prosecutrix *held* insufficient to sustain a conviction as a matter of law.—State v. Roberts, 119 P. 836.

### RATIFICATION.

See Alteration of Instruments; Insurance, § 142.

See Appeal and Error, § 336; Ejectment; Forcible Entry and Detainer; Quieting Title.

### REASONABLE DOUBT.

See Criminal Law, § 789.

### RECEIVERS.

See Appeal and Error, § 327.

#### IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

##### (C) Receiver's Certificate.

§ 122 (Idaho) Courts *held* to have authority to allow interest on receiver's certificate in excess of rate fixed by statute to be allowed on money judgments and decrees, but not at a rate that would be usurious.—Hewitt v. Walters, 119 P. 705.

##### (D) Sale and Conveyance or Redelivery of Property.

§ 133 (Idaho) Determination in order for sale of property in hands of receiver of minimum bid to be received, *held* not an excess of jurisdiction.—Hewitt v. Walters, 119 P. 705.

#### V. ALLOWANCE AND PAYMENT OF CLAIMS.

§ 154 (Idaho) Equity *held* to have power to appoint receiver, and to decree that expenses incurred in the discharge of his duty shall become a lien paramount to existing mortgages or other liens.—Hewitt v. Walters, 119 P. 705.

### RECEPTION OF EVIDENCE.

See Trial, §§ 41-97.

### RECLAMATION DISTRICTS.

See Drains.

### RECORDS.

See Acknowledgment; Appeal and Error, §§ 554-695, 907, 909, 928; Chattel Mortgages, § 90; Counties, § 53; Criminal Law, §§ 543, 1087-1122, 1153; Evidence, §§ 174, 340; Ferries; Fraudulent Conveyances, § 96; Justices of the Peace, § 58; Vendor and Purchaser, §§ 214, 231.

§ 9 (Wash.) Under Rem. & Bal. Code, §§ 8809, 8813, 8823, 8834, an applicant for the registration of title to land *held* to possess the absolute right to dismissal before final decree.—Krutts v. Dodge, 119 P. 183.

§ 17 (Cal.App.) The court has the right of its own motion to restore its own records.—In re Jones' Estate, 119 P. 670.

The sole object of St. 1906, p. 73, providing for the restoration of court records which have been destroyed by conflagration, is to restore the record as it existed, regardless of its regularity or legal effect.—Id.

Under St. 1906, p. 73, petitioner *held* to be a party entitled to the restoration of the court records as to an estate.—Id.

§ 18 (Cal.) In an action to quiet title under the McEnerney act, an affidavit, alleging mere possession, *held* sufficient under section 5.—Soher v. Cabaniss, 119 P. 911.

In a suit to establish title under the McEnerney act, an affidavit *held* sufficient under section 5.—Id.

### REDEMPTION.

See Taxation, § 704.

### REFERENDUM.

See Counties, § 178.

**REFORMATION OF INSTRUMENTS.**

See Cancellation of Instruments.

**REFRESHING MEMORY.**

See Witnesses, § 255.

**REGISTRATION.**

See Records.

**REHEARING.**

See New Trial.

**RELATIONSHIP.**

See Depositions, § 83.

**RELEASE.**

See Accord and Satisfaction.

**REMAINDERS.**

See Life Estates; Wills, § 622.

**REMEDY AT LAW.**

See Equity.

**REMITTITUR.**

See Appeal and Error, § 1140.

**REMOVAL.**

See Judges, § 11; Officers, § 74.

**REMOVAL OF CAUSES.****III. CITIZENSHIP OR ALIENAGE OF PARTIES.****(B) Separable Controversies.**

§ 49 (Mont.) Suit against a nonresident employer *held* removable for plaintiff's failure to summon or procure appearance by a resident codefendant.—*Murphy v. Stone & Webster Engineering Corporation*, 119 P. 717.

**VI. PROCEEDINGS TO PROCURE AND EFFECT OF REMOVAL.**

§ 81 (Mont.) Right to remove a cause may be waived by stipulation or by failure to make timely application therefor.—*Murphy v. Stone & Webster Engineering Corporation*, 119 P. 717.

§ 86 (Okl.) Verification of petition for removal of cause to federal court not being necessary, defects therein *held* immaterial.—*Western Coal & Mining Co. v. Osborne*, 119 P. 973.

§ 89 (Okl.) Petition for removal to United States court from state court *held* to present only a question of law as to its sufficiency.—*Western Coal & Mining Co. v. Osborne*, 119 P. 973.

Where right of removal arises from facts averred in petition, issue of fact thereon must be tried in the federal court.—*Id.*

Petition for removal of cause against a foreign corporation and resident employé *held* to require its transfer by the state court.—*Id.*

§ 94 (Mont.) A nonresident defendant *held* not to have waived its right to removal of the cause to the federal Circuit Court.—*Murphy v. Stone & Webster Engineering Corporation*, 119 P. 717.

§ 94 (Okl.) Error in denying petition for removal *held* not waived by a proceeding to trial and filing motion requiring plaintiff to furnish security for costs.—*Western Coal & Mining Co. v. Osborne*, 119 P. 973.

§ 97 (Mont.) Proper application for removal of a cause *held* to deprive a state court of jurisdiction to proceed.—*Murphy v. Stone & Webster Engineering Corporation*, 119 P. 717.

**REMOVAL OF CLOUD.**

See Quieting Title.

**RENEWAL.**

See Chattel Mortgages, § 97.

**RENT.**

See Landlord and Tenant, § 208.

**REPEAL.**

See Statutes, § 159.

**REPLEVIN.****VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.**

§ 88 (Okl.) Evidence, in an action of replevin, *held* to require a demurrer to the evidence to be sustained.—*Sawyers v. Schuler*, 119 P. 984.

**REPLICATION.**

See Pleading, § 180.

**REPLY.**

See Pleading, § 180.

**REPRESENTATIONS.**

See Insurance, §§ 256-291.

**REPUTATION.**

See Criminal Law, § 377; Rape, § 40; Witnesses, § 410.

**REQUESTS.**

See Trial, §§ 256-267.

**RESCISSION.**

See Cancellation of Instruments; Exchange of Property, §§ 5, 8; Sales, §§ 101-104; Vendor and Purchaser, §§ 34, 44, 116, 118, 214.

**RESIDENCE.**

See Limitation of Actions, §§ 4, 84; Removal of Causes, § 49; Venue, § 68.

**RES JUDICATA.**

See Judgment, §§ 713, 719.

**RESTRICTIONS.**

See Wills, § 647.

**REVENUE.**

See Taxation.

**REVIEW.**

See Appeal and Error; Certiorari.

**REVIVAL.**

See Judgment, §§ 858-870.

**RIGHT OF WAY.**

See Easements.

**RIPARIAN RIGHTS.**

See Navigable Waters, §§ 36-44; Waters and Water Courses, §§ 8, 33, 42-62.

**RISKS.**

Assumption of, see Master and Servant, §§ 205-226, 260, 288.

**RIVERS.**

See Navigable Waters.

**ROADS.**

See Highways; Turnpikes and Toll Roads.

**ROBBERY.**

See Conspiracy.

**RULES.**

See Master and Servant, § 144.

**RULES OF COURT.**

See Appeal and Error, §§ 607, 757, 773, 800; Costs, § 254; Criminal Law, § 1172.

**SAFE PLACE TO WORK.**

See Master and Servant, §§ 88-297.

**SALES.**

See Appeal and Error, § 999; Bills and Notes, §§ 339-345, 427, 497, 509, 525, 537; Boundaries, §§ 47, 53; Brokers; Cancellation of Instruments; Carriers, § 253; Chattel Mortgages, § 41; Corporations, §§ 82, 404, 425; Criminal Law, § 823; Dedication; Drains; Ejectment, § 17; Estoppel, § 68; Evidence, § 455; Execution, §§ 222-256; Fraud, § 11; Fraudulent Conveyances, § 329; Husband and Wife, § 262; Indians, § 20; Intoxicating Liquors; Mortgages, §§ 358-370, 502-538; Receivers, § 133; Taxation, §§ 630-685, 704, 734; Vendor and Purchaser.

**II. CONSTRUCTION OF CONTRACT.**

§ 64 (Wash.) A contract for sale of lambs and ewes *held* not to leave the sale of the lambs optional with the sellers.—Rothrock v. Hunter, 119 P. 1114.

§ 82 (Kan.) A sale of mules *held* to have been for cash and delivery conditioned on the payment of the check given therefor.—Doughan Nat. Bank v. Jelf, 119 P. 588.

**III. MODIFICATION OR RESCISSION OF CONTRACT.****(B) Rescission by Seller.**

§ 101 (Kan.) Where seller breaches contract, he cannot claim right to rescind, because payments for deliveries after default have been withheld.—Central Lumber Co. v. Arkansas Valley Lumber Co., 119 P. 321.

§ 103 (Or.) A defendant, contracting to sell to plaintiff cattle of a kind and quality described, *held* not entitled to rescind the contract without first showing a disposition to substantially comply with the contract.—William Hanley Co. v. Combs, 119 P. 333.

§ 104 (Or.) A defendant, contracting to sell to plaintiff cattle of a kind and quality described, *held* not entitled to rescind the contract and keep the money advanced.—William Hanley Co. v. Combs, 119 P. 333.

**IV. PERFORMANCE OF CONTRACT.****(C) Delivery and Acceptance of Goods.**

§ 174 (Kan.) Seller *held* not obliged to make further delivery when buyer is in default in payment for previous shipments.—Central Lumber Co. v. Arkansas Valley Lumber Co., 119 P. 321.

**(D) Payment of Price.**

§ 187 (Cal.App.) Interest *held* properly allowable on a judgment for goods sold and de-

livered under Civ. Code, § 1917, or section 3287.—Robinson v. American Fish & Oyster Co., 119 P. 388.

**VII. REMEDIES OF SELLER.****(E) Actions for Price or Value.**

§ 355 (Cal.App.) In an action for the price of fish sold, where the defendant did not plead that the fish were in a nonmerchantable condition when received, proof of that defense could not be made.—Robinson v. American Fish & Oyster Co., 119 P. 388.

§ 359 (Cal.App.) Evidence in an action for hay sold *held* not sufficient to establish the amount chargeable on an agreement to pay for loading certain other hay.—French v. Atlas Milling Co., 119 P. 203.

§ 363 (Okla.) In an action for goods sold, evidence *held* sufficient to take the case to the jury.—St. Louis Button Co. v. Martin, 119 P. 208.

§ 365 (Cal.App.) In an action for the price of merchandise sold, findings *held* not inconsistent, but to support a judgment for the seller.—Wagner v. El Centro Seed & Nursery Co., 119 P. 952.

**VIII. REMEDIES OF BUYER.****(C) Actions for Breach of Contract.**

§ 413 (Kan.) In an action for damages for refusal to deliver, the buyer, pleading default on a specified day, is bound by the pleading.—Central Lumber Co. v. Arkansas Valley Lumber Co., 119 P. 321.

§ 415 (Kan.) In an action by buyer for refusal to deliver, the burden is on seller to show that after notice the buyer might have protected himself from loss by purchasing other goods.—Central Lumber Co. v. Arkansas Valley Lumber Co., 119 P. 321.

§ 418 (Kan.) Where, before time of delivery, seller notifies buyer that all the goods will not be delivered, the buyer, if possible, must buy other goods.—Central Lumber Co. v. Arkansas Valley Lumber Co., 119 P. 321.

Measure of damages for failure to deliver goods according to contract stated.—Id.

§ 418 (Wash.) Where the seller failed to deliver sheep, and there was no "market value" at the place of delivery, other evidence might be resorted to to show value at that place.—Rothrock v. Hunter, 119 P. 1114.

**IX. CONDITIONAL SALES.**

§ 479 (Cal.App.) In an action seeking a money judgment, a complaint based upon a note and an agreement, both executed for the price of a piano, *held* not to state a cause of action.—Southern California Music Co. v. Skinner, 119 P. 106.

**SALOONS.**

See Landlord and Tenant, § 29.

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See Accord and Satisfaction; Mechanics' Liens, § 239.

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**SCHOOLS AND SCHOOL DISTRICTS.**

See Mandamus, § 108; Public Lands, § 144.

**II. PUBLIC SCHOOLS.****(A) Establishment, School Lands and Funds, and Regulation in General.**

§ 10 (Idaho) Under Const. art. 9, § 1, Legislature *held* to have a large discretion in making laws to establish and maintain public school system.—Fenton v. Board of Com'rs of Ada County, 119 P. 41; Independent School Dist. No. 1 of Kootenai County v. Board of County Com'rs, Id. 52.

**(B) District Debt, Securities, and Taxation.**

§ 90 (Wash.) In view of Rem. & Bal. Code, § 4446, the indebtedness of a consolidated school district within the constitutional limitation *held* to be measured by the value of the taxable property within the district and the amount of the debts of any of the districts composing the consolidation.—State v. Clausen, 119 P. 797.

§ 99 (Idaho) A school district is not a municipal corporation, within Const. art. 7, § 6, prohibiting the Legislature from imposing taxes for the purpose of any municipal corporation.—Fenton v. Board of Com'rs of Ada County, 119 P. 41; Independent School Dist. No. 1 of Kootenai County v. Board of County Com'rs, Id. 52.

Legislature *held* to have authority under the Constitution to require county board to levy tax of not less than five nor more than ten mills on the dollar, for school purposes.—Id.

Sess. Laws 1911, p. 510, § 65, relating to tax by county board for school purposes, *held* constitutional and mandatory.—Id.

§ 99 (Idaho) Sess. Laws 1911, p. 510, § 65, requiring county commissioners to levy tax for school purposes, *held* constitutional and mandatory.—Dart v. Board of Com'rs of Kootenai County, 119 P. 52.

§ 103 (Idaho) Under Rev. Codes, § 1950, order of board of county commissioners, making levy of taxes under Sess. Laws 1911, p. 510, § 65, *held* appealable.—Fenton v. Board of Com'rs of Ada County, 119 P. 41; Independent School Dist. No. 1 of Kootenai County v. Board of County Com'rs, Id. 52.

On appeal from decision of county board, admission in evidence of stipulation containing immaterial matter *held* not reversible error.—Id.

**SCIRE FACIAS.**

See Judgment, § 870.

**SEA GATES.**

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**SET-OFF AND COUNTERCLAIM.****II. SUBJECT-MATTER.**

§ 33 (Okla.) A claim on an implied contract is not allowable to defendant as a set-off in an action sounding in tort.—Nation v. Planters' & Mechanics' Bank, 119 P. 977.

**SETTING ASIDE.**

See Judgment, §§ 139-159.

**SETTLEMENT.**

See Accord and Satisfaction.

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See Drains; Municipal Corporations, § 845.

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**SPECIAL LAWS.**

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**SPECIFIC PERFORMANCE.**

See Appeal and Error, § 1009; Interest, § 50; Process.

**I. NATURE AND GROUNDS OF REMEDY IN GENERAL.**

§ 8 (Or.) Specific performance is not a matter of absolute right, but rests in the sound discretion of the court, exercisable as justice demands.—Hawkins v. Doe, 119 P. 754.

**II. CONTRACTS ENFORCEABLE.**

§ 28 (Or.) An instrument, signed by defendant, *held* not a memorandum of an agreement of sale which could be specifically enforced, not showing any purchaser, but being a mere offer to sell to either of two.—Mossie v. Cyrus, 119 P. 485.

§ 49 (Cal.) Specific performance of a contract to convey *held* properly denied under the provision of Civ. Code, § 3391, for inadequacy

of consideration and unfairness of a contract to defendant.—*Wilson v. White*, 119 P. 895.

In determining the adequacy of consideration under a contract sought to be specifically performed, as affecting plaintiffs' right to such relief, the question is not whether the price was the highest obtainable, but whether it was fair and adequate under the circumstances.—*Id.*

### III. GOOD FAITH AND DILIGENCE.

§ 92 (Wash.) Vendee's default in final payment at the time specified *held* no defense to an assignee's suit to compel performance in the absence of the vendor's election to forfeit the contract and of ability to convey a clear title as agreed.—*Katz v. Hathaway*, 119 P. 804.

§ 97 (Wash.) A contract for the sale of a portion of school land by means of a bank as trustee *held* to impose on the bank as trustee, and not as plaintiff's agent, the duty of receiving and paying over to the state the money necessary to perfect title.—*Adams v. Canutt*, 119 P. 865.

### IV. PROCEEDINGS AND RELIEF.

§ 114 (Cal.) A complaint for specific performance must allege that the contract sought to be enforced is just and reasonable as to the defendants, and that the consideration is adequate.—*Fraser v. Bentel*, 119 P. 509.

Complaint *held* to state a cause of action to foreclose a mortgage lien and not for specific performance of an agreement to convey.—*Id.*

§ 114 (Wash.) An allegation in a complaint for specific performance *held* to sufficiently allege performance of certain conditions precedent by complainants and their assignor.—*Adams v. Canutt*, 119 P. 865.

§ 116. (Kan.) In an action for specific performance, allegation in answer that plaintiff has never tendered deed executed by himself *held* met by allegations in the reply.—*Geo. H. Paul Co. v. Shaw*, 119 P. 546.

§ 116½ (Wash.) Objection, in a suit for specific performance, that complainants and their assignor had not complied with certain covenants and conditions in the contract was matter of defense, and could not be urged on demurrer.—*Adams v. Canutt*, 119 P. 865.

§ 121 (Or.) In certain cases for specific performance of a contract to convey, strict proof *held* required.—*Hawkins v. Doe*, 119 P. 754.

In a suit to specifically perform a claimed oral contract by decedent to convey, evidence *held* insufficient to show such agreement.—*Id.*

Where specific performance of an oral contract to convey land is sought on the ground of performance by the purchaser, evidence of the terms of the contract should be clear and satisfactory.—*Id.*

In a suit to specifically perform an oral contract to convey, evidence *held* insufficient to show that plaintiffs went into possession under the agreement.—*Id.*

### SPIRITUOUS LIQUORS.

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### SPLITTING CAUSES OF ACTION.

See Action, § 53.

### STATEMENT.

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### STATES.

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### I. POLITICAL STATUS AND RELATIONS.

§ 9 (Okl.Cr.App.) Defendant, charged with crime in the Indian Territory before statehood, *held* to have no vested right to be prosecuted in accordance with the procedure in force in that jurisdiction, beyond the rights guaranteed by Const. U. S. Amend. 6.—*Mendenhall v. United States*, 119 P. 594.

### II. GOVERNMENT AND OFFICERS.

§ 41 (Kan.) Const. art. 1, § 3, vesting supreme executive power in Governor, construed.—*State v. Dawson*, 119 P. 360.

### III. PROPERTY, CONTRACTS, AND LIABILITIES.

§ 94 (Idaho) Rev. Codes, §§ 1475, 1476, relating to state printing, *held* to refer only to work to be done, and not to purchase of material, and to be constitutional.—*Ex parte Gemmill*, 119 P. 298.

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### STATUTES.

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### I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§ 64 (Cal.) The irrigation act of 1897 *held* not impaired as a whole by unconstitutionality of provision for an appeal to the superior court.—*In re Bonds of South San Joaquin Irr. Dist.*, 119 P. 126.

### II. GENERAL AND SPECIAL OR LOCAL LAWS.

§ 89 (Idaho) Act March 13, 1911 (Sess. Laws 1911, p. 281) §§ 1, 2, *held* not in conflict with Const. art. 12, § 1, relating to power of Legislature as to organization and classification of cities and towns.—*Kessler v. Fritchman*, 119 P. 692.

§ 93 (Idaho) Act March 13, 1911 (Sess. Laws 1911, p. 280), relating to organization of cities, *held* authorized by Const. art. 12, § 1.—*Kessler v. Fritchman*, 119 P. 692.

Act March 13, 1911 (Sess. Laws 1911, p. 280), relating to the organization of cities, *held* not violative of Const. art. 3, § 19, relating to local or special laws.—*Id.*

§ 104 (Cal.) St. 1907, p. 987, validating leases of tide or submerged lands by counties or municipalities, for a period of not more than 50 years, *held* not invalid as special legislation.—*San Pedro, L. A. & S. L. R. Co. v. Hamilton*, 119 P. 1073; *Same v. Nelson*, *Id.* 1077.

### III. SUBJECTS AND TITLES OF ACTS.

§ 107 (Wash.) The local option law *held* to contain but one subject within Const. art. 2, § 19, and provisions in the body of the act are germane to the subject.—*State v. Jones*, 119 P. 384.

§ 114 (Wash.) The title of local option law *held* to contain but one subject within Const. art. 2, § 19.—*State v. Jones*, 119 P. 384.

§ 118 (Nev.) St. 1911, c. 133, §§ 217, 218, *held* not unconstitutional, under Const. art. 4, § 17, as not being covered by the title.—*Ex parte Ah Pah*, 119 P. 770.

§ 120 (Idaho) The title to Act March 13, 1911 (Sess. Laws 1911, p. 280), *held* to sufficiently embrace the matters therein, and not to violate Const. art. 3, § 16.—*Kessler v. Fritchman*, 119 P. 692.

§ 123 (Cal.) Irrigation Act 1897, §§ 68-72, held not invalid under Const. art. 4; § 24, as being foreign to the title of the act.—In re Bonds of South San Joaquin Irr. Dist., 119 P. 198.

§ 123 (Okl.) Act 2d Leg. (Sess. Laws 1909, c. 32, art. 1), relating to opening and improvement of public highways, held not violative of Const. art. 5, § 57, relating to subjects and titles of acts.—Rea v. State, 119 P. 235.

Authority given by Act 2d Leg. (Sess. Laws 1909, c. 32, art. 1) §§ 53, 54, for issuance of bonds to pay expense of road improvements, held covered by the title of the act.—Id.

## V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§ 159 (Utah) In the absence of an express repeal of a statute to justify the presumption of an intention to repeal a statute by a later one, the two must be irreconcilable.—Park v. Rives, 119 P. 1034.

## VI. CONSTRUCTION AND OPERATION.

### (A) General Rules of Construction.

§ 181 (Utah) The intention of the Legislature, as expressed by the language of a statute, interpreted according to its fair and obvious meaning and the context, is the controlling feature in the construction of the statute.

—Park v. Rives, 119 P. 1034.

§ 185 (Okl.) Where a power is given by statute, there is carried with it power to do everything reasonably necessary to make it effective.—Missouri, O. & G. Ry. Co. v. State, 119 P. 117.

§ 190 (Mont.) An unambiguous statute should not be interpreted, but should be enforced according to its clear language.—United Missouri River Power Co. v. Wisconsin Bridge & Iron Co., 119 P. 796.

§ 199 (Idaho) "General election," as generally used in Constitutions and statutes, defined.—Kessler v. Fritchman, 119 P. 692.

§ 225 (Nev.) Separate acts covering the same subject-matter should be so construed, if possible, as to allow both to stand, where the language is consistent and plain.—Ex parte Ah Pah, 119 P. 770.

### (C) Time of Taking Effect.

§ 258 (Nev.) Crimes and punishment act, effective January 1, 1912, held not to have superseded the limitation on location of houses of ill fame prescribed by St. 1911, c. 133, §§ 217, 218, until that date.—Ex parte Ah Pah, 119 P. 770.

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**STOCKHOLDERS.**

See Corporations, §§ 190, 217, 245, 320, 424.

**STORAGE.**

See Warehousemen.

**STREET RAILROADS.**

See Municipal Corporations, § 682.

**I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.**

§ 18 (Okl.) Corporation formed under Comp. Laws 1909, § 1408, held to have power, with

consent of local authorities, to construct street railways, accept lighting contracts, and acquire other street railway or lighting systems by purchase, as authorized by section 1409.—Overholser v. Oklahoma Interurban Traction Co., 119 P. 127.

**II. REGULATION AND OPERATION.**

§ 93 (Wash.) A motorman is required to give a timely alarm to warn a pedestrian of the approach of the car.—Mallett v. Seattle R. & S. Ry. Co., 119 P. 743.

§ 98 (Wash.) If one using a street car track knew, or in the exercise of ordinary care should have known, that a car was approaching in front or behind, he was bound to avoid the danger.—Mallett v. Seattle, R. & S. Ry. Co., 119 P. 743.

One walking on a street car track in a city was not required to use the same degree of care as if upon a private way, or upon a steam railroad, not being a trespasser.—Id.

§ 117 (Wash.) Whether a pedestrian struck by a street car could have seen the car in time to have gotten off the track held a ques-

tion for the jury.—*Mallett v. Seattle, R. & S. Ry. Co.*, 119 P. 743.

## STREETS.

See Municipal Corporations, §§ 230-1034.

## STRIKING OUT.

See Appeal and Error, § 655; Pleading, §§ 336, 388; Trial, § 91.

## SUBCONTRACTORS.

See Mechanics' Liens, § 106; Municipal Corporations, §§ 353, 376.

## SUBROGATION.

§ 7 (Colo.) Under the general rule and under the negotiable instruments act the discharge of a guaranty contract by several guarantors on a note, by paying the note, *held* not to extinguish it, so that the guarantors could maintain a joint action thereon against the makers upon its transfer to them jointly.—*Cone v. Eldridge*, 119 P. 616.

§ 41 (Colo.) The guarantors on notes *held* entitled to bring a joint action thereon against the maker upon the transfer of the notes to them after payment, whether the funds with which they were discharged were individual funds or jointly owned.—*Cone v. Eldridge*, 119 P. 616.

Where the original notes were indorsed and delivered to the guarantors upon payment by them of the guaranteed debt, *held*, that it must be presumed, in absence of a contrary showing, in an action against the maker by the guarantors, that they owned the notes.—*Id.*

Evidence, in an action by guarantors on notes transferred to them, after payment by them, *held* not to show that a note, designated as "Exhibit 6," was one of the notes which was paid.—*Id.*

## SUBSCRIPTIONS.

See Corporations, § 82.

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See Action.

## SUMMONS.

See Process.

## SUPERINTENDENTS.

See Master and Servant, §§ 190, 254, 297.

## SUPERSEDEAS.

See Appeal and Error, §§ 459, 465, 781; Mandamus, § 55.

## SUPERVISORS.

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## SUPERVISORY CONTROL.

See Mandamus, § 168.

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See Parent and Child, § 17.

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See Courts, §§ 212-240½.

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See Principal and Surety.

## SURFACE WATERS.

See Waters and Water Courses, § 116.

## SURPRISE.

See Continuance, § 80.

## SURRENDER.

See Cancellation of Instruments.

## SURVEYS.

See Boundaries, §§ 53, 54.

## TAXATION.

See Adverse Possession; Agriculture; Constitutional Law, § 208; Corporations, § 661; Counties, §§ 24, 114, 200; Drains; Intoxicating Liquors, § 224; Licenses; Municipal Corporations, §§ 73, 289-294, 425-514; Newspapers; Schools and School Districts; Waters and Water Courses, § 231.

## I. NATURE AND EXTENT OF POWER IN GENERAL.

§ 23 (Mont.) The right of the state, in the exercise of police power, to regulate extra-hazardous employment is supplemented by the right to tax, in order to carry the scheme of regulation and benefits into effect.—*Cunningham v. Northwestern Improvement Co.*, 119 P. 554.

Tax levied to pay benefits for injuries sustained by employes engaged in the extra-hazardous business of coal mining *held* for public purpose.—*Id.*

§ 25 (Idaho) Const. art. 7, § 2, authorizing tax by valuation, *held* to apply to raising of revenue for state purposes.—*Fenton v. Board of Com'rs of Ada County*, 119 P. 41; *Independent School Dist. No. 1 of Kootenai County v. Board of County Com'rs*, *Id.* 52.

## V. LEVY AND ASSESSMENT.

(C) Mode of Assessment in General.

§ 356 (Kan.) Stock of a building association *held* not a credit, within Gen. St. 1901, § 7503, and Gen. St. 1909, § 9222.—*Abrahams v. Medlicott*, 119 P. 375.

## VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

(B) Summary Remedies and Actions.

§ 585 (Or.) Action for personal property tax will not lie, but it can be collected only as provided by L. O. L. § 3683: seizure and sale of the personal property, if it can be found in the county, or charge of it against real estate, and enforcement thereof as a real estate lien.—*Marion County v. Woodburn Mercantile Co.*, 119 P. 487.

(C) Remedies for Wrongful Enforcement.

§ 608 (Ok.) Where owner of land neglected to avail himself of the remedy provided for an illegal assessment under Sess. Laws 1909, c. 88, art. 5, §§ 3, 4, and Comp. Laws 1909, §§ 1690-1694, the collection of the taxes due thereunder will not be enjoined.—*Fast v. Rogers*, 119 P. 241.

§ 611 (Ok.) Petition for order enjoining collection of taxes *held* bad on demurrer, where it shows that plaintiff neglected to avail himself of remedy provided by statute.—*Fast v. Rogers*, 119 P. 241.

## IX. SALE OF LAND FOR NONPAYMENT OF TAX.

§ 630 (Ok.) Wilson's Rev. & Ann. St. 1903, § 3060, fixing fees for publication of delinquent tax lists, *held* repealed by section 6021.—*Stillwater Advance Printing & Publishing Co. v. Board of Com'rs of Payne County*, 119 P. 1002.

§ 662 (Kan.) There is no statute requiring proof of publication of a sheriff's sale notice by affidavit of printer.—Gibson v. Walters, 119 P. 319.

§ 663 (Colo.) Facts recited in a tax deed *held* to make the tax sale void.—Newsom v. Jacobs, 119 P. 623.

§ 679 (Cal.) Under Pol. Code, § 3650, *held*, that a tax collector, on making a resale of land after sale to the state, must mail notice thereof to the address shown by the assessment next before the sale.—Campbell v. Moran, 119 P. 89.

Under Pol. Code, § 3897, as amended by St. 1907, p. 697, and sections 3780, 3817, prescribing the right of the former owner of land to redeem from a tax sale and to have notice of a resale, *held*, that such notice was a jurisdictional prerequisite to a valid sale by the state.—Id.

§ 679 (Cal.) Resale of land, after sale to the state for nonpayment of taxes, without notice by mail as prescribed by Pol. Code, § 3897, *held* invalid.—Smith v. Boston, 119 P. 91.

§ 685 (Kan.) Confirmation of a tax sale is an adjudication of due publication of the notice.—Gibson v. Walters, 119 P. 319.

## X. REDEMPTION FROM TAX SALE.

§ 704 (Kan.) Inclusion in redemption notice of an amount in excess of that due renders the tax deed subject to be defeated if attacked in due time.—Gibson v. McClees, 119 P. 870.

## XI. TAX TITLES.

### (A) Title and Rights of Purchaser at Tax Sale.

§ 734 (Cal.) Under Pol. Code, § 3897, the mailing of a notice to the person to whom the land was last assessed next before the sale *held* essential to the validity of a sale by the state of land purchased for delinquent taxes.—Wright v. Anglo-Californian Bank, 119 P. 651.

§ 734 (Kan.) Tax deed, showing variance in description of the land as it appeared in tax roll and the delinquent tax sale notice, *held* void under Gen. St. 1909, § 9441.—Gibson v. Walters, 119 P. 819.

§ 734 (Or.) Under B. & C. Comp. § 3118, a tax deed was void, where it appeared that an unsigned memorandum of sale was made in the sheriff's office, which merely recited the sale to defendant of 80 acres in the section described, and the amount received.—Johnson v. White, 119 P. 769.

### (B) Tax Deeds.

§ 762 (Kan.) Where a tax deed correctly stated the payments on account of the lots conveyed thereby, and correctly stated the total, an error in the granting clause, in stating the amount paid, *held* a clerical error, and not to avoid the deed under Gen. St. 1909, § 9480.—Gibson v. Jackson, 119 P. 378.

§ 762 (Kan.) A tax deed issued under Gen. St. 1909, § 9475, on record for more than five years, will be sustained, notwithstanding statement showing sale of tract in question in 1896 for the taxes of 1895.—Hoffman v. Woodward, 119 P. 712.

§ 769 (Kan.) A second tax deed to correct defects in former tax deed reopens the question of the validity of both deeds and the regularity of the tax proceedings.—Gibson v. Walters, 119 P. 319.

§ 788 (Cal.) The recital in a tax deed from the state on a resale as to the mailing of a copy of the notice, prescribed by Pol. Code, § 3807, as amended by St. 1907, p. 697, is made, by section 3898, only prima facie evidence of the facts recited.—Campbell v. Moran, 119 P. 89.

§ 788 (Cal.) A recital in the deed of a tax collector, given on a resale of lands by the

state, is prima facie evidence of the fact recited.—Smith v. Boston, 119 P. 91.

Facts in record on appeal from a decision in an action to try a tax title *held* sufficient to warrant a conclusion by the trial court that the recital in the collector's deed that the notice, required by Pol. Code, § 3897, was not given because the address was unknown, was false.—Id.

§ 788 (Or.) The prima facie case made by a tax deed, pursuant to B. & C. Comp. § 3127, may be overcome by contrary proof.—Johnson v. White, 119 P. 769.

### (C) Actions to Confirm or Try Title.

§ 810 (Cal.) Evidence in an action to try title, claimed under a tax deed, *held* sufficient to support a finding that plaintiff had no interest in the property.—Smith v. Boston, 119 P. 91.

§ 810 (Colo.) Where the tax deed on which defendant relied was void on its face, he was not entitled to the benefit of the five-year limitations, by showing by extrinsic evidence that he would have been entitled to a valid deed.—Newsom v. Jacobs, 119 P. 623.

§ 811 (Cal.) Finding in an action by tax title holder to quiet title *held* to support a judgment for defendant.—Smith v. Boston, 119 P. 91.

## TAXATION OF COSTS.

See Costs, § 207.

## TELEGRAPHS AND TELEPHONES.

See Master and Servant, § 88.

## II. REGULATION AND OPERATION.

§ 37 (Okla.) A telegraph company *held* liable for failure to transmit message relating to purchase of land.—Western Union Telegraph Co. v. Allen, 119 P. 951.

On failure of telegraph company to transmit message to principal, agent *held* not bound to seek other method of communication where he has no knowledge of such nondelivery.—Id.

§ 55 (Okla.) Order of Corporation Commission, requiring a telephone company to receive and transmit messages, and connecting with a rural telephone company on payment of reasonable charges, *held* proper.—Pioneer Telephone & Telegraph Co. v. Grant County Rural Telephone Co., 119 P. 968.

## TENDER.

See Estoppel, § 68; Interest, § 50; Vendor and Purchaser, §§ 116, 170.

## TERRITORIES.

See Acknowledgment; Appeal and Error, § 1019; Criminal Law, § 108; Eminent Domain, §§ 74, 208; States, § 9.

## THEATERS AND SHOWS.

See Damages, § 40; Mandamus, § 14; Municipal Corporations, §§ 7, 116, 591-603.

§ 3 (Cal.App.) The regulation of the moving picture business *held* contemplated by an ordinance providing for the regulation of panoramas and kinetoscopes.—Laurelle v. Bush, 119 P. 953.

§ 6 (Cal.) Findings on the issue of contributory negligence that the injury resulted from defendant's negligence *held* not to be so construed, where all the findings taken together indicated the court's intention to find that defendant was not negligent.—Flora v. Bimini Water Co., 119 P. 661.

Evidence *held* to sustain a finding that defendant was not negligent in failing to provide ample life guards to protect persons from drowning in his natatorium.—Id.

§ 6 (Wash.) A patron of a place of amusement held guilty of negligence, and to assume the hazards in taking a dark way, where the proprietor had provided a safe entrance.—*Hendershott v. Modern Woodmen of America*, 119 P. 2.

§ 6 (Wash.) Plaintiff held not entitled to recover against a company which controlled an amusement park for injury in a swing located outside the park.—*Schwab v. Anderson Steamboat Co.*, 119 P. 614.

§ 6 (Wash.) The owner of a place of public entertainment must maintain it in a reasonably safe condition.—*Hollenbaek v. Clemmer*, 119 P. 1114.

The owner of a moving picture show held not negligent in maintaining a step at a side exit.—*Id.*

## THEFT.

See Larceny.

## TICKETS.

See Carriers, § 253.

## TIDE LANDS.

See Navigable Waters, § 37.

## TIMBER.

See Public Lands, §§ 103, 184½; Woods and Forests.

## TIME.

See Appeal and Error, §§ 338, 349, 361, 564, 622, 773; Chattel Mortgages, § 97; Counties, § 178; Criminal Law, §§ 1081, 1130; Estoppel, § 99.

## TITLE.

See Adverse Possession; Bills and Notes, § 538; Corporations, § 34; Covenants, § 42; Ejectment, § 95; Mortgages, § 454; Officers, § 95; Public Lands, § 39; Quietening Title; Records, § 9; Statutes, §§ 107, 123; Taxation, §§ 734-811.

## TOOLS.

See Master and Servant, §§ 88-297.

## TORTS.

See Action, § 27; Assault and Battery, § 40; Fraud; Libel and Slander; Malicious Prosecution; Municipal Corporations, §§ 723-845; Negligence; Nuisance; Set-Off and Counterclaim; Trover and Conversion.

§ 22 (Mont.) One injured by the united acts of two or more persons held entitled to sue them jointly or severally.—*Verlinda v. Stone & Webster Engineering Corporation*, 119 P. 573.

§ 28 (Kan.) It does not indicate that a verdict against one tort-feasor is wrong, because the jury excuses another who, under the evidence and instructions, was also liable.—*Mensing v. Wright*, 119 P. 374.

## TOWNS.

See Municipal Corporations.

## TRESPASS.

See Constitutional Law, § 152.

## TRESPASS TO TRY TITLE.

See Taxation, § 810.

## TRIAL.

See Appeal and Error, §§ 215, 216, 232, 882, 925, 928, 954-982, 1029, 1047, 1064, 1067, 1068; Bills and Notes, §§ 345, 525, 537, 538;

Continuance; Contracts, § 176; Costs; Criminal Law, §§ 292, 627-893, 1159, 1166½; Damages, § 214; Electricity, § 18; Embezzlement; Eminent Domain, § 106; Exchange of Property, § 8; Executors and Administrators, § 29; Fences, § 25; Forcible Entry and Detainer, § 34; Homicide, §§ 293-313, 325, 340; Infants; Insurance, §§ 103, 668; Intoxicating Liquors, §§ 224, 239; Judgment, § 211; Jury; Master and Servant, §§ 285-297; Negligence, § 136; New Trial; Principal and Agent, §§ 24, 124; Railroads, § 352; Rape, § 57; Replevin; Sales, §§ 363, 365; Street Railroads, § 117; Theaters and Shows, § 6; Torts, § 28; Venue.

## III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

§ 29 (Cal.App.) A statement by the trial judge, on overruling an objection to evidence, which embodies a correct statement of the law does not amount to misconduct.—*Blaeholder v. Guthrie*, 119 P. 524.

## IV. RECEPTION OF EVIDENCE.

(A) Introduction, Offer, and Admission of Evidence in General.

§ 41 (Ok.) The principal officer of a railroad company in an action may be excluded from the room as other witnesses.—*Missouri, O. & G. Ry. Co. v. Hayden*, 119 P. 581.

§ 41 (Wash.) The trial court held not to have abused its discretion in placing defendant's witnesses under the rule.—*Wiles v. Northern Pac. Ry. Co.*, 119 P. 810.

(C) Objections, Motions to Strike Out, and Exceptions.

§ 91 (Mont.) An answer made by a witness to a question of counsel without objection at the time held not open to a subsequent motion to strike out.—*Cohen v. Clark*, 119 P. 775.

§ 97 (Cal.App.) In view of the nature of plaintiff's question, held, he could not complain that the answer of witness was scandalous and libelous.—*Carpenter v. Sibley*, 119 P. 391.

## V. ARGUMENTS AND CONDUCT OF COUNSEL.

§ 109 (Idaho) Permitting counsel to discuss matters stricken from the complaint held error.—*Unfried v. Libert*, 119 P. 885.

## VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

§ 139 (Wash.) In certain circumstances, a motion for verdict for defendant on the ground of insufficiency of the evidence held properly overruled.—*Wiles v. Northern Pac. Ry. Co.*, 119 P. 810.

§ 142 (Mont.) A case should not be withdrawn from the jury, unless the conclusion from the facts necessarily finds, as a matter of law, that no recovery may be had on any view which may reasonably be drawn from the facts.—*Stewart v. Stone & Webster Engineering Corporation*, 119 P. 568.

§ 143 (Or.) Where, though the testimony is contradictory, it tends to sustain the allegations of the complaint, a refusal to grant a nonsuit is proper.—*Nutt v. Isensee*, 119 P. 722.

(B) Demurrer to Evidence.

§ 150 (Ok.) When the evidence, with all the inferences that can be properly drawn from it, is insufficient to support a verdict, it is error to overrule a demurrer thereto.—*Shawnee Fire Ins. Co. v. Thompson & Rowell*, 119 P. 985.

(C) Dismissal or Nonsuit.

§ 163 (Or.) A motion for nonsuit *held* sufficient in form.—Culver v. Van Valkenburgh, 119 P. 753.

§ 165 (Mont.) The court on motion for nonsuit will deem every fact proved which the evidence tends to prove.—Stewart v. Stone & Webster Engineering Corporation, 119 P. 568.

(D) Direction of Verdict.

§ 178 (Wash.) In determining a motion for directed verdict, the evidence must be construed most favorably to plaintiff.—King v. Page Lumber Co., 119 P. 180.

VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

§ 194 (Cal.) In a suit to quiet title to a mining claim, an instruction *held* not objectionable as charging that the location of defendants' grantor was a pretended one.—Galbreath v. Simas, 119 P. 86.

§ 194 (Idaho) In action on note, instruction *held* erroneous as invading the rights and privileges of the jury in determining the weight of the evidence.—Park v. Brandt, 119 P. 877.

§ 194 (Kan.) In an action for fire caused by the operation of a railroad, an instruction *held* erroneous as invading the province of the jury.—Tuttle v. Missouri Pac. Ry. Co., 119 P. 870.

(C) Form, Requisites, and Sufficiency.

§ 233 (Mont.) Where requested instructions emphasized conflicting theories embodied in the charge, and were not themselves entirely correct, they were properly refused.—Pelican v. Mutual Life Ins. Co. of New York, 119 P. 778.

§ 235 (Idaho) Instruction in action on note as to effect of statement of plaintiff *held* proper.—Park v. Brandt, 119 P. 877.

§ 242 (Mont.) An otherwise correct instruction cannot be refused on the ground that it does not use the most precise and refined language, if not misleading.—Tiggerman v. City of Butte, 119 P. 477.

A requested charge on a plaintiff's duty to mitigate damages from personal injuries *held* not so badly worded as to authorize its refusal on the ground that it was meaningless and misleading.—Id.

(D) Applicability to Pleadings and Evidence.

§ 251 (Kan.) Instruction to determine disputed question of fact incidentally involved, and to base verdict on finding thereon, *held* error.—Fear v. First Nat. Bank, 119 P. 539.

§ 252 (Or.) A request to instruct that machinery often gets out of order *held* properly refused, in an action for injuries of a servant from a defective machine.—Nutt v. Isensee, 119 P. 722.

(E) Requests or Prayers.

§ 256 (Colo.) Error cannot be predicated on an instruction not sufficiently full or explicit, in the absence of a request for a proper instruction supplying the omissions.—Mounts v. Apt, 119 P. 150.

§ 260 (Or.) The refusal to give a requested instruction is proper, where its substance is covered by an instruction given as part of the general charge.—Nutt v. Isensee, 119 P. 722.

261 (Mont.) A request to charge *held* properly refused, where it was erroneous in so far as it assumed that the answers of insured were warranties and not representations.—Pelican v. Mutual Life Ins. Co. of New York, 119 P. 778.

§ 267 (Or.) The modification of a requested instruction is not erroneous, where, taken in connection with the general charge, the law is correctly stated.—Nutt v. Isensee, 119 P. 722.

(G) Construction and Operation.

§ 295 (Cal.) A part of an instruction, when attacked as declaring an erroneous statement of law, must be construed with reference to the entire instructions.—Ergo v. Merced Falls Gas & Electric Co., 119 P. 101.

§ 295 (Colo.) Instructions should be construed as a whole.—Starrett v. Ruth, 119 P. 690.

§ 296 (Colo.) Any error in an instruction *held* cured by another instruction.—Starrett v. Ruth, 119 P. 690.

§ 296 (Ok.) Instruction technically inaccurate *held* not ground for reversal, where it fairly covers the legal phases necessary to present to jury.—Missouri, K. & T. Ry. Co. v. Horton, 119 P. 233.

§ 296 (Wash.) Instructions in an action for ejecting an intoxicated railway passenger *held* not prejudicially erroneous as allowing compensation for humiliation, etc., though the ejection was rightful.—Wiles v. Northern Pac. Ry. Co., 119 P. 810.

IX. VERDICT.

(A) General Verdict.

§ 323 (Ok.) Where, in an action in the county court, the parties agreed to a trial by a jury of five instead of six, and a unanimous verdict is returned, it is not void because not signed by all the members of the jury concurring, in view of Const. art. 2, § 19.—Rudolph v. Jurgensen, 119 P. 640.

§ 337 (Mont.) Where instructions were inharmonious, but the evidence authorized a verdict either way, a verdict for plaintiff was not contrary to the instructions, and therefore not against law.—Pelican v. Mutual Life Ins. Co. of New York, 119 P. 778.

(B) Special Interrogatories and Findings.

§ 350 (Kan.) Refusal of submission of special questions *held* not erroneous, in view of the instructions enabling the jury by general verdict to determine the issues.—Martin v. City of Chanute, 119 P. 377.

§ 351 (Kan.) A party not presenting questions for the jury or adopting those submitted by adverse party cannot, after verdict, insist on the questions of the other party being submitted when they have been returned unanswered.—Saunders v. Atchison, T. & S. F. Ry. Co., 119 P. 552.

§ 352 (Kan.) Submission of questions by defendant to the jury *held* not improper.—Saunders v. Atchison, T. & S. F. Ry. Co., 119 P. 552.

§ 359 (Ok.) Where the general verdict and the special findings can be harmonized, the court should do so, and can only disturb the general verdict where there is no reasonable hypothesis under which they can be harmonized.—St. Louis & S. F. Ry. Co. v. Bryan, 119 P. 581.

X. TRIAL BY COURT.

(A) Hearing and Determination of Cause.

§ 387 (Idaho) Under Rev. Codes, § 4406, and Const. art. 5, § 17, failure of counsel to furnish brief *held* no excuse for failure of judge to decide case within time prescribed by section 4406.—McGary v. Steele, 119 P. 448.

(B) Findings of Fact and Conclusions of Law.

§ 395 (Cal.App.) Defendant *held* not entitled to complain of the failure of the findings to fix the exact date when the debt became due in view of other findings.—Wagner v. El Centro Seed & Nursery Co., 119 P. 952.

§ 404 (Cal.App.) The findings must be so construed as to support the judgment if pos-

sible.—Wagner v. El Centro Seed & Nursery Co., 119 P. 952.

§ 404 (Cal.App.) Finding construed, and held to involve a conclusion of law.—People v. Lawley, 119 P. 1089.

## TROVER AND CONVERSION.

See Appeal and Error, § 1151; Chattel Mortgages, §§ 169, 176.

### II. ACTIONS.

#### (D) Damages.

§ 46 (Idaho) Plaintiff in trover held entitled to recover, as a general rule, the market value of the property at the time it was taken.—Unfried v. Libert, 119 P. 885.

## TRUST DEEDS.

See Mortgages.

## TRUSTS.

See Convicts; Gifts, § 23; Indians, § 1; Public Lands, § 39; Specific Performance, § 97; Vendor and Purchaser, § 8.

### I. CREATION, EXISTENCE, AND VALIDITY.

#### (A) Express Trusts.

§ 21 (Idaho) Voluntary trust held not complete, unless there is reasonable certainty as to manner in which fund is to be used.—Bliss v. Bliss, 119 P. 451.

§ 29 (Idaho) Vague and indefinite expressions, or words of recommendation or sentiment, held not sufficient to create a trust.—Bliss v. Bliss, 119 P. 451.

Expression by insured of expectation that beneficiaries would take care of insured's family held not sufficient to create trust in proceeds of policy.—Id.

§ 35 (Wash.) A bank, acting under a contract for the sale of a portion of school land, held to act as trustee.—Adams v. Canutt, 119 P. 865.

§ 43 (Wash.) Where an assignment of a school land contract created a trust, but was indefinite as to the duties of the trustee, parol evidence was admissible to make the instrument definite and certain in that regard.—Adams v. Canutt, 119 P. 865.

### VII. ESTABLISHMENT AND ENFORCEMENT OF TRUST.

#### (B) Right to Fellow Trust Property or Proceeds Thereof.

§ 356 (Colo.) A purchaser from a trustee in contravention of the trust becomes a constructive and not an express trustee.—Harding v. Burris, 119 P. 1063.

#### (C) Actions.

§ 359 (Idaho) Courts of equity held to have power to declare and enforce trust, but not to create a trust, or make a contract for the parties.—Bliss v. Bliss, 119 P. 451.

## TURNPIKES AND TOLL ROADS.

See Execution, § 27.

### I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

§ 9 (Cal.App.) Defendants in quo warranto to question their right to maintain a toll road held to have rights as persons associated with the original grantee under the terms of the grant.—People v. Lawley, 119 P. 1089.

§ 23 (Cal.App.) Franchise to construct and maintain a toll road held property within the meaning of Civ. Code, § 1044, and as such

transferable by assignment, etc.—People v. Lawley, 119 P. 1089.

Under the terms of a franchise to construct and maintain a toll road, held, that the grantee named had the implied right to assign certain interests in the franchise.—Id.

In view of Civ. Code, §§ 1072, 1106, held, that the grant of a toll road franchise without express limitation of its duration vested a fee in the grantee and his associates.—Id.

Franchise to construct and maintain a toll road held transferable without the consent of the state.—Id.

The state has the right to require as a condition to the transfer of a toll road franchise that its consent be procured.—Id.

§ 30 (Cal.App.) Franchise for a toll road held not to be construed as terminated, unless in a very clear case.—People v. Lawley, 119 P. 1089.

§ 31 (Cal.App.) The state may forfeit a toll road franchise and all the rights acquired thereby, where it is not used or where it is misused.—People v. Lawley, 119 P. 1089.

### II. REGULATION AND USE FOR TRAVEL.

§ 33 (Cal.App.) State held to have a reserved right to regulate and control franchises for toll roads.—People v. Lawley, 119 P. 1089.

§ 34 (Cal.App.) Civ. Code, § 516, as amended by Acts 1901, p. 5, relating to printed lists of toll gate charges, etc., held not to apply to perpetual franchises or those not limited in duration.—People v. Lawley, 119 P. 1089.

## UNDERTAKINGS.

See Appeal and Error, § 837.

## UNDUE INFLUENCE.

See Wills, §§ 164-166.

## UNITED STATES.

See Indians; Public Lands; Removal of Causes.

## UNLAWFUL DETAINER.

See Forcible Entry and Detainer.

## VACATION.

See Appeal and Error, § 957; Divorce, § 246; Judgment, §§ 139-159, 344.

## VALUE.

See Appeal and Error, § 1056; Carriers, § 158; Eminent Domain, §§ 122-134, 202; Evidence, §§ 155, 323, 501, 502, 543.

## VARIANCE.

See Appeal and Error, § 197; Pleading, § 387.

## VENDOR AND PURCHASER.

See Boundaries, § 46; Brokers; Contracts, § 94; Escrows; Estoppel, § 83; Exchange of Property; Fraud, § 23; Sales; Specific Performance.

### I. REQUISITES AND VALIDITY OF CONTRACT.

§ 3 (Cal.) Contract held not to show that defendant held certain land in trust for plaintiff.—Kellogg v. Mallory, 119 P. 937.

§ 16 (Or.) If no time is fixed within which an offer to sell land is to be accepted, it will remain open a reasonable time, or until withdrawn.—Mossie v. Cyrus, 119 P. 485.

§ 17 (Cal.) Transactions set forth held to constitute a completed contract for the sale

of land without crops.—*Wilson v. White*, 119 P. 895.

§ 18 (Cal.) The unconditional acceptance of an option agreement to purchase land constitutes a binding contract, enforceable by the acceptor.—*Rheingans v. Smith*, 119 P. 494.

§ 18 (Cal.) An agreement *held* sufficient consideration to support an option to purchase land.—*Stein v. Leeman*, 119 P. 663.

Under Civ. Code, § 1605, an agreement to extend an option to purchase land *held* sustained by sufficient consideration.—*Id.*

§ 18 (Or.) An option to purchase land, if not supported by a consideration, is not binding, unless accepted before it was withdrawn, though, if so accepted, the price named in the contract would constitute its consideration.—*Mossie v. Cyrus*, 119 P. 485.

An amount, the receipt of which was acknowledged by an option to purchase land, *held* a part of the purchase price, and not the consideration of the option.—*Id.*

A seal, affixed to a signature of one executing an option to purchase land, was only prima facie evidence of a consideration.—*Id.*

If an option is not accepted within a reasonable time, it is terminated, though no notice is given the vendee of its withdrawal.—*Id.*

The tender of the purchase price, under an option to purchase land, should be at the place where the option was executed.—*Id.*

An acceptance of an option to purchase land *held* not within a reasonable time.—*Id.*

§ 34 (Wash.) A misrepresentation by vendors as to the width of the street on which the property faced *held* to entitle the vendees to rescind the contract.—*Kuehl v. Scott*, 119 P. 742.

§ 44 (Cal.) In an action to cancel a contract for the sale of land for fraud in misrepresenting that an option theretofore given by plaintiff to another had expired, evidence *held* to show that plaintiff did not rely on defendant's statement that the option had expired.—*Rheingans v. Smith*, 119 P. 494.

### III. MODIFICATION OR RESCISSION OF CONTRACT.

#### (C) Rescission by Purchaser.

§ 116 (Wash.) A demand and rescission by a purchaser of land *held* sufficient to support a rescission.—*Mauk v. Lee*, 119 P. 185.

The failure of a purchaser of land to tender a quitclaim deed at the time of an attempted rescission of the contract did not affect the validity of the rescission.—*Id.*

§ 118 (Wash.) Vendees *held* entitled to rescind a contract for fraud, though in default, where no steps had been taken by the vendors to terminate it.—*Kuehl v. Scott*, 119 P. 742.

### IV. PERFORMANCE OF CONTRACT.

#### (A) Title and Estate of Vendor.

§ 140 (Wash.) A contract of sale of land *held* to require the abstract of title to accompany the deed on date named, and not to be compelled with by all possible diligence after demand made on that date.—*Mauk v. Lee*, 119 P. 185.

§ 141 (Kan.) Vendee, to avoid effect of tender of deed of third person on the ground that it does not include the warranty of the vendor, *held* required to make that specific objection.—*Geo. H. Paul Co. v. Shaw*, 119 P. 546.

#### (B) Conveyance.

§ 151 (Kan.) Under contract for sale of realty and its conveyance by warranty deed, purchaser *held* ordinarily entitled to deed executed by person with whom he contracts.—*Geo. H. Paul Co. v. Shaw*, 119 P. 546.

#### (D) Payment of Purchase Money.

§ 170 (Cal.) Evidence *held* to show evasion by the vendor under a contract to convey of a tender of performance by the purchaser, permitting a tender at the vendor's residence under Civ. Code, § 1489.—*Stein v. Leeman*, 119 P. 663.

Under Civ. Code, § 1489, a tender of performance by the purchaser under a contract to convey *held* properly made at the residence of the evading vendor.—*Id.*

§ 185 (Cal.) A contract for the sale of real estate *held* terminated by the purchaser's failure to pay installments at the times specified.—*Kellogg v. Mallory*, 119 P. 937.

### V. RIGHTS AND LIABILITIES OF PARTIES.

#### (A) As to Each Other.

§ 194 (Cal.) As between vendor and purchaser a growing crop *held* to constitute part of the realty.—*Wilson v. White*, 119 P. 895.

#### (B) As to Third Persons in General.

§ 214 (Wash.) Failure of assignee of contract for purchase of land to record assignment *held* not to affect his right to rescind the contract where vendors had actual notice.—*Mauk v. Lee*, 119 P. 185.

#### (C) Bona Fide Purchasers.

§ 231 (Kan.) Conveyance, not acknowledged nor proved, *held* void, though recorded, as to one subsequently buying the land with notice of the record, if otherwise a bona fide purchaser.—*Nordman v. Rau*, 119 P. 351.

### VII. REMEDIES OF PURCHASER.

#### (A) Recovery of Purchase Money Paid.

§ 334 (Or.) An action by a purchaser for excessive payments *held* based on the contract, and to involve the issue of the number of acres sold.—*Sun Dial Ranch v. May Land Co.*, 119 P. 758.

#### (B) Actions for Breach of Contract.

§ 351 (Cal.) Under Civ. Code, § 3306, plaintiffs *held* not entitled to damages for breach of contract to convey.—*Wilson v. White*, 119 P. 895.

### VENUE.

See Appeal and Error, §§ 675, 684; Appearance; Criminal Law, §§ 108, 1117.

### I. NATURE OR SUBJECT OF ACTION.

§ 13 (Colo.) A suit by a railroad company to enjoin ticket scalpers from dealing in non-transferable passenger tickets *held* not a suit involving property within Mills' Ann. Code, § 25a, relating to the venue of action involving property.—*Kirby v. Union Pac. Ry. Co.*, 119 P. 1042; *Same v. Colorado & S. Ry. Co.*, *Id.* 1056.

A passenger ticket, *held* not property within Mills' Ann. Code, § 25a, relating to venue.—*Id.*

### III. CHANGE OF VENUE OR PLACE OF TRIAL.

§ 68 (Wash.) Plaintiff may challenge the truth of defendants' claimed residence, where they apply for change of venue under Rem. & Bal. Code, §§ 207-209, on the ground that they are residents of another county than that in which the action is brought.—*Critler v. Jacobson & Lindstrom*, 119 P. 819.

### VERDICT.

See Appeal and Error, §§ 994-1005; Criminal Law, § 893; New Trial, §§ 72, 143; Trial, §§ 178, 323-359.



**VERIFICATION.**

See Executors and Administrators, § 256; Removal of Causes, § 86.

**VESTED REMAINDERS.**

See Wills, §§ 629, 634.

**VESTED RIGHTS.**

See Constitutional Law, § 93; Limitation of Actions, § 6.

**VICE PRINCIPALS.**

See Master and Servant, §§ 121, 185, 190.

**VOTERS.**

See Elections.

**WAIVER.**

See Appeal and Error, §§ 625, 1078; Appearance; Bills and Notes, § 537; Contracts, § 175; Criminal Law, §§ 627, 1178; Depositions, §§ 99, 111; Estoppel; Insurance, §§ 372, 883; Judgment, § 147; Jury, § 28; Landlord and Tenant, § 31; Master and Servant, § 144; Mortgages, § 370; Municipal Corporations, § 488; Parties, § 96; Pleading, §§ 406, 418; Removal of Causes, §§ 81, 94.

**WARDS.**

See Guardian and Ward.

**WAREHOUSEMEN.**

§ 24 (Ok.) Banks held liable for loss of diamonds received on special deposit through gross negligence of employes.—First Nat. Bank v. Tevis, 119 P. 218.

**WARNING.**

See Master and Servant, §§ 121, 157, 190, 248, 278, 280; Street Railroads, § 93.

**WARRANTY.**

See Insurance, §§ 268, 291.

**WATCHMEN.**

See Mines and Minerals, § 23.

**WATERMARK.**

See Navigable Waters, § 36.

**WATERS AND WATER COURSES.**

See Appeal and Error, §§ 232, 1010, 1067, 1119; Constitutional Law, § 63; Drains; Limitation of Actions, § 78; Municipal Corporations, §§ 385, 394, 433, 845, 1016, 1034; Navigable Waters; Statutes, §§ 64, 123.

**I. APPROPRIATION OF RIGHTS IN PUBLIC LANDS.**

§ 8 (Or.) A nonriparian appropriator with lawful access to a natural stream has a right to use and diversion of water similar to that of a riparian user.—Caviness v. La Grande Irr. Co., 119 P. 731.

§ 12 (Colo.) A ditch owner, to be entitled to a decree settling its priority for irrigation, held required to show its construction, a diversion of water, carriage through the ditch, and a beneficial application of the water.—Weldon Valley Ditch Co. v. Farmers' Pawnee Canal Co., 119 P. 1066.

A settler of 160 acres of government land, who constructs a ditch or buys a water right, held entitled to all the water necessary to irri-

gate all the land beneficially used with reasonable diligence in the improvement thereof.—Id.

§ 12 (Or.) In an action to establish an appropriation of water, held, that plaintiff's appropriation had been continuous.—Caviness v. La Grande Irr. Co., 119 P. 731.

§ 15 (Wash.) Evidence held to show acquisition of water rights by adverse user.—Farwell v. Brisson, 119 P. 814.

§ 17 (Cal.) Under Civ. Code, §§ 1416, 1419, 1422, prior to amendment of 1907, where an appropriator of water for irrigation gave notice that its point of diversion was within a United States forest reserve, such appropriation was not subject to adverse location until after 60 days from the determination of the appropriator's application to use the public domain.—Inyo Consol. Water Co. v. Jess, 119 P. 934.

§ 19 (Or.) One whose appropriation of water is prior in time is superior in right to the extent of his appropriation.—Caviness v. La Grande Irr. Co., 119 P. 731.

§ 23 (Or.) An appropriation of water from a nonnavigable stream contemplates a tenancy in severalty with all other appropriators.—Caviness v. La Grande Irr. Co., 119 P. 731.

§ 24 (Colo.) The owners of separate tracts of land and of water rights, under a contract with an owner of an irrigation ditch, held entitled to apply to the land only the necessary amount of water represented by the contracts.—Weldon Valley Ditch Co. v. Farmers' Pawnee Canal Co., 119 P. 1066.

§ 24 (Or.) An appropriator, subject to prior rights, may take all the water he can use reasonably and without waste for a beneficial project, although it may leave none for those claiming by subsequent right.—Caviness v. La Grande Irr. Co., 119 P. 731.

§ 32 (Or.) Plaintiff, in an action to establish a right of appropriation, held not estopped by his subsequent diversion, while acting as officer of a corporation, which did not diminish his own prior appropriation.—Caviness v. La Grande Irr. Co., 119 P. 731.

§ 33 (Cal.) Right of an appropriator of water for irrigation pending his application to use United States reserve land for his point of diversion and for a part of his conduit held an interest in realty within Code Civ. Proc. § 738, authorizing protection by suit to determine adverse claims.—Inyo Consol. Water Co. v. Jess, 119 P. 934.

§ 33 (Or.) On pleadings in an action to establish water rights and to enjoin a diversion by upper riparian users, held, that the parties were before the court as appropriators and not as riparian owners.—Caviness v. La Grande Irr. Co., 119 P. 731.

A corporation organized to facilitate the use of water by appropriators held to be in such privity of estate with them as to enable it to defend in their behalf.—Id.

Defendant corporations, in an action to establish right to appropriation and to enjoin diversion, held not to be in privity of estate with their stockholders or those to whom they distributed water, and to have rights depending only on priorities of use.—Id.

In an action by a prior appropriator to establish his right and to enjoin private corporations from a diversion of water above his land, held, that the circuit court had no power to adjudicate the rights of individual stockholders in the defendant corporations.—Id.

Where defendants, in an action to establish a right of appropriation and to enjoin a diversion, raise no issue between themselves, the court cannot properly make a decree affecting the rights of defendants as to each other.—Id.

Allegations in petition in an action to establish a right of appropriation held sufficient-

ly definite as to the amount of water claimed.—Id.

Form and extent of relief in an action to protect a prior appropriation of water, stated.—Id.

§ 33 (Wash.) A finding held to constitute an adjudication of riparian rights.—Farwell v. Brisson, 119 P. 814.

In determining irrigation water rights, the court was not necessarily bound to apportion a certain amount of water per acre, since such rights were based upon reasonable use.—Id.

## II. NATURAL WATER COURSES.

### (A) Riparian Rights in General.

§ 42 (Or.) The use of water from a nonnavigable stream by a riparian proprietor is essentially a tenancy in common with all other riparian proprietors on the same stream.—Caviness v. La Grande Irr. Co., 119 P. 731.

§ 43 (Or.) Upper riparian owner held to have the right to use of water for domestic purposes to the exclusion of lower riparian owners, if necessary.—Caviness v. La Grande Irr. Co., 119 P. 731.

§ 44 (Or.) The riparian use of water for purposes of irrigation held conditioned on a use, so as not to reasonably injure the rights of other riparian owners.—Caviness v. La Grande Irr. Co., 119 P. 731.

§ 48 (Or.) A settler upon public lands which border upon a nonnavigable stream may claim the use of water either as a riparian owner or as an appropriator; but he cannot claim in both rights.—Caviness v. La Grande Irr. Co., 119 P. 731.

§ 49 (Or.) In an action involving the right to waters in a stream, held that, L. O. L. § 6596, having recognized riparian ownership, the decree would be predicated upon that ground.—Pacific Live Stock Co. v. Davis, 119 P. 147.

§ 49 (Or.) In the very nature of things, a court cannot fix in advance by its decree the quantity of water which shall be reasonable for the future use of a riparian appropriator claiming the right to water as such.—Caviness v. La Grande Irr. Co., 119 P. 731.

### (B) Obstruction and Detention.

§ 62 (Kan.) Exemplary damages are recoverable for wanton and grossly negligent obstruction of a water course to the injury of another.—Arnold v. Chicago, R. I. & P. Ry. Co., 119 P. 373.

## V. SURFACE WATERS.

§ 116 (Wash.) Surface water caused by rain or melting snow is a common enemy against which every landowner may defend his land, even to the injury of others.—Wood v. City of Tacoma, 119 P. 859.

## VI. APPROPRIATION AND PRESCRIPTION.

§ 138 (Or.) Limitations would not attach to defendant's use of all the water of a stream from the fact that at times defendant used all the water.—McCoy v. Huntley, 119 P. 481.

§ 143 (Or.) Elements to be considered, in determining the amount of water to which a prior appropriator for irrigation is entitled, stated.—Donnelly v. Cuhna, 119 P. 331.

§ 144 (Or.) In cases involving prior and subsequent appropriations of water, courts may require the appropriators to alternate in the use of the water.—McCoy v. Huntley, 119 P. 481.

§ 152 (Or.) Defendant's right under an appropriation of water for irrigation held prior to that of plaintiff.—Donnelly v. Cuhna, 119 P. 331.

In a suit to determine the priority of water rights, evidence held to limit the amount of defendant's prior appropriation to 100 inches of water.—Id.

## IX. PUBLIC WATER SUPPLY.

### (B) Irrigation and Other Agricultural Purposes.

§ 213 (Or.) Under the exigencies of agriculture, any use of the water of a natural stream for a beneficial purpose is free to one who takes it without infringing upon the rights of others, and Act Cong. July 26, 1866, and Act Cong. March 3, 1877, are declaratory of this law.—Caviness v. La Grande Irr. Co., 119 P. 731.

§ 216 (Cal.) Irrigation Act 1897 held not unconstitutional through provision in section 1, relating to organization of districts.—In re Bonds of South San Joaquin Irr. Dist., 119 P. 198.

Irrigation Act 1897, § 34, relating to elections for issuance of irrigation district bonds, held not unconstitutional.—Id.

§ 216 (Idaho) Qualifications prescribed by Constitution for voters at elections held to apply to election in irrigation district.—Pioneer Irr. Dist. v. Walker, 119 P. 304.

Const. art. 6, § 1, providing for a secret ballot, is applicable to elections in an irrigation district.—Id.

Act March 6, 1911 (Sess. Laws 1911, c. 154)

§ 2, prescribing residence within state as sufficient to qualify voter at election in irrigation district, held violative of Const. art. 6, § 2.—Id.

Act March 6, 1911 (Sess. Laws 1911, c. 154)

§ 2, relating to qualifications of voters at election in irrigation district, held violative of Const. art. 6, § 2.—Id.

Act March 6, 1911 (Sess. Laws 1911, c. 154)

§ 2, relating to qualifications of voters in irrigation district election, held violative of Const. art. 1, § 20.—Id.

Act March 6 (Sess. Laws 1911, c. 154) § 2,

relating to marking ballots in irrigation district elections, held violative of Const. art. 6, § 1.—Id.

§ 216 (Utah) The defects, if any, in Laws 1909, c. 74, as amended by Laws 1911, c. 53, afford no ground for holding the statute invalid.—Lundberg v. Green River Irrigation Dist., 119 P. 1039.

§ 230 (Utah) The court on application for prohibition against the directors of an irrigation district held required to assume that all the land within the district is similarly situated, and capable of irrigation by the waterworks owned by the district to pay for which the bonds are issued.—Lundberg v. Green River Irrigation Dist., 119 P. 1039.

§ 231 (Utah) Const. art. 13, §§ 2, 3, held not to apply to special assessments, as authorized by Laws 1909, c. 74, as amended by Laws 1911, c. 53.—Lundberg v. Green River Irrigation Dist. 119 P. 1039.

An owner of land within an irrigation district created under Laws 1909, c. 74, as amended by Laws 1911, c. 53, held authorized to seek redress in the courts for any legal injury resulting from an unjust assessment of his land.—Id.

§ 247 (Colo.) Evidence, in a suit to enjoin interference with an irrigation ditch, held to authorize a finding that plaintiff was in the actual and exclusive possession of the ditch, and entitled to such possession.—Reno v. Reno & Juchem Ditch Co., 119 P. 473.

### (C) Mining, Mechanical, and Manufacturing Purposes.

§ 267 (Or.) Under the exigencies of mining, any use of the water of a natural stream for a beneficial purpose is free to one who takes it without infringing upon the rights of others, and Act Cong. July 26, 1866, and Act Cong. March 3, 1877, are declaratory of this law.—Caviness v. La Grande Irr. Co., 119 P. 731.

**WAYS.**

See Easements.

**WEAPONS.**

See Criminal Law, § 404.

**WILLS.**

See Appeal and Error, § 625; Descent and Distribution; Evidence, § 222; Executors and Administrators.

**IV. REQUISITES AND VALIDITY.****(A) Nature and Essentials of Testamentary Dispositions.**

§ 81 (Cal.) A will cannot be invalidated as to one legatee and upheld as to the others.—In re Lavinburg's Estate, 119 P. 915.

**(F) Mistake, Undue Influence, and Fraud.**

§ 163 (Cal.) The existence of a confidential relation between testator and the principal beneficiary will not of itself raise the presumption of undue influence.—In re Lavinburg's Estate, 119 P. 915.

§ 164 (Cal.) In a will contest for undue influence, evidence of testator's unhappy married life held admissible.—In re Lavinburg's Estate, 119 P. 915.

In a will contest by testator's son to set aside the will for undue influence, evidence held not admissible for contestant in rebuttal that he was poor.—Id.

§ 165 (Cal.) Declarations tending to show testator's affection for his son, to whom he only gave a small sum, are admissible in evidence in a will contest to show testator's friendliness to one of his heirs.—In re Lavinburg's Estate, 119 P. 915.

§ 166 (Cal.) Evidence held not to show that a will was executed through the undue influence of testator's daughter.—In re Lavinburg's Estate, 119 P. 915.

The circumstantial evidence offered to show undue influence must do more than raise a suspicion, and must prove circumstances inconsistent with the claim that the will is testator's spontaneous act.—Id.

That a will was unnatural as to children held not of itself to show undue influence.—Id.

**V. PROBATE, ESTABLISHMENT, AND ANNULMENT.****(H) Evidence.**

§ 288 (Cal.) The presumption in a will contest is in favor of the will.—In re Lavinburg's Estate, 119 P. 915.

**VI. CONSTRUCTION.****(A) General Rules.**

§ 439 (Cal.) Under Civ. Code, § 1318, where a will is uncertain on its face, the circumstances under which it was made are to be considered in determining testator's intention.—In re Carothers' Estate, 19 P. 926.

§ 457 (Cal.) A will construed, and held that a bequest to testator's wife, including both real and personal property, constituted a legacy within a substitutionary clause that, in case any of the legatees died before testator, the legacy should be divided equally among the residuary legatees.—In re Henderson's Estate, 119 P. 496.

§ 466 (Cal.) Construction of word "that" as used in will.—In re Carothers' Estate, 119 P. 926.

**(B) Designation of Devisees and Legatees and Their Respective Shares.**

§ 522 (Cal.) Gift to class defined.—In re Henderson's Estate, 119 P. 496.

§ 523 (Cal.) Bequest of a residue of estate to testator's widow and surviving children held a bequest to a class, so that on the prior death of the wife before testator her share of the residue passed to the surviving members of the class.—In re Henderson's Estate, 119 P. 496.

**(C) Survivorship, Representation, and Substitution.**

§ 542 (Cal.) Provision in a will in case of death of one "without issue" held not words referring to his death "simply," within Civ. Code, § 1336, providing that such words relate to the time of testator's death.—In re Carothers' Estate, 119 P. 926.

§ 545 (Cal.) Statement of general rule for determining the time referred to by the words of a will "dies without issue."—In re Carothers' Estate, 119 P. 926.

Statement of time referred to by the words "dies without issue" in a will giving property to wife and son for life, and on wife's death to son, with provision for its disposition if son "dies without issue."—Id.

**(E) Nature of Estates and Interests Created.**

§ 602 (Cal.) Though, considered separately, certain words devised a fee, held, subsequent words of limitation were equally clear, so as to be effective under Civ. Code, § 1322.—In re Carothers' Estate, 119 P. 926.

§ 622 (Cal.) Construction of will as to creation of remainder after an estate in fee.—In re Carothers' Estate, 119 P. 926.

**(F) Vested or Contingent Estates and Interests.**

§ 629 (Cal.App.) The use of words of present gift in a will is construed as creating a vested interest, in the absence of other controlling circumstances.—In re De Vries' Estate, 119 P. 109.

While testator's wishes will be effectuated, if possible, the law prefers to consider future estates as vested rather than contingent.—Id.

§ 634 (Cal.App.) Under a provision of a will, testator's son held to take a vested remainder in certain lots.—In re De Vries' Estate, 119 P. 109.

The intention of testator should control in determining whether a future interest devised is vested or contingent.—Id.

Under Civ. Code, §§ 694, 695, 1841, testator's son held to take a vested remainder upon testator's death.—Id.

The test for determining whether a future estate devised is a vested remainder stated.—Id.

In view of Civ. Code, § 1317, and the following sections, relating to the interpretation of wills, in determining whether a future interest devised is vested or contingent, testator's intention thereof must be gathered from the language of the will construed in view of established rules of construction.—Id.

**(G) Conditions and Restrictions.**

§ 647 (Cal.) A will construed, and held to give the residuary estate to testator's widow during widowhood, and the will does not impose an invalid restraint on marriage, within Civ. Code, § 710.—In re Fitzgerald's Estate, 119 P. 96.

**WITNESSES.**

See Appeal and Error, §§ 994, 1050; Attorney General; Continuance, § 26; Criminal Law, §§ 543, 594, 595, 598, 662, 742, 757; Depositions; Evidence; Trial, § 41.

**III. EXAMINATION.****(A) Taking Testimony in General.**

§ 246 (Cal.) Interrogating of witness by the court held not subject to complaint of showing

an active sympathy with the prosecution.—*People v. Szafcsur*, 119 P. 1083.

§ 255 (Mont.) Under Rev. Codes, § 8020, reference to a memorandum book by a witness to refresh his memory *held* proper.—*Cohen v. Clark*, 119 P. 775.

#### (B) Cross-Examination and Re-Examination.

§ 268 (Idaho) In an action on a note, cross-examination of plaintiff as to facts connected with purchase of note *held* proper to determine good faith in making the purchase.—*Park v. Johnson*, 119 P. 52.

§ 268 (Mont.) The state *held* entitled to show that an information filed against witness for accused was not filed to prejudice accused.—*State v. Roberts*, 119 P. 566.

§ 269 (Cal.) A question, in view of the facts, *held* germane to the examination in chief, and proper cross-examination.—*Consolidated Lumber Co. v. Fidelity & Deposit Co. of Maryland*, 119 P. 506.

§ 269 (Mont.) Plaintiff not having testified on direct examination concerning the condition of insured's health, defendant was not entitled to introduce, on her cross-examination, proofs of death to show that insured was probably suffering from tuberculosis when the application was made.—*Pelican v. Mutual Life Ins. Co. of New York*, 119 P. 778.

§ 275 (Cal.App.) One having, for the purpose of showing malice on his part, been asked if he was not sued by plaintiff for slander for what he said on a certain occasion, can on cross-examination, to show good faith, state just what he then said.—*Carpenter v. Sibley*, 119 P. 391.

A part of the information on which defendant acted having been elicited in his examination in chief, when called as a witness for plaintiff, in an action for malicious prosecution, *held*, on his cross-examination, he could show all the information on which he acted.—*Id.*

Defendant called as a witness for plaintiff, and asked if he did a certain thing, could on cross-examination, to show his good faith in the matter, explain fully what occurred.—*Id.*

### IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

#### (A) In General.

§ 317 (Okl.Cr.App.) Instruction that, if any witness has willfully testified falsely, the jury can disregard his testimony except in so far as it may be corroborated, *held* improper.—*Henry v. State*, 119 P. 278.

§ 329 (Okl.Cr.App.) On cross-examination of witness testifying as to general reputation of a person, cross-examination as to whether witness ever heard of particular facts *held* permissible.—*Stouse v. State*, 119 P. 271.

§ 329 (Okl.Cr.App.) On cross-examination, a witness may be asked any question tending to test his means of knowledge or memory.—*Henry v. State*, 119 P. 278.

#### (B) Character and Conduct of Witness.

§ 344 (Wash.) On a trial for assault with intent to commit sodomy, certain evidence *held* properly excluded.—*State v. Harsted*, 119 P. 24.

#### (C) Interest and Bias of Witness.

§ 372 (Idaho) A question to witness for condemnor on cross-examination whether he had not sold the property to the condemnor *held* permissible.—*Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 119 P. 60.

§ 372 (Okl.) An attorney testifying for his client may be asked on cross-examination

whether he has any interest in the recovery.—*Wallace v. Kopenbrink*, 119 P. 579.

§ 372 (Okl.Cr.App.) On cross-examination a witness may be asked any question tending to test his bias.—*Henry v. State*, 119 P. 278.

#### (E) Contradiction and Corroboration of Witness.

§ 410 (Okl.Cr.App.) Where testimony of witness is contradicted, he may be corroborated by evidence of his general reputation as to truth.—*Friel v. State*, 119 P. 1124.

### WOODS AND FORESTS.

§ 7 (Cal.) Under St. 1905, p. 235, an order of a board of county supervisors *held* invalid so far as it attempted to remove petitioner as county fire warden, but operative to deprive him of right to compensation from the county.—*Welch v. Ware*, 119 P. 1080.

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